

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

NORTH SHORE GAS COMPANY)	
)	
Proposed General Increase in Rates for Gas Service.)	No. 07-0241
)	
)	No. 07-0242
THE PEOPLES GAS LIGHT & COKE COMPANY)	
)	
)	(consolidated)
Proposed General Increase in Rates for Gas Service.)	
)	

**THE PEOPLE OF THE STATE OF ILLINOIS’
MOTION FOR A PARTIAL STAY OF THE COMMISSION’S
ORDER OF FEBRUARY 5, 2008 OR, IN THE ALTERNATIVE,
MOTION FOR COLLECTION OF RATES SUBJECT TO REFUND**

The People of the State of Illinois, by and through Lisa Madigan, Attorney General of the State of Illinois (“the People”), pursuant to Illinois Supreme Court Rule 335(g) and 83 Ill. Admin. Code 200.190, hereby move to stay implementation of those portions of the February 5, 2008 Illinois Commerce Commission (“the Commission”) Order in this docket that authorize the Peoples Gas Light & Coke Company and the North Shore Gas Company (“the Companies”) to collect revenues under tariffs implementing the decoupling rider, Rider VBA. In the alternative, the People respectfully move the Commission to enter an order that provides that all revenues collected pursuant to the February 5, 2008 Order be subject to refund pending the outcome of the People’s appeal of the Commission’s February 5, 2008 Order, and any Order that may be issued by the Commission denying the People’s Application for Rehearing on the Rider VBA issue. In support of this Motion, the People state as follows:

1. The Commission's February 5, 2008 Order ("the Order") approved the Companies' proposed Rider VBA, a tariff that assesses monthly surcharges on Rates 1 and 2 (residential and small business) customer bills when usage per customer levels fall below a usage-per-customer benchmark identified in the Order. This tariff is scheduled to go into effect next month. *See, e.g.* PGL Ex. VG-1.1, p. 57. The Rider VBA tariff is both unlawful and unsupported by the record evidence, as discussed in paragraph 6, *infra*, and in the People's initial and reply briefs, as well as the People's Brief on Exceptions and Reply Brief on Exceptions. *See* Initial Brief of the People of the State of Illinois, pp. 29-70; Reply Brief of the People of the State of Illinois, pp. 24-47; Brief on Exceptions and Exceptions of the People of the State of Illinois, pp. 9-30 and pp. 6-14 of Attachment A; and the Reply Brief on Exceptions of the People of the State of Illinois, pp. 5-39.

2. Supreme Court Rule 335(g) provides that "[a]pplication for a stay of a decision or order of an agency pending direct review in the Appellate Court shall ordinarily be made in the first instance to the agency." Ill. Supreme Court Rule 335(g).

3. The People of the State of Illinois are filing an Application for Rehearing, pursuant to Section 10-113 of the Public Utilities Act, within the statutory deadline of 30 days after service of the Commission's February 5, 2008 Order, asking the Commission to reconsider and revise several portions of its February 5, 2008 Order, including their adoption of Rider VBA as not supported by the substantial evidence of record and as in violation of applicable Illinois law. If the Commission denies the People's Application for Rehearing or grants rehearing but fails to reject Rider VBA, the People expect to file an appeal in the Illinois Appellate Court of the Commission's Order and any order denying rehearing.

4. The Court that obtains jurisdiction of the appeal is not likely to rule on the People's appeal for several months. Rider VBA surcharges will begin appearing on customer bills in April of 2008, according to the Companies' tariffs filed in this case. *See, e.g.,* PGL Ex. VG-1.1, pp. 57-60; NS Ex. VG-1.1, pp. 55-58.

5. A partial stay of the Commission's Order pending resolution of an appeal is necessary to preserve the status quo during the Commission's rehearing period and during the appellate review of the Commission's Order. Such a stay would prevent irreparable harm to hundreds of thousands of Peoples Gas and North Shore Gas customers who could be required to pay millions more in natural gas delivery charges than required under the status quo ante, with no legal opportunity to be made whole. Under Rider VBA, the warmer the weather, the more likely Peoples Gas and North Shore customers will pay more in delivery service charges. Likewise, the more residential and small business customers reduce their usage of natural gas as a result of conservation, higher natural gas prices, customer-financed insulation measures and appliance purchases, the more likely Peoples Gas and North Shore customers will pay more in delivery service charges under the ratemaking formula in the Rider VBA tariff. *See* PGL Ex. VG-1.0 at 46-48; PGL Ex. VG-1.1, pp. 56-59; VG-1.17; NS Ex. VG-1.0 at 41-43; NS Ex. VG-1.1, pp. 55-58; NS Ex. VG-1.16.

6. "Good cause" for ordering a stay of an administrative decision is not determined by traditional equitable requirements, but rather requires a showing that an immediate stay is required in order to preserve the status quo and that the plaintiff has raised at least a fair question as to the likelihood of success on the merits. *Markert v. Ryan*, 247 Ill.App.3d 915, 917, 617 N.E.2d 1373 (1993). The People have a reasonable

likelihood of success on the merits of their appeal (assuming the Commission declines to revisit its decision on Rider VBA in response to the People's Application for Rehearing), which will raise an important legal issue of first impression -- whether the ICC has the authority to approve a rider that guarantees recovery of a designated revenue per customer level or so-called rate case margin level.

7. In the landmark case *Bluefield Waterworks Improvement Co. v. Public Service Comm'n of West Virginia*, 262 U.S. 679, 692-693 (1923), the U.S. Supreme Court established that a utility's rates should reflect the opportunity – not a guarantee – to earn a return on its used and useful property when a commission sets rates. The Supreme Court elaborated on the principles governing rate of return regulation in the case of *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591 (1941). Here, the Supreme Court reaffirmed its holding in *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S.575, 590 (1942) that “regulation does not insure that the business shall produce net revenues.” *Hope Natural Gas*, 320 U.S. at 603.

8. Illinois courts have adopted the *Hope* and *Bluefield* standards and applied them to the regulation of utilities in Illinois: “ ‘The rate making process under the act, i.e., the fixing of ‘just and reasonable’ rates[,] involves a balancing of the investor and the consumer interests.’ ” *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n* (1953), 414 Ill. 275, 287, 111 N.E.2d 329, quoting *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603, (1944). All of these cases contradict the view inherent in the Companies' Rider VBA proposal that Peoples and North Shore must be assured receipt of their so-called margin revenue level assumed when rates are established in this case.

9. Moreover, for utility ratemaking purposes, riders are closely scrutinized because of the danger of single-issue ratemaking. *City of Chicago v. Illinois Commerce Comm'n*, 281 Ill.App.3d 617, 666 N.E.2d 212 (First Dist. 1996). The rule against single-issue ratemaking is a ratemaking principle which recognizes that the revenue requirement formula is designed to determine a utility's revenue requirement based on the utility's aggregate costs and demand. *Citizens Utility Board v. Illinois Commerce Comm'n*, 166 Ill.2d 111, 136-137, 651 N.E.2d 1089 (1995); *Business and Professional People for the Public Interest v. Illinois Commerce Comm'n*, 146 Ill. 2d. 175, 244, 585 N.E.2d 1032 (1991) ("*BPI II*"). The rule prohibits the Commission from considering changes to components of the revenue requirement in isolation. *Id.* Instead of considering costs and earnings in the aggregate, where potential changes in one or more items of expense or revenue may be offset by increases or decreases in other such items, the Companies' Rider VBA proposal considers only margin revenue changes in the designated rate classes in isolation, ignoring the totality of circumstances and thereby constituting illegal single-issue ratemaking.

10. In addition, Rider VBA's recovery of lost revenues associated with energy efficiency, customer conservation and warm weather trends for purposes of maintaining a designated, baseline revenue per customer level is not contemplated by the Public Utilities Act or Illinois court rulings reviewing past Commission-approved riders. In the case of *A. Finkl & Sons Company v. Illinois Commerce Commission*, 250 Ill.App.3d 317, 620 N.E.2d 1141 (1st Dist. 1993) ("*Finkl*"), the Illinois Appellate Court held that riders are useful in alleviating the burden imposed upon a utility in meeting unexpected, volatile or fluctuating expenses, citing *City of Chicago v. Illinois Commerce Comm'n*, 13 Ill.2d

607, 150 N.E.2d 776 (1958); *Finkl*, 250 Ill.App.3d at 327 (emphasis in original). While the Illinois Supreme Court upheld the Commission's approval of rider recovery of coal tar clean-up expenses in *Citizens Utility Board v. Illinois Commerce Comm'n*, 166 Ill.2d 111, 651 N.E.2d 1089 (1995), the Court affirmed the criteria relied upon in *Finkl* for rider recovery of expenses, noting that the coal tar remediation expenses commonly incurred to comply with the mandate of federal and state law are sufficiently volatile and not within management's control to justify rider recovery. The Court made clear that the prohibition against single-issue ratemaking did not apply in that case because the Commission's approval of a rider for the coal tar clean-up expenses occurred outside of a general rate case. *Id.* at 137-138. Given the fact that the above-captioned docket *is* a general rate case, the *Citizens Utility Board* holding demands consideration of the single-issue ratemaking argument.¹

11. In the case of *City of Chicago v. Illinois Commerce Comm'n*, 281 Ill.App.3d 617 (1st Dist. 1996), the First District Appellate Court upheld the Commission's approval of a separate line-item charge for franchise fees to be charged to the residents of the municipalities assessing the fees and removing them from base rates. The Court cited the aforementioned *Citizens Utility Board* case, wherein the Court stated, "The rule (against single-issue ratemaking) does not circumscribe the Commission's ability to approve direct recovery of unique costs through a rider when circumstances warrant such treatment." *Citizens Utility Board*, 166 Ill.2d at 138. Those "circumstances", both the

¹ It should be noted, however, that the *Citizens Utility Board* decision did not reverse the *Finkl* court's holding that the Commission's approval of ComEd's Rider 22 violated that prohibition against single-issue ratemaking, despite the fact that the docket at issue in *Finkl* was not a general rate case. Accordingly, the Commission is obligated to examine all proposals to recover expenses (or lost revenues, as in this instance) via rider mechanisms through the single-issue ratemaking lens, whether or not the riders are proposed within the context of a general rate case.

City of Chicago ruling and the *Citizens Utility Board* decision held, involved either the recovery of unexpected, volatile or fluctuating expenses, pursuant to *Finkl*, or direct recovery of a particular cost *without direct impact on the utility's rate of return*. *City of Chicago*, 281 Ill.App.3d at 628-629; *Citizens Utility Board*, 166 Ill. 2d at 1102-1103.

12. Accordingly, based on the case law issued to date, the Commission decisions implementing riders for the recovery of certain *expenses* have not been reversed by Illinois courts when the expenses at issue are (1) unexpected, volatile or fluctuating, pursuant to *Finkl* and the 1958 *City of Chicago* case, or (2) imposed on the utility by law or ordinance, pursuant to the *Citizens Utility Board* and *City of Chicago* cases. Establishing a test year revenue level is an essential element traditionally built into a utility's revenue requirement and base rates through the test-year ratemaking process. Accordingly, maintaining a set level of revenues per customer does not qualify as the kind of "expenses" that might be recovered under any existing court decision.

13. Moreover, the *Finkl* court specifically rejected the notion of requiring ratepayers to reimburse a utility for revenues lost due to energy efficiency and conservation measures. The *Finkl* Court noted that the Rider 22 recovery of lost revenues associated with the DSM programs "fails to take into consideration Edison's aggregate costs and revenues, which is also the vice inherent in this revenue recapture..." *Finkl*, 250 Ill.App.3d at 328.

14. The People incorporate by reference these and other evidentiary and legal arguments presented against Rider VBA in their initial and reply briefs, as well as the arguments presented in both the People's Brief on Exceptions and Reply Brief on Exceptions. *See* Initial Brief of the People of the State of Illinois, pp. 29-70; Reply Brief

of the People of the State of Illinois, pp. 24-47; Brief on Exceptions and Exceptions of the People of the State of Illinois, pp. 9-30 and pp. 6-14 of Attachment A; and the Reply Brief on Exceptions of the People of the State of Illinois, pp. 5-39.

15. The fact that the Commission's own attorneys argued that Rider VBA was illegal under the Public Utilities Act and Illinois case law likewise raises "at least a fair question as to the likelihood of success on the merits." *Id.* Moreover, the appeal would involve a question of statutory interpretation, which the Court reviews *de novo*.

Harrisonville Telephone Co. v. Illinois Commerce Comm'n, 212 Ill.2d 237, 247 (2004); *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*, 201 Ill.2d 351, 368-369 (2002). The lack of legal support or precedent for Rider VBA at the Commission or under Illinois law raises a "fair question" as to the sustainability of the rider and the success of the appeal.

16. Failure to grant a stay of the Rider VBA portion of the February 5, 2008 Order will cause irreparable harm to hundreds of thousands of Peoples Gas and North Shore Gas residential and small business/commercial customers. The undisputed record evidence in the above-captioned docket shows that had Rider VBA been in effect during 2002 through 2006, Peoples Gas ratepayers would have paid more than \$218 million more in delivery service charges than what was collected by the Company without Rider VBA during that same time period. The undisputed evidence also showed that North Shore ratepayers would have paid more than \$24 million over that same time period had Rider VBA been in effect. *See* GCI Ex. MLB-1.3, attached to this Motion as Appendix A.

17. A partial stay of the implementation of Rider VBA tariffs does not threaten irreparable harm to the Companies' financial condition. The Commission has just granted Peoples Gas a \$71 million rate increase and North Shore Gas a \$213,000 rate decrease. The evidence is undisputed that if Rider VBA had been in effect for the years 2002 and 2003, for example, the Companies would have collected significantly increased revenues from consumers despite having realized equal to or more than their allowed rate of return in those years. AG Cross Exhibit (Borgard) 3, attached to this Motion as Appendix B; GCI Ex. MLB-1.3 (Appendix A). A partial stay of the Commission's Order pending resolution of the appeal is necessary to preserve the status quo during appellate review of the Commission's Order. It is further necessary to ensure that Peoples Gas and North Shore residential and small business/commercial customers do not pay millions of dollars more than they would otherwise pay without Rider VBA, and millions of dollars more than is necessary for the Companies to realize a fair return.

18. If the Commission denies the People's Motion to Stay, the People request that rates be collected subject to refund. Unless the Commission grants this alternative request, ratepayers will be irreparably harmed. Once the Commission establishes rates, the Act does not permit refunds if the established rates are too high or surcharges if the rates are too low. *Business and Professional People for the Public Interest v. Illinois Commerce Comm'n*, 136 Ill.2d 192, 209, 555 N.E.2d 693 (1989) ("BPI I"); *Citizens Utilities Co. v. Illinois Commerce Comm'n*, 124 Ill.2d 195, 207, 529 N.E.2d 510 (1988). Moreover, if a Commission order that approves a rate increase is subsequently reversed by a court, and the rate increase has not been stayed, the ratepayers are not entitled to any refund for excess charges collected between the effective date of the Commission's order

and the date of the court's decision. *Independent Voters of Illinois v. Illinois Commerce Comm'n*, 117 Ill.2d 90, 510 N.E.2d 850 (1987). In addition, even if a court reverses the Commission's order in part or in whole, the utility can continue to charge the rates originally approved by the Commission until the agency establishes new rates (although the utility is subject to ratepayers' claims for reparations for excessive rates collected from the time of the Court's reversal through the time new rates are approved by the Commission). *BPI I*, 136 Ill.2d at 242; *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 117 Ill.2d 120, 148, 510 N.E.2d 865 (1987). Collecting rates subject to refund protects ratepayers from illegal and excessive rates that cannot otherwise be refunded.

WHEREFORE, the People of the State of Illinois respectfully request that the Commission stay implementation of those portions of the Commission's Order of February 5, 2008, in this docket that authorize Peoples Gas and North Shore Gas to implement the Companies' decoupling rider, Rider VBA. In the alternative, the People respectfully move the Commission to enter an order that provides that all revenues shall

be collected subject to refund pending the outcome of the People's appeal of the Commission's February 5, 2008 Order and any ICC Order that denies rehearing on this issue.

Respectfully submitted,

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