STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Northern Illinois Gas Company d/b/a Nicor Gas Company	:	08-0363
Proposed general increase in rates, and revisions to other terms and conditions of service	:	

REPLY OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION TO THE COMPANY'S RESPONSE TO THE MOTION TO STRIKE

NOW COMES the Staff of the Illinois Commerce Commission ("Staff"), through its undersigned counsel, and files its Reply to the Response of Nicor Gas Company to Staff's Motion to Strike ("Response"). For its Reply, Staff states as follows:

The Response filed by Nicor Gas Company ("Nicor Gas" or "Company") has not persuaded Staff to withdraw its objections to the Company's Reply Brief. The Response fails to address the gravamen of Staff's objections.

I. Notice of the Dow Jones Industrial Average

Staff objects to the Company's request that the Illinois Commerce Commission ("Commission") take administrative notice that "the Dow Jones Industrial Average ["Dow Jones"] plummeted a sickening 25%" because it is not a matter of which the Commission *should* take administrative notice. The drop in the Dow Jones, in and of itself, should not affect the Commission's decision in this matter because Nicor Gas has

failed to link a decline in the Dow Jones Industrials to an increase in utilities' cost of equity generally or Nicor Gas' cost of equity in particular. Rather than address this criticism, Nicor Gas describes it as a "red herring." (Co. Response, p. 5)

Staff does not quarrel with Nicor Gas' arguments regarding the Commission's authority to take administrative notice or that the Dow Jones would be an appropriate subject for administrative notice. Staff's argument is that the Commission should not take administrative notice of the fact because the fact has not been directly linked with a return on equity ("ROE") analysis. The closest the Company comes is its histrionic arguments which it references and cites in its Response. (See pp. 1 & 5-6) None of the referenced testimony mentioned or defined the Dow Jones.[1]

The statements that the Dow Jones is "the most widely followed indicator of stock prices" and that "[a]ny change, even minuscule, to the Dow Jones Industrial Average, can affect the livelihood of virtually every person worldwide" (See Co. Response, pp. 3-4, citations omitted) do nothing to tie the drop in the Dow Jones to the ROE Nicor Gas should be allowed in this proceeding. The Commission should not take administrative notice of it when no witness has provided any analysis demonstrating a relationship between changes in the Dow Jones and Nicor Gas' ROE.

The arguments, referenced in the Response, are dramatic, not analytical. They are made by an attorney, Mr. Fetter (Co. Ex. 2.1), and a Certified Public Accountant, Mr. Hawley (Co. Ex. 1.0, pp. 1-2). Dr. Makholm, who presented Nicor Gas' ROE analysis, did not rely upon the Dow Jones. Dr. Makholm, who has the relevant education and experience to opine on the alleged link between the Dow Jones and Nicor Gas' cost of equity generally and the decline in the Dow Jones and the cost of equity in particular,

[1] In fact, none of the witnesses mentioned or defined the Dow Jones.

did not do so. The arguments from Mr. Fetter and Mr. Hawley do not provide a rational basis that the Commission could rely upon in using the drop in the Dow Jones to determine the appropriate ROE for Nicor Gas. As shown on Appendix A, the Dow Jones is comprised of only thirty companies, none of which are utilities and none of which are in Staff's or the Company's comparable samples used to develop their respective ROE recommendations. In the absence of a rational basis through which the fact could be applied in this proceeding, the fact is not an appropriate one for administrative notice.

The purpose of Nicor Gas' reference to the current Dow Jones is to rebut Staff's revised ROE recommendation in its rebuttal testimony because it is lower than Staff's ROE recommendation in its direct testimony. However, Nicor Gas has no one to blame for that revised lower recommendation than itself. In its rebuttal, Nicor Gas criticized Staff's use of unpublished betas as inputs to the CAPM. To minimize issues in the case, Staff prepared a CAPM analysis in its rebuttal that relied only on published betas. Now that the Company sees that the result of Staff's revised analysis is a lower ROE, it has desperately turned to out-of-record and irrelevant facts in an attempt to negate the result. The Company's opposition to an update to Staff's cost of equity analysis further demonstrates the absence of a link between the Dow Jones and Nicor Gas' cost of equity. The above underscores how the Company's argument is not driven by theoretically sound and reasonable financial arguments but by the size of the rate of return it can get.

II. <u>URL Link To An EPA Website</u>

In response to Staff's objection regarding the citation to a link found in Mr. Lazare's direct testimony as support for the statement "… a more complete analysis of the Report, would have demonstrated that declining rate block structures can promote efficiency," the Company appears to argue that the Commission could take administrative notice of the technical report because it "is maintained on the U.S. Environmental Protection Agency's official website" (Co. Response, pp. 2-3) and that because the URL address for the Report was contained within Mr. Lazare's testimony, anything found at that URL was accordingly admitted into evidence. (Id.) These arguments, at the Reply Brief stage of the proceeding, stretch the bounds of the concept of administrative notice beyond the reasonable.

Staff does not concur with the argument that if a Report is found on the official website of the U.S. Environmental Protection Agency, or any other State or federal agency, that alone is sufficient to make that Report into an appropriate subject for administrative notice at the reply brief stage of a proceeding. Although this may be appropriate for some Reports under some circumstances, it is certainly not appropriate in the current situation. Here, Nicor Gas simply makes a bare assertion: "a more complete analysis of the Report, would have demonstrated that declining rate block structures can promote efficiency" and cites the entire URL included in Mr. Lazare's testimony for the proposition. (See Staff Motion, p. 4) The Company does not attempt to cite to a particular portion of the Report or demonstrate how the rest of the report undermines Staff's position. The Company failed to provide any supporting analysis in the evidentiary portion of this proceeding and should be prohibited from making the argument based on innuendo at the briefing stage.

Neither does the fact that "the internet URL address for the entire Report … was admitted in evidence by *Staff* (Co. Response, pp. 2-3, emphasis in original) affect whether the statement is proper. Staff rejects the implication that including a URL in testimony is tantamount to including all material found at that URL in testimony and admitting it into evidence. Ultimately, the logical result of the Company's argument would be the unreasonable conclusion that anything found at any of the links on that URL could be considered by the Commission as evidence in this docket.

The Response states "Staff claims that no portion of the Report relied upon by Mr. Lazare supports the Company's argument…" (Co. Response, pp. 9-10) This is inaccurate. Staff's Motion states, "… The portions of the Report contained in Mr. Lazare's testimony do not support the Company's argument that declining rate block structures can promote efficiency. No other portion of the Report is contained within the record of this proceeding. …" (Motion, ¶ 19) The Company has not provided testimony supporting its argument; neither does the record contain any portion of the Report which supports its argument.

WHEREFORE, for the foregoing reasons Staff respectfully requests the Commission to:

A. Strike the following in the Company's Reply Brief:

i) To put Ms. Kight-Garlisch's revised proposal in a broader context, from August 27, 2008 to October 23, 2008, when Staff filed its Direct and Rebuttal Testimony, the Dow Jones Industrial Average plummeted a sickening 25%.[8] (Nicor Gas RB, p. 46); and

ii) [8] The Commission or Hearing Examiner may take administrative notice of generally recognized scientific or technical facts within the specialized knowledge of the Commission, and of all other matters of which the Circuit Courts of this State may take judicial notice. 83 Ill. Adm. Code 200.640 (2008) (Nicor Gas RB, p. 46);

or, in the alternative:

B. Allow Staff to update its cost of equity analysis for the record, if the Commission wishes to consider the impact the drop in the financial markets had on the investor required return on common equity for Nicor Gas;

C. Strike the following in the Company's Reply Brief:

i) However, a more complete analysis of the Report, would have demonstrated that declining rate block structures can promote efficiency. Lazare Dir., Staff Ex. 7.0, 36:796-99, *citing* http://www.epa.gov/cleanrgy/energyprograms/napee/resources/action-plan.html, Ch. 5, p. 5, fn. 1. (Nicor Gas RB, p. 64);

and

D. Allow such other and further relief as this Commission deems appropriate.

Respectfully submitted,

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JANIS E. VON QUALEN
JENNIFER LIN
Staff Attorneys
Counsel for the Staff of the Illinois Commerce Commission

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JAN VON QUALEN
Office of General Counsel
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
Phone: (217) 785-3402
Fax: (217) 524-8928
jvonqual@ icc.illinois.gov

JENNIFER LIN
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle St., Suite C-800
Chicago, IL 60601
Phone: (312) 793-8183
Fax: (312) 793-1556
jlin@icc.illinois.gov

Dow Jones Industrial Average

from :

http://online.wsj.com/mdc/public/npage/2_3051.html?mod=mdc_h_dtabnk&symb=DJIA

Index Components: Dow Jones Industrial Average

Company Name	Symbol	Last	Change	% Change	Date
3m Co	MMM	52.76	1.21	2.35	2/6/2009
Alcoa Inc	AA	8.40	0.34	4.22	2/6/2009
American Express Company	AXP	17.89	0.86	5.05	2/6/2009
AT&T Inc.	T	26.03	0.88	3.51	2/6/2009
Bank of America Corporation	BAC	5.60	0.76	15.70	2/6/2009
Boeing Co.	BA	43.19	0.47	1.10	2/6/2009
Caterpillar Inc.	CAT	33.17	1.56	4.94	2/6/2009
Chevron Corp	CVX	73.28	0.03	0.04	2/6/2009
Citigroup, Inc.	C	3.79	0.26	7.37	2/6/2009
E.I. du Pont de Nemours and Company	DD	24.41	0.62	2.61	2/6/2009
Exxon Mobil Corp	XOM	79.36	-0.02	-0.03	2/6/2009
General Electric Company	GE	11.01	0.16	1.47	2/6/2009
General Motors Corporation	GM	3.00	0.14	4.90	2/6/2009
Hewlett-Packard Co.	HPQ	35.49	0.40	1.15	2/6/2009
Intel Corporation	INTC	14.48	0.23	1.62	2/6/2009
International Business Machines	IBM	93.65	1.74	1.88	2/6/2009
Johnson & Johnson	JNJ	58.30	0.19	0.33	2/6/2009
JP Morgan & Chase & Co	JPM	26.38	1.84	7.50	2/6/2009
Kraft Foods Inc.	KFT	26.12	0.12	0.46	2/6/2009
McDonald's Corporation	MCD	58.66	0.30	0.51	2/6/2009
Merck & Co., Inc.	MRK	30.29	0.19	0.63	2/6/2009
Microsoft Corporation	MSFT	19.58	0.54	2.84	2/6/2009
Pfizer Inc	PFE	14.82	0.33	2.24	2/6/2009
The Coca-Cola Company	KO	43.59	0.90	2.11	2/6/2009
The Home Depot, Inc.	HD	23.06	0.66	2.95	2/6/2009
The Procter & Gamble Company	PG	54.06	0.74	1.39	2/6/2009
United Technologies Corporation	UTX	49.39	1.34	2.79	2/6/2009
Verizon Communications	VZ	31.72	0.53	1.70	2/6/2009
Wal-Mart Stores, Inc.	WMT	49.50	0.94	1.94	2/6/2009
Walt Disney Company (The) (Holding Company)	DIS	19.01	0.30	1.60	2/6/2009