STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion -vs- Northern Illinois Gas Company Reconciliation of revenues collected under gas adjustment charges with actual costs prudently incurred.	: : : : : : : :	01-0705
Illinois Commerce Commission On Its Own Motion -vs- Northern Illinois Gas Company d/b/a NICOR Gas Company Proceeding to review Rider 4, Gas Cost, pursuant to Section 9-244(c) of the Public Utilities Act.	: : : : : : : : : :	02-0067 On Reopening
Illinois Commerce Commission On Its Own Motion -vs- Northern Illinois Gas Company d/b/a NICOR Gas Company Reconciliation of revenues collected under gas adjustment charges with actual costs prudently incurred.	: : : : : : : : :	02-0725 (Consolidated)

PUBLIC
STAFF RESPONSE TO NICOR GAS COMPANY'S
MOTION TO STRIKE PORTIONS OF DIRECT TESTIMONY

NOW COMES the Staff of the Illinois Commerce Commission ("Staff" or Commission Staff"), through its attorney, and pursuant to 83 Ill. Adm. Code 200.190 and the November 30, 2009 ruling of the Administrative Law Judges, files its Response ("Response") to Nicor Gas Company's ("Nicor's" or "Company's") Motion to Strike Portions of Direct Testimony ("Motion") in the above-captioned proceeding.

I. INTRODUCTION

A. Overview

On October 9, 2009, Nicor filed its Motion to Strike Portions of Direct Testimony. Staff objects to the Motion for the following reasons: (1) it attempts to narrow the scope of these proceedings by gravely misstating the issues; (2) it seeks to misapply the hearsay rule to prevent Commission consideration of important, admissible evidence; and (3) it argues against itself in critical ways.

This Response offers a brief history this proceeding, and sets the record straight as to how completely the Commission has reserved the issues for its resolution in the Second Interim Order it entered on December 17, 2002 (attached to this Response as Exhibit A). It then responds to the four main points of Nicor's Motion, and highlights a few of the more grievous misstatements in that motion. Exhibits B through E to this Response offer a point-by-point refutation of the largely specious objections Nicor has stated as to of the testimony of Staff Witnesses Zuraski, Maple, Everson, and Knepler, respectively.

Nicor's Motion requests that the ALJs require Staff and CUB to confer with Nicor Gas regarding documents that properly may be stipulated in whole or in part into evidence. (Motion, p.31) Staff does not object to such a direction from the ALJs, and undertakes, without conceding any of the points addressed in this Response, that it will work with Nicor and other parties such as CUB to enter into stipulations as to the admissibility of evidence in these proceedings.

B. History

1. Docket No. 99-0127

On March 1, 1999, Nicor filed its petition seeking approval under Section 9-244 of its "Gas Cost Performance Program" ("GCPP"). During the pendency of the resulting case (Docket No. 99-0127), the Company adduced evidence that would support the Commission findings required under Section 9-244, including the following:

> (1) the program is likely to result in rates lower than otherwise would have been in effect under traditional rate of return regulation for the services covered by the program . . . ; and
>
> (2) the program is likely to result in other substantial and identifiable benefits that would be realized by customers served under the program and that would not be realized in the absence of the program; and

* * * * *

> (8) the program includes provisions for an equitable sharing of any net economic benefits between the utility and its customers to the extent the program is likely to result in such benefits.

(220 ILCS 5/9-244(b)(1), (2), and (8))

On November 23, 1999, the Commission entered its Order in Docket No. 99-0127. It granted Nicor permission to implement its GCPP, and in doing so, made the eight findings Section 9-244 requires in order to implement a program under that Section, including those required by subsections (b)(1), (2), and (8) quoted immediately above. In its Order, the Commission described the Company's evidence in part as follows:

> The Company states that its proposal responds to the Commission's invitation [issued to gas utilities in the Commission rulemaking order in Docket No. 94-0403] and is based on three major objectives. First, the Program would align the interests of ratepayers and the Company by providing appropriate economic incentives for Nicor Gas to improve its performance in providing customers with the best gas prices available, while recognizing the need for continued reliability and security of supply. Second, the Program would encourage the appropriate use of competitive market opportunities and risk management mechanisms for procurement of gas supply, transportation, and storage services by establishing a reasonable balance between risk and reward. Third, the Program would lower regulatory costs by establishing an objective, market-based standard for evaluating gas supply purchasing, planning, and management, while also eliminating after-the-fact prudence reviews. (Order, p. 3, November 23, 1999, Docket No. 99-0127)

One of the issues that arose in Docket No. 99-0127 was the extent to which Nicor could manipulate storage under its program. Nicor repeatedly denied that manipulation of storage was possible, in a data request response and testimony (see Staff Ex. 2.0, 19:319-333), and through counsel in oral argument (see *Id*., 20:334-339)

Staff evidence in the instant proceedings, consisting of admissions of Nicor and demonstrated below to be admissible over Nicor's objections, shows that even several months before Nicor presented its case to the Commission, key personnel were documenting that storage could in fact be manipulated. "Since the timing of injections and withdrawals may be altered under the PBR [performance based ratemaking, a

synonym in this instance for what became the GCPP], by assuming additional risk related to seasonal pricing, the amount of capacity available for these services and the timing of when it is available may be altered." (*Id*., 20:342-345, quoting Att. F)

Furthermore, Staff's evidence establishes, in large measure through admissions Nicor erroneously seeks to exclude from the record of these proceedings, that "[f]rom day one, Nicor made a conscious effort to refrain from discussing LIFO layers [gas carried on Nicor's books at a price that was a small fraction of the market price of natural gas as of 1999] in any filing, testimony, or data request response." (*Id*., 51:899-52:901)

Staff's evidence in these proceedings shows that at the very time Nicor was prosecuting to conclusion a case in which it proclaimed its intent to "align the interests of ratepayers and the Company by providing appropriate economic incentives for Nicor Gas to improve its performance in providing customers with the best gas prices available," key Nicor personnel were laying the groundwork for, and beginning to engage in, a specified series of transactions. This action would in effect permit Nicor to appropriate some of the value of the LIFO layers under the GCPP in a way that could not have occurred under traditional regulation. The bulk of Staff's evidence in these proceedings is devoted to an explication of these transactions, and expert testimony supporting ways to undo the ratepayer harm the transactions have caused.

2. Docket No. 02-0067

Section 9-244(c) provides as follows:

> (c) The Commission shall open a proceeding to review any program approved under subsection (b) 2 years after the program is first implemented to determine whether the program is meeting its objectives, and may make such revisions, no later than 270 days after the proceeding is opened, as are necessary to result in the program meeting its objectives. A utility may elect to discontinue any program so revised. The Commission shall not otherwise direct a utility to revise, modify or cancel a program during its term of operation, except as found necessary, after notice and hearing, to ensure system reliability.

(220 ILCS 5/9-244(c))

On January 24, 2002, the Commission initiated Docket No. 02-0067 pursuant to this mandate. The case proceeded as many other cases proceed during its first five months. Then, on June 21, 2002, the Citizens Utility Board ("CUB") received a fax from an anonymous source who accused Nicor of improprieties related to the GCPP. (Staff

Ex. 1.0, p. 2) The document is referred to below as the "whistleblower fax." Staff and the parties to these proceedings then engaged in extensive discovery from the summer of 2002 through the first period in which rounds of testimony on reopening were filed, which extended from August 2003 through March 2004. As the matter appeared to approach hearing in the spring of 2004, it came to light that other evidence concerning the issues in these proceedings existed in the possession of a company called Entergy-Koch Trading, L.P. ("EKT"). Issues concerning discovery related to that evidence were then litigated before the Commission, the Cook County Circuit Court, and the Illinois Appellate Court, for some two and one-half years.

Nicor filed its most recent iteration of its Direct Testimony on Reopening on April 13, 2007. [1] Nicor's current witnesses are Gary R. Bartlett (Nicor Ex. 1.0) and James Gorenz (Nicor Ex. 2.0). Mr. Bartlett joined Nicor as Vice President Supply Operations in September, 2004. Mr. Gorenz, who has been employed by Nicor Gas since 1993 in the accounting area, is Assistant Controller.

According to Mr. Bartlett, in this proceeding Nicor is "seek[ing] to flow all the appropriate adjustments identified by Nicor Gas' independent investigation of the operation of the GCPP and contained in the Company's restated financial results through operation of the GCPP and contained in the Company's restated financial results through Rider 6 to Nicor Gas' customers." (Nicor Ex. 1.0, p. 5) The "independent investigation" was conducted at the behest of a Special Committee of independent non-management directors formed by the Board of Directors of Nicor, Inc. (the directors of Nicor, Inc., are also the directors of Nicor Gas, as will be discussed below), the parent company of Nicor. Scott R. Lassar, a partner in the law firm of Sidley Austin Brown & Wood, LLP ("Sidley"), was retained to conduct an independent investigation of the allegations in the whistleblower fax and other matters coming to his attention. Sidley engaged the accounting firm KPMG LLP ("KPMG") to help analyze the GCPP, and to assist in "the forensic investigation of Nicor Gas' records." (*Id*., pp. 6-7) The findings and conclusions of the Lassar investigation are contained in a Report to the Special Committee (the "Lassar Report"). The Lassar Report was 74 pages long and had an Appendix of Documents which contained seven documents.

[1] Nicor previously filed its initial direct testimony on March 8, 2002. Nicor filed direct testimony on reopening on August 5, 2003. On December 5, 2006, Nicor filed a Notice of Withdrawal of Nicor Exhibits 1.0 through 16.0, which consisted of the direct, rebuttal and surrebuttal testimony of 9 witnesses (Rocco D'Allesandro (Ex. 1.0), Scott Lassar (Ex. 2.0), Russ Feingold (Exs. 3.0, 6.0 and 11.0), Mike Barrett (Exs. 4.0, 7.0 and 12.0), Tom Moretti (Exs. 5.0, 10.0 and 17.0), Ted Lenart (Exs. 8.0 and 15.0), Al Harms (Exs. 9.0 and 16.0), Tom Fisher (Ex. 13.0) and Jeff Metz (Ex. 14.0).

The Special Committee recommended that the findings, conclusions, and recommendations of Mr. Lassar's independent investigation contained in the Lassar Report be adopted and that independent auditors be engaged. (*Id*., pp. 7-8) These recommendations were implemented, resulting in restated financial statements being filed with the Securities and Exchange Commission ("SEC") for the years 1999, 2000, and 2001. Thus, the restated financial results which the Company seeks to flow through Rider 6, are the direct result of the investigation of Mr. Lassar, including the "forensic investigation of Nicor Gas's records" by KPMG.

Staff filed its second iteration of its direct testimony on reopening on August 14, 2009. Staff's testimony responds to the Company's direct testimony on reopening and attempts to address all issues relating to the operation of the GCPP and all issues relating to any refunds that may be owing to Nicor's customers as a result of the GCPP or Nicor's PGA in 1999 through 2002. In order to address the operation of the GCPP and the PGA, Staff of necessity sent out data requests and relied upon the information provided by Nicor. (See Staff Ex. 1.0, p. 2 and Staff Ex. 2.0, p. 2) This is standard procedure for Staff in all Commission proceedings, as the public utility is the only source and certainly the most direct source for information regarding its operations. The unusual aspect of Staff's testimony in this proceeding is its reliance on deposition transcripts in addition to other information provided by the Company.

Nicor's Motion to Strike seeks to remove all references to the Lassar Report, deposition transcripts, and other information that Nicor provided through discovery from Staff's testimony.

II. ARGUMENT

A. Scope of this Consolidated Proceeding

The Second Interim Order concisely describes the scope of this proceeding as the "appropriate formal mechanism for addressing all issues related to the program Nicor Gas implemented under [the GCPP]…" (Second Interim Order, p. 5, Finding (4))[2] The Second Interim Order was entered as the result of a Joint Motion to Reopen the Record and Expand the Scope of the Proceeding ("Joint Motion") filed by Staff, CUB, Cook County State's Attorney's Office, the Attorney General and Nicor. The Second Interim Order cites the Joint Motion at length for such considerations as: the statutory requirements for the GCPP found at 9-244 of the Act, the necessity for additional discovery, the large amount (60,000 pages) of additional discovery provided to date by Nicor, and the need to review related issues related to the 1999-2002 PGAs. A non-exhaustive list of issues to be addressed in the reopened proceeding is included: (1)

[2] The Second Interim Order is attached to this Response as Exhibit A.

1999 inventory reduction; (2) prefill accounting treatment; (3) storage management; (4) affiliate transactions; (5) weather insurance; (6) infield transfers; (7) Natural Gas Pipeline Company of America ("NGPL") storage capacity; and (8) errors in delivery volumes that were reported.

The Commission ordered that the docket be reopened and consolidated with Dockets 01-0705 and 02-0725 and stated that it would consider for final resolution, all issues relating to the operation of the GCPP and all issues relating to any refunds that may be owing to Nicor's customers as a result of the GCPP or Nicor's PGA in 1999 through 2002 and for ordering such other and further relief as deemed equitable and just. (*Id*., p. 6) Although Dockets 99-0481 and 00-0718 were not reopened concurrently, the Commission clearly stated its intention to "examine any issues that it deems appropriate in light of new information raised in the current docket." (*Id*.) It ordered that Dockets 99-0481 and 00-0718 would be reopened, if necessary, for the limited purpose of entering Amendatory Orders reflecting the findings in the reopened, consolidated dockets. (*Id*.)

Thus, the explicit findings and ordering paragraphs of the Second Interim Order, provide that these consolidated proceedings will have an expansive scope. The scope is to include: (1) consideration of the statutory requirements of the GCPP; (2) all issues related to the operation of the GCPP; and (3) all issues relating to refunds related to the GCPP or the PGA during the years 1999 through 2002.

The position Nicor takes in the Motion, that these proceedings exist solely to determine whether customers paid reasonable rates, is contradictory to the Joint Motion, on which Nicor was a signatory, and to the Second Interim Order. Nicor's construction of the scope of the proceeding flies in the face of the statutory and procedural basis of this proceeding and the clear language of the Second Interim Order. The Motion mischaracterizes the Second Interim Order when it states "[t]he purpose of this proceeding, as defined by the Commission, is to examine the Company's gas costs for the years 1999-2002 and to ensure that its customers paid reasonable rates for natural gas during this time period—no more or no less." (Motion, p. 3) Although the Company cites the Second Interim Order as authority for this pronouncement, the Second Interim Order in fact offers no support for minimizing the scope of these proceedings. The Company repeats this construction of the scope of the proceedings several times in the Motion. (See *Id.*, "This is not a criminal trial; it is an administrative proceeding related to the reasonableness of utility rates.", at p. 7; "Neither Staff nor CUB has made any showing… the … deposition testimony tends to prove or disprove *the only material fact in this case*, *i.e.*, *whether Nicor Gas' customers paid less or more than reasonable rates for natural gas from 1999-2002*." (emphasis added), at p. 14; and "the Commission's statutory jurisdiction . . . is limited to determining whether rates or charges were excessive."[Citing the Second Interim Order, p. 6] "The only issue is whether the Company's gas costs were reasonable under the GCPP and, if not, whether refunds to its customers are due." at p. 21)

Contrary to Nicor's assertions, the concept of "reasonable rates" is not explicitly discussed in the Second Interim Order. The Second Interim Order focuses on the PGAs, which until 2000 provided for the automatic pass-through of prudently incurred actual gas costs, and the GCPP, which among other things was to provide for an equitable sharing of net benefits between Nicor and its customers, and to collect revenue under a modified version of the PGA. Nicor's view of the scope of the proceeding ignores the history of the docket, the legal bases for the proceedings, the fact that these proceedings were reopened because of the Whistleblower fax and improprieties alleged therein, and the clear language of the Second Interim Order itself.

B. "Previously Struck Testimony"

Nicor's arguments regarding the previously struck testimony must fail; if Nicor is allowed a full opportunity to change its strategy and reproduce its case regardless of the case in previously presented, Staff and other parties must also be allowed the identical opportunity. Nicor's argument fails to recognize that Staff, like Nicor, has rewritten its testimony. In Staff's view its testimony is fully admissible.[3] Nicor is free to take another position and argue that the testimony should be stricken. But, having started the process of filing wholly new rounds of testimony, Nicor cannot then look back to previous rounds of testimony and argue solely on the basis of what happened to prior, testimony that Staff's testimony should be stricken. That is what Nicor is arguing and Nicor's Motion should be denied in that regard.

On December 5, 2006, Nicor filed a Notice of Withdrawal of Testimony, stating:

> "Nicor Gas does not intend to introduce its existing pre-filed testimony into the evidentiary record given the more than two years that have passed and the continuation of discovery since this proceeding was stayed in April 2004. Instead, Nicor Gas intends to submit other pre-filed testimony in compliance with a schedule to be set by the ALJs.

The withdrawal of testimony at a time when all parties had completed all rounds of testimony and were ready for hearing is highly irregular. But, it must be recalled that the withdrawal happened after it came to light, on the eve of hearing, that other evidence concerning the issues in these proceedings existed in the possession of a company called EKT. Staff did not object to Nicor's Notice of Withdrawal. Given the new turn of events, it was unclear what evidence might be obtained and it seemed clear that additional testimony would be needed.

[3] The one exception is Staff Ex. 1.0, p. 13, fn. 7, which was included in Mr. Zuraski's testimony in error. Nicor had pointed out this error and Staff had agreed to withdraw this testimony prior to the filing of the Motion to Strike.

By withdrawing its previous iteration of direct testimony on reopening, Nicor secured for itself the benefit of a 'fresh start' in regards to its case in chief on reopening. Nicor, currently, is offering two witnesses in place of the five witnesses it previously presented. Nicor's tactics have clearly changed. For example, rather then presenting the testimony and report of Mr. Lassar, it presents a few quotes from the Lassar Report and relies upon its conclusions. By withdrawing its previously filed testimony, Nicor obtained an opportunity to change strategies and provide an alternative presentation of its case.

However, having obtained an opportunity for itself to start fresh with new testimony and a new strategy, Nicor improperly seeks to deny Staff the same opportunity. If Nicor wishes to limit other parties to evidence already submitted and rulings already made in the docket, then Nicor should be held to the same limitation. Nicor's position seems to be that arguments and testimony may evolve as this docket proceeds, but they may only evolve in ways that benefit Nicor. Nicor's presentation of its case in chief is not hampered by the contents of its previous testimony in this proceeding; it may file new testimony, reflecting a new strategy. However, Nicor's view appears to be that Staff and other parties should not be given any latitude to adjust *their* testimony. Staff objects to this view. It is too much to ask that Nicor can repeatedly recreate its case while each time holding Staff and the other parties to evidence, strategies, arguments, and rulings from earlier in the proceeding. It would be unreasonable to give Nicor the latitude of recreating itself at every turn while holding Staff and other parties to previous iterations of their evidence and argument.

Staff has rewritten its testimony and offers new bases for its admissibility. Nicor's Motion should be considered in light of Staff's testimony as currently written and Staff should be allowed to make arguments as to admissibility contemporary to its filing.

C. Discovery Depositions

Discovery depositions may be used as admissions and as such are admissible as substantive evidence of the truth of the statements made or of the existence of any facts which they have a tendency to establish. (*Cardiel v. Warren*, 191 Ill. App. 3d 816, 548 N.E.2d 1081, 139 Ill. Dec. 525, at 527-528) Nicor's argument about the discovery depositions comes under the heading "The Depositions Are Inadmissible Under Rule 212." (Motion, p. 13) Despite the heading, and although Nicor adopts a broad range of arguments to support its Motion, Nicor does not argue that discovery deposition testimony is inadmissible *per se*.

Nicor first distinguishes the purposes of discovery depositions from the purposes of evidence depositions. Nicor then references Illinois Supreme Court Rule 212 and concedes that discovery depositions may be used at trial for the "impeachment of the deponent or as an admission by a party, its officer, or agent." (*Id*., citing Ill. S. Ct. Rule.

212(a)(1-2); *Skonberg v. Owens-Corning Fiberglas Corp*., 215 Ill. App. 3d 735, 749 (1st Dist. 1991)) After conceding that depositions may be used as admissions, Nicor relies upon its view of the limited nature of the scope of this proceeding to argue that the statements do not tend to prove or disprove any material fact in the docket. Finally, Nicor opines that Staff has used the wrong approach to present the deposition testimony.

As discussed below, discovery deposition testimony is admissible as an admission of a party opponent. The testimony relied upon Staff qualifies as admissions. The subject matter of the admissions falls squarely within the scope of this proceeding, and finally, the manner in which Staff has presented them is appropriate.

1. **Admissions of a Party Opponent**

Supreme Court Rule 212(a)(2) permits the use of discovery depositions "as an admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person."[4]

Almost without exception, the deposition statements included with the testimony of Staff's witnesses are taken from the deposition transcripts of individuals who were employees or officers of Nicor in the years during which the GCPP was developed, and were still employees or officers Nicor in 2003, when the depositions were taken. Statements of the employees of a party are admissible as admissions of the party as long as two conditions are met. First, the statement must be made during the employment relationship. Second, the statement must concern matters within the scope of that employment. (*First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill. Dec. 77, at 85, 867 N.E.2d 1063 (4th Distr., 2007); See also, *Vojas v. K Mart Corporation*, 312 Ill. App. 3d 544, 727 N.E.2d 397, 245 Ill. Dec. 144 (5th Distr., 2000))

All of the statements in the deposition transcripts of the Nicor employees and officers concern matters within the scope of the employment of the employee, or the services of the relevant officer. According to their testimony, at the time of their depositions the witnesses job titles were as follows: X X X X X X X X,[5] X X X X X X X X

X X X

App. 3d 290, 304 Ill. Dec. 9, 852 N.E.2d 259 (2006); Cleary and Graham, *Handbook of Illinois Evidence*, Ninth Edition ("*Handbook of Illinois Evidence"*), § 802.1, p. 73)

2. Relevance

Nicor acknowledges that admissions made during the course of a discovery deposition are admissible under Supreme Court Rule 212. (Motion, p. 13) However, Nicor argues that Staff's and CUB's attempt to use the deposition testimony as admissions in this proceedings fail because the deposition statements that Staff quotes do not tend to prove or disprove a material fact in the case. (*Id*., p.14)

A review of Staff's testimony shows that the admissions quoted from the depositions are directly relevant to the very issues that the Commission outlined in its recitation of the issues the Staff and parties to this proceeding presented to it in the Joint Motion to Reopen the Record and Expand the Scope of the Proceedings. In arguing that Staff's quotations from deposition transcripts are irrelevant, Nicor is clearly not defining relevance in terms of the Commission's Second Interim Order. (See Second Interim Order, p. 4) The relevance argument thus fails, and the deposition admissions come into evidence.

3. Method of Introduction

Nicor then argues that Staff has chosen the "wrong way" to introduce the deposition testimony. (Motion, p. 14) Nicor makes a formalistic complaint that the "unfiltered" deposition testimony was included with Staff testimony rather than being read separately to the trier of fact.

Despite Nicor's argument, Supreme Court Rule 212(c) expressly permits the use of excerpts. The rule reads as follows: "If only a part of a deposition is read or used at the trial by a party, any other party may at that time read or use or require him to read any other part of the deposition which ought in fairness to be considered in connection with the part read or used." (Ill. S. Ct. Rule 212(c))

The Supreme Court Rule that Nicor has cited thus expressly permits a deposition to be read *or* "used." It expressly permits the use of "only a part of a deposition." It expressly permits any other party to "read or use, or require [the party using the deposition] to read any other part of the deposition which ought in fairness to be considered in connection with the part read or used." Clearly, the rule supports Staff's "use" of any part of the deposition testimony, and provides Nicor with the right to seek admission of other portions of the deposition "which ought in fairness to be considered."

Nicor may be relying on the phrase "at that time" in the Supreme Court Rule 212(c). "At that time" could be interpreted to mean at that instant. But, that interpretation is impracticable in the Commission setting. That concept applies more neatly to a traditional court trial than to a Commission proceeding. Evidentiary hearings in court are generally conducted so witnesses testify orally before the trier of fact, both on direct and cross-examination; so that the trier of fact is given one opportunity to hear the evidence the witness presents and immediately proceeds to deliberation. Reading "at that time" as contemporaneously, would provide for the presentation of deposition evidence in the way least likely to confuse a jury in a traditional court trial.

Commission proceedings, by contrast, are governed by 83 Illinois Administrative Code Section 200.660. (Part 200 is hereafter referred to as the "Rules of Practice") The first two sentences of Section 660 read as follows:

> It is the policy of the Commission to encourage the advance submission of testimony and exhibits by all parties and staff witnesses. The [Administrative Law Judge] may direct parties and staff witnesses to serve testimony and exhibits and may establish a date certain for service. (83 Ill. Adm. Code 200.660)

The time-honored and rule-sanctioned way to present evidence before the Commission is for all rounds of direct evidence to be circulated among the parties and provided to the administrative law judges in the time leading up to the evidentiary hearings. The hearings themselves, of course, consist of the verification by witnesses of the written rounds of their direct testimony, following which they are cross-examined by counsel for the other parties to the case. The Administrative Law Judges and the Commission itself, "a tribunal appointed by law and informed by experience" (*Village of Apple River v. Illinois Commerce Commission*, 18 Ill. 2d 518, 523, 165 N.E.2d 329 (1960)), consider the totality of the evidentiary record with full access to the rounds of written direct evidence, complete transcripts of cross-examination and other oral proceedings, briefs of the parties, the proposed order process contemplated by Section 10-111 of the PUA and Sections 820 and 830 of the Rules of Practice. (220 ILCS 5/10-111; 83 Ill. Adm. Code 200.820 and 200.830)

More importantly, the legislature has provided that it is not necessary for the Commission to follow every formality that might apply in court:

> No violation of this Section or the Illinois Administrative Procedure Act and *no informality in any proceeding or in the manner of taking testimony before the Commission, any commissioner or hearing examiner of the Commission shall invalidate any order, decision, rule or regulation made,*

> *approved, or confirmed by the Commission in the absence of prejudice*. (220 ILCS 5/10-101; emphasis added)

To the extent Nicor is arguing that it is unable to read other parts of the depositions which it wants to have considered contemporaneously with the filing of Staff's direct testimony, what Nicor suggests is a procedural impossibility in Commission proceedings. But, Nicor will have two additional rounds of testimony in which it can read additional portions of the deposition testimony into the record. The timing issue actually favors Staff's approach. Nicor would, rightfully argue that it was grossly unfair, if Staff's prefiled testimony did not mention the depositions, and then Staff proposed reading portions of the transcripts into evidence at the evidentiary hearing. Nicor is not prejudiced by the inclusion of the excerpts from the transcripts in Staff's direct testimony filing.

Exhibits B through E attached to the Motion clearly illustrate the error of Nicor's position. The Exhibits contain all of Staff's pre-filed direct testimony with color-coded objections. Yet Nicor professes to be hampered in its ability to timely offer context for Staff's quotations from the depositions of its own employees and officers. The Motion claims prejudice in the way in which Staff seeks to present testimony, while the very same Motion demonstrates that it has been afforded a full opportunity to argue—well in advance of any evidence being admitted into the record—that its admissions should be excluded from evidence.

The totality of the circumstances favors Staff's approach. Staff has used traditional Commission-sanctioned forms of testifying. As is the norm in Commission proceedings the Company and its personnel are the source of much of the documentation Staff seeks to introduce. The Staff testimony quoting assertions of Company employees, Company officers, and Company agents is well within the substantive law of evidence. It is not necessary to adopt the more formalistic and cumbersome methods used to place facts before juries in Illinois. Nicor offers no reason to pretend that a Commission evidentiary proceeding requires the formality of a jury trial. The Supreme Court Rule Nicor cites for authority, for the proposition that Staff has chosen "the wrong way" to introduce deposition testimony is more supportive of Staff's position than its own. Staff's approach is consistent with Commission practice and does not result in any prejudice to Nicor.

D. Exhibits

Nicor makes several blanket arguments in support of its claim that Attachments A, B, E, F, G, H, I, M, and N to the Direct Testimony of Mark Maple, Staff Exhibit 2.0,

should be stricken. These will be addressed at the close of this portion of the Response, after a document by document demonstration of the admissibility of these attachments to Staff Witness Maple's testimony.

1. Attachment A—The Inventory Value Team Report

Attachment A is a Bates-stamped (NIC 049924 - 049937) document provided to Staff by Nicor entitled the Inventory Value Team Report ("IVT Report"). According to the Lassar Report (see section 6, below), Nicor created the Inventory Value Team in early 1998, and the Team issued the IVT Report in mid-1998. (Staff Ex. 2.0, Att. I, pp. 58 and 59)

The authorship of the IVT report is attributed (on the title page of the report—NIC 049924 CONFIDENTIAL) to seven Nicor employees. These include: X X X

2. Attachment B—"Post Board Information Meeting" Agenda and Memo

Attachment B consists of two pages from a Bates-stamped document (NIC 115046 & 115049) provided to Staff by Nicor that, by its terms, is X X X

v. Illinois Commerce Commission, 193 Ill. App. 3d 178, 140 Ill. Dec. 455, 549 N.E.2d 1327 (1990)) For a further discussion of these provisions, see G. Section 10-40 of the Illinois Administrative Procedure Act, below.

4. Attachment F- Brucher Memo

Attachment F is a Bates-stamped (NIC 003213 - 003215 CONFIDENTIAL), Nicor-provided document that, by its terms, is a X X X X X X X X XX X X X X X X X X X X X X X X X X X X X X X X X X X It bears the letterhead of Nicor and is a Company document for which Nicor has sought confidential treatment. Ms. Brucher was an employee of Nicor at the time. (See Ex. H X X X X Tr., pp. 39-40, July 1, 2003) This memorandum is admissible as an admission of Nicor in that it was, by its terms, created by a Nicor employee acting within the scope of her employment with Nicor. "[W]e note the long-standing rule that admissions made by a party, or on its behalf, are admissible as exceptions to the hearsay rule. When . . . the statement has been made by an employee of a party, the test for application of the party-admission rule is whether the statement was made during the employment relationship and concerning matters within the scope of that employment." (*First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill. Dec. 77, at 85, 867 N.E.2d 1063 (4th Distr., 2007) citations omitted)

In terms of the statements within the memo, they are admissible in these proceedings because they are an actual part of the communications and transactions at issue here. In using this memorandum in its direct evidence, Staff is not necessarily seeking to prove the truth of the matters asserted within the memorandum, as such. Rather, Staff is proving that communications existed within the Company—as early as 1998—that acknowledged the potential for Nicor to structure its operations and conduct its day-to-day business in a way that would give the lie to its subsequent protestations in Docket No. 99-0127 that it could not manipulate storage.

5. Attachments G and H – Buckets Reports

Attachment G is a Bates-stamped [NIC 002777 CONFIDENTIAL], Nicor-provided document entitled "X X X X X X X X X X X X X X X ." Attachment H is a Bates-stamped (NIC 110776 CONFIDENTIAL), Nicor-provided document bearing the word "X X" in its upper right corner and entitled "X X X X X X X X X X X X X X X ." These so-called "XXX X X X X X " are the subject of deposition testimony by Nicor employee Beth Hohisel. She identifies NIC 002777 as such a X X X (See Ex., J, X X X X Tr., p. 124, June 25, 2003) X X X X X X X X X X X X X X X (*Id*., at125), and acknowledges that X X X X X X X X X X X X X X X X X X X

opponent are admissible under the rules of evidence in Illinois. (*Handbook of Illinois Evidence,* p.730)

6. Attachment I--The Lassar Report

It will be recalled from the "History" portion of this Response that in the immediate wake of the revelations in the whistleblower fax coming to light, a committee of the Nicor, Inc., Board of Directors retained Scott R. Lassar, and Sidley, to investigate the allegations and such other matters as came to his attention, and that Sidley in turn retained the accounting firm of KPMG LLP for assistance in the investigation. Sidley prepared and furnished the Lassar Report, dated October 28, 2002, to Nicor, Inc. The conclusions and recommendations of the Lassar Report were accepted and the restated financial results form the basis for Nicor's testimony filed on April 13, 2007.

Staff has in its possession at least three different versions of this report, all of which were provided to it by Nicor. One version bears Bates numbers NIC 049799 - 049940 CONFIDENTIAL, with the Bruce Bickner cover letter numbered NIC 049798. This version refers to a "third party" (with no typographical error) in the second sentence of footnote 28, at the bottom of page 58 of the Report itself (NIC 049859 CONFIDENTIAL), and shows seven members of the Inventory Value Team on the title page of the IVT Report (NIC 049924 CONFIDENTIAL). This version became Attachment I (Unredacted) to Staff's testimony; any underlining or other handwritten notation on that version was inadvertent and should not be considered part of the Attachment.

A second version bears Bates numbers NIC 049799 - 049940 REDACTED, with the Bruce Bickner cover letter numbered NIC 049798 REDACTED. This version also refers to a "third party" in the second sentence of footnote 28, at the bottom of page 58 of the Report itself (NIC 049859 REDACTED), but shows only one member (Jeff Metz) of the Inventory Value Team on the title page of the IVT Report (NIC 049924 REDACTED). Staff has not made this document an Attachment to its testimony, but is attaching, for illustrative purposes, NIC 049859 and 049924 REDACTED to this Response.[14]

The third version begins with four pages that constitute the 8-K Current Report filed by Nicor, Inc., and Nicor Gas Company with the SEC on October 31, 2002 (NIC 115421 - NIC 115424), to which the Lassar Report is Exhibit Number 99.1. This version was provided in a markedly smaller typeface than the two noted above, and shows the Bruce Bickner cover letter as NIC 115425. It notably refers to a "third patty" in the second sentence of footnote 28, at the bottom of page 58 of the Report itself (NIC 115486), shows the same one member of the Inventory Value Team on the title page of the IVT Report NIC 115551), and, unlike the two versions described above, bears the

[14] See Ex. O, attached.

notation "Created by 10K Wizard Technology www.10KWizard.com" at the end of the document (NIC 115567). This version of the Lassar Report, beginning with the Bickner letter, appears to be identical to Attachment I, REDACTED, to Staff's testimony, with the exception that Bates numbers do not appear on Staff's Attachment I. Staff is attaching to this Response the four page 8-K report to the SEC (NIC 115421 - NIC 115424),[15] page 58 of the Lassar Report (NIC 115486), and the first and last page of the IVT Report from this version (NIC 115551 and 115567).[16]

There are several bases for the admissibility of the Lassar Report.

The Lassar Report was filed by "Northern Illinois Gas Company (Doing business as Nicor Gas Company)," as a registrant with the SEC, by the action of Kathleen L. Halloran, identified on the signature page of the 8-K as "Executive Vice President[,] Finance and Administration" of both Nicor, Inc., and Nicor Gas Company. (NIC 115421 - NIC 115423) Page 2 of the Form 8-K states that "The [Lassar] report and its transmittal letter, with certain names or addresses redacted to protect the confidentiality of the individuals in question, are attached as Exhibit 99.1." (See Ex. P, NIC 115422) Admissions made by the officer of a corporation in the exercise of the officer's duties are binding on the corporation. (*Hild v. Avland Development Co.*, 46 Ill. App. 3d 173, 360 N.E.2d 785, 4 Ill. Dec. 672 (1977)) The Lassar Report, along with its Appendix of Documents, is thus an admission of Nicor Gas Company, the party-opponent of Staff in these proceedings.

Under Illinois law, a party cannot complain of evidence that party has introduced or brought out. (*Handbook of Illinois Evidence,* p. 18) The direct evidence of both Nicor witnesses in this proceeding relies upon the Lassar Report as a basis for evidence the witnesses offer. (See Nicor Ex. 1.0 "Bartlett Direct," 6:122-8:172; Nicor Ex. 2.0, "Gorenz Direct," 4:72-5:77, 15:289-291). Nicor witness Bartlett quotes the Lassar Report directly. (Nicor Ex. 1.0, 7:135-143) "[W]here a party himself introduces or elicits certain evidence, he cannot later complain." (*Gillespie v. Chrysler Motors Corporation*, 135 Ill. 2d 363, 553 N.E.2d 291, 142 Ill. Dec. 777, at 783 (1990))

Furthermore, the admission of an agent of a party opponent, made during the agency and concerning a matter within the scope of that agency, is admissible as an admission against the principal. (*Werner v. Botti, Marinaccio & DeSalvo*, 205 Ill. App. 3d 673, 563 N.E.2d 1147, 151 Ill. Dec. 41, at 46 (5th Distr., 1991)) The Lassar Report states that Sidley was hired by a Special Committee of the Board of Directors of Nicor Inc. to conduct a factual investigation of certain allegations regarding the "Performance Based Rate system under which the Company has been operating since January 2000 and to report on our factual findings and conclusions." (Staff Ex. 2.0, Att. I, p. 1) The Report recites that Sidley hired the accounting firm KPMG LLP ("KPMG") to assist in the

[15] See Ex. P, attached.
[16] See Ex. Q, attached.

investigation, and that Sidley and KPMG reviewed thousands of Nicor documents and interviewed numerous current and former Nicor employees. (*Id.*) (By contrast, "Item 9. Regulation FD Disclosure," on page 2 of Nicor Gas's 8-K report, recites that "the Special Committee [of non-management directors of Nicor, Inc.] retained Scott Lassar of the law firm of Sidley Austin Brown & Wood (Sidley) *and* the accounting firm of KPMG LLP.") (Ex. P, NIC 115422 emphasis added)

Thus, the Board of Directors of Nicor Inc. appointed a Special Committee from among its membership ("Special Committee") who in turn either retained Sidley and KPMG, or who retained Sidley Lassar, who in turn retained KPMG. According to records Nicor has filed with the Illinois Commerce Commission (2002 Nicor Gas Annual Report to the Illinois Commerce Commission, p. 105) and that Nicor, Inc., has filed with the SEC (SEC Form 10-K for 2002, p.68)[17], the Board of Directors of Nicor, Inc. was, in 2002, identical to the Board of Directors of Nicor Gas Company. Mr. Lassar and KPMG acted under this agency, created by the Board of Directors of Nicor, Inc., which was made up of the identical persons who formed the Board of Directors of Nicor Gas, to investigate and cause the preparation of a report which Staff seeks to admit. The Lassar Report is the declaration of agents of Nicor Inc. and Nicor Gas Company, it pertains directly to matters within the scope of that agency, i.e., investigating allegations regarding the GCPP, and it is therefore admissible against Nicor Gas Company as a party to these proceedings.

The fact that the boards of directors of Nicor Gas and Nicor, Inc., were identical in 2002 is not one that Staff raises lightly, in view of the body of case law establishing what facts must be proven in order to "pierce the corporate veil." See, e.g., *Goulding v. AG-RE-CO, Inc.*, 233 Ill. App. 3d 867, 599 N.E.2d 1094, 175 Ill. Dec. 80 (1st Dist. 1992)

Rather than seeking damages or other substantive legal or equitable relief against Nicor, Inc., however, Staff seeks to use the identity of the boards of directors for the narrower evidentiary issue of agency for purposes of determining that declarations of Scott Lassar, Sidley, and KPMG are admissible as the admissions of Nicor. Staff thus relies on the following chain of events: Nicor Gas employees took actions that became known to, and led to action on the part of the directors of Nicor, Inc., who are also the directors of Nicor Gas. These individuals, albeit it in their capacity as Nicor, Inc. directors, appointed a committee from among their membership, to look into the actions of the Nicor Gas employees. The committee retained Sidley (or Sidley and KPMG) to investigate, and Sidley in turn retained KPMG to assist. There is thus a chain of agency that extends from Nicor Gas directors to the Special Committee to Scott Lassar and KPMG, which renders declarations of those entities, within the scope of that agency, admissible against Nicor as the admissions of a party opponent.

[17] See Ex. R, attached.

Furthermore, and without regard to the foregoing discussion, an out-of-court declaration that is adopted by the words or conduct of a party opponent is admissible against that party. (*Handbook of Illinois Evidence,* p. 741, citing *Pagel v. Yates*, 128 Ill. App. 3d 897, 471 N.E.2d 946) The Lassar Report was adopted by Nicor, Inc. (and Nicor Gas Company) Board member, Bruce P. Bickner, according to whom the Special Committee "recommends that the Board of Directors direct the Company to adopt the recommendations set forth in Sidley's Report." (Staff Ex. 2.0, Att. I, cover letter, NIC 049798) Nicor Gas Company took a number of actions identified and discussed in the Lassar Report (Nicor Ex. 2.0, 4:72-75), and "recorded a contingent liability in response to the recommendations of the Lassar Report" (*Id*., 14:277-278). Nicor Gas has thus adopted the Lassar Report by words and conduct.

7. Attachment M – Metz Memo

Attachment M is a Bates-stamped (NIC 011420 - 011422 CONFIDENTIAL), Nicor-provided document the subject line of which reads "X X X X X X X X X X X X X X X X X X X X X X." By its terms, it is an X X X X X X X X X X X X X X from Nicor employee Jeff Metz, a Nicor employee from 1981 until 2005, who worked as a senior Nicor accountant and Controller in 1999 and 2000. (Staff Ex. 2.0., p. 8) It concerns matters within the scope of Mr. Metz's employment with Nicor, and was prepared during that employment. In his discovery deposition, X X X X X X X X X X X X X X X X X X X X X X X X X X X X. (See Ex. L, X X Tr., p. 32 June 27, 2003)[18] Statements of the employees of a party are admissible as admissions of the party as long if made during the employment relationship on matters within the scope of that employment. (*First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill. Dec. 77, at 85, 867 N.E.2d 1063 (4th Dist., 2007)

Attachment M thus constitutes an admission of Nicor, the party-opponent of Staff. Admissions of a party opponent are admissible under the rules of evidence in Illinois. (*Handbook of Illinois Evidence,* p. 730)

8. Attachment N

Staff will withdraw its testimony regarding Attachment N.

9. General Argument

The nub of Nicor's argument seems to be a sense of outrage that Staff would have the temerity to take a series of documents, almost all of which were provided to Staff by Nicor, and use the statements in those documents to prove the truth of the matter asserted:

[18] See Ex. O, attached.

> The fundamental error in Staff's and CUB's approach is their witnesses' misuse of these hearsay documents to prove facts that are not otherwise in evidence. Neither Mierzwa, nor Maple, nor Zuraski (who quotes from Maple's attachments) has established, or could establish, any foundation for the use of these hearsay documents as substantive evidence. The witnesses have no personal knowledge about the documents they seek to move into evidence or the actual matters and events addressed in the documents. These opinion witnesses are simply reading the documents, many years after they were created, and drawing from them irrelevant conclusions or inferences. In virtually every instance, these witnesses do not have any understanding of who created the documents that are the subject of their testimony and can only speculate as to what purposes the documents actually served. Nevertheless, in the absence of any proper foundation, each of these witnesses directly asks the Commission to rely upon these hearsay documents for the truth of the matters asserted within them. (Motion, pp. 27-28)

If this argument were accepted at face value, it would turn practice and procedure at the Commission completely on its head. Utility companies are required by law to maintain records, and to provide those to the Commission and its Staff upon request. (See, generally, 220 ILCS 5/5-101, 5-102, 5-103, 5-104, 5-105, 5-107, and 5-109, as well as 83 Ill. Adm. Code 510) Whenever a utility petitions the Commission for any form of relief, and whenever the Commission formally considers the rates a utility charges, under Article IX of the PUA, it would be a practical impossibility for the Staff to testify about anything of substance in the proceeding without the ability to seek utility records and use the information they contain as substantive evidence. Other than in those few types of cases in which Engineering Staff conducts facilities inspections or investigates specific incidents, the norm is for Staff to send out data requests and to rely upon the company to stand by the accuracy of the responses.

The simple fact is that the vast bulk of the attachments to Mr. Maple's testimony bear the evidentiary watermark of Nicor's Bates stamp. "Relevant admissions of a party, whether consisting of a statement or conduct, are admissible when offered by the opponent as an exception to the Hearsay Rule." (*Handbook of Illinois Evidence*, p. 730)

"[A]dmissions by a party are admissible as substantive evidence of the truth of the statements made or of the existence of any facts which they have a tendency to establish." (*Cardiel v. Warren*, 191 Ill. App. 3d 816, 548 N.E.2d 1081, 139 Ill. Dec. 525, at 527-528 (1st Distr., 1989)) The Nicor documents attached to Staff's testimony "have a tendency to establish" many facts: that they were created or circulated on the dates they bear, that they document the knowledge possessed and concepts created by their named authors, whether Nicor officers, employees, or agents, that they were communicated to those they purport to have been communicated to, and that the handwritten statements thereon—to the extent those existed when the documents were

furnished on a "Confidential" basis to Staff—were made by employees of the Company. Staff does not need to prove to a philosophical certainty that these things are true; it needs only to establish the party opponent as the source of the admissions, and can reasonably infer facts these documents "have a tendency to establish."

Nicor points out inconsistencies between versions of the documents, and what they describe as handwritten notes of Staff. (Motion, pp. 29-30) As discussed at length in Section 6 above, the inconsistencies in the copies of the Lassar Report, come as a logical result of the three different versions provided to Staff, the Confidential version (NIC 049799 - 049940 CONFIDENTIAL), the redacted version (NIC 049799 - 049940 REDACTED), and the 8-K Current Report filed by Nicor, Inc., and Nicor Gas Company with the SEC on October 31, 2002 (See Ex. P, NIC 115421 - NIC 115424), to which the Lassar Report is Exhibit Number 99.1. (The latter appears to be identical to Attachment I, REDACTED, to Staff's testimony, with the exception that Bates numbers do not appear on Staff's Attachment I.) The handwritten notes about which Nicor complains are not words written on the documents but are underline marks. It thus appears that the documents were working documents. In Staff's view the determinations of the ALJs and Commissioners are not likely to be biased by the existence of underling on these pages. Thus, Nicor is not prejudiced. However, if Nicor feels otherwise and is willing to provide a clean copy of the Lassar Report, Staff is certainly willing to substitute the clean copy for the offending one.

E. "State of Mind and Otherwise Inadmissible Testimony"

Nicor takes issue with certain assertions that Staff witnesses Zuraski and Maple, and CUB witness Mierzwa, have included in their testimony. Contrary to Nicor's argument, none of the statements witnesses Zuraski and Maple offer are based on "unfounded speculation." (See Motion, p. 19) The assertions are based on admissions properly attributable to Nicor itself and, in a few instances, on matters that can be directly inferred from such admissions.

1. Staff Witness Zuraski

Nicor claims that five Zuraski statements are "pure conjecture" which "adds nothing of probative value to the record in this proceeding." (*Id*., at 20) The first two cited are that Nicor gas "knowingly" took certain actions that led to an increase in gas costs under the GCPP. (*Id*., at 19)

On page 7 of his testimony, Staff Witness Zuraski does state that Nicor Gas "took actions that knowingly led to an increase in the cost of gas included in the PGA by engaging in at least one transaction with an affiliate (Nicor Enerchange) in which Nicor sold gas to Nicor Enerchange for future delivery at a price demonstrably less than [the price of gas at stated times]." This is, however, a fair summary of evidence he offers

later in his testimony. As substantiated in footnote 25 of page 38 of Staff Witness Zuraski's testimony, Nicor-provided records show that X X X

own Assistant Vice President of Supply Operations, in a Report adopted for filing with the SEC by Nicor's own Executive Vice President of Finance and Administration.

Nicor is similarly troubled with the following testimony offered by Mr Zuraski: "The Company wished to physically maintain possession of the gas through the remainder of the winter." (Motion, p. 20) His footnote 25 identifies his sources as the Lassar Report, Staff Exhibit 2.0, Attachment I, pages 70 and 71, and workpapers supporting that Report, which were provided to Staff by KPMG. These workpapers include one in which Zuraski quotes X X X

2. Staff Witness Maple

Nicor argues that Staff Witness Maple "speculates as to the Company's state of mind at various times before and during the operation of the GCPP, based not on any first-hand contemporaneous observations but on secondary sources such as documents or depositions." (Motion, p. 22) Staff will address, point by point, the specific portions of Staff's evidence Nicor quotes, but must observe at the outset that nowhere does Nicor explain, let alone cite authority for, the notion that the Commission should ignore admissible evidence simply because it is not a "first-hand contemporaneous observation." Indeed, it is difficult to imagine how Nicor proposes that Staff would accomplish first-hand contemporaneous observation" of Nicor's employees or transactions. Occurrence witnesses are rare in Commission proceedings. (Staff does not "witness" purchases of gas or any other transactions utilities conduct; nevertheless, Staff does review such transactions and the Commission does have general supervisory authority over them. (See 220 ILCS 5/4-101)) The Staff testimony is well-founded and admissible; admissions of a party-opponent are admissible as substantive evidence. This is, and should be, especially true where, as here, the "first-hand contemporaneous" statements made by Company witnesses in Docket Nos. 99-0127 and 02-0067 (before July 2002) are proven to be rife with falsehood by the Company's own subsequent admissions.

In terms of specifics, Nicor first attacks Mr. Maple's testimony "that the Company '*purposely*' withheld certain information from Staff related to its use of LIFO accounting for gas storage inventory during the GCPP approval proceeding." (Motion, p. 22) An examination of Mr. Maple's testimony shows that the statement is, in fact, amply supported and admissible as an inference fairly to be drawn from Nicor's own admissions.

Witness Maple testifies that he will discuss later the fact that Nicor "purposely" withheld relevant documents from Staff in response to data requests. The buckets reports serve as one such example in Mr. Maple's testimony. (See Staff Ex. 2.0, pp. 44-48) The buckets reports are X X X

identify the savings for each action. (*Id*., p. 46) X X X

X X X

With respect to the use of "purposely" in line 393 of Mr. Maple's testimony, the testimony refers to information being purposely withheld. This conclusion is again, fully supported. The fact is that Nicor witness Gilmore testified, on rebuttal in Docket No. 99-0127, that the Company "has no incentive under the GCPP to inappropriately manipulate storage." Gilmore further testified that the notion that the Company has an incentive to manipulate storage withdrawals "is incorrect." (Staff Ex. 2.0, 19:323-333) Gilmore was X X X

Nicor further objects to Mr. Maple's characterization of Staff's "state of mind," including, specifically, that Staff was not aware of that fact that "Nicor had developed a viable scheme to monetize these low-cost [LIFO] layers by manipulating net withdrawals." (Motion, p. 23) Nicor argues that Staff's state of mind is irrelevant; this argument fails, again, to acknowledge the scope of this proceeding. Staff's evidence shows that the Company engaged in a strategy based on the existence of the LIFO strategy not coming to light. The fact that the Staff was not aware of the LIFO strategy is clearly relevant. The LIFO strategy is the basis for much of Staff's testimony on issues related to how to make ratepayers whole for the losses they suffered as a direct result of that strategy. Those Staff issues are set forth at length in the Commission's Second Interim Order in Docket No. 02-0067.

Nicor attempts to preclude Staff from arguing the relevance of this evidence, by pointing out that the Commission sustained Staff's objection to Nicor's attempt to discover Staff's knowledge concerning LIFO accounting. (Motion, p. 23) Nicor fails to mention that its discovery request was in fact originally a blanket request of Staff generally, that was ultimately narrowed by an Administrative Law Judges' Ruling to "energy- and finance-related personnel". (Notice of Administrative Law Judges' Ruling; January 6, 2004) As is demonstrated in Staff's Petition for Interlocutory Review of the Ruling on Staff Objections to Nicor Data Requests ("Staff Petition for Interlocutory Review"), Nicor's request, even as narrowed, went far beyond typical the Commission practice of discovery of the bases for the testimony of all of Staff's *witnesses*, by requiring *all* Commission energy and finance-related employees to respond to an extensive set of questions. (Staff Petition for Interlocutory Review, p. 5, February 20, 2004) The record does not disclose any Nicor request tailored to cover only Commission Staff members assigned to offer testimony in these proceedings, or even in these proceedings and Docket No. 99-0127. Nicor's failure to propound a discovery request of reasonable scope in 2003 and 2004 should not now preclude the introduction of relevant evidence against it.

The attack on Mr. Maple's testimony concludes with an intemperate diatribe against his use of the term "steal" in his testimony, and an analogy he draws between the facts and circumstances of this case and the actions of a house burglar. Webster's Third New International Dictionary includes the following in its definition of the transitive verb "steal": "take or appropriate without right or leave and with intent to keep or make use of wrongfully," "to take away by . . . unjust or underhand means: deprive one of." The word "steal," understood in the sense of these common dictionary definitions, is consistent with the evidence Mr. Maple offers. It is an appropriate term to use in this context, and Mr. Maple is competent to summarize the evidence in this manner.

The burglar metaphor is not an inappropriate one. Viewed in light of the dictionary definition of the word "steal" quoted above, the analogy is best seen as drawing a comparison between Nicor's actions and those of someone who wrongfully

takes something of value, even though not currently being used, from someone who is entitled to benefit from that value at an indefinite future time. If Nicor believes the testimony is harmful, it is free to cross-examine the witness and make appropriate arguments in its briefs.

For the reasons set forth above, the so-called "state of mind" testimony of Messrs. Zuraski and Maple is consistent with the rules of evidence, makes appropriate use of Company admissions and other admissible evidence, and will help the Commission reach a just determination of the issues it faces as a result of Nicor's GCPP. The testimony should not be stricken.

F. Other Flaws in the Motion

Nicor's Motion contains a number of other misstatements and seriously flawed arguments.

Nicor argues that "Staff's and CUB's combined claims for refunds, if granted, would total nearly five years of Nicor Gas' net income." (Motion, p. 2) This statement should be disregarded entirely. The amount of refunds recommended by Staff and CUB is completely irrelevant to the determination of whether specific portions of testimony should be stricken. The decision whether or not to strike the testimony must be based upon the rules of evidence, not upon the magnitude of the risk to Nicor. The magnitude of the recommended refunds may factor in to Nicor's decisions regarding a whole range of litigation strategies, including whether to file a Motion to Strike. But consideration of the magnitude of the relief requested has no place in the evidentiary issues of the Motion. It is entirely inappropriate to argue that the size of the recommended refunds affects the admissibility of evidence. The decision about whether a refund is appropriate or the magnitude of the refund will be addressed after the presentation of all evidence. It is not a matter to be prejudged in connection with a Motion to Strike. Even if the argument concerning the magnitude of potential refunds were tenable, Nicor fails to take into account that these claims in many cases overlap, and that the sum of the sets of claims for refund is not a possibility, even if CUB and Staff were to prevail on all issues.

Nicor complains that Staff and CUB ask the Commission "to pursue, in effect, a complete hindsight reconstruction of what the Company's gas costs might have been during the 1999-2002 time period, if only things had been different at the time." (Motion, p. 2) Yet Nicor's own witnesses in this proceeding effectively adopt the Lassar Report (see Section II.D.6., above), which does nothing if not engage in after the fact reconstructions of the actions of Nicor. The Lassar Report offers retroactive solutions for

improper actions of Nicor, which are themselves based on numerous assumptions. (See Staff Ex. 2.0, Att. I, pp. 25-26, 33-36, 39, 48, 55-56, and 63-64) Nicor's own case in chief adopts the "if only things had been different" (Motion, p. 2) position for which it criticizes Staff and CUB. Nicor's protestations are ironic in the face of its own witnesses' adoption of the Lassar Report and especially in light of the following Lassar conclusion:

> *We note one extremely important caveat regarding* this calculation. These calculations assume that overcharges and undercharges may be netted against each other in determining the ultimate harm to the ratepayer. We offer no opinion as to whether this is permissible as a regulatory matter, or whether the ICC will accept this methodology. If, in fact, only overcharges to ratepayers were to be considered here for purposes of calculating a potential refund, these numbers would be significantly different. (Staff Ex. 2.0, Att. I, p. 64; emphasis added)

The Nicor Motion states that Nicor's audited restated financial results were never contested. (See Motion p. 5) This point does not bear scrutiny as a reason for any Commission determination in these proceedings. At a time in which Staff and all parties to these cases were conducting extensive discovery in the wake of the whistleblower fax, the Company, without any determination of its ultimate liability from the Commission or any other forum, took actions that had the effect of flowing certain dollars back to ratepayers for identified reasons. In December of 2002, Nicor and all parties filed with the Commission a Joint Motion that clearly preserved a host of issues for Commission determination at a later date. There was no real reason for anyone to argue that Nicor should not voluntarily undo at least the portion of the ratepayer harm it quickly acknowledged it had done.

Now, having considered and analyzed all of the evidence that has come to light since June 2002, including that which has come to light since Nicor voluntarily restated its financial results, Staff is vigorously and appropriately contesting the substance and thoroughness of that restatement. Staff is offering the Commission its expert opinions as to the totality of issues that have arisen out of the GCPP and the PGA proceedings for the relevant years.

G. Section 10-40 of the Illinois Administrative Procedure Act

Apart from and in addition to all of the reasons stated above, the evidence Staff is presenting in these consolidated proceedings is admissible as evidence of a type

"commonly relied upon by reasonably prudent men in the conduct of their affairs." 5 ILCS 100/10-40(a)) That provision of the Illinois Administrative Procedure Act reads in part as follows:

> The rules of evidence and privilege as applied in civil cases in the circuit courts of this State shall be followed. Evidence not admissible under those rules of evidence may be admitted, however, (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. (5 ILCS 100/10-40(a))

The Commission, in turn, has adopted almost identical language in Section 200.610(b) of its Rules of Practice, and it is this provision that Nicor cites in the section of its Motion attacking the use of deposition transcripts. (Motion, p. 17) Nicor cites a 1990 Illinois Commerce Commission decision in which it states that the Commission "has determined that Section 200.610(b) is to be strictly construed when relied upon for the admission of hearsay evidence." (*Id*.)

However, the Illinois Appellate Court has affirmed a Commission decision that was based on hearsay evidence, relying on this very provision. In *Metro Utility v. Illinois Commerce Commission*, 193 Ill. App. 3d 178, 549 N.E.2d 1327, 140 Ill. Dec. 455 (2nd Distr., 1990), the court held that the Commission properly admitted a letter from a staff member of the Illinois Environmental Protection Agency that set forth the cost of constructing sewage treatment facilities. Included in the Court's opinion is the following:

> While hearsay evidence has generally been held to be inadmissible in an administrative hearing, section [10-40(a)] appears to create an exception to the rule when the hearsay is reliable. We believe the Commission accurately stated the pertinent question in determining the letter's admissibility as "whether a reasonably prudent person would rely on the written assurances of sewer connection costs put forward by a staff member of the [Illinois Environmental Protection Agency]." We believe that it was reasonable for [the ICC Staff witness], in forming his opinion, to rely upon the information provided by the Agency. Thus, we find that the Commission was correct in admitting [the IEPA employee's] letter into evidence. (140 Ill. Dec. 459-460; citations omitted)

Applying this reasoning to the facts and circumstances of this case, any doubt concerning the admissibility of the challenged evidence can readily be resolved in favor of Staff's case.

The author of the Lassar Report "hired the accounting firm KPMG LLP ('KPMG'). We [i.e., Sidley] and KPMG reviewed thousands of Nicor documents and interviewed numerous current and former Nicor employees, including all current officers." (Staff Ex. 2.0, Att. A; NIC 049802) Sidley and the professional accounting firm of KPMG, whose employees duly noted their interviews with Nicor personnel at the heart of the controversy, committed the results of those interviews to writing, which writings were ultimately provided to the Commission's Staff. If Scott Lassar relied upon the documentation assembled by KPMG, and Nicor relied upon the conclusions of Scott Lassar when filing its direct case, should the Commission be precluded from admitting into evidence the testimony its Staff assembled in reasonable reliance thereon?

In short, Commission reliance on the statements made by Nicor employees or officers to, and recorded by, Sidley or KPMG personnel, can be seen as nothing more than reliance on "evidence of a type commonly relied on by reasonable prudent persons in the conduct of their affairs." (83 Ill. Adm. Code 200.610(b)) In the words of Professor Graham, "Section 10-40(a) [of the Illinois Administrative Procedure Act] creates an additional hearsay exception for trustworthy statements, that is, those commonly relied upon by reasonably prudent people in the conduct of their affairs." (*Handbook of Illinois Evidence*, p. 4, citing *Metro Utility v. Illinois Commerce Commission*, 193 Ill. App. 3d 178, 140 Ill. Dec. 455, 549 N.E.2d 1327 (1990))

III. CONCLUSION

Nicor has mounted a spirited effort to preclude the Commission from considering much of the evidence Staff seeks to put before it in this proceeding. The foregoing demonstrates that all of these attacks are unavailing.

Staff has taken Nicor's own words, the sworn statements of its own employees and officers, the Report of its prestigious investigator, and the documentation created by the investigator's forensic assistant in accountancy, and has used them to offer the Commission the expert testimony promised to it in 2002. The challenge the Commission now faces is to consider all of this evidence and to determine how Nicor can be held to its promise to "align the interests of ratepayers and the Company."

As stated above, Staff will withdraw the testimony cited in Nicor Exhibit B, note 11 and Nicor Exhibit C, notes 47 through 49.

WHEREFORE, for all of the reasons state above, Staff respectfully requests that the remainder of Nicor's Motion be denied.

Respectfully submitted,

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

January 26, 2010

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

Of Counsel:
PATRICK A. FOSTER
Office of General Counsel
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
Phone: (217) 782-4182
Fax: (217) 524-8928
pfoster@icc.illinois.gov

EXHIBIT A

PUBLIC VERSION

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	**:**	
On Its Own Motion	**:**	
-vs-	**:**	
Northern Illinois Gas Company	**:**	
d/b/a NICOR Gas Company	**:**	**02-0067**
	:	
Proceeding to review Rider 4, Gas cost,	**:**	
pursuant to Section 9-244(c) of the	**:**	
Public Utilities Act.	**:**	

SECOND INTERIM ORDER

On March 2, 1999, Northern Illinois Gas Company ("Nicor" or "Company"), pursuant to Section 9-244 of the Public Utilities Act ("Act") (220 ILCS 5/1-101 *et seq.*), filed a Petition along with testimony seeking approval of its performance-based regulatory ("PBR") program, known as the Gas Cost Performance Program ("GCPP" or "Program"). The Commission initiated Docket 99-0127, to review the proposed program. After testimony, hearings and oral argument, the Commission entered an order modifying the proposed program. The Company accepted the Commission's modifications and on December 15, 1999, the Commission entered an order approving a modified GCPP.

Section 9-244(c) of the Act requires that the Commission open a proceeding to review any program approved under Section 9-244(b) two years after the program is first implemented to determine whether the program is meeting its objectives and may make such revisions as are necessary to result in the program meeting its objectives. On January 24, 2002, the Commission initiated this docket to review the GCPP pursuant to 9-244(c).

In its Initiating Order, the Commission took notice of Section 9-244(c) of the Act, which states:

> (c) The Commission shall open a proceeding to review any program approved under subsection (b) 2 years after the program is first implemented to determine whether the program is meeting its objectives, and may make such revisions, no later than 270 days after the proceeding is opened, as are necessary to result in the program meeting

> its objectives. A utility may elect to discontinue any program so revised. The Commission shall not otherwise direct a utility to revise, modify, or cancel a program during its terms of operation, except as found necessary, after notice and hearing, to ensure system reliability.

The scope of the proceeding established by the Initiating Order is as set forth in the following ordering paragraph:

> IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the proceeding contemplated by Section 9-244(c) of the Act as to the program Nicor Gas implemented under tariffs filed in accordance with the Commission's Order entered November 23, 1999, in Docket No. 99-0127 be, and the same hereby is, initiated.

Order initiating Docket 02-0067, p. 2

The Commission thus initiated a proceeding, as required by Section 9-244(c) of the Act, to "determine whether the program is meeting its objectives, and [to] make such revisions, no later than 270 days after the proceeding is opened, as are necessary to result in the program meeting its objectives."

An evidentiary hearing was held before duly authorized Administrative Law Judges on June 10, 2002. At the close of the hearing, the record was marked "Heard and Taken."

On June 27, 2002, CUB filed a Motion to Reopen the Record. In response to that Motion, the parties agreed that additional discovery was necessary. As a result of the Motion to Reopen, Nicor, Governmental and Consumer Intervenors, and Staff entered into a stipulation. The stipulation provided that the parties agree that additional discovery is necessary and, as such, the then procedural schedule should be suspended. The stipulation further provides that Nicor, CUB, Cook County, and Staff agree that no party to this proceeding will be harmed or prejudiced in any manner to the extent that the Commission does not determine whether the Program is meeting its objectives or make any revisions to the Program by October 21, 2002. In the stipulation Nicor, CUB, Cook County, and Staff each waives any right it may have to question, comply with, challenge, or appeal any determinations or revisions made by the Commission to the extent they are made by the Commission on a date subsequent to the 270 days referenced in Section 9-244(c). On July 16, 2002, the Commission entered its Interim Order.

On December 9, 2002, and during the course of discovery as provided for in the Commission's Interim Order, Staff, Citizens Utility Board, Cook County State's Attorney's Office, Attorney General, and Nicor filed a Joint Motion to Reopen the Record

and Expand the Scope of the Proceeding (hereinafter Joint Motion"). A corrected Joint Motion was filed on December 10, 2002.

The Joint Motion notes that the GCPP in fact went into effect on January 1, 2000. In the time since then, under the terms of Rider 4, GCPP amounts have been applicable to the Company's Rider 6 ("Gas Supply Cost"), have been reflected in charges filed under the provisions of Rider 6, and have been added to Adjustment Factor A for the Commodity Gas Charge, the Demand Gas Charge, and Non-Commodity Gas Charge and Aggregator Balancing Service Charge under Rider 6 for billing purposes. During the program, the Commission has continued to initiate annual reconciliation proceedings concerning the operation of Rider 6, but has acted in accordance with Section G(b) of the Company's Rider 6, which provides that "[t]he Commission shall not consider the prudence of gas costs incurred for any period included in Rider 4, Gas Cost Performance Program."

The Joint Motion further notes that the Commission has completed purchased gas adjustment clause reconciliation proceedings for Nicor Gas for calendar year 1999 (Docket 99-0481, Order entered January 31, 2001), and calendar year 2000 (Docket 00-0718, Order entered September 12, 2001). Nicor Gas was the only party to Docket 99-0481, while the Company, the People of the State of Illinois *ex rel.* James E. Ryan, Attorney General, the Citizens Utility Board, and the Cook County State's Attorney's Office were all parties to Docket 00-0718. Still pending are reconciliation proceedings for calendar years 2001 and 2002 (Dockets 01-0705 and 02-0725, respectively).

The Joint Motion recites that the statutory requirements for any program implemented under Section 9-244 of the Public Utilities Act are as follows:

> (1) the program is likely to result in rates lower than otherwise would have been in effect under traditional rate of return regulation for the services covered by the program and that are consistent with the provisions of Section 9-241 of the Act; and
>
> (2) the program is likely to result in other substantial and identifiable benefits that would be realized by customers served under the program and that would not be realized in the absence of the program; and
>
> (3) the utility is in compliance with applicable Commission standards for reliability and implementation of the program is not likely to adversely affect service reliability; and
>
> (4) implementation of the program is not likely to result in deterioration of the utility's financial condition; and
>
> (5) implementation of the program is not likely to adversely affect the development of competitive markets; and

(6) the electric utility is in compliance with its obligation to offer delivery services pursuant to Article XVI; and

(7) the program includes annual reporting requirements and other provisions that will enable the Commission to adequately monitor its implementation of the program; and

(8) the program includes provisions for an equitable sharing of any net economic benefits between the utility and its customers to the extent the program is likely to result in such benefits.

Section 9-244(b) of the Act [220 ILCS 5/9-244(b)].

The Joint Motion states that pursuant to the Interim Order, Nicor has provided Staff and the parties to this proceeding over 60,000 hard copy pages of discovery. The Joint Motion alleges that as a result of the additional discovery, reopening of the record in this proceeding is warranted, as well as expanding the scope of this proceeding in order to review related issues impacting the PGA for the years 1999-2002.

The Joint Motion asserts that all parties agree that some amount of refunds will be in order although there remain outstanding issues amongst the parties concerning the amount of refunds.

The Joint Motion states that currently, Staff's analysis focuses on issues that include but are not limited to the following: (1) 1999 inventory reduction; (2) prefill accounting treatment; (3) storage management; (4) affiliate transactions; (5) weather insurance; (6) infield transfers; (7) Natural Gas Pipeline Company of America ("NGPL") storage capacity;and (8) errors in delivery volumes that were reported. The Joint Motion states that these issues and refunds will impact the 1999, 2000, 2001 & 2002 PGA dockets in addition to the current docket, and that the refunds should be treated in a manner that is uniform and complete.

The Joint Motion also requests that the Commission take administrative notice of the filing by Nicor Gas, on November 7, 2002, of rate sheets that would have the effect of canceling Rider 4, the tariff sheets embodying the Program, and making modification to Rider 6, "Gas Supply Cost," that would restore the Nicor Gas purchased gas adjustment clause to its traditional status as a Section 9-220 automatic adjustment clause subject to an annual prudence review as part of the statutorily required reconciliation between amounts expended and amounts recovered. The Joint Motion recites that if the proposed filing were to take effect, it would also have the effect of at least technically canceling Section C of Rider 4, which reads as follows:

> The Company may, upon 60 days' notice to the Illinois Commerce Commission, discontinue the Gas Cost Performance Program at the end of a calendar year. The

> Company will make a determination of the results from the final year and follow the methodology included herein for allocating the results. The Company will also follow the methodology herein with respect to refunds received after termination of the program for costs incurred during the program, with such refunds applied to the corresponding period of the program.

The Joint Motion asserts that there is a link between the issues described above, the possibility that one or more types of refunds may need to be made for various periods of the program, and the statutorily required elements of a program established under Section 9-244 of the Act. The statutory elements include whether the program is likely to result in rates lower than otherwise would have been in effect under traditional rate of return regulation for the services covered by the program, whether the program is likely to result in other substantial and identifiable benefits that would be realized by customers served under the program and that would not be realized in the absence of the program, and whether the program includes provisions for an equitable sharing of any net economic benefits between the utility and its customers to the extent the program is likely to result in such benefits.

The Joint Motion states that given the arguably limited scope of the proceeding as originally defined in the portion of the ordering paragraph quoted above, it would be appropriate for the Commission to clarify that this proceeding is the appropriate formal mechanism to consider the totality of issues currently before this Commission as a result of the operation of the Program, including the transactions occurring in 1999. The Joint Motion further states that given the possibility that Section C of Rider 4 will be canceled along with the remainder of that Rider effective January 1, 2003, it is further necessary to specify that issues related to the operation of that tariff provision be preserved for any action determined by the Commission to be necessary.

No party filed a response in opposition to the Joint Motion.

FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) Northern Illinois Gas Company d/b/a Nicor Gas Company is a local gas distribution company certificated to provide gas services in the State of Illinois, and is a public utility within the meaning of Section 3-105 of the Public Utilities Act;

(2) the Commission has jurisdiction over the parties hereto and the subject matter hereof;

(3) the findings of fact and conclusions of law set forth in the prefatory portions of this Order are supported by the record herein and are hereby adopted as findings of fact and conclusions of law;

(4) the Commission should reopen this proceeding and this proceeding is the appropriate formal mechanism for addressing all issues related to the program Nicor Gas implemented under tariffs filed in accordance with the Commission's Order entered November 23, 1999, in Docket 99-0127.

IT IS THEREFORE ORDERED that the record in this proceeding shall be fully re-opened, that it will consolidate this proceeding with Dockets 01-0705 and 02-0725, and that it will consider for final resolution in this proceeding all issues relating to the operation of the Program Nicor Gas implemented under tariffs filed in accordance with the Commission's Order entered November 23, 1999, in Docket 99-0127, and all issues relating to any refunds that may be owing to Nicor customers as a result of the operation of the Program and as a result of the operation of the Company's Rider 6 in 1999, 2000, 2001, and 2002, and for ordering such other and further relief as deemed equitable and just. It is not the Commission's intent to re-litigate issues resolved in Dockets 99-0481 and 00-0718 to the extent that the Commission determines that its resolution of the issues is unaffected by information revealed to parties other than Nicor subsequent to June 1, 2002. The Commission will, however, examine any issues that it deems appropriate in light of new information raised in the current docket.

IT IS FURTHER ORDERED that, if necessary, the records of Dockets 99-0481 and 00-0718 will be re-opened for the limited purpose of entering Amendatory Orders that reflect the findings in this Docket.

IT IS FURTHER ORDERED that a copy of this Order be served upon all parties to this proceeding, all parties to Dockets 99-0481, 00-0718, 01-0705 and 02-0725, and to all municipalities listed in the filing Nicor Gas made in Docket No. 02-0725.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 III. Adm. Code 200.880, this Order is not final; and it is not subject to the Administrative Review Law.

By Order of the Commission this 17th day of December, 2002.

(SIGNED) KEVIN K. WRIGHT

Chairman

EXHIBIT B

PUBLIC VERSION

1. Testimony: Staff Ex.1.0, 2:41: "requests and rely upon utility personnel being forthright and accurate in their responses…"

Objection

- Previously struck, (see Apr. 8, 2004 Tr. At 599:20-601:16);

Previous Objection: Incompetent (Outside Scope of Permissible Expert Testimony); Cumulative.

Testimony previously stricken: RTTY filed 5/24/02, 2: 35-48:

Q. What if anything about the deposition testimony makes you believe that it is reliable such that you would base your opinion upon it?

A. I expect Company employees to provide honest and accurate information in response to discovery in docketed matters, whether it is in the form of data request responses or depositions. In the Commission discovery process, data requests are sent to utilities addressed either specifically to a particular witness or to the utility in general. A utility employee who has knowledge of the area of inquiry provides responses. Similarly, during the depositions taken in this case, Staff and intervenors posed questions to Company employees who either had knowledge in the area being inquired about, or who responded that they did not know the answer to the question.

Furthermore, unlike utility personnel providing data request responses, the deponents took an oath to tell the truth prior to their depositions. Thus, the deposition testimony cited in my testimony would seem at least as reliable as the discovery normally relied upon by Staff.

Staff Response

- The testimony sought to be stricken is different than the testimony previously stricken;

- The witness should be allowed to explain the bases for his opinion. This testimony provides the foundation for his expert opinion. It is not outside the scope of permissible expert testimony; an expert can and must testify as to how his opinion was formed. The testimony is not cumulative. Cumulative evidence is additional or corroborative evidence to the same point. (Black's Law Dictionary, 5th Ed.) The witness makes a simple statement.

- Under different circumstances, Nicor might be able to argue that a statement about relying upon utility personnel being forthright and accurate was stating the obvious. But, as is made clear in Staff's testimony, the circumstances in this case have caused Staff to question the validity of this assumption. Thus, there arises a need for Staff to articulate its expectations.

2. Testimony: Staff Ex. 1.0, 3:fn 1: : "Staff Ex. 2, Att. I"

Objection

- Hearsay (Staff Ex. 2.0, Att. I)

Staff Response

- Attachment I is a Nicor provided document entitled "Report to the Special Committee of the Board of Directors of Nicor Inc.," covered by a transmittal letter from Nicor, Inc., director Bruce P. Bickner to the Board of Directors of Nicor, Inc. Attachment I is generally referred to as the "Lassar Report" (see, for example, Nicor Ex. 1.0 ("Bartlett Direct"), 7:133). Staff has in its possession at least three different versions of this report, all of which were provided to it by Nicor. One version bears Bates numbers NIC 049799 - 049940 CONFIDENTIAL, with the Bruce Bickner cover letter numbered NIC 049798. This version refers to a "third party" (with no typographical error) in the second sentence of footnote 28, at the bottom of page 58 of the Report itself (NIC 049859 CONFIDENTIAL), and shows seven members of the Inventory Value Team on the title page of the IVT Report (NIC 049924 CONFIDENTIAL). This version became Attachment I (Unredacted) to Staff's testimony; any underlining or other handwritten notation on that version was inadvertent and should not be considered part of the Attachment.

- A second version bears Bates numbers NIC 049799 - 049940 REDACTED, with the Bruce Bickner cover letter numbered NIC 049798 REDACTED. This version also refers to a "third party" in the second sentence of footnote 28, at the bottom of page 58 of the Report itself (NIC 049859 REDACTED), but shows only one member (Jeff Metz) of the Inventory Value Team on the title page of the IVT Report (NIC 049924 REDACTED). Staff has not made this document an Attachment to its testimony, but is attaching, for illustrative purposes, NIC 049859 and 049924 REDACTED to this Response.[1]

- The third version begins with four pages that constitute the 8-K Current Report filed by Nicor, Inc., and Nicor Gas Company with the SEC on October 31, 2002 (NIC 115421 - NIC 115424), to which the Lassar Report is Exhibit Number 99.1. This version was provided in a markedly smaller typeface than the two noted above, and shows the Bruce Bickner cover letter as NIC 115425. It notably refers to a "third patty" in the second sentence of footnote 28, at the bottom of page 58 of the Report itself (NIC 115486), shows the same one member of the Inventory Value Team on the title page of the IVT Report NIC 115551), and, unlike the two versions described above, bears the notation "Created by 10K Wizard Technology www.10KWizard.com" at the end of the document (NIC 115567). This version of the Lassar Report, beginning with the Bickner letter, appears to be identical to Attachment I, REDACTED, to Staff's testimony, with the exception that Bates numbers do not appear on Staff's Attachment I. Staff is attaching to this Response the four page 8-K report to the SEC (NIC 115421 - NIC 115424),[2] page 58 of the Lassar Report (NIC 115486), and the first and last page of the IVT Report from this version (NIC 115551 and 115567).[3]

[1] See Ex. O, attached.
[2] See Ex. P, attached.
[3] See Ex. Q, attached.

- There are several bases for the admissibility of this document.

- The Lassar Report was filed by "Northern Illinois Gas Company (Doing business as Nicor Gas Company)," as a registrant with the SE Commission, by the action of Kathleen L. Halloran, identified on the signature page of the 8-K as "Executive Vice President[,] Finance and Administration" of both Nicor, Inc., and Nicor Gas Company. (See Ex. P**,** NIC 115421 - NIC 115423) Page 2 of the Form 8-K states that "The [Lassar] report and its transmittal letter, with certain names or addresses redacted to protect the confidentiality of the individuals in question, are attached as Exhibit 99.1." (*Id*., NIC 115422) Admissions made by the officer of a corporation in the exercise of the officer's duties are binding on the corporation. (*Hild v.Avland Development Co.*, 46 Ill. App. 3d 173, 360 N.E.2d 785, 4 Ill. Dec. 672 (1977)) The Lassar Report, along with its Appendix of Documents, is thus an admission of Nicor Gas Company, the party-opponent of Staff in these proceedings.

- Under Illinois law, a party cannot complain of evidence that party has introduced or brought out. (Cleary and Graham, *Handbook of Illinois Evidence* (Ninth Edition) ("*Handbook of Illinois Evidence*", p. 18) The direct evidence of both Nicor witnesses in this proceeding relies upon the Lassar Report as a basis for evidence the witnesses offer. (Nicor Ex. 1.0, 6:122-8:172; Nicor Gas Ex. 2.0 ("Gorenz Direct"), 4:72-5:77; 15:289-291) Nicor witness Bartlett quotes the Lassar Report directly. (Nicor Ex. 1.0 7:135-143) "[W]here a party himself introduces or elicits certain evidence, he cannot later complain." (*Gillespie v. Chrysler Motors Corporation*, 135 Ill. 2d 363, 553 N.E.2d 291, 142 Ill. Dec. 777, at 783 (1990))

- Furthermore, the admission of an agent of a party opponent, made during the agency and concerning a matter within the scope of that agency is admissible as an admission against the principal. (*Werner v. Botti, Marinaccio & DeSalvo*, 205 Ill. App. 3d 673, 563 N.E.2d 1147, 151 Ill. Dec. 41, at 46 (5th Distr., 1991)) The Lassar Report states that Sidley was hired by a Special itself, the law firm of Sidley Austin Brown & Wood ("Sidley") was hired by a Special Committee of the Board of Directors of Nicor Inc. to conduct a factual investigation of certain allegations regarding the "Performance Based Rate system under which the Company has been operating since January 2000 and to report on our factual findings and conclusions." (Staff Exhibit 2.0, Att. I, p. 1) The Report recites that Sidley hired the accounting firm KPMG LLP ("KPMG") to assist in the investigation, and that Sidley and KPMG reviewed thousands of Nicor documents and interviewed numerous current and former Nicor employees. (*Id*.) (By contrast, "Item 9. Regulation FD Disclosure," on page 2 of Nicor Gas's 8-K report, recites that "the Special Committee [of non-management directors of Nicor, Inc.] retained Scott Lassar of the law firm of Sidley Austin Brown & Wood (Sidley) *and* the accounting firm of KPMG LLP.") (NIC 115422, emphasis added)

- Thus, the Board of Directors of Nicor Inc., which according to records Nicor has filed with the Illinois Commerce Commission, and that Nicor, Inc., has filed with the SEC,[4] was in 2002 identical to the Board of Directors of Nicor Gas Company, appointed a Special Committee from among its membership ("Special Committee"). The Special Committee in turn either retained Sidley and KPMG, or retained Sidley who in turn retained KPMG; Sidley and KPMG acted under this agency to investigate and cause the preparation of a report which Staff seeks to admit. The Lassar Report is the declaration of agents of Nicor Inc. and Nicor Gas Company, it pertains directly to matters within the scope of that agency, and it is therefore admissible against Nicor Gas Company as a party to these proceedings.

- The fact that the boards of directors of Nicor Gas and Nicor, Inc., were identical in 2002 is not one that Staff raises lightly, in view of the body of case law establishing what facts must be proven in order to "pierce the corporate veil." See, e.g., *Goulding v. AG-RE-CO, Inc.*, 233 Ill. App. 3d 867, 599 N.E.2d 1094, 175 Ill.Dec. 80 (First District 1992). Rather than seeking damages or other substantive legal or equitable relief against Nicor, Inc., however, Staff seeks to use the identity of the boards of directors for the narrower evidentiary issue of agency for purposes of determining that declarations of Scott Lassar, Sidley, and KPMG are admissible as the admissions of Nicor. Staff thus relies on the following chain of events: Nicor Gas employees took actions that became known to, and led to actions on the part of the directors of Nicor, Inc., who are also the directors of Nicor Gas. These individuals, albeit it in their capacity as Nicor, Inc. directors, appointed a committee from among their membership to look into the actions of the Nicor Gas employees. The committee retained Sidley (or Sidley and KPMG) to investigate, or who in turn retained KPMG to assist. There is thus a chain of agency that extends from Nicor Gas directors to the Special Committee to Sidley and KPMG, which renders declarations of those entities, within the scope of that agency, admissible against Nicor as the admissions of a party opponent.

- Furthermore, and without regard to the foregoing discussion, an out-of-court declaration that is adopted by the words or conduct of a party opponent is admissible against that party. (*Handbook of Illinois Evidence*), p. 741, citing *Pagel v. Yates*, 128 Ill. App. 3d 897, 471 N.E.2d 946) The Lassar Report was adopted by Nicor, Inc. (and Nicor Gas Company) Board member, Bruce P. Bickner, according to whom the Special Committee "recommends that the Board of Directors direct the Company to adopt the recommendations set forth in Sidley's Report" (Staff Ex. 2.0, Att. I, NIC 049798). Nicor Gas Company took a number of actions identified and discussed in the Lassar Report (Nicor Ex. 2.0, 4:72-75), and "recorded a contingent liability in response to the recommendations

[4] See Ex. R, 2002 Nicor Gas Annual Report to the Illinois Commerce Commission, p. 105 and Nicor, Inc., Sec Form 10-K for 2002, p.68, attached.

of the Lassar Report" (*Id*., 14:277-278). Nicor Gas has thus adopted the Lassar Report by words and conduct.

3. Testimony: Staff Ex. 1.0, 3:57-60: "Since the Company and Staff have both identified adjustments to the 1999 and 2000 PGAs, arising from this investigation, the 1999 and 2000 PGA reconciliation dockets should also be reopened after the Commission makes a decision in this proceeding."

Objection

- Previously struck (See Ex. A, April 8, 2004 Tr., 593-596 as to 1999-2000)

Previous Objection

- Beyond the scope of the case established by the Second Interim Order

Staff Response

- Nicor relates this solely to the 2% adjustment offered in Mr. Knepler's testimony (Staff Ex. 4.0) However, regardless of whether Staff's testimony regarding its proposed 2% adjustment is stricken, Staff proposes other adjustments that, if adopted by the Commission, would necessitate opening the 1999 and 2000 PGA dockets. (See, for example, Staff Ex. 2.0, 36:608-609)

- Staff's response relating to the 2% adjustment is provided at number 6, below.

4. Testimony: Staff Ex. 1.0, 7:141 "knowingly"

Objection

- State of mind

Staff Response

- As substantiated in footnote 25 of page 38 of Staff Witness Zuraski's testimony, Nicor-provided records show that X X X

discount on the premiums for weather insurance for calendar year 2001." The Lassar Report is admissible for the reasons outlined in Note 2, above. It admits that Nicor provided the gas discount in exchange for an insurance discount. It is impossible to conclude that an entity could provide such a *quid pro quo* in any way other than "knowingly."

6. Testimony: Staff Ex. 1.0, 9:195-99: "J) According to Staff witness Knepler, there should be additional refunds associated with lost storage gas, the cost of which the Company has been including in the PGA. In consultation with Mr. Knepler, I computed the cost of this lost storage gas and removed it from recoverable PGA costs. This leads to an adjustment of $18,667,265. No comparable adjustment is included in the Company's reopening testimony."

Objection

- Previously struck (See Ex. A, April 8, 2004 Tr., 593-596 as to 1999-2000)

Previous Objection

- Beyond the scope of the case established by the Second Interim Order

Response

- The testimony regarding the 2% storage factor in years 1999-2000 is properly presented in this matter. The Second Interim Order provided for the reopening of the 1999 and 2000 PGA dockets if they were affected by information revealed to parties other than Nicor subsequent to June 1, 2002. (See Second Interim Order, p. 6)

- Nicor's objection ignores the scope of the proceeding as articulated in the Second Interim Order. In the Ordering paragraphs of the Second Interim Order, the Commission stated in relevant part:

> that it will consider for final resolution in this proceeding all issues relating to the operation of the Program Nicor Gas implemented under tariffs filed in accordance with the Commission's Order entered November 23, 1999, in Docket 99-0127, and all issues relating to any refunds that may be owing to Nicor customers as a result of the operation of the Program and as a result of the operation of the Company's Rider 6 in 1999, 2000, 2001, and 2002, and for ordering such other and further relief as deemed equitable and just. It is not the Commission's intent to *re-litigate* issues resolved in Dockets 99-0481 and 00-0718 *to the extent that the Commission determines that its resolution of the issues is unaffected by information revealed to parties other than Nicor subsequent to June 1, 2002*. The *Commission will, however, examine any issues that it deems appropriate in light of new information raised in the current docket*.

> IT IS FURTHER ORDERED that, if necessary, the records of Dockets 99-0481 and 00-0718 will be re-opened for the limited purpose of entering Amendatory Orders that reflect the findings in this Docket. (Second Interim Order, p. 6, emphasis added)

- The Second Interim Order contemplated reviewing such issues in the instant consolidated proceeding and then the reopening of the 1999 (Docket No. 99-0481) and 2000 (Docket No. 00-0718) proceedings for the limited purpose of entering Amendatory Orders that reflect the findings in this consolidated docket. (*Id*.)

- This adjustment is not a relitigation of an issue resolved in Dockets 99-0481 and 00-0718. The accounting for gas injected into storage and unavailable for withdrawal was not previously addressed in Dockets 99-0481 or 00-0718. The 2% adjustment arises out of *new information raised in the current docket*.

- Testimony regarding the 2% storage factor should be allowed in this proceeding because the Second Interim Order anticipates reopening the 1999 and 2000 PGAs to enter orders reflecting changes based upon the information revealed to Staff and the intervenors during this proceeding. The information supporting the 2% adjustment is just such information.

- The discovery of this information was a direct result of the additional scrutiny that Nicor subjected itself to due to the information received in the whistleblower fax and the necessity of reopening Docket No. 02-0067. During review of workpapers provided by Nicor in October of 2003, Staff became aware of a report that demonstrated that reported volumes of gas withdrawn had been increased by a 2% factor.

- Prior to reviewing a 2nd tier report in connection with its intense review of Nicor's actions during the relevant period, Staff was not aware that Nicor did not report the actual volumes of gas withdrawn in its monthly PGA report, but rather increased the actual volumes by 2 %.

- The Commission should consider Staff's 2% adjustment as a matter of public policy. The Commission should take every opportunity to assure that only actual costs are passed on to ratepayers through the PGA. The PGA is a result of the legislature authorizing the Commission to, "increase or decrease rates and charges based upon … changes in the cost of purchase gas through the application of … purchased gas adjustment clauses." 220 ILCS 5/9-220(a) Concomitant with this authority, the Commission is required to annually initiate hearings to "determine whether the clauses reflect actual costs of… gas.. purchased…" (*Id*.)

- The purpose of the PGA is to pass the actual costs of purchased gas on to rate payers. To the extent that Nicor has charged ratepayers in excess of actual costs, such charges should be refunded to ratepayers.

- Nicor's objection is tantamount to a taunt: Commission you did not discover these improper costs in time. However, the PGA is not some sort of game where Nicor can keep ill-gotten proceeds if the Commission is not aware of them at the time an order is entered.

- The Commission may never have learned of the 2% issue had the whistleblower fax not surfaced. However, the whistleblower fax was received and Staff commenced upon a thorough investigation. As a result, Staff discovered that volumes of gas reported by Nicor as withdrawn had been increased by a 2% factor. Staff contends that the 2% factor does not reflect an actual cost of gas to Nicor and, therefore, cannot properly be passed through the PGA.

- This 2% adjustment is one of many issues raised solely as a result of the additional scrutiny given to Nicor's books.

- The Commission made clear in its 2nd Interim Order that it will reopen the 1999 and 2000 PGA dockets to enter amendatory orders to reflect the findings in this proceeding. As discussed above, the existence of the 2% factor only came to Staff's attention in its intensive review in this proceeding. Therefore, consideration of the 2% adjustment is appropriate in this proceeding. It is unnecessary and would be an inefficient use of Commission, Staff, Company, and Intervenor resources to require a second and separate reopening of these same dockets to consider the issue.

- Further as a matter of administrative efficiency, the 2 % adjustment factor should be considered in all four PGAs simultaneously; there is no benefit in treating 1999 and 2000 as separate matters for two reasons. First, the same facts support the 1999, 2000, 2001, and 2002 adjustments. Finally, any separate motion to reopen the 1999 and 2000 PGAs would be based upon the same facts that are present in the current consolidated proceeding.

7. Testimony: Staff Ex. 1.0, 11:fn 4 "For example, in a Post Board Information Meeting agenda handout, X X X

- Hearsay (Staff Ex. 2.0, Att. B)

Staff Response

- Footnote 4 quotes a Bates-stamped document provided to Staff by Nicor that, by its terms, judging from the agenda of appears to be one of the pages of the presentation X X X X X X X X X X X X X X X X X X X X X X X X X X X X . By its terms, it is a declaration of an officer of Nicor Gas created during his service as such, and concerning matters within the apparent scope of his corporate duties. Admissions of a party opponent are admissible under the rules of evidence in Illinois. (*Handbook of Illinois Evidence,* p. 730) Admissions made by the officer of a corporation in the exercise of the officer's duties are binding on the corporation. (*Hild v.Avland Development Co.*, 46 Ill. App. 3d 173, 360 N.E.2d 785, 4 Ill. Dec. 672 (1977)) To the extent the source of this document, Staff's party-opponent Nicor, has reason to believe this Attachment is anything other than what it purports to be, it is free to attempt to adduce evidence to that effect.

8. Testimony: Staff Ex. 1.0, 12:fn. 5, "The Inventory Value Team Report (Staff Ex. 2.0, Att. A) was provided to Staff as NIC 003655-003671, in response to a data request. The first page in the body of the report states, in part, "The 'top' 30% of our LIFO layers are priced at close to market value. The 'bottom' 70% of our LIFO layers are priced significantly below market value. There is about 75 BCF of gas in these lower priced layers, with market value of about $100-200 million in excess of cost. … We recommend that the Company 'capture' the LIFO inventory value by filing and implementing a Gas Rate Performance Plan (GRPP) related to gas costs." (NIC 003657)"

Objection

- Hearsay (Staff Ex. 2.0, Att. A)

Staff Response

- Footnote 5 describes and quotes a Bates-stamped document (NIC 049924 - 049937 CONFIDENTIAL) provided to Staff by Nicor entitled the "Inventory Value Team Report" ("IVT Report"). According to the Lassar Report, which is admissible in evidence against Nicor for the reasons demonstrated in Note 2, above, Nicor created the Inventory Value Team in early 1998, and the Team issued the IVT Report in mid-1998. (Staff Ex. 2.0, Att. I, pp. 58 - 59) By its terms, the IVT Report was created by a number of employees and officers of Nicor Gas Company, acting within the scope of their service to Nicor. Nicor furnished the document to Staff, and it is thus an admission of a party-opponent. Admissions of a party opponent are admissible under the rules of evidence in Illinois. (*Handbook of Illinois Evidence*, p. 730)

- It further bears noting that a virtually identical version of the IVT Report appeared as Exhibit 7 of the Appendix to the Lassar Report, as referenced on page 58 of that Report. The Lassar Report, complete with the IVT Report, was itself filed by

Nicor Inc. and Nicor Gas as a public document with the SEC as part of an 8-K filing on October 31, 2002, as described in Note 2, above.

9. Testimony: Staff Ex. 1.0, 13:253-54: "was worried that the Staff might figure out the LIFO strategy on its own."

Objection

- State of mind

Staff Response

- Lines 253 and 254 are admissible in that they fairly summarize the thoughts of Nicor personnel, as described in the documents quoted in footnote 7 (in turn admissible as discussed immediately below).

10. Testimony: Staff Ex. 1.0, 13:fn. 7 Beginning with "First": "***First***, in X X X

11. Testimony: Staff Ex. 1.0, 13:fn7: "***Second***, X X X

- Discovery deposition(s)

Staff Response

- X X X

XXXX

more than justified in admitting into evidence those declarations of KPMG to prove that Nicor employee, X X X X , made admissions chargeable to Nicor.

15. Testimony: Staff Ex. 1.0, 38:758-59: "Apparently concerned with the "impression of impropriety" that the Nicor Enerchange deal might create,"

Objection

- State of mind

Staff Response

- Nicor objects to the following phrase in Mr. Zuraski's testimony: "Apparently concerned with the 'impression of impropriety' the Nicor Enerchange deal might create…. ". His footnote 23 identifies his source as the Lassar Report, Staff Exhibit 2.0, Attachment I. As demonstrated in connection with Note 2 above, the Lassar Report is an admission of Staff's party-opponent, and is admissible on that basis. The Lassar Report contains the following sentence at page 69: "Concerned by the impression of impropriety, and pursuant to Enerchange's related-party practice, Lenart expressly cautioned that Enerchange could only be involved in the deal if Nicor engaged in the identical transaction with independent third parties." Zuraski's "state of mind" statement is thus directly based on the statement attributed by Nicor's own agent-investigator to Nicor's own Assistant Vice President of Supply Operations, in a Report adopted for filing with the SEC by Nicor's own Executive Vice President of Finance and Administration. The 2007 pronouncement of the Appellate Court is again relevant: "[W]e note the long-standing rule that admissions made by a party, or on its behalf, are admissible as exceptions to the hearsay rule. When . . . the statement has been made by an employee of a party, the test for application of the party-admission rule is whether the statement was made during the employment relationship and concerning matters within the scope of that employment." *First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill.Dec. 77, at 85, 867 N.E.2d 1063 (Fourth District, 2007; citations omitted)

16. Testimony: Staff Ex. 1.0, 38:fn. 23 "(Staff Ex. 2.0, Att. I)"

Objection

- Hearsay

Staff Response

- See Note 15. The Lassar Report is admissible against Nicor as demonstrated in Note 2.

17. Testimony: Staff Ex. 1.0, 38:764-65, incl. fn. 24: "had "a pressing need to eliminate the overflow of gas it experienced in January 2000."[24] (Staff Ex. 2.0, Att. I)"

Objection

- Hearsay (Staff Ex. 2.0, Att. I)

Staff Response

- Mr. Zuraski's lines 764 and 765 contain a direct quote from the Lassar Report, and the footnote correctly cites page 70 of that Report. The Lassar Report is admissible against Nicor as demonstrated in Note 2.

18. Testimony: Staff Ex. 1.0, 38:766-67: "the Company wished to physically maintain possession of the gas through the remainder of the winter."

Objection

- State of mind

Staff Response

- Nicor objects to the following statement from Staff Witness Zuraski's testimony: "The Company wished to physically maintain possession of the gas through the remainder of the winter." His footnote 25 identifies his sources as the Lassar Report, Staff Exhibit 2.0, Attachment I, pages 70 and 71, and workpapers supporting that Report, which were provided to Staff. These workpapers include one (See, Ex. S, Memo to file from X X X X X X X X X ; KPMG 025785-025789; attached) in which X X X X X X X X X

germane to the agency. The record of the declaration was furnished by KPMG, an agent of Nicor, to Staff. The testimony is thus admissible.

- Section 10-40(a) of the Illinois Administrative Procedure Act (5 ILCS 100/10-40(a)) provides an additional basis for the admissibility of KPMG records of the declarations of Nicor employees, as demonstrated in Note 14, above.

19. Testimony: Staff Ex. 1.0, 38:fn. 25: "For instance, the Lassar Report (Staff Ex. 2.0, Att. I) also states, "Nicor gained the benefit of having gas in its storage fields through the winter of 2000, where it could be 'borrowed' on peak demand days in February and March to better service the ratepayer." pp. 70-71. In workpapers supporting the Lassar Report, there is a memorandum from X X X

- As an alternative basis for the admissibility of this evidence, Section 10-40(a) of the Illinois Administrative Procedure Act states that "Evidence not admissible under [the] rules of evidence [as applied in civil cases in the courts of this State] may be admitted, however, (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." (5 ILCS 100/10-40(a)) To the same effect is Section 200.610(b) of the Commission's Rules of Practice. (83 Ill. Adm. Code 200.610(b)) As noted in the body of Staff's Response to Nicor's Motion, former United States Attorney Lassar and other Sidley personnel, along with KPMG, interviewed Nicor employees and painstakingly committed the results of those interviews to writing. There should be no doubt that the Commission is more than justified in admitting those declarations of Sidley personnel to prove that Nicor employee Lenart made the admissions, chargeable against Nicor.

20. Testimony: Staff Ex. 1.0, 39:768-69 The Company's "pressing need to eliminate the overflow of gas it experienced in January 2000" was merely a perceived need"

Objection

- Hearsay (Staff Ex. 2.0, Att. I)

Staff Response

- This quote is the same as the quotation addressed in Note 17 above, and is admissible for the reasons noted there.

21. Testimony: Staff Ex. 1.0, 39:769-70: "a perceived need"

Objection

- State of mind

Staff Response

- Nicor objects to Staff Witness Zuraski's use of the phrase "perceived need." His footnote 26 appropriately identifies the basis for the assertion of "perceived need" as X X X

X These statements, made by critical Nicor personnel concerning a time at which they were structuring and executing the transactions that are at the heart of the very strategy being scrutinized in this case, demonstrate clearly the "perception" that was driving those transactions.

- Statements made during the discovery depositions of employees of a party opponent concerning matters within the scope of employment are admissible as the admissions of a party opponent, as is demonstrated in Note 12. There is simply no basis for excluding them.

22. Testimony: Staff Ex. 1.0, 39:fn. 26: "[26] For instance, X X X X X X X X X X X X X X X X X X X

Objection

- Hearsay (Staff Ex. 2.0, Att. I)

Staff Response

- Attachment I is the so-called Lassar Report, a Bates-stamped copy of which was provided to Staff by Nicor, and which is admissible in these proceedings against Nicor for the reasons set forth in Note 2 above.

24. Testimony: Staff Ex. 1.0, 44:864-68: "As stated in the Lassar Report, "These costs were included with the cost of gas and included in the PGA. Had Nicor obtained the financing on this inventory directly, the related interest cost would not have been recoverable under the PGA. We do not believe it was appropriate to have included these costs in the PGA." (Lassar Report, p. 36)."

Objection

- Hearsay (Staff Ex. 2.0, Att. I (ref. as the Lassar Report, p. 36))

Staff Response

- Attachment I is the so-called Lassar Report, a Bates-stamped copy of which was provided to Staff by Nicor, and which is admissible in these proceedings against Nicor for the reasons set forth in Note 2 above.

25. Testimony: Staff Ex. 1.0, 44:875-80: "Given that the Company's own internal documents cite 'a fixed guaranteed up front amount of carrying cost savings' totaling $2.6 million per year, I suspect that I have not captured all the carrying cost that got shifted into the PGA. If there were other similar carrying charges from NSS and/or DSS deals in 1999 through 2002 that were included in the PGA, the Company should bring those to the Commission's attention when it presents its rebuttal testimony."

Objection

- Previously struck (see Apr. 8, 2004 Tr. At 579:17-580:20)

Rationale stated in previous motion

- This reference addresses Mr. Mierzwa's unrelated testimony.

Staff Response

- The Company has failed to state an objection to this testimony.

26. Testimony Staff Ex. 1.0, 49:971-50:995: "**Adjustment Related to the Two-percent of Storage Withdrawals Assumed by Nicor to be Lost**

Q. According to Staff witness Knepler, there should be additional refunds associated with lost storage gas, the cost of which the Company has been including in the

PGA. Have you assisted Mr. Knepler in computing the size of this adjustment?

A. Yes. Based on discussions with Mr. Knepler, it is my understanding that the Company was accounting for a portion of its lost gas by adding two percent to gross withdrawals from storage. After transportation customers paid for their share of lost storage gas, the Company recovered the remaining cost through the PGA. However, according to Mr. Knepler, the Commission's PGA rule does not permit utilities to recover the cost of lost storage gas through the PGA. Rather, the expense of lost storage gas is considered a base-rate item. In consultation with Mr. Knepler, I have computed the quantity of the lost storage gas recovered through the PGA in 1999 through 2002, by taking 2% of aquifer withdrawals and subtracting 2% of withdrawals by transportation customers. In net withdrawal years (1999, 2000, and 2002), I valued the lost gas at the average cost of the net withdrawals. In the net injection year (2001), I valued the lost gas at the original cost of the new 2001 LIFO layer, as computed by the Company. Removing from the PGA the computed cost of lost storage gas leads to an additional refund of $18,667,265.

Q. How does this adjustment to PGA costs affect PBR savings?

A. Since, according to Mr. Knepler, the Company should have been excluding the cost of lost storage gas from the PGA all along, the PBR benchmark should have excluded such costs all along, as well. Hence, for purposes of computing savings, I have left out the reduction in 2000 through 2002 costs arising from the adjustment, discussed above. However, if this cost disallowance were to be included in the savings calculation, then the refund to customers arising from this adjustment would be only $12,343,487."

Objection

- Previously struck (see Apr. 8, 2004 Tr. At 593:8-596:2 as to 1999-2000)

Response

- Staff adopts and incorporates its response to Note 6 above as its response to this objection.

EXHIBIT C

PUBLIC VERSION

1. **Testimony:** Staff Ex.2.0, 2:28-29: "and rely upon them being forthright and accurate in their responses …"

Objection

- Previously struck (see Apr. 8, 2004 Tr., 599:20-601:16, 634:9)

Note: This reference addresses Mr. Zuraski's testimony. The relevant citation is to Tr., 634:9.

Objection stated in previous motion

- Incompetent (Outside Scope of Permissible Expert Testimony); Cumulative.

Testimony previously stricken was as follows: "Yes. I always expect both the Company and its employees to provide complete, accurate, and honest answers regardless of the method of discovery. I normally rely upon company data request responses when forming my opinions. When I send a request to a company, one of its witnesses who is knowledgeable on the subject matter provides a response. Likewise, Staff and the intervenors used the depositions to pose questions to Company employees regarding areas in which each person had knowledge. Each deponent gave his or her responses under oath and verified that the answers given were truthful. No such verification is required of data request responses. Therefore, the deposition testimony is at least as reliable, if not more so, than the data request responses from the Company." Staff Ex. 6.0, 3:44-53, filed 2/27/04

Staff Response

- The witness should be allowed to explain the bases for his opinion. This testimony provides the foundation for his expert opinion. It is not outside the scope of permissible expert testimony; an expert can and must testify as to how his opinion was formed. The testimony is not cumulative. Cumulative evidence is additional or corroborative evidence to the same point. (Black's Law Dictionary, 5th Ed.) The witness makes a simple statement.

- Under different circumstances, Nicor might be able to argue that a statement about relying upon utility personnel being forthright and accurate was stating the obvious. But, as is made clear in Staff's testimony, the circumstances in this case have caused Staff to question the validity of this assumption. Thus, there arises a need for Staff to articulate its expectations.

2. **Testimony:** Staff Ex. 2.0, 12:177-81: "*X X X

Objection

- Discovery deposition(s)

Staff Response

- Jeffrey Metz was employed by Nicor at the time of his deposition in 2003. (Staff Ex. 2.0, 8:114-123) The deposition concerned his actions as a Nicor employee. Discovery deposition testimony is admissible if it constitutes an "admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person." (Ill. S. Ct. Rule 212(a)(2)) "[W]e note the long-standing rule that admissions made by a party, or on its behalf, are admissible as exceptions to the hearsay rule. When . . . the statement has been made by an employee of a party, the test for application of the party-admission rule is whether the statement was made during the employment relationship and concerning matters within the scope of that employment." (*First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill. Dec. 77, at 85, 867 N.E.2d 1063 (4th Distr., 2007; citations omitted))

3. **Testimony:** Staff Ex. 2.0, 12:189-13:204:

"X X X

- Discovery deposition(s)

Staff Response

- X X X X X X X X X X X X X X X X X X X X X X X X X were employed by Nicor at the time of their depositions in 2003. (Staff Ex. 2.0, 8:114-123 (Metz); 6:85-7:94 (Gilmore); 8:108-112 (Lenart)) The depositions concerned their actions as Nicor employees. Discovery deposition testimony is admissible if it constitutes an "admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person." (Ill. S. Ct. Rule 212(a)(2)) "[W]e note the long-standing rule that admissions made by a party, or on its behalf, are admissible as exceptions to the hearsay rule. When . . . the statement has been made by an employee of a party, the test for application of the party-admission rule is whether the statement was made during the employment relationship and concerning matters within the scope of that employment." (*First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill. Dec. 77, at 85, 867 N.E.2d 1063 (4th Distr., 2007; citations omitted))

4. **Testimony:** Staff Ex. 2.0, 13:211: "Attachment A"

5. **Testimony:** Staff Ex. 2.0, 14:218: "Attachment A"

Objection

- Hearsay (Att. A)

Staff Response

- Attachment A is a Bates-stamped, Nicor provided document entitled "Inventory Value Team Report." Staff received this document from Nicor. It is an admission of Nicor, the party-opponent of Staff, and is admissible for the reasons outlined in Note 8 concerning the testimony of Staff Witness Zuraski. Please note that Nicor has provided an Unredacted Version of the Inventory Value Team Report to the Staff as NIC 049924 through 049940 CONFIDENTIAL, a Redacted version as NIC 049924 through 049940 REDACTED, and a version that bears the numbers NIC 115551 through 115567. (See Response)

6. **Testimony:** Staff Ex. 2.0, 14:222-15:247:

" X X X X X X X X X X X X X X X X X X X

X X X

person." (Ill. S. Ct. Rule 212(a)(2)) "[W]e note the long-standing rule that admissions made by a party, or on its behalf, are admissible as exceptions to the hearsay rule. When . . . the statement has been made by an employee of a party, the test for application of the party-admission rule is whether the statement was made during the employment relationship and concerning matters within the scope of that employment." (*First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill. Dec. 77, at 85, 867 N.E.2d 1063 (4th Distr., 2007; citations omitted))

7. **Testimony:** Staff Ex. 2.0, 15:253-16:268:

"*X X X

by a party, or on its behalf, are admissible as exceptions to the hearsay rule. When . . . the statement has been made by an employee of a party, the test for application of the party-admission rule is whether the statement was made during the employment relationship and concerning matters within the scope of that employment." (*First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill. Dec. 77, at 85, 867 N.E.2d 1063 (4th Distr., 2007; citations omitted))

- X X X X X X was not an employee of Nicor at the time of his discovery deposition in 2003. To the extent necessary, Staff is willing to take steps to determine if Mr. Upshaw might be available to testify before the Commission at hearing in this matter.

8. Testimony: Staff Ex. 2.0, 16:270-75: "X X X X X X

9. Testimony: Staff Ex. 2.0, 17:282-92:

*X X X

buckets reports serve as one such example in Mr. Maple's testimony. (See Staff Ex. 2.0, pp. 44-48) The buckets reports are X X X

which are set forth on pages 48 through 53 of his testimony, that are admissible as the admissions of Nicor, as demonstrated in Notes 41 to 46, below.

- As noted above, a witness may testify about a subjective state of mind of another person manifested by objective facts. (*Law v. Central Illinois Public Service Company*, 86 Ill. App. 3d 701, 408 N.E.2d 74 (4th Distr., 1980)) This should especially be true when the actions demonstrated to have been taken by Company employees are viewed in light of the statements of individual employees, which are admissible against Nicor as the admissions of a party opponent, that describe individual states of mind driving these actions. Examples of such statements are found throughout pages 48 through 53 of Mr. Maple's testimony. "A witness may testify directly as to [his or] her own mental or emotional state." (*Handbook of Illinois Evidence*, pp. 581-582, citations omitted))

12. Testimony: Staff Ex. 2.0, 18:316-19:319: "Second, even if Staff members knew or should have known about the existence of the LIFO layers that is still a far cry from Staff knowing that Nicor had discovered a viable scheme to monetize these low-cost layers by manipulating net withdrawals."

Objection

- Irrelevant

Staff Response

- The efforts of Nicor to present a formal case to the Commission describing how the GCPP would benefit customers, while at the same time key employees were creating a plan to deprive customers of the value of the LIFO layers, and at the same time representing to the Commission in oral argument and to Staff in data request responses that manipulations of storage were not possible, is at the heart of this proceeding, as demonstrated in the body of Staff's Response.

- Staff's evidence shows that the Company engaged in a strategy based on the existence of the LIFO strategy not coming to light. The fact that the Staff was not aware of the LIFO strategy is clearly relevant. The LIFO strategy is the basis for much of Staff's testimony on issues related to how to make ratepayers whole for the losses they suffered as a direct result of that strategy. Those Staff issues are set forth at length in the Commission's Second Interim Order in Docket No. 02-0067.

- Nicor attempts to preclude Staff from arguing the relevance of this evidence, by pointing out that the Commission sustained Staff's objection to Nicor's attempt to discover Staff's knowledge concerning LIFO accounting. (Motion, p. 23) Nicor fails to mention that its discovery request was in fact originally a blanket request of Staff generally, that was ultimately narrowed by an Administrative Law Judges' Ruling to "energy- and finance-related personnel". (Notice of Administrative Law Judges' Ruling; January 6, 2004) As is demonstrated in Staff's Petition for Interlocutory Review of the Ruling on Staff Objections to Nicor

Data Requests ("Staff Petition for Interlocutory Review"), Nicor's request, even as narrowed, went far beyond typical the Commission practice of discovery of the bases for the testimony of all of Staff's *witnesses*, by requiring *all* Commission energy and finance-related employees to respond to an extensive set of questions. (Staff Petition for Interlocutory Review, p. 5, February 20, 2004) The record does not disclose any Nicor request tailored to cover only Commission Staff members assigned to offer testimony in these proceedings, or even in these proceedings and Docket No. 99-0127. Nicor's failure to propound a discovery request of reasonable scope in 2003 and 2004 should not now preclude the introduction of relevant evidence against it.

13. Testimony: Staff Ex. 2.0, 20:340-41: "The Company and its witnesses continued to give misleading information to Staff, X X X

document, it constitutes an admission of Nicor, the party-opponent of Staff. Admissions of a party opponent are admissible under the rules of evidence in Illinois. (*Handbook of Illinois Evidence*, p. 730)

- In terms of the statements within the memo, they are admissible in these proceedings because they are an actual part of the communications and transactions at issue here. In using this memorandum in its direct evidence, Staff is not necessarily seeking to prove the truth of the matters asserted within the memorandum, as such. Rather, Staff is proving that communications existed within the Company—as early as 1998—that acknowledged the potential for Nicor to structure its operations and conduct its day-to-day business in a way that would give the lie to its subsequent protestations in Docket No. 99-0127 that it could not manipulate storage.

- Even if this memorandum is thought of as hearsay, it is also admissible as an admission of Nicor in that it was, by its terms, created by a Nicor employee acting within the scope of her employment with Nicor. "[W]e note the long-standing rule that admissions made by a party, or on its behalf, are admissible as exceptions to the hearsay rule. When . . . the statement has been made by an employee of a party, the test for application of the party-admission rule is whether the statement was made during the employment relationship and concerning matters within the scope of that employment." (*First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill. Dec. 77, at 85, 867 N.E.2d 1063 (4th Distr., 2007; citations omitted))

15. Testimony: Staff Ex. 2.0, 20:349-21:353: "X X X

employment." (*First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill. Dec. 77, at 85, 867 N.E.2d 1063 (4th Distr., 2007; citations omitted))

16. Testimony: Staff Ex. 2.0, 21:354-56: "Knowing that the Company had value stored in low-cost LIFO layers did not endow Staff with the knowledge of how or if Nicor would extract that value."

Objection

- Irrelevant

Staff Response

- Manipulations of storage in unprecedented ways, and the efforts of Nicor personnel to hide these manipulations from Staff and parties to relevant Commission dockets, are at the heart of the issues in this proceeding, as demonstrated in the body of Staff's Response. The testimony describing these manipulations and substantiating the success of efforts to hide them, at least for a time, is clearly relevant.

17. Testimony: Staff Ex. 2.0, 21:358-59: "Staff was unable to detect Nicor's intentions to monetize the LIFO layers."

Objection

- Irrelevant

Staff Response

- Manipulations of storage in unprecedented ways are at the heart of the issues in this proceeding, as demonstrated in the body of Staff's Response. Testimony describing these manipulations and substantiating the success of efforts to hide them, at least for a time, is clearly relevant.

18. Testimony: Staff Ex. 2.0, 23:393: "purposely"

Objection

- State of mind

Staff Response

- As demonstrated in Note 10, Nicor witness Gilmore testified, on rebuttal in Docket No. 99-0127, that the Company "has no incentive under the GCPP to inappropriately manipulate storage," and that the notion that the Company has an incentive to manipulate storage withdrawals "is incorrect." (Staff Ex. 2.0, 19:323-333) As further demonstrated, X X X

(*Law v. Central Illinois Public Service Company*, 86 Ill. App. 3d 701, 408 N.E.2d 74 (4th Distr., 1980))

19. Testimony: Staff Ex. 2.0, 28:458-66:

"X X X

- An additional basis of admissibility for this document, even if considered hearsay, is that a notice of the pending expiration of a contract is the type of document that is relied upon by reasonably prudent persons in the conduct of their affairs. Such documents are admissible in Commission cases (83 Ill. Adm. Code 200.610(b), and in administrative proceedings in Illinois generally (5 ILCS 100/10-40(a)). It is recognized as an exception to the hearsay rule. (Handbook of Illinois Evidence, p. 4, citing *Metro Utility v. Illinois Commerce Commission*,193 Ill. App. 3d 178, 140 Ill. Dec. 455, 549 N.E.2d 1327 (1990))

21. Testimony: Staff Ex. 2.0, 33:539: "purposely"

Objection

- State of mind

Staff Response

- Line 539 of Staff Witness Maple's testimony is part of the question "Is there any evidence that Nicor purposely reduced capacity management credits in 1999?" As is demonstrated in Note 22, below, "purposely" can fairly be inferred from the conduct proven by Staff Exhibit 2.0, Att. F, as well as in Staff Ex. 2.0, pages 34 and 35, lines 562 through 589, including Table 4.

22. Testimony: Staff Ex. 2.0, 33:541-47: "Yes. X X X

memorandum, as such. Rather, Staff is proving that communications existed within the Company—as early as 1998—that acknowledged the potential for Nicor to structure its operations and conduct its day-to-day business in a way that would give the lie to its subsequent protestations in Docket No. 99-0127 that it could not manipulate storage.

- Even if this memorandum is thought of as hearsay, it is also admissible as an admission of Nicor in that it was, by its terms, created by a Nicor employee acting within the scope of her employment with Nicor. "[W]e note the long-standing rule that admissions made by a party, or on its behalf, are admissible as exceptions to the hearsay rule. When . . . the statement has been made by an employee of a party, the test for application of the party-admission rule is whether the statement was made during the employment relationship and concerning matters within the scope of that employment." *First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill.Dec. 77, at 85, 867 N.E.2d 1063 (Fourth District, 2007; citations omitted.)

23. Testimony: Staff Ex. 2.0, 33:550-53: 'X X X

in a way very consistent with the handwritten descriptions themselves (Staff Ex. 2.0, 34:562-35:589, including Table 4).

24. Testimony: Staff Ex. 2.0, 33:553-34:562: "In my opinion, based upon the subject matter, the term "Cap Release" is referring to capacity releases. According to the Merriam-Webster Online Dictionary, the common meaning of sandbag, when not in connection to a flood, is "to conceal or misrepresent one's true position, potential, or intent especially in order to take advantage of." There being no reason to connect this memo with a flood, in my opinion, the term sandbag was used to mean that the Company would attempt to hold down capacity releases and other capacity management credits in the coming year so that the benchmark would be set at a more favorable level for the Company, which is in fact what actually occurred."

Objection

- Previously struck (See Apr. 8, 2004 Tr., 631:3-633:22)

Objection stated in previous motion

- Speculation

Testimony previously stricken was as follows: "The term "Cap Release" is referring to capacity releases, which are part of the capacity management credits. The most obvious meaning of "sandbag" is that the Company would attempt to hold down capacity releases and other capacity management credits in the coming year so that the benchmark would be set at a more favorable level for the Company." Staff Ex. 2.0, lines 515-519

Staff Response

- The testimony sought to be stricken is different than the testimony previously stricken.
- The witness is providing his expert opinion as to what the terms "Cap Release" and "sandbag" reference on this document. Mr. Maple has qualified himself as an expert witness in regards to the operations and planning of gas utilities. He testifies at length about Capacity Management Credits and how they affected the Firm Deliverability Adjustment (FDA) in the Company's benchmark. It is appropriate for him to rely upon the memo from Nancy Brucher to Al Harms. It is appropriate for him to use his expertise to opine about the meaning of the handwritten notes on the memo. The witness laid a foundation for his interpretation of the notes. Even for a lay person, it is logical that "Cap Release" would refer to capacity releases in the context of the memo. Similarly, the witness provides a foundation for his interpretation of "sandbag", the Merriam-Webster Dictionary. Again, this interpretation is one that a lay person could understand. But, the interpretation has no meaning without the witness' understanding of how the Capacity Management Credits affect the FDA and the implicit incentive within the benchmark to hold down capacity releases and other

capacity management credits. This is not speculation. This is the witness properly sharing his expertise about a complex subject matter.

- "An expert witness may testify as to what another witness meant by making a remark. *See United States v. Daly*, 842 F.2d 1380 (2d Cir. 1988), meaning of term *capo* in relation to structure of organized crime." *Handbook of Illinois Evidence*, p. 600.
- There is also a persuasive case made for permitting even lay witnesses to offer testimony as to what another witness meant by making a remark in the *Handbook of Illinois Evidence*, pp. 582-583. To the authors, such testimony should be admitted if it would in fact aid the trier of fact in determining questions at issue, and they state that current Illinois law in this area is unduly restrictive in that helpful testimony is being kept from the trier of fact.

25. Testimony: Staff Ex. 2.0, 34:562-35:579:

"X X X

- X X X X X X X X was employed by Nicor at the time of his deposition in 2003. The deposition concerned his actions as a Nicor employee. Discovery deposition testimony is admissible if it constitutes an "admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person." (Ill. S. Ct. Rule 212(a)(2)) "[W]e note the long-standing rule that admissions made by a party, or on its behalf, are admissible as exceptions to the hearsay rule. When . . . the statement has been made by an employee of a party, the test for application of the party-admission rule is whether the statement was made during the employment relationship and concerning matters within the scope of that employment." (*First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill. Dec. 77, at 85, 867 N.E.2d 1063 (Fourth District, 2007; citations omitted))

26. Testimony: Staff Ex. 2.0, 35:590: "'sandbagging'"

Objection

- Previously struck (See Apr. 8, 2004, Tr., 633:2-16)

Testimony previously stricken was as follows: lines 515-519: "The term "Cap Release" is referring to capacity releases, which are part of the capacity management credits. The most obvious meaning of "sandbag" is that the Company would attempt to hold down capacity releases and other capacity management credits in the coming year so that the benchmark would be set at a more favorable level for the Company."

Staff Response

- Staff adopts and incorporates its response to Note 24 above as its response to this objection.

27. Testimony: Staff Ex. 2.0, 35:590: "'sandbagging'"

Objection

- Previously stricken;

Previous objection

- Speculation

Staff Response

- Staff adopts and incorporates its response to Note 24 above as its response to this objection.

28. Testimony: Staff Ex. 2.0, 36:604: "purposely"

Objection

- State of mind

Staff Response

- Line 604 of Staff Witness Maple's testimony contains the word "purposely." As is demonstrated in Note 22, above, "purposely" can fairly be inferred from the conduct proven by Staff Exhibit 2.0, Att. F, as well as in Staff Ex. 2.0, pp. 34-35, ll. 562-589, including Table 4.

29. Testimony: Staff Ex. 2.0, 39:662-63: "(Attachment G, NIC 002777 & 662 Attachment H, NIC 110776)"

Objection

- Hearsay (Atts. G and H)

Staff Response

- Attachment G is a Bates-stamped (NIC 002777 CONFIDENTIAL), Nicor provided document entitled "X X X X X X X X X X X X X X ." Attachment H is a Bates-stamped (NIC 110776 CONFIDENTIAL), Nicor-provided document bearing the word "X X X " in its upper right corner and entitled "X X X X X X X X X X X X X X X X X X " By their terms, they are Nicor documents prepared at the times stated thereon. They constitute admissions of Nicor, the party-opponent of Staff. Admissions of a party opponent are admissible under the rules of evidence in Illinois. (*Handbook of Illinois Evidence*, p. 730)

30. Testimony: Staff Ex. 2.0, 40:667-76:

*X X X X X X X X X X X X X X X X X X

officer or agent of a party in the same manner and to the same extent as any other admission made by that person." (Ill. S. Ct. Rule 212(a)(2)) "[W]e note the long-standing rule that admissions made by a party, or on its behalf, are admissible as exceptions to the hearsay rule. When . . . the statement has been made by an employee of a party, the test for application of the party-admission rule is whether the statement was made during the employment relationship and concerning matters within the scope of that employment." (*First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill. Dec. 77, at 85, 867 N.E.2d 1063 (4th Distr., 2007; citations omitted))

31. **Testimony:** Staff Ex. 2.0, 41:686-87:
*"X X X

- X X X X X X was not an employee of Nicor at the time of his discovery deposition in 2003. To the extent necessary, Staff is willing to take steps to determine if Mr. Upshaw might be available to testify before the Commission at hearing in this matter.

33. Testimony: Staff Ex. 2.0, 41:699: "steal"

Objection

- Incompetent

Staff Response

- The objection seems to be that Witness Maple is not competent to characterize certain behavior as "stealing." Webster's Third New International Dictionary includes the following in its definition of the transitive verb "steal": "take or appropriate without right or leave and with intent to keep or make use of wrongfully," "to take away by . . . unjust or underhand means: deprive one of." The word "steal," understood in the sense of these common dictionary definitions, is consistent with the evidence Mr. Maple offers. It is an appropriate term to use in this context, and Mr. Maple is competent to summarize the evidence in this manner.

34. Testimony: Staff Ex. 2.0, 41:701: "ill gotten"

Objection

- Incompetent

Staff Response

- Webster's Third New International Dictionary defines "ill-gotten" as "obtained dishonestly or otherwise unlawfully or unjustly." The evidence Staff is adducing, when combined with the Company's evidence in Docket No. 99-0127 and the Commission's ruling in that case, demonstrates that term is apt. It is within the competence of the witness and should not be stricken.

35. Testimony: Staff Ex. 2.0, 41:703-42:715: "Think of the LIFO gas in storage as an attic full of antiques passed down for generations. These antiques have great worth on the open market and you could profit greatly from selling them. . If a burglar were to steal all of those antiques from you, the immediate monetary loss would be negligible since they cost you next to nothing to acquire and store them. However, your opportunity losses would be great, as you could have sold them down the road for a large profit. Thus the burglar, by stealing the antiques, did not cost the owner any money directly out of pocket but he did cause the owner lost income in the future. Nicor operated the exact same way. The Company took an asset that had great future value to ratepayers, and sold it, perhaps for less than it would have been worth later, all the while taking 50% of the profits. This is how gas costs remained steady while Nicor profited on the backs of ratepayers."

Objection

- Incompetent

Staff Response

- The analogy Staff Witness Maple uses in lines 703 through 715 draws an appropriate comparison between two (admittedly different) types of misappropriation of items of economic value at a time when the person deprived of the value is not currently making use of the item. The analogy illustrates the point made by the bulk of Mr. Maple's testimony. He is competent to make this point, and the testimony should not be stricken.

36. **Testimony:** Staff Ex. 2.0, 42:719: "(Attachment I)"

Objection

- Hearsay (Att. I)

Staff Response

- Attachment I is a Nicor provided document entitled "Report to the Special Committee of the Board of Directors of Nicor Inc.," covered by a transmittal letter from Nicor, Inc., director Bruce P. Bickner to the Board of Directors of Nicor, Inc. Attachment I is generally referred to as the "Lassar Report" (see, for example, Nicor Ex. Direct Testimony of Gary R. Bartlett, Vice President Supply Operations, Nicor Gas Ex. 1.0 ("Bartlett Direct"), page 7, line 133). There are several bases for the admissibility of this document, which are outlined in Exhibit B, Note 2 concerning the testimony of Richard Zuraski.

37. Testimony: Staff Ex. 2.0, 44:749: "(Attachments G & H)"

Objection

- Hearsay (Atts. G and H)

Staff Response

- Attachment G is a Bates-stamped (NIC 002777 CONFIDENTIAL), Nicor-provided document entitled "X X X X X X X X X X X X X X X ." Attachment H is a Bates-stamped (NIC 110776 CONFIDENTIAL), Nicor-provided document bearing the word "X X " in its upper right corner and entitled "X XX X X X X X X X X X X X X X X X " These so-called "X X X X X X " are the subject of deposition testimony by Nicor employee X X X X X X X X X X X X X X X

Admissions of a party opponent are admissible under the rules of evidence in Illinois. (*Handbook of Illinois Evidence*, p. 730)

38. **Testimony:** Staff Ex. 2.0, 45:759-46:785:

"*X X X

Objection

- Discovery deposition(s)

Staff Response

- X X X X X X X X X X X X X X X X X X X X X X X X X were employed by Nicor at the time of their depositions in 2003. The depositions concerned their actions as Nicor employees. Discovery deposition testimony is admissible if it constitutes an "admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person." (Ill. S. Ct. Rule 212(a)(2)) "[W]e note the long-standing rule that admissions made by a party, or on its behalf, are admissible as exceptions to the hearsay rule. When . . . the statement has been made by an employee of a party, the test for application of the party-admission rule is whether the statement was made during the employment relationship and concerning matters within the scope of that employment." (*First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill. Dec. 77, at 85, 867 N.E.2d 1063 (4th Distr., 2007; citations omitted))

39. Testimony: Staff Ex. 2.0, 48:815-29:

"X X X X X X X X X X X X X X X X X X X

- Discovery deposition(s)

Staff Response

- X X X X X X X X X X X X X X were employed by Nicor at the time of their depositions in 2003. The depositions concerned their actions as Nicor employees. Discovery deposition testimony is admissible if it constitutes an "admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person." (Ill. S. Ct. Rule 212(a)(2)) "[W]e note the long-standing rule that admissions made by a party, or on its behalf, are admissible as exceptions to the hearsay rule. When . . . the statement has been made by an employee of a party, the test for application of the party-admission rule is whether the statement was made during the employment relationship and concerning matters within the scope of that employment." (*First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill. Dec. 77, at 85, 867 N.E.2d 1063 (4th Distr., 2007; citations omitted))

40. Testimony: Staff Ex. 2.0, 49:840-42: "X X X X X X X X X X X X X X

X X X

Objection

- Discovery deposition(s)

Staff Response

- X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X X were employed by Nicor at the time of their depositions in 2003. The depositions concerned their actions as Nicor employees. Discovery deposition testimony is admissible if it constitutes an "admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person." (Ill. S. Ct. Rule 212(a)(2)) "[W]e note the long-standing rule that admissions made by a party, or on its behalf, are admissible as exceptions to the hearsay rule. When . . . the statement has been made by an employee of a party, the test for application of the party-admission rule is whether the statement was made during the employment relationship and concerning matters within the scope of that employment." (*First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill.Dec. 77, at 85, 867 N.E.2d 1063 (4th Distr., 2007; citations omitted))

42. Testimony: Staff Ex. 2.0, 61:896-99: "X X X X X X X X X X X X X X X X X X X

Objection

- Hearsay (Att. M)

Staff Response

- See Note 44.

44. Testimony: Staff Ex. 2.0, 52:906-11: X X X

46. Testimony: Staff Ex. 2.0, 53:919-21:

Objection

- Discovery deposition(s)

Staff Response

- X X X X X X was employed by Nicor at the time of his deposition in 2003. The deposition concerned his actions as a Nicor employee. Discovery deposition testimony is admissible if it constitutes an "admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person." (Ill. S. Ct. Rule 212(a)(2)) "[W]e note the long-standing rule that admissions made by a party, or on its behalf, are admissible as exceptions to the hearsay rule. When . . . the statement has been made by an employee of a party, the test for application of the party-admission rule is whether the statement was made during the employment relationship and concerning matters within the scope of that employment." (*First Assist, Inc. v. Industrial Commission*, 371 Ill. App. 3d 488, 311 Ill. Dec. 77, at 85, 867 N.E.2d 1063 (4th Distr., 2007; citations omitted))

47. Testimony: Staff Ex. 2.0, 54:940-52: "X X X X X X

EXHIBIT D

PUBLIC VERSION

1. Testimony: Staff Ex.3.0, 15:300-17:334:

Comment on Incentive Compensation

Q. As part of your review of information provided by Nicor did you find information that demonstrated that Nicor paid incentive compensation awards based on goals related to the PBR?
A. Yes.
Q. During the year immediately preceding and during the life of the PBR, did certain Nicor employees receive incentive compensation that was tied to the actions that are described in Staff witness Maple's and Staff witness Zuraski's testimonies?
A. Some of the goals in Nicor's incentive compensation plan, approved in Nicor's preceding rate case (Docket No. 95-0219, Order entered April 3, 1996), were directly related to either gaining approval of the PBR or the results of each year's activity under the PBR. The potential for incentive compensation could have motivated Nicor employees to devise ways of inflating the benchmark and "creating" artificial savings.

The incentive plan goals gave employees an incentive to create savings where none would exist without manipulation of accounting records.

Incentive compensation bonuses, directly related to either gaining approval of the PBR or the results of each year's activity under the PBR, paid to Officers, Managers and Gas Supply employees for the year immediately preceding and during the life of the PBR are shown in the following table:

Year	Amount Paid
1999	X X X X
2000	X X X X X
2001	X X X X X
2002	X X X X X

These amounts do not include amounts awarded for Company overall net income goals, although Company overall net income and thus, the incentive compensation awards for the same were affected by the results of the PBR. For 1999, the PBR-related goal was to "Obtain ICC approval of the Company's proposed Gas Cost Performance Program in such a form that the Company will 'accept the Order.'" For the years in which the PBR program was in effect, the goals were to "Achieve PBR IBT (measured as 50% of the result of the actual cost less the benchmark)." Other goals that were not clearly related to the PBR were also not included in the totals described above.

Many of the goals for officers, managers and gas supply employees were focused on the results of the PBR. Therefore, the possibility exists that these goals gave those employees an incentive to manipulate the results of the PBR to achieve greater incentive bonuses.

Objection

- Previously struck, (see Apr. 8, 2004 Tr. at 610:12-615:4);

Previous Objection: Relevance

Testimony previously stricken:

TTY filed 11/21/03, lines 318-362:

"Comment on Incentive Compensation

Q. Please comment on the Company's incentive compensation plans and their effect on the events that are the subject of this proceeding.

A. The Order in Nicor's last rate case (Docket No. 95-0219, Ordered entered April 3, 1996) allowed incentive compensation in the amount of $ 3,015,000 to be included in the Company's revenue requirement. In part, the Commission stated that the reason the Company was allowed to recover incentive compensation was that the Company had demonstrated that its incentive compensation plans provided direct benefits to ratepayers. As a result of the events that occurred at Nicor during the PBR years, I believe the Commission should reconsider whether ratepayers should be required to pay incentive compensation to Nicor and its employees. Nicor's incentive compensation plan served to provide the Company and its employees with the incentive to devise ways of inflating the benchmark and "creating" artificial savings. Ratepayers were then required to pay 50% of the phantom savings created. In light of the accounting manipulations that took place during the course of the PBR, I question whether the incentive compensation plan that was in effect in 1999-2002 produced a benefit to ratepayers.

The incentive plan goals gave employees an incentive to create savings where none would exist without manipulation of accounting records.

Incentive compensation bonuses paid to Officers, Managers and Gas Supply employees for the year immediately preceding and during the life of the PBR are shown in the following table:

	Year	**Amount Paid**
	1999	$ 4,645
	2000	$34,665
	2001	$85,799
Total		$125,109

These amounts reflect only the amounts of incentive compensation that directly related to either gaining approval of the PBR or the results of each years activity under the PBR. They do not include amounts awarded for Company overall net income goals, although Company overall net income, and thus the incentive

compensation awards for the same, were affected by the results of the PBR. For 1999 the PBR-related goal was to "Obtain ICC approval of the Company's proposed Gas Cost Performance Program in such a form that the Company will accept the order." For the years in which the PBR program was in effect, the goals were to "Achieve PBR IBT (measured as 50% of the result of actual gas cost less the benchmark)." Other goals that were not clearly related to the PBR were also not included in the totals described above.

Many of the goals for officers, managers and gas supply employees were focused on the results of the PBR. Therefore, the possibility exists that these goals gave those employees an incentive to manipulate the results of the PBR to achieve greater incentive bonuses.

I am not making an adjustment for these incentive payments because the costs of incentive compensation are not charged through the PGA and the Commission approved recovery of an amount of incentive compensation in the Order in Docket No. 95-0219. However, I believe it is important to bring this situation to the Commission's attention and recommend that this issue be thoroughly examined in the Company's next rate case"

Staff Response

- The testimony sought to be stricken is different than the testimony previously stricken. Staff should be allowed an opportunity to correct a lack of foundation for the presentation of its testimony in this new testimony filing.

- Nicor has withdrawn all of its testimony and refiled its direct testimony. Staff should be given an opportunity to fully respond.

- The new testimony should be considered in its own right.

- Ms. Everson identifies a clear relationship between Nicor's incentive compensation rewards, approval of the PBR plan and the results of each year's activities under the plan.

- As discussed at length in the body of the Response, the Second Interim Order broadly defined the scope of this proceeding as the "appropriate formal mechanism for addressing all issues related to the program Nicor Gas implemented under [the GCPP]…" (Second Interim Order, p. 5, Finding (4), Docket No. 02-0067, December 17, 2002) The relationship between Nicor's incentive compensation rewards and the approval of and actions taken under the GCCP is relevant to the issues and the determinations of fact to be made in this proceeding.

- In the Motion, Nicor complains repeatedly that Staff does not have a basis for opining about the state of mind of various Nicor actors, (see Motion, "… not based on personal knowledge or observation… but on unfounded speculation",

p. 19; "pure conjecture…", p. 20; "… speculation as to the Company's state of mind…", Id.; "… no knowledge of the actual mental state of any employee or agent of the Company…" Id.; etc. Clearly the state of mind is at issue. Staff has responded to Nicor's argument and fully supported the testimony of Mssrs. Zuraski and Maple. (See Response, and Exs. B & C) However, Ms. Everson's testimony fills in yet another piece of the puzzle of Nicor's actions under the GCPP and serves to corroborate even further the statements of Mssrs. Zuraski and Maple.

- Furthermore, there is no requirement that each statement uttered by Staff be tied to a financial adjustment. Staff's testimony need only be relevant to material facts in the docket; Staff has endeavored to lay out a clear picture of what transpired during the time period of the GCPP, including obtaining approval of the GCPP. The testimony that "[s]ome of the goals in Nicor's incentive compensation plan …were directly related to either gaining approval of [GCPP] or the results of each year's activity under the [GCPP]" and that "[t]he potential for incentive compensation could have motivated Nicor employees to devise ways of inflating the benchmark and 'creating' artificial savings" (Staff Ex. 3.0, 16:309-314) are relevant to material issues in the case.

- The provision of this testimony is consistent with the clear language of the Second Interim Order: "this proceeding is the formal mechanism for addressing all issues related to the program Nicor Gas Implemented under [the GCPP]." (Second Interim Order, p. 6)

- Nicor's argument that this testimony is irrelevant is consistent with its argument for a limited scope to this proceeding. (Motion pp. 3-5) That argument has been thoroughly refuted in Staff's Response. (See Response)

EXHIBIT E

PUBLIC VERSION

1. Testimony: Staff Ex.4.0, 12:217-24:

- "Recommendation 2: I recommended that the Commission disallow the cost of gas and order a refund related to the 2% adjustment factor that has been charged to ratepayers for the period 1999-2002. The amount of the refund related to the 2% adjustment factor has been reflected in the testimony and schedules of Staff witnesses Zuraski and Everson (ICC Staff Exhibit 1.0 and 3.0, respectively).

  Current Status
  I am maintaining Recommendation 2. "

Objection

- Previously struck, (see Apr. 8, 2004 Tr. at 593:17-596:2 as to 1999-2000);

Previous Objection: Beyond the scope of the case established by the Second Interim Order

Testimony previously stricken:

The prior ruling did not enumerate the testimony stricken. After reviewing Staff Ex. 4.0 filed, 11/21/03, it appears that on line193: "1999" was stricken to be replaced by 2001.

Staff Response

- The testimony regarding the 2% storage factor in years 1999-2000 is properly presented in this matter. The Second Interim Order provided for the reopening of the 1999 and 2000 PGA dockets if they were affected by information revealed to parties other than Nicor subsequent to June 1, 2002. (See Second Interim Order, p. 6)

- Nicor's objection ignores the scope of the proceeding as articulated in the Second Interim Order. In the Ordering paragraphs of the Second Interim Order, the Commission stated in relevant part:

  > that it will consider for final resolution in this proceeding all issues relating to the operation of the Program Nicor Gas implemented under tariffs filed in accordance with the Commission's Order entered November 23, 1999, in Docket 99-0127, and all issues relating to any refunds that may be owing to Nicor customers as a result of the operation of the Program and as a result of the operation of the Company's Rider 6 in 1999, 2000, 2001, and 2002, and for ordering such other and further relief as deemed equitable and just. It is not the Commission's intent to *re-litigate* issues resolved in Dockets 99-0481 and 00-0718 *to the extent that the Commission determines that its resolution of the issues is unaffected by information revealed to parties*

> *other than Nicor subsequent to June 1, 2002*. The *Commission will, however, examine any issues that it deems appropriate in light of new information raised in the current docket*.
>
> IT IS FURTHER ORDERED that, if necessary, the records of Dockets 99-0481 and 00-0718 will be re-opened for the limited purpose of entering Amendatory Orders that reflect the findings in this Docket. (Second Interim Order, p. 6, emphasis added)

- The Second Interim Order contemplated reviewing such issues in the instant consolidated proceeding and then the reopening of the 1999 (Docket No. 99-0481) and 2000 (Docket No. 00-0718) proceedings for the limited purpose of entering Amendatory Orders that reflect the findings in this consolidated docket. (*Id*.)

- This adjustment is not a relitigation of an issue resolved in Dockets 99-0481 and 00-0718. The accounting for gas injected into storage and unavailable for withdrawal was not previously addressed in Dockets 99-0481 or 00-0718. The 2% adjustment arises out of *new information raised in the current docket*.

- Testimony regarding the 2% storage factor should be allowed in this proceeding because the Second Interim Order anticipates reopening the 1999 and 2000 PGAs to enter orders reflecting changes based upon the information revealed to Staff and the intervenors during this proceeding. The information supporting the 2% adjustment is just such information.

- The discovery of this information was a direct result of the additional scrutiny that Nicor subjected itself to due to the information received in the whistleblower fax and the necessity of reopening Docket No. 02-0067. During review of workpapers provided by Nicor in October of 2003, Staff became aware of a report that demonstrated that reported volumes of gas withdrawn had been increased by a 2% factor.

- The Commission should consider Staff's 2% adjustment as a matter of public policy. The Commission should take every opportunity to assure that only actual costs are passed on to ratepayers through the PGA. The PGA is a result of the legislature authorizing the Commission to, "increase or decrease rates and charges based upon … changes in the cost of purchase gas through the application of … purchased gas adjustment clauses." 220 ILCS 5/9-220(a) Concomitant with this authority, the Commission is required to annually initiate hearings to "determine whether the clauses reflect actual costs of… gas.. purchased…" (*Id*.)

- The purpose of the PGA is to pass the actual costs of purchased gas on to rate payers. To the extent that Nicor has charged ratepayers in excess of actual costs, such charges should be refunded to ratepayers.

- Nicor's objection is tantamount to a taunt: Commission you did not discover these improper costs in time. However, the PGA is not some sort of game where Nicor can keep ill-gotten proceeds if the Commission is not aware of them at the time an order is entered.

- The Commission may never have learned of the 2% issue had the whistleblower fax not surfaced. However, the whistleblower fax was received and Staff commenced upon a thorough investigation. As a result, Staff discovered that volumes of gas reported by Nicor as withdrawn had been increased by a 2% factor. Staff contends that the 2% factor does not reflect an actual cost of gas to Nicor and, therefore, cannot properly be passed through the PGA.

- This 2% adjustment is one of many issues raised solely as a result of the additional scrutiny given to Nicor's books.

- The Commission made clear in its 2nd Interim Order that it will reopen the 1999 and 2000 PGA dockets to enter amendatory orders to reflect the findings in this proceeding. As discussed above, the existence of the 2% factor only came to Staff's attention in its intensive review in this proceeding. Therefore, consideration of the 2% adjustment is appropriate in this proceeding. It is unnecessary and would be an inefficient use of Commission, Staff, Company, and Intervenor resources to require a second and separate reopening of these same dockets to consider the issue.

- Further as a matter of administrative efficiency, the 2 % adjustment factor should be considered in all four PGAs simultaneously; there is no benefit in treating 1999 and 2000 as separate matters for two reasons. First, the same facts support the 1999, 2000, 2001, and 2002 adjustments. Finally, any separate motion to reopen the 1999 and 2000 PGAs would be based upon the same facts that are present in the current consolidated proceeding.

EXHIBIT F

PUBLIC VERSION

RULE 212. Use of Depositions

(a) Purposes for Which Discovery Depositions May Be Used.

Discovery depositions taken under the provisions of this rule may be used only:

(1) for the purpose of impeaching the testimony of the deponent as a witness in the same manner and to the same extent as any inconsistent statement made by a witness;

(2) as an admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person;

(3) if otherwise admissible as an exception to the hearsay rule;

(4) for any purpose for which an affidavit may be used; or

(5) upon reasonable notice to all parties, as evidence at trial or hearing against a party who appeared at the deposition or was given proper notice thereof, if the court finds that the deponent is neither a ~~retained opinion~~ controlled expert witness nor a party, the deponent's evidence deposition has not been taken, and the deponent is unable to attend or testify because of death or infirmity, and if the court, based on its sound discretion, further finds such evidence at trial or hearing will do substantial justice between or among the parties.

* * * * * *

[Illinois Supreme Court Rule 212(a); emphasis, strikethrough and underline in original; as amended March 28, 2002, effective July 1.]

EXHIBIT G through O

PUBLIC VERSION

EXHIBIT P

PUBLIC VERSION

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Date of Report (Date of earliest event reported): October 28, 2002

Commission File Number	Registrant, State of Incorporation, Address and Telephone Number	I.R.S. Employer Identification Number
1-7297	**Nicor Inc.** (An Illinois Corporation) 1844 Ferry Road Naperville, Illinois 60563-9600 (630) 305-9500	36-2855175
1-7296	**Northern Illinois Gas Company** (Doing business as Nicor Gas Company) (An Illinois Corporation) 1844 Ferry Road Naperville, Illinois 60563-9600 (630) 305-9500	36-2863847

Item 7. ***Financial Statements and Exhibits***

The following is filed as an exhibit to this report.

Exhibit Number	Description
99.1	Report to the Special Committee of the Board of Directors of Nicor Inc. and transmittal letter.

Item 9. ***Regulation FD Disclosure***

On July 18, 2002, the Nicor Inc. Board of Directors appointed a Special Committee of non–management Directors to investigate Nicor Gas' natural gas purchases, transportation, and storage activities, including allegations regarding Nicor Gas' performance–based rate plan that had been made in an anonymous fax sent to the Citizens Utility Board and submitted to the Illinois Commerce Commission.

To conduct the inquiry, the Special Committee retained Scott Lassar of the law firm of Sidley Austin Brown & Wood (Sidley) and the accounting firm of KPMG LLP. Sidley's report was presented to Nicor's Board of Directors on October 28, 2002.

The report and its transmittal letter, with certain names or addresses redacted to protect the confidentiality of the individuals in question, are attached as Exhibit 99.1.

SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrants have duly caused this report to be signed on their behalf by the undersigned thereunto duly authorized.

NICOR INC.

By: /s/ KATHLEEN L. HALLORAN

Kathleen L. Halloran
Executive Vice President
Finance and
Administration

Date October 31, 2002

NICOR GAS COMPANY

By: /s/ KATHLEEN L. HALLORAN

Kathleen L. Halloran
Executive Vice President
Finance and
Administration

Date October 31, 2002

EXHIBIT INDEX

Exhibit Number	Description of Document
99.1	Report to the Special Committee of the Board of Directors of Nicor Inc. and transmittal letter.

EXHIBIT Q

PUBLIC VERSION

EXHIBIT R

PUBLIC VERSION

FORM 21 ILCC

13

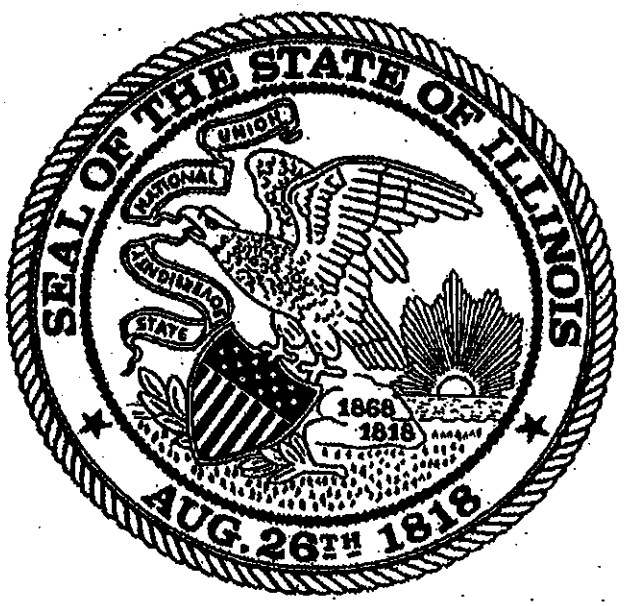
ORIGINAL

ILLINOIS
COMMERCE COMMISSION
2003 JAN 31 P 2:26
CHIEF CLERK'S OFFICE

ANNUAL REPORT OF ELECTRIC UTILITIES LICENSEES AND/OR NATURAL GAS UTILITIES

To The

ILLINOIS COMMERCE COMMISSION



Exact Legal Name of Respondent *(Company)*	Year of Report
Northern Illinois Gas Company (Doing business as Nicor Gas Company)	December 31, 2002

This state agency is requesting disclosure of information that is necessary to accomplish the statutory purpose as outlined in Section 5-109 of the Public Utilities Act [220 ILCS 5/5-109]. Disclosure of this information is REQUIRED. Failure to provide any information could result in a fine of $100 per day under Section 5-109 of the Public Utilities Act.

Printed by authority of the State of Illinois
50 copies – December 2002 – 390r

NICOR GAS COMPANY	AN ORIGINAL	DECEMBER 31, 2002

DIRECTORS

1. Report below the information called for concerning each director of the respondent who held office at any time during the year. Include in column (a), abbreviated titles of the directors who are officers of the respondent.
2. Designate members of the Executive Committee by an asterisk and the Chairman of the Executive Committee by a double asterisk.

Name (and Title) of Director (a)	Principal Business Address (b)	Number of Directors' Meetings During Year (c) (1)	Fees During Year (d)
Robert M. Beavers, Jr. *	21 East 8th Street Hinsdale, IL 60521-4411	14	19,000
Bruce P. Bickner	3100 Sycamore Road DeKalb, IL 60115	30	59,000
John H. Birdsall, III*	2755 Schelford Farm Charlottesville, VA 22901	27	40,500
Thomas A. Donahoe	560 Green Bay Road Suite 300 Winnetka, IL 60093	32	43,500
Thomas L. Fisher** Chairman and CEO	1844 Ferry Road Naperville, IL 60563-9600	8	-
John E. Jones*	840 N. Washington Hinsdale, IL 60521	29	42,000
Dennis J. Keller*	1 Tower Lane, Suite 1000 Oakbrook Terrace, IL 60181-4624	14	21,500
William A. Osborn	50 South LaSalle Street Chicago, IL 60675	9	17,500
John Rau	180 East Pearson St., Ste. 4303 Chicago, IL 60611	11	18,500
John F. Riordan	1700 S. Mount Prospect Road Des Plaines, IL 60018	21	37,500
Patricia A. Wier*	230 East Delaware Place, Apt. 6W Chicago, IL 60611-1769	14	19,000

(1) Directors' meetings include committee meetings.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

[X] Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

For the fiscal year ended December 31, 2002

or

[ ] Transition Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Commission File Number	Registrant, State of Incorporation, Address and Telephone Number	I.R.S. Employer Identification Number
1-7297	**Nicor Inc.** (An Illinois Corporation) 1844 Ferry Road Naperville, Illinois 60563-9600 (630) 305-9500	36-2855175

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Name of each exchange on which registered
Common Stock, par value $2.50 per share, including Preference Stock purchase rights	New York Stock Exchange Chicago Stock Exchange

Securities registered pursuant to Section 12(g) of the Act: None

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months and (2) has been subject to such filing requirements for the past 90 days. Yes [X] No [ ]

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. [ ]

Indicate by check mark whether the registrant is an accelerated filer (as defined in rule 12b-2 of the Act). Yes [X] No [ ].

The aggregate market value of common stock (based on the June 28, 2002 closing price of $45.75) held by non-affiliates of the registrant was approximately $2.0 billion.

DOCUMENTS INCORPORATED BY REFERENCE

Portions of the company's 2003 Annual Meeting Definitive Proxy Statement, dated March 31, 2003, are incorporated by reference into Part III.

Table of Contents

Item No.		
	Part I	
1.	Business	1
2.	Properties	5
3.	Legal Proceedings	5
4.	Submission of Matters to a Vote of Security Holders	5
	Executive Officers of the Registrant	6
	Part II	
5.	Market for Registrant's Common Equity and Related Stockholder Matters	7
6.	Selected Financial Data	8
7.	Management's Discussion and Analysis of Financial Condition and Results of Operations	9
7A.	Quantitative and Qualitative Disclosures about Market Risk	29
8.	Financial Statements and Supplementary Data	30
9.	Changes in and Disagreements with Accountants on Accounting and Financial Disclosure	61
	Part III	
10.	Directors and Executive Officers of the Registrant	62
11.	Executive Compensation	62
12.	Security Ownership of Certain Beneficial Owners and Management	62
13.	Certain Relationships and Related Transactions	62
14.	Controls and Procedures	63
	Part IV	
15.	Exhibits, Financial Statement Schedules, and Reports on Form 8-K	66
	Signatures	68
	Certifications	69
	Exhibit Index	71

Glossary

Degree day.....The extent to which the daily average temperature falls below 65 degrees Fahrenheit. Normal weather for Nicor Gas' service territory is about 6,000 degree days.

FERC.....Federal Energy Regulatory Commission, the agency that regulates the interstate transportation of natural gas, oil and electricity.

ICC.....Illinois Commerce Commission, the agency that regulates investor-owned Illinois utilities.

Mcf, MMcf, Bcf....Thousand cubic feet, million cubic feet, billion cubic feet.

PBR.....Performance-based rate, a regulatory plan that provided economic incentives based on natural gas cost performance.

TEU.....Twenty-foot equivalent unit, a measure of volume in containerized shipping equal to one 20-foot-long container.

Signatures

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

Nicor Inc.

Date March 27, 2003

/s/ KATHLEEN L. HALLORAN
Kathleen L. Halloran
Executive Vice President
Finance and Administration

Pursuant to the requirements of the Securities Exchange Act of 1934, this report has been signed below by the following persons on behalf of the registrant and in the capacities indicated on March 20, 2003.

Signature	Title
/s/ THOMAS L. FISHER Thomas L. Fisher *(Principal Executive Officer)*	Chairman and Chief Executive Officer
/s/ KATHLEEN L. HALLORAN Kathleen L. Halloran *(Principal Financial and Accounting Officer)*	Executive Vice President Finance and Administration
ROBERT M. BEAVERS, JR.*	Director
BRUCE P. BICKNER*	Director
JOHN H. BIRDSALL, III*	Director
THOMAS A. DONAHOE*	Director
JOHN E. JONES*	Director
DENNIS J. KELLER*	Director
WILLIAM A. OSBORN*	Director
JOHN RAU*	Director
JOHN F. RIORDAN*	Director
PATRICIA A. WIER*	Director

* By /s/ JEFFREY L. METZ
Jeffrey L. Metz
(Attorney-in-fact)

SEC FORM 10-K

EXHIBIT S, T and U

PUBLIC VERSION