

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

North Shore Gas Company)	
)	
The Peoples Gas Light and Coke Company)	
)	
)	Docket No. 10-0090
Petition Pursuant to Section 19-140 of the Public Utilities Act to Submit an On-Bill Financing Program.)	
)	

ADDITIONAL COMMENTS OF THE CITIZENS UTILITY BOARD

The Citizens Utility Board (“CUB”) hereby submits the following Additional Comments in response to the Administrative Law Judge (“ALJ”) Ruling of March 25, 2010 regarding the proposed On-Bill Financing (“OBF”) Program filed by North Shore Gas Company (“NS”) and the Peoples Gas Light and Coke Company (“PGL”), (collectively “the Petitioners” or “NS-PGL” or “the Companies”) on February 8, 2010 and the applicability of various taxes to any OBF Program revenues.

I. Application of the Gas Revenue Tax Act

In its Reply Comments, the Staff of the Illinois Commerce Commission (“Staff”) agrees with CUB’s Initial Comments that the Gas Revenue Tax Act (“GRT Act”) would not appear to capture revenues public utilities collect under the OBF Program. Staff Reply Comments at 6. The only reason the GRT Act might apply is because the Gas On-Bill Financing Law (“Gas OBF Law”) provides in pertinent part that “amounts due under the program shall be deemed amounts owed for residential, and as appropriate, small commercial gas service.” 220 ILCS 5/19-104(c)(5); Staff Reply Comments at 5. While the GRT Act does not limit its reach, Staff posits that Section (c)(5) of the OBF Law should be interpreted to apply only to the Gas OBF Law.

Staff Reply Comments at 6. It is not clear to Staff whether the Illinois Commerce Commission (“ICC” or “the Commission”) has jurisdiction to determine whether municipal and state tax laws apply to this program. *Id.* The only issue before this Commission, therefore Staff argues, is whether any taxes, if assessed by the applicable tax authorities, should be considered “program costs” that may be passed through to ratepayers generally or “measure” costs that are taken into account in determining the cost effectiveness of the measure and paid by the participating customer. Staff Reply Comments at 6-7.

As the Petitioners note in their Reply Comments, NS-PGL will not be selling energy efficiency measures to customers. NS-PGL Reply Comments at 7. Nor will NS-PGL be loaning money to customers to purchase these measures. *Id.* Notwithstanding those limitations on the Petitioners involvement in the OBF Program, NS-PGL maintain that gross receipts taxes under the GRT Act apply to loans financed through the OBF Program. NS-PGL Reply Comments at 8. Petitioners rely on Section 2 of the GRT Act, which states in part that a tax is imposed upon persons engaged in the distribution, supply or sale of natural gas at the rate of 2.4 cents per therm for each customer served, or 5% of the gross receipts received from each customer served. NS-PGL Reply Comments Ex. 1 at 1. Petitioners note that if the per therm measure applies, then there is effectively no tax on the OBF Program portion of the bill. *Id.* If the 5% measure applies, the tax applies because Section 19-140 prescribes that amounts due under the OBF Program are, in Petitioners interpretation, for gas service. *Id.* The Petitioners agree with Staff that the Commission lacks authority to determine the applicability of the GRT Act or municipal utility taxes to the OBF Program loan payments. NS-PGL Reply Comments at 8.

Staff solicited the opinion of the Illinois Department of Revenue (“IDOR”) on its interpretation of whether the GRT Act applies to any OBF Program revenues. Staff Reply

Comments at 6. IDOR, at the request of the Office of General Counsel of the ICC, was asked to provide an opinion on whether loan payments included on utility bills, paid by consumers to public utilities and remitted by utilities to third-party lenders pursuant to the Gas OBF Law are included within “gross receipts” for purposes of the GRT Act. Staff Reply Comments, Attachment A at 1. Although IDOR noted it was a “close call,” in IDOR’s opinion constitutional issues weigh in favor of a conclusion that the loan payments are not included within “gross receipts” under the GRT Act. *Id.* IDOR supported their conclusion by reasoning that if OBF payments are included “gross receipts,” a gas utility will pay a tax of 5% on the participant’s loan payments. Attachment A at 5. Because the GRT can be passed through to customers, customers will pay a 5% tax on the loan payments as well. *Id.* However, since the tax base for loan payments made to electric utilities is established by kilowatt hours used, not a percentage of gross receipts, a decision to include OBF payments in “gross receipts” for purposes of the GRT Act will result in gas utilities and electric utilities not being taxed uniformly. *Id.*

For IDOR, this raises serious constitutional uniformity issues, and since it is not reasonable to conclude the Illinois General Assembly intended to discriminate against gas utilities, gas utility customers under the programs, and companies that manufacture and sell gas-using energy equipment, OBF payments should not be included in “gross receipts” and should not be subject to liability under the GRT Act. Attachment A at 5, 7.

CUB agrees with IDOR’s conclusion. Petitioners are concerned that IDOR’s memorandum addressing this issue is not binding, and as such, is not sufficient to protect the Petitioners from potential tax liability should they rely upon it over the next few months in planning their program. NS-PGL Reply Comments at 9. CUB believes IDOR’s memorandum should be sufficient to allow the Commission to determine the applicability of the GRT Act to

the OBF Program. However, if the Commission determines a binding opinion is necessary from IDOR, the costs associated with that opinion should be recoverable as program costs.

As discussed in CUB's Initial Comments, CUB continues to believe that the GRT Act itself puts limitations on the meaning of "gross receipts" under the GRT Act. CUB/City of Chicago Corrected Initial Comments at 3.¹ Taxing laws are to be strictly construed and not extended beyond the clear import of the language used; where there is any doubt in their application, they will be construed in favor of the taxpayer. *Quad Cities Open, Inc. v. City of Silvis*, 208 Ill.2d 498, 508 (2004), citing *Getto v. City of Chicago*, 77 Ill. 2d 346, 359 (1979). The purchase of energy efficiency equipment designed to lower a customer's overall usage includes an inspection and servicing of equipment located on customer's premises. *Id.* Petitioners themselves described the program as "retrofits" of existing equipment. NS-PGL Ex. 1.0 at 5. They are clear that this program does not involve the sale of any equipment, or the lending of any money to purchase equipment by the Petitioners. By subjecting measures funded through the OBF Program to the Gas Revenue Tax Act, Petitioners inappropriately raise the cost of the measure for the individual participants. CUB/City Corrected Initial Comments at 4.

II. Application of Municipal Utility Taxes

Staff recommends that the Commission direct gas utilities to seek clarification with the proper tax authorities and report the results of those inquiries to the Commission. Staff Reply Comments at 6. As with application of the GRT Act to OBF Program loan payments, Staff believes the only issue before the Commission is whether municipal utility taxes be treated as

¹ The City of Chicago did not join in this section of these comments, and took no position on the applicability of the GRT Act to On-Bill Financing Programs. CUB/City Initial Comments at 2.

program costs or measure costs. Staff Reply Comments at 6-7. Petitioners agree that the ICC lacks authority to determine the applicability of those taxes to the OBF Program loan amounts, and note the City of Chicago specifically opted not to address this issue. NS-PGL Reply Comments at 8.

CUB agrees that the ICC should seek clarification with the applicable tax authorities to determine whether municipal utility taxes apply to OBF Program loan payments. However, as with the application of the GRT Act, CUB believes that the application of “gross receipts” within Article 11 of the Illinois Municipal Code to OBF Program loan amounts would present municipalities with the same concerns as expressed by IDOR, that is, the tax bases for natural gas and electric consumption are different. See, e.g. 65 ILCS 5/8-11-2(2a) and 2(3).

III. Application of the Public Utility Fund Tax

The Public Utilities Act (“PUA”) imposes Public Utility Fund (“PUF”) tax upon “gross revenue” which is collected by a public utility. 220 ILCS 5/2-202. For the purposes of the PUF tax, “gross revenue” is defined to include all revenues collected by a public utility subject to regulation under the PUA, Section 3-121, but to exclude revenue from the production, transmission, distribution, sale, delivery or furnishing of electricity, Section 2-202. 220 ILCS 5/3-121; 220 ILCS 5/2-202.

Petitioners raise the question of whether the PUF tax contained in Section 9-202 of the PUA is applicable to OBF Program loan payments received by natural gas utilities. NS-PGL Reply Comments at 9. The Petitioners believe the Commission does have authority to determine the applicability of that tax, and that it should do so in this proceeding. NS-PGL Reply Comments at 8.

CUB agrees that the ICC has the authority to determine whether the PUF tax is applicable to OBF loan payments. Should the ICC determine that the PUF tax is applicable, CUB recommends the ICC clarify how the tax is to be treated for the purposes of the OBF Program. CUB believes that since the individual taking out the loan is not the only person to benefit from this program – there being societal benefits resulting from avoided natural gas costs – any applicable tax should be recovered by the utilities as a part of their program costs. Energy efficiency measures – such as those financed through an OBF Program – will reduce the overall amount of natural gas used, which has monetary and environmental benefits that will accrue to not just the individual customer but society at large.

Respectfully Submitted,

CITIZENS UTILITY BOARD



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