

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

North Shore Gas Company	:	10-0090
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The Peoples Gas Light and Coke Company	:	
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Petition for Approval of the On-Bill Financing Program	:	
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**VERIFIED ADDITIONAL REPLY COMMENTS OF THE STAFF
OF THE ILLINOIS COMMERCE COMMISSION**

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April 5, 2010

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Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned counsel, pursuant to Section 200.525 of the Rules of Practice of the Illinois Commerce Commission (“Commission” or “ICC”) (83 Ill. Adm. Code 200.525) and Section 10-101 of the Public Utilities Act (the “PUA” or “Act”), respectfully submits its Verified Additional Reply Comments (“Reply Comments”) in the instant proceeding.

I. BACKGROUND

On July 10, 2009 the Governor signed Senate Bill 1918 into law creating Public Act 96-0033 (“SB 1918”). SB 1918 added, among other additions, Sections 16-111.7 (the “Electric On-Bill Financing Law”) and 19-140 (the “Gas On-Bill Financing Law”) to the PUA, requiring those electric and gas utilities, respectively, serving more than 100,000 customers on January 1, 2009, to create programs that “will allow utility

customers to purchase cost-effective energy efficiency measures with no required initial upfront payment, and to pay the cost of those products and services over time on their utility bill.” (220 ILCS 5/16-111.7(a), 220 ILCS 5/19-140(a)).

Both the Electric On-Bill Financing Law and the Gas On-Bill Financing Law required the affected utilities to submit proposals on or before February 2, 2010. On February 2, 2010, North Shore Gas Company and The Peoples Gas Light and Coke Company (collectively the “Companies” or “Peoples/NS”) filed their Petition, Direct Testimony, and Program Design Document (“PDD”) (collectively, these filings are sometimes herein referred to as the “Proposal”), pursuant to both the Electric On-Bill Financing Law and the Gas On-Bill Financing Law, establishing this docket.¹ The following parties filed Petitions to Intervene in this docket: The Citizens Utility Board (“CUB”), the People of the State of Illinois (“AG”), and the Illinois Competitive Energy Association (“ICEA”). Counsel for the City of Chicago (“City”) filed an appearance.

On March 25, 2010, the Administrative Law Judge issued a ruling (the “ALJ Ruling”) in this docket and the Companion Dockets asking parties to address certain tax issues raised in connection with the Utility Reply Comments. Peoples/NS, the utilities in the Companion Dockets, Staff, and CUB filed Additional Initial Comments on March 31, 2010 (each is sometimes hereinafter referred to as the “Additional Initial Comments”). Pursuant to the ALJ Ruling, Additional Reply Comments are due April 5, 2010. Staff’s Additional Reply Comments follow.

¹ The petition of Northern Illinois Gas Company (“Nicor”) established Docket No. 10-0096; the petition of Commonwealth Edison (“ComEd”) established Docket No. 10-0091; and the petition of AmerenCILCO/AmerenCIPS/AmerenIP (“Ameren”) established Docket No. 10-0095 (these additional dockets addressing the Electric On-Bill Financing Law or the Gas On-Bill Financing Law are sometimes hereinafter referred to as the “Companion Dockets”).

II. STAFF REPLY COMMENTS

In order to have a consistent record and because some issues in this Docket are relevant to not only this Docket but also to the Companion Dockets, Staff will herein address issues raised in the Additional Initial Comments of parties to this Docket and the Companion Dockets.

Docket 10-0090

In general, Staff agrees with much of the discussion raised in the Additional Initial Comments of Peoples/NS. Peoples/NS identified three taxes that it believed applied to its OBF Program: (i) Illinois Gas Revenue Tax (“GRT”- see, the Gas Revenue Tax Act, 35 ILCS 615/et seq.); (ii) Municipal Utility Tax (“MUT”); and (iii) the Public Utility Funding Tax (see, 220 ILCS 5/2-202, sometimes hereinafter referred to as the “PUF Act” or the “PUF tax”). (Peoples/NS Additional Initial Comments at 1). Staff does not dispute the identification by Peoples/NS of the relevant taxes in this Docket.

Peoples/NS states that the Commission does not have jurisdiction over the Gas Revenue Tax Act and the Municipal Utility Tax but does have jurisdiction over the PUF tax. Staff agrees with this assessment. (Id. at 2).

Peoples/NS also states that the Commission need not make determinations in this Docket concerning taxes and that such a failure would not jeopardize the OBF program. (Id. at 3). Staff agrees. Peoples/NS argues, however, that it would be administratively efficient for the Commission to make a determination regarding: (i) the applicability of PUF taxes to OBF program amounts; and (ii) “...the recoverability as Program costs of certain costs that utilities may incur to receive an authoritative decision concerning the GRT or MUT....” Id. Staff disagrees and does not believe that the record is sufficient for either determination. As Staff has stated in its Additional

Initial Comments, Staff believes that the time allotted in this Docket is not sufficient to determine the applicability of PUF taxes. In addition, Staff agrees with Peoples/NS that a legislative solution should be sought. As will be discussed below in more detail, Staff also believes it is premature to address the recoverability of costs not yet incurred to receive a binding opinion from IDOR concerning the GRT or opinions from other taxing authorities.

In its Additional Initial Comments, Peoples/NS provides an analysis of the applicability of both the GRT and the MUT to OBF program amounts. (Id. at 3-7). As Staff agrees with Peoples/NS that these taxes are not within the jurisdiction of the Commission, Staff will not comment on this analysis. Peoples/NS also determines that PUF taxes apply to the OBF. (Id. at 7-8). As this analysis is consistent with Staff's preliminary analysis set forth in Staff's Additional Initial Comments, Staff does not disagree with Peoples/NS' determinations but will note that Peoples/NS did not address the applicability to the PUF tax of the constitutional arguments raised by the Illinois Department of Revenue ("IDOR") in connection with the GRT. That said, Staff also acknowledges that it was unable to provide this analysis under the timeframes of this Docket and the Companion Dockets. Thus, from Staff's point of view, the PUF tax analysis remains preliminary. Consequently, Staff posits that the parties' concerns regarding the applicability of taxes to OBF Program amounts ought to be brought to the legislature.

Peoples/NS also points out the IDOR memorandum, attached to Staff's Reply Comments filed in this Docket, is non-binding. (Id. at 11). Staff agrees. Peoples/NS raises questions regarding the consistency of this IDOR memorandum with other

decisions made by IDOR in contexts that Peoples/NS argues are similar. (Id. at 8-9). As Peoples/NS has correctly pointed out, the Commission has no jurisdiction over these issues. IDOR is not a party to this Docket and so is not available to respond in this forum. While Staff acknowledges that the application of the GRT may impact the OBF programs, neither Staff nor the Commission has any role in resolving these disputed issues.

Peoples/NS states that it “believes a binding opinion from the taxing authority is needed if they are to exclude OBF revenues.” (Id. at 8). Peoples/NS also state:

Petitioners are not averse to seeking binding opinions from taxing authorities concerning the GRT and MUT, but they believe that these efforts are directly tied to administering the OBF Program and request that the Commission rule that associated costs are recoverable Program costs. But for the statutory mandate to offer the OBF Program and the differing opinions that have arisen in this proceeding, Petitioners would have no need to seek such authority.

(Id. at 11).

Staff is not certain what precisely Peoples/NS is requesting. Peoples/NS states that “it would not be prudent for Petitioners to exclude from ‘gross receipts’ revenue that seems clearly to fit within the definition of ‘gross receipts’ under the GRT Act.” (Id. at 11). Furthermore, Peoples/NS also states that the IDOR memorandum is problematic. Id. Peoples/NS raises issues that even a binding opinion of IDOR may be subject to *de novo* review, which suggests that a binding opinion would not provide the company with sufficient justification to exclude taxes. (Id. at 8-9). So, while Peoples/NS appears to want a binding opinion from IDOR, it also appears not to trust a binding opinion as determinative.

Staff points out that the responsibility to determine its tax liability remains with the utility. If Peoples/NS believes, using their expertise and judgment, that obtaining a binding opinion is a necessary course of action, they should pursue that course of action. If they believe that a binding opinion does not provide sufficient justification to refrain from including the tax, then they should collect the tax. It would not seem appropriate for the Commission to decide this issue for the Company, particularly since the tax is not within the Commission's jurisdiction.

If Peoples/NS is requesting a "prudency review" under Section (f) of the Gas On-Bill Financing Law, Staff points out that a determination of the reasonableness or prudency of costs, not yet incurred or submitted, is not appropriate at this time. Staff recommends that the Commission decline to "pre-approve" unknown costs in isolation, outside a rate case or reconciliation of a rider. Even if the Company is asking only if these kinds of costs (not yet described in any detail) are "costs of offering a program ... including, but not limited to, start-up and administrative costs..." Staff believes a decision on this would be premature because of the unknown costs. That said, Staff would tend to agree that these kinds of costs would likely fall under the category of program, start-up or administrative costs under Section (f) of the Gas On-Bill Financing Law; provided, such costs were reasonable and prudently incurred, and were not otherwise covered in base rates, they would likely be recoverable.

CUB Comments

CUB disagrees with the conclusions of Peoples/NS regarding the GRT and instead agrees with IDOR's conclusions in its memo. (CUB Additional Initial Comments at 2). CUB argues further that the same concerns raised in the IDOR memorandum

with respect to the GRT apply in the case of municipal taxes. (CUB Additional Initial Comments at 2-3). Staff maintains that any municipal taxes are not within our jurisdiction and we have no way of knowing if the IDOR memorandum will be persuasive authority to such municipalities.

CUB argues in addition that if a binding opinion is necessary from IDOR, the costs associated with the opinion should be recoverable as program costs. Staff understands CUB to argue that these costs should be passed onto ratepayers generally under Section (f) of the On-Bill Financing Laws. As Staff has stated herein, the recoverability of these costs is premature and not properly before the Commission in this Docket or the Companion Dockets.

With respect to the PUF tax, CUB believes the ICC has authority to determine if the PUF tax is applicable to OBF loan payments. (Id. at 4). CUB, however, recommends that if the Commission determines that the PUF tax is applicable to the OBF Program, the tax should not be assessed against the individual loan participant (as part of the cost of the measure under Section (c)(1)(B)) but, because of the societal benefit resulting from energy savings, this tax should be recovered as a program cost , in other words, against ratepayers generally (under Section (f) of the laws). Staff disagrees with CUB on this point. Notwithstanding any general societal benefit, Staff believes that the individual loan participant should bear these taxes since they are assessed on the amounts payable under their individual loan.

Docket 10-0091

ComEd's position is that no taxes are applicable to OBF program revenues and that taxes are not an issue in this Docket. (ComEd Additional Initial Comments at 1). ComEd also notes that the tax situation may be different for gas utilities. *Id.* As to PUF taxes, ComEd points out that electricity revenues are excluded from the definition of "gross revenue" for purposes of applying PUF taxes. (*Id.* at 2). As discussed more fully in its Additional Initial Comments, Staff agrees with this assessment.

In its Additional Initial Comments, ComEd identifies and discusses the State Electricity Excise Tax, the State Electricity Distribution Tax and the Municipal Electricity Use Tax but argues that since these taxes are imposed based upon kilowatt-hours rather than revenues, the OBF program amounts are not subject to these taxes. (*Id.* at 2-3). Because none of these laws are within the Commission's jurisdiction, Staff will not comment other than to say these taxes do appear, in general, to be based upon kilowatt hours rather than revenues and the Electricity On-Bill Financing Law would not appear to create additional taxes under such laws. ComEd also speculates that if it were to incur any costs related to obtaining a binding opinion of IDOR, "such costs would be properly recoverable." (*Id.* at 3). Per Staff's discussion in connection with Docket 10-0090 with respect to this issue, Staff contends that the recoverability of these costs is premature and not properly before the Commission in this Docket or the Companion Dockets.

Docket 10-0095

Ameren declines from identifying "the universe of taxes that might apply to the OBF program" suggesting instead that the utilities or the Commission seek guidance

from the respective taxing entity, be it IDOR, or another taxing body. (Ameren Additional Initial Comments at 2). Since Staff made this suggestion to the utilities in its Reply Comments, Staff agrees that, to the extent the utilities deem it necessary or advisable; guidance should be sought from the appropriate taxing authorities. Staff is less certain that it would be within the Commission's jurisdiction to undertake this task. In light of time constraints, Ameren also suggests that this process of identifying taxes that might apply to OBF program funds "is one best left until after the approval of the OBF Program." (Id at 3). Staff concurs.

Ameren argues that the Commission has jurisdiction to approve its OBF Program and the associated program costs. Id. Staff agrees. Ameren also points out that its request for approval of its program does not include a request that the Commission determine the applicability of any taxes and that a tax determination (or a binding ruling) is not necessary to approve its program. (Id at 4). Ameren posits that the Commission may approve its program and at later date address any future tax issues "...if and when they are properly presented to the Commission." (Id at 5). Staff agrees that the Commission need not address these issues in this Docket or the Companion Dockets and such issues may be addressed at a later date.

Ameren notes that the IDOR memorandum is not binding but suggests that the Commission can adopt the factual and legal basis set forth in the memorandum and apply the conclusion in this proceeding, subject to a future ruling by the IDOR. (Id. at 4-5). Staff agrees that it is within the Commission's authority to resolve allocation and billing issues with respect to taxes but points out that it is not necessary at this time and would necessarily be conditional because the IDOR memorandum is not binding and

Commission has no jurisdiction over the GRT itself. It is also unclear to Staff what benefit a conditional determination would give to the parties, especially since there is no need to apply taxes in the near future. With respect to any unidentified taxes, including any state or municipal taxes “generally referenced by Staff in its Reply Comments,” Ameren advises that such taxes should be taken up in a future proceeding, if and when necessary, arguing there is no record support for the Commission to make a determination. (Id. at 5). Staff agrees but points out that CUB first identified municipal taxes as an issue (although the City declined to comment with respect to Chicago municipal taxes); Staff merely responded to the issues raised.

Finally, Ameren suggests that Staff stated in its Reply Comments that “...the costs associated with complying with any subsequently identified, applicable taxes [would] be included as OBF program costs.” (Id at 2). Staff disagrees. Staff was silent in its Reply Comments as to the recoverability of compliance costs² as “program costs.” In a footnote, Ameren suggests similarly that “Staff and AIU would be in agreement that [any taxes that would apply to the OBF programs] would be recoverable OBF Program costs. (Footnote 1 at 4). In this case, Staff cautiously agrees. To be clear, Staff in its Reply Comments did agree that any such *taxes* would be recoverable from *participants in the OBF program* but distinguished that recovery from the recovery of taxes from *ratepayers generally*. (Staff Reply Comments at 6).

Ameren’s discussion raises a concern generally for Staff that parties may be using the term “program costs” to mean different things. The term “program costs” can

² Staff notes, however, that this issue is discussed in these Staff Additional Reply Comments in connection with Docket 10-0090.

refer to “the prudently incurred costs of offering a program approved by the Commission pursuant to [the Gas On-Bill Financing Law or Electric On-Bill Financing Law] including, but not limited to, all start-up and administrative costs and the costs for program evaluation.” (220 ILCS 5/16-111.7(f) and 220 ILCS 5/19-140(f)) These so called “program costs” would be recoverable from ratepayers generally pursuant to the terms of Section (f) of the laws. That said, the term “program costs” can also refer to “the costs of implementing the measures, including finance charges and any program fees not recovered pursuant to subsection (f) of the [the Gas On-Bill Financing Law or Electric On-Bill Financing Law]...” (220 ILCS 5/16-111.7(c)(1)(B) and 220 ILCS 5/19-140(c)(1)(B)). These costs would be paid by the loan participant as a cost of the loan and would only be passed on to ratepayers generally if the borrower defaults.

In its Reply Comments, Staff argued that taxes applicable to the OBF program should be included in the costs of implementing a measure and paid by the participating customer as part of the cost of the loan, in other words, Section (c)(1)(B) costs. (Staff Reply Comments at 6). Because Ameren uses the term program costs without statutory reference, it is difficult to know whether Staff and Ameren are in agreement. Staff notes, however, that with respect to taxes, utilities are permitted generally to pass through taxes on bills. In the case of the OBF program, Staff expects to see these taxes (to the extent they apply at all) shown separately on participating borrowers’ bills. As Ameren suggests, the Commission may address any future tax issues if and when they are properly presented to the Commission.

CUB Comments

CUB states that Ameren and CUB agree that “utilities should exclude any gross receipts tax from the cost of an OBF program measure.” (CUB Additional Initial Comments at 1, citing Ameren Reply Comments at 11). CUB also agrees with Ameren that the conclusions in the IDOR memorandum should be accepted and argues further that the same concerns raised in the IDOR memorandum with respect to the GRT apply in the case of municipal taxes. (CUB Additional Initial Comments at 2-3). Staff maintains that any municipal taxes are not within our jurisdiction and we have no way of knowing if the IDOR memorandum will be persuasive authority to such municipalities.

CUB argues in addition that if a binding opinion is necessary from IDOR, the costs associated with the opinion should be recoverable as program costs. Staff understands CUB to argue that these costs should be passed onto ratepayers generally under Section (f) of the On-Bill Financing Laws. As Staff has stated herein with respect to the other dockets, in particular Docket 10-0090, the recoverability of these costs is premature and not properly before the Commission in this Docket or the Companion Dockets.

With respect to the PUF tax, CUB believes the ICC has authority to determine if the PUF tax is applicable to OBF loan payments. (Id. at 4). CUB, however, recommends that if the Commission determines that the PUF tax is applicable to the OBF Program, CUB believes that the tax should not be assessed against the individual loan participant (as part of the cost of the measure under Section (c)(1)(B)) but, because of the societal benefit resulting from energy savings, this tax should be recovered as a program cost, in other words, against ratepayers generally (under Section (f) of the laws). Staff disagrees with CUB on this point. Notwithstanding any

general societal benefit, Staff believes that the individual loan participant should bear these taxes since they are assessed on the amounts payable under their individual loan.

Docket 10-0096

In general, Staff agrees with much of the discussion raised in the Additional Initial Comments of Nicor. Nicor identified three taxes that it believed applied to its OBF Program: (i) the GRT; (ii) the MUT; and (iii) the PUF tax. (Nicor Additional Initial Comments at 3). Staff does not dispute the identification by Nicor of the relevant taxes in this Docket, nor the fact that Nicor believes the Commission to have jurisdiction over only the PUF tax. Id.

Nicor, however, believes this proceeding is the proper forum to determine whether the PUF tax should apply to OBF program revenues. (Nicor Additional Comments at 4). As Staff has stated in its Additional Initial Comments, Staff believes that the time allotted in this Docket is not sufficient to determine the applicability of PUF taxes. Finally, Nicor believes that should Peoples/NS seek additional assurances from IDOR involving the applicability of the GRT, “the costs to obtain such assurances should be considered prudent and included in the OBF Program costs.” (Nicor Additional Comments at 5). Again, if Nicor is requesting a “prudency review” under Section (f) of the Gas On-Bill Financing Law, Staff points out that a determination of the reasonableness or prudency of costs not yet incurred or submitted, is not appropriate at this time. Staff recommends that the Commission decline to “pre-approve” unknown costs in isolation, outside a rate case or reconciliation of a rider.

CUB Comments

CUB appears to agree with Nicor's intention to rely upon the memo of IDOR and not to collect the GRT to OBF program charges. (CUB Additional Initial Comments at 1, citing Nicor Reply Comments at 11). CUB argues that the same concerns raised in the IDOR memorandum with respect to the GRT apply in the case of municipal taxes. (CUB Additional Initial Comments at 2-3). Staff maintains that any municipal taxes are not within our jurisdiction and we have no way of knowing if the IDOR memorandum will be persuasive authority to such municipalities.

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general societal benefit, Staff believes that the individual loan participant should bear these taxes since they are assessed on the amounts payable under their individual loan.

III. CONCLUSION

Staff recommends that the Commission issue an Order in this Docket and the Companion Dockets consistent with the recommendations set forth herein.

Respectfully submitted,

/s/
NORA NAUGHTON
JESSICA L. CARDONI
Counsel for the Staff of the Illinois
Commerce Commission

April 5, 2010

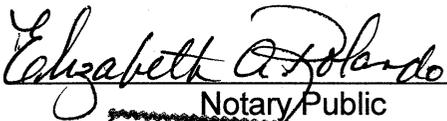
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VERIFICATION

I, Mary Selvaggio, being first duly sworn, depose and state that I am the Manager of the Accounting Department of the Financial Analysis Division of the Illinois Commerce Commission; that I sponsor the foregoing Additional Reply Comments; that I have personal knowledge of the information stated in the foregoing Additional Reply Comments; and that such information is true and correct to the best of my knowledge, information and belief.


Mary Selvaggio
Illinois Commerce Commission

Subscribed and sworn to before me
this 5th day of April, 2010.


Notary Public

