RB-1

LexisNexis®

Chebanse Grain and Lumber Co. -vs- Northern Illinois Gas Company
Complaint as to billing errors caused by charging a customer an unjust or unreasonable rate or charge

97-0079

ILLINOIS COMMERCE COMMISSION

1997 Ill. PUC LEXIS 821

December 3, 1997

OPINION: [*1]

ORDER

By the Commission:

I. PROCEDURAL HISTORY

On January 29, 1997, Chebanse Grain and Lumber Company ("Chebanse" or "Complainant"), filed with the Illinois Commerce Commission ("Commission"), a formal complaint, in five counts, against Northern Illinois Gas and Electric Company ("Ni-Gas" or "Respondent" or the "Company"). The gravamen of the complaint is that Ni-Gas engaged in inappropriate behavior by accepting the assignment of Complainant's remaining gas inventory between December 15, 1993 and January 26, 1994, without compensating Complainant for the market value of the gas.

The various counts of the complaint allege that the action resulted in Ni-Gas: (I) charging unjust and unreasonable rates in violation of Section 9-101 of the Public Utilities Act ("the Act") (220 ILCS 9-101), resulting in an overcharge as proscribed by *83 Ill. Adm. Code 280.75*; (II) providing a service that has not been tariffed with the Commission in violation of Section 9-104 of the Act (220 ILCS 9-104), resulting in an overcharge as proscribed by *83 Ill. Adm. Code 280.75*; (III) remitting a bill to Complainant that fails to clearly show all charges and any applicable adjustments relating **[*2]** to services, energy or other programs provided to customers in violation of *83 Ill. Adm. Code 500.330*, resulting in an overcharge as proscribed by *83 Ill. Adm. Code 280.75*; (IV) taking the assignment of the gas pursuant to a void contract because the contract was not filed with the Commission as required by Section 9-102 of the Act (220 ILCS 9-102), resulting in an overcharge as proscribed by *83 Ill. Adm. Code 280.75* and; (V) being compensated by taking and utilizing Complainant's gas, resulting in the Company underreporting its gross revenues for tax purposes and for the purposes of its annual report, both in violation of the Uniform System of Accounts. The complaint further alleges that Ni-Gas failed to recognize the value of the gas in its monthly PGA calculation, resulting in an overcharge as proscribed by *83 Ill. Adm. Code 280.75*. The prayers for relief in each count are identical in requesting the Commission to find:

> . . . that Respondent's rate or practices as specified to be illegal, null and void . . . [and to] order Respondent to cease and desist from engaging in such practices as specified. Finally, Complainant prays

RB-1

> that the Commission order Respondent to refund to Complainant **[*3]** any charges wrongfully billed to and paid by Complainant plus interest thereon, as provided by *83 Ill. Adm. Code 280.75*.

II. FACTS

While the facts here are relatively simple and apparently uncontested, a brief recitation is necessary because the Commission's resolution of this Motion is largely fact based.

Chebanse Grain and Lumber Company is a customer of Northern Illinois Gas as defined by Respondent's tariff (Ill.C.C. No. 9, 18th Revised Sheet No. 16, effective February 5, 1993). During the pertinent times referred to in the complaint, Complainant had a valid contract with Respondent to receive Rider 25 non-daily read seasonal transportation and storage service (Ill.C.C. No. 9, 2nd Revised Sheet No. 48.15, effective September 1, 1989) ("Rider 25"). Under Rider 25, Ni-Gas provided firm transportation service to seasonal customers. A Rider 25 transportation customer received firm transportation service up to 100% of its Maximum Daily Contract Quantity ("MDCQ"), as well as sales on demand, as needed. Because of the sales gas on demand feature, Rider 25 customers paid PGA related demand charges based upon the MDQC, regardless of monthly usage. Rider 25 further provided that **[*4]** a customer taking thereunder would be treated as a sales customer during a given billing period if it did not have any gas in its storage account and did not deliver gas into the Ni-Gas system. This resulted in seasonal customers such as Complainant paying PGA related demand charges for as long as they maintained a storage account balance, despite the fact that they were not conducting any grain drying operations. Rider 25 customers could avoid paying these charges by zeroing out their account through venting the gas or burning it in an empty grain dryer.

On January 27, 1993, Respondent filed with the Illinois Commerce Commission a supplemental statement in which it explained a proposed filing which would establish a method for the company to value customer-owned gas left in storage. Respondent's "Finaled Accounts of Transportation/Storage Customers" of its Schedule G General Terms and Conditions (Ill.C.C. No. 9, 22nd Revised Sheet No. 18, effective May 23, 1993) provides the following method to fairly compensate customers for the value of gas left in storage.

> Whenever the account of a transportation/storage company is finaled, the gas will be valued at the price reported in **[*5]** Natural Gas Week, or a similar publication if Natural Gas Week is not available, for the Chicago area spot gas times 0.90. The price used will be the most current published price prior to the day the account was finaled.

On December 15, 1993, Complainant signed Respondent's "Rider 25 Storage Gas Assignment Letter of Agreement," thereby offering to assign to Ni-Gas all claims to and rights respecting any gas left in storage when, and if, the assignment became effective. On December 27, 1993, Respondent issued Complainant a statement of account showing that Complainant's storage account had a "ending" balance of 8,057.29 therms on December 22, 1993. The December 27, 1993 bill did not show an adjustment reflecting the withdrawal or transfer of 8,057.29 therms from Complainant's storage account on or before December 22, 1993. On January 26, 1994, Respondent issued Complainant a bill showing that Complainant's storage account had a beginning balance of 0.00 therms on December 23, 1993, and that Complainant's storage account had "withdrawals" of 0.00 therms during the December 22, 1993 to January 21, 1994 billing period. The January 26, 1994 bill does not reflect an adjustment **[*6]** or other compensation for the therms assigned to Ni-Gas.

III. MOTION TO DISMISS

On February 25, 1997, Respondent filed a Motion to Dismiss Formal complaint or, in the Alternative, for an Extension of Time to File Answer to Formal Complaint ("Motion to Dismiss"). Complainant filed its response on March 13, 1997. Respondent filed its reply on March 28, 1997. The Motion to Dismiss argued that Complainant was time barred from filing this complaint. Respondent noted first that the essential relief sought by Complainant is for either rate reparation under Section 9-252 of the Act (220 ILCS 9-252) ("Section 252") or a refund under Section

9-252.1 of the Act (220 ILCS 9-252.1) ("Section 252.1"). Respondent pointed out that Section 252 requires all complaints brought under it to be filed within two years from the time the produce, commodity or service as to which the complaint is made was furnished or performed. From this, Respondent argued that the portion of the complaint seeking Section 252 relief is time barred because the services complained of here were provided and reflected on bills submitted to Complainant in December 1993 and January 1994, making the last date upon which the **[*7]** complaint could be timely filed January 1996. The complaint was filed January 29, 1997.

In terms of the portions of the complaint seeking relief under Section 252.1, Respondent noted that the Statute requires complaints filed thereunder to be filed no more than two years after the date the customer first had knowledge of an incorrect billing. Respondent argued that the facts, as alleged in the complaint, demonstrate that Complainant had knowledge of the alleged inappropriate billing upon receipt of a bill on January 26, 1994, bringing the complaint within the time restrictions of Section 252.1.

Complainant's response argued against dismissal by positing that the complaint is not subject to the limitations of either Section 252 or Section 252.1, because it seeks numerous remedies beyond refunds and must be viewed as being filed under Section 10-108 of the Act (220 ILCS 10-108) ("Section 108"), which has no temporal limitations. Complainant first argued that in addition to seeking "refunds", the complaint also seeks "reparations" if the Commission finds that Ni-Gas' rate was either excessive or unjustly discriminatory, or null and void, while other prayers for relief seek an order requiring **[*8]** Ni-Gas to cease and desist from the practices complained of therein. Complainant noted that Section 108 specifically states that "no complaint shall be dismissed because of the absence of direct damage to the complainant." (220 LCS 10-108) from which it argued that this complaint cannot be dismissed even if Complainant has no damages.

Complainant went on to argue that the time bar of Section 252.1 cannot apply to this complaint because no bill ever received by Complainant actually set out the value of the gas assigned to Ni-Gas, from which it must be inferred that Complainant had no knowledge of any relevant fact until some (unspecified) time after the billings mentioned in the complaint. Complainant also noted that Section 252.1 of the Act became effective on January 1, 1994, a date after Ni-Gas purportedly accepted Complainant's remaining storage gas, from which Complainant argued that the knowledge limitation of Section 252.1 does not apply to this matter.

In its Reply, Respondent argued that Complainants attempt to recast the complaint should be found unavailing because none of the factual allegations, even when taken in the light most favorable to Complainant, support any of **[*9]** its purported claims for relief other than refunds or reparations. In terms of its prayers for relief relating to declarations of unlawfulness or cease and desist orders, Respondent noted that the complaint does not allege that Ni-Gas continued to engage in the complained of behavior or is engaging in it today. Respondent also asserted that Complainant's claim that it is seeking "reparations" rather than "refunds" is a distinction without merit. Respondent pointed out that if Complainant's assertions relating to Section 252.1 and its inapplicability to this cause are taken on their face, Complainant has admitted its complaint is time barred because the uncontroverted facts here are that the behavior complained of took place, at the latest, in January 1994, while the complaint was filed in January 1997.

IV. PROPOSED ORDER

On April 2, 1997, a Hearing Examiner's Proposed Order was served on the parties granting Respondent's Motion to Dismiss. Exceptions and replies to the proposed order were filed. Complainant's brief on exceptions argued that Section 10-108 must be read as allowing virtually anyone to file a complaint under its auspices no matter whether the activity complained **[*10]** of is currently occurring or not. The brief on exceptions went on to argue that the facts alleged in the instant case "easily envision that a public utility's demonstrated practice (rate) of confiscating customer-owned gas indicates a current practice (rate) of confiscating such gas." Under this view, Complainant argued that it must be allowed to press this case forward and seek a finding from the Commission that past practices engaged in by the Company were illegal. The brief on exceptions went on to note that the various counts in the complaint ask for a number of forms of relief other than refunds or reparations. Complainant pointed specifically to the fact that one count

of the complaint, count five, sets forth a specific allegation that Ni-Gas took compensation from Complainant and did not report such compensation as "gross income," thereby violating Section 3-121 of the Act. Finally, Complainant argued that by not publishing the contract entered into between Ni-Gas and Chebanse Grain and Lumber Company, the Complainant failed to publish a tariff, thereby violating Sections 9-102 and 9-104 of the Act.

In its reply brief on exceptions, Northern Illinois Gas Company argued that **[*11]** Section 10-108 of the Act should not be viewed as allowing anyone who can show standing to be allowed to bring a complaint under the Public Utilities Act. In Respondent's view, the Complainant's purported reading of Section 10-108 is so overly broad as to render other provisions of the act, as well as the very concept of standing, meaningless. Respondent noted that the proposed interpretation would allow any person, anywhere, and at any time, to file a complaint against a utility for any action that took place at any point in history. The utility argued that this construction would distort the language far beyond any reasonable interpretation and renders the limitation periods in Sections 9-252 and 9-252.1 of the Act virtually meaningless. Finally, Respondent notes that the complaint under consideration here contains no facts from which one may infer standing, even under Section 10-108 of the Act for any claims other than those which are time barred by Sections 9-252 and 9-252.1 of the Act.

Following a review of the Briefs on Exceptions and Replies, the Hearing Examiner issued a ruling finding that the complaint stated a single cause of action relating to the allegation that Ni-Gas **[*12]** violated Section 9-102 of the Act by entering into a contract with Chebanse prior to filing the contract with the Commission. Following the service of this ruling, a status hearing was held on May 13, 1997. A schedule was established for the submission of briefs and replies on this issue.

V. COMMISSION CONCLUSION

In reaching its determination in this docket, the Commission must resolve three issues. First, whether the Hearing Examiner's Ruling dismissing all but one count of the complaint was correct. Second, whether that count was proven. Third, whether, in the event the remaining count was proven, Complainant is entitled to the relief requested.

After fully reviewing the complaint and subsequent pleadings, the Commission first concludes that the Hearing Examiner's Ruling on the Motion to Dismiss was correct and should be affirmed. In reaching this conclusion, the Commission has construed all of the facts in the light most favorable to the non-moving party, as it must do in reaching a decision to dismiss a docket. The first question is whether the time bar of Section 252 applies to this case. This matter involves a complaint relating to billings that took place in December **[*13]** 1993 and January 1994. The complaint prays for, inter alia, refunds or "reparations." The complaint falls within the ambit of Section 252. The complaint was not filed until January of 1997, well past the two year limitation contained in Section 252.

The next issue is whether Section 252.1 applies to this matter. While Complainant has, curiously, argued that Section 252.1 does not apply, the Commission concludes otherwise. Here, on December 15, 1993, Complainant signed a Storage Gas Assignment Letter of Agreement, offering to assign to Ni-Gas all claims and rights to any gas left in storage, when and if the agreement became effective. On December 27, 1993, Respondent issued Complainant a bill showing an "Ending Balance" in Complainant's storage account of 8,057.29 therms of gas. Section 252.1 became effective on January 1, 1994. On January 26, 1994, Respondent issued a bill to Complainant showing a "Beginning Balance" in Complainant's Storage account of zero and a monthly withdrawal of zero. As noted previously, Section 252.1 expands the opportunity to file a complaint by adding a "discovery" provision to the two-year time bar found in Section 252. It is a well settled proposition **[*14]** of law that statutes which provided additional protection to litigants are to be, where possible, construed as applicable to a controversy. Section 252.1 became effective after the December 1993 billing but before the January 1994 billing. The Commission concludes that the discovery rule of Section 252.1 is applicable to this matter.

The next issue is whether Complainant had knowledge of the complained of activity before January 29, 1995, a date two years prior to the date the instant complaint was filed. The Commission concludes that it did. The Commission

finds especially relevant the fact that Complainant saw fit to sign the Assignment Letter and remit it to Respondent. This contract, which is appended to the formal complaint as Exhibit B, places Complainant's remaining storage gas at risk of loss, at the option of Respondent. Upon placing this valuable commodity at risk, Complainant received, but apparently ignored, subsequent billings which indicate that a previous storage balance of 8,057.95 therms had been reduced to zero, despite the fact that no withdrawals had been made by Complainant. The billing also shows no adjustments made to Complainant's bill by Respondent. Under **[*15]** these circumstances, the Commission concludes that Complainant had constructive knowledge of Respondent's actions at the latest upon the receipt of the January 26, 1994 bill, and that the two year limitations period began to run at that time, expiring sometime in January, 1996.

Regarding Complainant's request for a "cease and desist order," the Commission concludes that such a request, assuming, arguendo the Commission's authority to enter an order of this type, is not supported by any allegations, since there is no allegation that Respondent is currently providing service to Complainant. Further, because actions of the Commission have no precedential effect, the Commission could not order Respondent to not engage in similar behavior in the future with any hopes that a subsequent Commission would be bound by that directive. Finally, an order of the Commission is applicable only to the parties before it and may not set a policy applicable to all utilities, which must be done through a rulemaking.

In conclusion, all of the Counts of the Complaint requesting refunds or reparations are time barred under Sections 252 and 252.1. In addition, Complainant has alleged no facts which would **[*16]** support the entry of an order finding that a current rate, charge, contract or other practice is unlawful, thereby precluding the entry of a cease and desist order. The final matter to be addressed is the allegation that Respondent violated Section 9-102 of the Act by entering into a contract with Complainant without first filing the contract for approval. We turn now to that issue.

Section 9-102 of the Act provides, in pertinent part:

> Every public utility shall file with the Commission copies of all. . . contracts. . . . with any . . . . other corporation affecting in the judgment of the Commission the cost to such public utility of any service, product or commodity.

Section 9-104 of the Act provides, in pertinent part:

> No public utility shall undertake to perform any service or provide any product or commodity unless or until the rates. . . . rules and regulations relating thereto, applicable to such service, product or commodity, have been filed and published in accordance with the provisions of this Act. . . .

Section 4-101 of the Act gives the Commission general supervisory authority over public utilities, while section 9-250 of the Act authorizes the Commission to **[*17]** review a public utilities' contracts, and to "fix" contracts that are found to be unjust, unreasonable, discriminatory or preferential. Here, Complainant has asked the Commission to fix the Agreement by rescinding it and ordering Ni-Gas to return to storage the 8,075.95 therms of gas Complainant assigned to Ni-Gas. Ni-Gas has indicated its willingness to return the gas, but has asked that the Commission order Complainant to pay it the PGA related demand charges that would have accrued during Complainant's off season, which Ni-Gas has calculated as $ 8,447.28. Ni-Gas supports its claim by arguing that without the receipt of this amount, its other sales and transportation customers would lose the contribution that Complainant would have made to the monthly PGA reconciliation. Ni-Gas argues that by virtue of Complainant's assignment of gas, sales and other transportation customers received volumes of gas at no cost, as opposed no gas if the gas had been vented or burned off by Complainant to avoid PGA related demand charges. Ni-Gas concludes that in the event the Commission orders the return of gas without the payment of charges, all remaining sales and transportation customers will **[*18]** be impacted because the cost of the gas will be included in the monthly PGA calculation without any concomitant payment of PGA charges by Complainant.

Complainant responds that an order requiring the payment of PGA related demand charges is precluded by *83 Ill.*

Adm. Code 280.100, which provides that a utility may not bill a non-residential customer for unbilled service more that two years after the service was provided. Complainant goes on to argue that the $ 8,447.28 figure is based upon pure speculation given Complainant's option of venting or burning the remaining gas to avoid the payment of the PGA related demand charges. In terms of the possible PGA impact of returning the gas, Complainant notes that, because a Rider 25 customer is neither required to transport nor maintain a balance in its storage account at any time, Ni-Gas' arguments relating to the off season contribution of such customers is not well taken. Finally, Complainant takes issue with Ni-Gas' assertion that the gas assigned was subsumed into its PGA because the PGA makes no provision for the injection of unpurchased gas into Ni-Gas' storage account or for the gas to be withdrawn and passed free of charge to customers. **[*19]** Complainant concludes that if Ni-Gas is ordered to return the gas, the gas should be withdrawn from the storage account where it currently resides and returned to Complainant, without charge.

The Commission has reviewed the arguments of the parties relating to the allegations that Ni-Gas violated Section 9-102 of the Act by entering into a contract which was neither filed with nor approved by the Commission. The Commission finds the allegations well taken and proven. Section 9-102 is mandatory. Ni-Gas' refusal to follow its dictates was wrong and is actionable. Ni-Gas' claim that the agreement was an accommodation to it Rider 25 customers is irrelevant. The more difficult question concerns the manner in which relief should be granted. Complainant has asked for rescission of the contract. Nothing in the Public Utilities Act speaks specifically to the issue of the legal effect of entering into a contract which is neither on filed nor approved. At law, a party seeking the rescission of a contract must prove that there has been substantial non-performance or a breach of the contract and that the parties can be placed in status quo (*Wilkonson v. Yovetich, (1st Dist 1993) 249 Ill.App. 3rd* **[*20]** *439, 188 Ill.Dec. 550).* A breach is deemed material or non-performance substantial where the matter, in respect to which the failure of performance occurs, is of such a nature and of such importance that the contract would not have been made without it. (*Solar v. Weinberg, 274 Ill.App. 3rd 726, 210 Ill.Dec. 903).*

Here, the Commission is convinced that, had Complainant known its assignment to Ni-Gas was to be uncompensated, it would not have made the assignment. Rather, it would have vented or burned the gas. The totality of the circumstances suggest that Complainant believe it would be compensated for the gas assigned according to the 90% of spot market pricing tariff Ni-Gas filed with the Commission. In fact, Complainant's final pleading, styled Reply to Northern Illinois Gas Company's Response to the Hearing Examiner's Ruling, suggests in a footnote that this would have been the "reasonable alternative" in the first instance. While the Commission agrees that this would be the reasonable solution, the narrow question before it is how to restore the parties to the status quo, not how to rewrite the agreement to make it reasonable. The first step at restoring the status quo is clear. **[*21]** Ni-Gas must place 8,057.95 therms of gas into Complainant's storage account, which places Complainant in the same position it was in prior to making the assignment. Getting Ni-Gas back to status quo is more troublesome. Ni-Gas is correct in noting that as long as Complainant had a storage balance, PGA related demand charges based upon Complainants MDQC were due and owing. Complainant, however, is correct in noting that eliminating the charges took no more than simply opening a valve. Under these circumstances, the Commission must reject Ni-Gas' contention that it is owed PGA related demand charges for the Complainant's entire off season. Some charges are however owed: The Commission concludes that, in order to restore both parties to the status quo, Complainant must pay to Respondent the equivalent of one months PGA related demand charges, to reflect the fact that it would have, in all likelihood incurred these charges before it decided to vent or otherwise dispose of the gas remaining in its storage account. To the extent that Ni-Gas has argued that the failure to order Complainant to pay the PGA related demand charges for the entire period will have a disparate impact upon all other **[*22]** PGA customers, the Commission notes that PGA reconciliations are accomplished in annual dockets dedicated to those issues. The Commission expresses no opinion on the manner in which the return of Complainant's gas will be treated in a PGA reconciliation.

VI. FINDINGS AND ORDERING PARAGRAPHS

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

RB-1

(1) Northern Illinois Gas Company is an Illinois corporation which provides gas service to the public in the State of Illinois, and, as such, is a public utility within the meaning of the Illinois Public Utilities Act;

(2) the Commission has jurisdiction over the parties and the subject matter of this proceeding;

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

(4) Complainant failed to bring this complaint within two years as required by Sections 9-252 and 9-252.1 of the Act, thus barring all portions of all Counts of the complaint seeking damages or refunds for excessive or unjust charges or overcharges due to billing **[*23]** errors;

(5) the complaint contains one allegation which could lead to the Commission granting the relief requested, namely that Ni-Gas erred by entering into a contract with Complainant without placing the contract on file for approval by the Commission;

(6) Respondent's motion to dismiss was properly granted in part and denied in part by the Hearing Examiner;

(7) upon its review of the Complaint, Answer and all pleadings, the Commission finds that Ni-Gas should be ordered to return 8,057.95 therms of gas to Chebanse Grain and Lumber Company, which should in turn be ordered to pay to Ni-Gas a sum equal to one month's PGA related demand charges.

IT IS THEREFORE ORDERED that the complaint filed by Chebanse Grain and Lumber Co. against Northern Illinois Gas Company on January 29, 1997, be and the same is hereby, dismissed in part and found in favor of Chebanse in part.

IT IS FURTHER ORDERED that Respondent shall return to Complainant the amount of 8,075.95 therms of gas.

IT IS FURTHER ORDERED that Complainant shall pay to Respondent an amount equal to one month's PGA related demand charges, to be determined in the same manner as those charges were determined at the time the assignment **[*24]** letter was signed.

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

By order of the Commission this 3rd day of December, 1997.

(SIGNED) DAN MILLER

Chairman

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawGas IndustryMarketing & TransportationGeneral OverviewEnergy & Utilities LawTaxationEnergy & Utilities LawTransportation & PipelinesNatural Gas Transportation