

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

NORTHERN ILLINOIS GAS COMPANY	)	
d/b/a NICOR GAS COMPANY	)	
	)	Docket No. 10-0562
Application pursuant to Section 8-104 and	)	
Section 9-201 of the Illinois Public Utilities	)	
Act for consent to and approval of an Energy	)	
Efficiency Plan and approval of Rider 30,	)	
Energy Efficiency Plan Cost Recovery and	)	
Related changes to Nicor Gas' tariffs.	)	

**THE NORTHERN ILLINOIS MUNICIPAL  
NATURAL GAS FRANCHISE CONSORTIUM'S  
VERIFIED RESPONSE TO NICOR'S MOTION TO STRIKE**

The Northern Illinois Municipal Natural Gas Franchise Consortium (the "Consortium"), by and through its attorneys, DLA Piper LLP (US), respectfully responds to Nicor's Motion to Strike, as follows:

**I.**

**INTRODUCTION**

Nicor's Motion seeks to entirely exclude the testimony submitted on behalf of the Consortium that pointedly criticizes Nicor's direct testimony and provides a specific recommendation on how to improve implementation of Nicor's Energy Efficiency Plan. There is no basis to strike the Consortium's testimony from the record, and to do so would be contrary to the Commission's Rules of Practice.

**A. The Consortium**

As explained in the Consortium's Verified Petition to Intervene, the Consortium is a joint undertaking of sixty-five (65) municipalities located in northern Illinois, organized pursuant to an Intergovernmental Agreement approved by each member municipality. The member

municipalities within the Consortium have over 1.3 million residents. Approximately fifty-five of the Consortium's member municipalities are located in whole or part within Nicor's service area.

The Consortium is addressing energy efficiency issues as part of its broader efforts to establish a model natural gas franchise agreement for use in the Nicor service territory, among other areas. The Consortium, through a Drafting Committee, has studied franchise agreement issues, including energy efficiency issues, and has created a draft Model Gas Franchise Agreement ("Model Franchise Agreement"). The Model Franchise Agreement addresses a range of items, including energy efficiency and energy savings issues.

**B. Nicor's Testimony In The Instant Proceeding Puts At Issue Nicor's Historic And Planned "Collaboration" And "Engagement"**

On September 29, 2010, Nicor initiated this proceeding by filing a Petition regarding its Energy Efficiency Plan ("EEP"), together with the written testimony of three (3) witnesses. Nicor's testimony puts at issue the level of "collaboration" in which Nicor engaged prior to filing its EEP and the way in which Nicor intends to "collaborate" going forward.

Nicor's lead witness James J. Jerozal, Jr., submitted testimony in which he testified about Nicor's EEP, including the "principles" that guided the development of Nicor's EEP and Nicor's "energy efficiency strategy." (*See, e.g.*, Nicor Gas Ex. 1.0 at 10:206-11:240.) In particular, Mr. Jerozal identified "collaboration" as one of the four guiding principles in the development of Nicor's EEP. (*Id.* at 10:210—11-218.)

Mr. Jerozal then identified "collaboration" as one of the five "components of the Nicor Gas energy efficiency strategy." (*Id.* at 11:223-27.) Mr. Jerozal went on to state that "collaboration [] will be a hallmark of the Nicor Gas EEP." (*Id.* at 11:236-37.) In addition, Mr.

Jerozal described Nicor’s strategy of “engagement with existing regional and national groups.” (*Id.* at 11:225-27; 12:248-53.) Mr. Jerozal described the strategy as one “to learn from the experience of other entities involved in energy efficiency efforts, as well as obtain information about new ideas and strategies.” (*Id.* at 12:250-51.)

Similarly, Mr. Jerozal described particular stakeholders with which Nicor collaborated as well as some of the reasons for doing so, claiming that the collaboration helped Nicor “develop a robust plan.” (*See id.* at 10:217.) Nicor was statutorily obligated to collaborate with some stakeholders – such as the Department of Commerce and Economic Opportunity (“DCEO”) – and was under no statutory obligation to collaborate with other stakeholders with which it collaborated.<sup>1</sup>

Mr. Jerozal admitted on cross-examination that although Nicor consulted with a few stakeholders as it developed its EEP (including entities that it had no statutory obligation to consult), it did not consult with the Consortium. (*See, e.g.*, Transcript at 76:4-9; 76:19-77:4; 79:21-80:2; 81:16-82:6; 83:11-84:7.) Mr. Jerozal also admitted on cross-examination that even though the statute requires Nicor to consult with DCEO, Nicor never even suggested to DECO that it should consult with the Consortium. (*See id.* at 87:6-88:9.) Mr. Jerozal also admitted that Nicor is responsible for implementing the entirety of the EEP – even the portion involving DCEO. (*See id.* 87:6-11.) Mr. Jerozal also repeatedly stated that broad-based collaboration would allow Nicor to improve its EEP, now and in the future. (*See id.* at 77:5-12; 78:20-79-5.)

Mr. Jerozal’s testimony obviously tries to highlight Nicor’s statutorily required *and non-statutorily* required “collaboration” and “engagement” as a way to impress upon the Commission

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<sup>1</sup> Mr. Jerozal admitted repeatedly on cross-examination on December 14, 2010 that Nicor was not under any statutory obligation to collaborate with certain stakeholders with whom it did

the value of collaboration to the EEP process, to try to demonstrate to the Commission that Nicor has done a good job in that respect, and to imply that it intends to collaborate voluntarily (and not just as a result of statutory requirements) with a broad base of stakeholders going forward.

**C. The Consortium Submitted Testimony Responding To Nicor’s Assertions Regarding Its Historic “Collaboration” And “Engagement” And Recommending The Commission Direct Future “Collaboration” With The Consortium**

The Consortium disagrees that Nicor should be given “credit” for having undertaken effective and appropriate collaboration and engagement with stakeholders prior to filing its EEP. On the contrary, the Consortium believes that Nicor has done a poor job of collaborating and engaging with stakeholders, and that Nicor is giving the Commission an incomplete and misleading picture of its efforts to date. Given Nicor’s historic poor performance, the Consortium believes that the Commission should take steps to encourage appropriate collaboration going forward.

Accordingly, on November 30, 2010, the Coalition intervened in the instant proceeding and filed the Direct Testimony of Martin J. Bourke. Mr. Bourke is the Chairman of the Consortium.<sup>2</sup> Mr. Bourke’s testimony explains his background and qualifications and introduces the Consortium. (See Consortium Ex. 1.0 at 1:5-5:77; Consortium Ex. 1.1). Mr. Bourke then explains the Consortium’s interest in developing a Model Franchise Agreement. (See Consortium Ex. 1.0 at 5:79-7:129.) Mr. Bourke provides specific discussion about the Model Franchise Agreement’s provisions that deal with energy efficiency issues, such as:

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collaborate on the EEP in the past and with whom it would collaborate on the EEP in the future. (See, e.g., Transcript at 76:4-9; 76:19-77:4; 79:21-80:2; 81:16-82:6; 83:11-84:7.)

<sup>2</sup> At the evidentiary hearing, Nicor’s counsel implied that Mr. Bourke had only very recently become the Consortium’s Chairman. (See Transcript at 89:22-90:2.) That implication is incorrect: although Mr. Bourke recently became the Village Administrator for the Village of

- Flexible alternative provisions regarding compensation to the municipality for Nicor’s use of the municipal right-of-way, including provisions to incentivize energy efficiency improvements and energy saving conduct by the municipality;
- Energy efficiency audit and training provisions;
- An effective most-favored-nations clause to ensure that all municipalities get the benefit of modern agreement provisions, including modern energy efficiency and savings provisions;
- Fair provisions regarding service compliance standards and the provision of information to municipalities;
- Modern requirements on use of the rights-of-way, restoration, abandonment of facilities, and public safety; and
- Provisions for real remedies for non-compliance.

(*Id.* at 7:131-8:152.)

Mr. Bourke then explains that energy efficiency items are *not* covered in the existing Nicor form franchise agreement. (*Id.* at 8:154-56.) He also points out that a very recent study by the United States Environmental Protection Agency suggests that energy efficiency items should be covered in franchise agreements, and that municipalities should consider seeking such provisions through collectively negotiation efforts; of course, this is exactly what the Consortium is doing. (*See id.* at 8:154-9:178.)

Mr. Bourke then addresses the issue of collaboration, and specifically responds to Nicor witness Mr. Jerozal’s testimony about collaboration. (*See id.* at 10:203-216.) That discussion addresses collaborative efforts both by Nicor and by DCEO and provides the Consortium’s perspective on those efforts. (*See id.* at 10:203-11:228.) Mr. Bourke points out that:

Nicor made no effort to consult with the Consortium regarding Nicor’s energy efficiency program, even though energy efficiency is a key part of the draft Model Franchise Agreement that the Consortium has been working on (as discussed above) and energy efficiency measures aimed at “local government [and]

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Bloomington, Mr. Bourke’s Chairmanship of the Consortium dates back to the Consortium’s original organization in 2009, when Mr. Bourke was the City Manager of Oakbrook Terrace.

municipal corporations” are specifically required by the section of Act mandating the Nicor energy efficiency program.

(*See id.* at 10:205-10.)

Mr. Bourke then provides a recommendation for Commission action. He testifies that given Nicor’s poor record of collaboration, the clear statutory requirement to include municipalities in the EEP, and the fact that the Consortium is working on energy efficiency issues that have a clear potential overlap with the goals of the statute and Nicor’s EEP, that it would be constructive for the Commission to direct Nicor to consult in the future in a meaningful, substantive manner on energy efficiency and related matters. (*See id.* at 11:232-248.)

## II.

### **NICOR’S MOTION TO STRIKE SHOULD BE DENIED**

Nicor moves to strike Mr. Bourke’s testimony on the basis that it is irrelevant. In particular, Nicor asserts it is irrelevant because Nicor has no statutory obligation to collaborate with the Consortium on its EEP and because the EEP statute does not refer to franchise agreements. (*See Nicor Motion to Strike at ¶¶ 5, 6.*) However, as outlined above and as demonstrated during the cross-examination of Nicor witness Mr. Jerozal, Consortium witness Mr. Bourke’s testimony is directly relevant to the issues presented in this case by Nicor itself and directly responsive to issues raised in Mr. Jerozal’s direct testimony.

#### **A. Mr. Bourke’s Testimony Is Directly Relevant And Responsive To Mr. Jerozal’s Testimony About Nicor’s “Collaboration” And “Engagement”**

Nicor itself raised the issue of its “collaboration” and “engagement” with stakeholders. As discussed above, Nicor’s lead witness James Jerozal asserted that “collaboration” was one of the guiding principles in Nicor’s development of its EEP, and that “collaboration” and

“engagement with existing regional and national groups” were two of the central components of Nicor’s energy efficiency implementation strategy. (*See* Nicor Ex. 1.0 at 10:206-11:240.)

Nicor itself decided to make the issue of its “collaboration” and “engagement” relevant to the case. It is entitled to do so.

However, if a stakeholder such as the Consortium -- representing a substantial portion of the local governments in Nicor’s service territory -- believes that Nicor’s direct testimony is incomplete or misleading, it is certainly permitted to provide responsive testimony. That is what the Consortium has done. To preclude a party from presenting such testimony would be directly contrary to the Commission’s Rules of Practice, which have the “principal goal” of assembling “a complete factual record.” (83 Ill. Admin. Code 200.25(a).)

It would be manifestly unfair for Nicor to be permitted to highlight its view about its voluntary “collaboration” and “engagement” to support approval of its EEP, but at the same time try to exclude information about Nicor’s *lack* of collaboration and engagement with an entity that represents the interests of sixty-five local governments on issues that include energy efficiency.

Additionally, the Consortium has provided testimony regarding an efficient way for Nicor to address energy efficiency issues going forward. By incorporating energy efficiency into a Model Franchise Agreement that could be used by municipalities throughout the Nicor service territory, Nicor could effectively partner with local governments to advance energy efficiency issues with residents and small businesses in the community. This would be a material improvement to Nicor’s EEP. For Nicor to object to even allowing the Commission to hear testimony about this as a potential improvement should cause the Commission to question Nicor’s sincerity when Nicor claims it wants to seek input into ways to improve implementation of its plan.

**B. Nicor Mis-States Mr. Bourke’s Testimony  
And Bases Its Motion On A False Premise**

Nicor’s Motion asserts that Mr. Bourke cited only one item in the relevant statute to support his position – (i.e., that “not less than 10% of the energy efficiency portfolio is supposed to be produced from municipalities and similar local public entities.” (Nicor Motion to Strike at ¶4.) Nicor’s assertion is simply false. In fact, Mr. Bourke also cites the statutory section mandating that Nicor itself is “responsible for overseeing the design, development, and filing of” the EE plan, regardless of whether DCEO also has some involvement. (Consortium Ex. 1.0 at 9:201-02, citing 220 ILCS 5/8-104(e).) Mr. Bourke also observes that Commission has comprehensive regulatory authority over public utilities and broad discretion to implement that authority in the public interest. (*See* Consortium Ex. 1.0 at 11:241-45) (*See also, e.g., Abbott Labs, Inc. v. Ill. Commerce Comm’n*, 289 Ill. App. 3d 705, 711, 682 N.E.2d 340, 347 (1st Dist. 1997; *Peoples Gas Light and Coke Co. v. Ill. Commerce Comm’n*, 165 Ill. App. 3d 325, 246, 520 N.E.2d 46 (1st Dist. 1987).)

Notably, not only does Nicor’s Motion to Strike ignore this additional support, but Mr. Jerozal did not take issue with either item in his Rebuttal Testimony responding to Mr. Bourke. Thus, Nicor’s witness did not take issue with the fact that Nicor has overall responsible for the entire EEP. That concession blunts Nicor’s attempt to hide behind certain limited sentences contained in section 8-104 to attempt to exempt Nicor from responsibility for preparation of its own EEP.

This is important because Nicor’s Motion to Strike is based upon the false premise that Nicor is not responsible for developing and implementing the portion of its Energy Efficiency Plan related to municipalities. The statute is clear, however, that Nicor *is* responsible. (*See* 220 ILCS 5/8-104(e).) On cross-examination, Mr. Jerozal admitted that fact – indeed, he admitted

that that requirement is “the language of the statute.” (Transcript at 87:6-11.) Accordingly, both in his silence in his rebuttal testimony and in his clear admission on cross-examination, Nicor’s witness makes it clear that Nicor is responsible for the entire EEP. Accordingly, the Commission should ignore any suggestion by Nicor in its Motion to Strike that it is not responsible for the entire EEP, and that municipal issues should be the sole domain of DCEO.

**C. The Consortium’s Perspective Is Relevant**

Nicor suggests that Mr. Bourke’s testimony should be stricken because Section 8-104 does not refer to franchise agreements. (*See* Nicor Motion to Strike at ¶ 5.) That argument should be rejected out of hand.

First, whether there is a specific reference in Section 8-104 is not the standard for reference. Nicor itself provided testimony about things that are not referenced in Section 8-104. To take just one example, Nicor provided Mr. Jerozal’s testimony about its voluntary “collaboration” and “engagement” with stakeholders in an effort to make Nicor look good in the eyes of the Commission. But obviously, that voluntary “collaboration” and “engagement” is not referenced or required by Section 8-104. Accordingly, using Nicor’s standard of limiting testimony to items literally referred to in the statute, Nicor’s own testimony should be stricken.

Second, Mr. Bourke’s testimony responds directly to Nicor’s testimony and explains clearly that there are components of the Consortium’s Model Franchise Agreement that directly deal with energy efficiency measures that could be implemented. (*See* Consortium Ex. 1.0 at 7:138-152.) The fact that those measures could be implemented through a Model Franchise Agreement does not *disqualify* them from this proceeding. As Mr. Bourke explain, the United States Environmental Protection Agency specifically found that substantive energy efficiency improvement can and should be implemented through franchise agreement. (*See id.* at 8:154-

9:178.) The fact that Nicor is apparently refusing to consider the Consortium's energy efficiency proposals just because they are in a Model Franchise Agreement is odd, at best – particularly given Nicor's lead witness's claim that Nicor should be engaging with stakeholders -- but it certainly does not provide a basis to strike Mr. Bourke's testimony.

**D. Nicor's Motion To Strike Ignores The Commission's Rules On Admissible Evidence**

As discussed above, Mr. Bourke's testimony on behalf of the Coalition is directly relevant to the instant proceeding and directly responsive to direct testimony submitted by Nicor. But even if the testimony somehow fell outside the formal definition of "relevant," it remains admissible under the Commission's Rules of Practice.

Nicor's Motion cites only to section 200.610(a) of the Rules of Practice, which refers to irrelevant evidence. (*See* Nicor Motion to Strike at ¶ 3.) However, Nicor's Motion ignores section 200.610(b) which states:

[E]vidence not admissible under such rules [used by Illinois courts] may be admitted if it is of a type commonly relied on by reasonable prudent person in the conduct of their affairs.

(83 Ill. Admin. Cost 200.610(b).)

Thus, even if Mr. Bourke's testimony is technically irrelevant -- which should be impossible given Nicor's own testimony about its "collaboration" and "engagement" -- the Commission is fully justified in admitting the testimony under section 200.610(b), and should do so. Plainly, the view of a consolidated, organized large group of municipalities such as the Consortium expressed through testimony submitted by highly experienced local government administrator such as Mr. Bourke is the type of information that a reasonable prudent person -- and the Commission -- could and should rely upon.

**III.**

**CONCLUSION**

For the reasons stated, Nicor's Motion to Strike should be denied, Mr. Bourke's Direct Testimony (Consortium Ex. 1.0-1.2) should be admitted into the record, and the Commission should grant such further relief as the Commission deems appropriate.

Dated: December 15, 2010.

Respectfully submitted,

**The Northern Illinois Municipal Natural Gas Consortium**

By: /s/Christopher J. Townsend  
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STATE OF ILLINOIS     )  
  ) SS  
COUNTY OF COOK     )

**VERIFICATION**

Christopher J. Townsend, being first duly sworn, on oath deposes and says that he is one of the attorneys for The Northern Illinois Municipal Natural Gas Consortium, that he has read the foregoing Verified Petition to Intervene, that he knows of the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

\_\_\_\_\_  
Christopher J. Townsend

Subscribed and sworn to me  
this \_\_\_\_ day of December 2010.

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