

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Central Illinois Light Company	:	
d/b/a Ameren CILCO	:	
	:	
Central Illinois Public Service Company	:	
d/b/a Ameren CIPS	:	Docket No. 10-0568
	:	
Illinois Power Company	:	
d/b/a AmerenIP	:	
	:	
Verified Petition for Approval of	:	
Integrated Electric and Natural Gas	:	
Energy Efficiency Plan	:	

STAFF’S INITIAL BRIEF ON REHEARING

Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned counsel, pursuant to Section 200.800 of the Illinois Commerce Commission’s Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Initial Brief on Rehearing in the instant proceeding.

INTRODUCTION

On January 20, 2011, the Environmental Law and Policy Center (“ELPC”) filed an Application for Rehearing (“Application”) with respect to the Illinois Commerce Commission’s (“Commission”) December 21, 2010 Final Order in Docket 10-0568 (“Final Order”). Several other requests for Rehearing were filed by intervenors and Ameren. The Commission granted Rehearing only on ELPC’s Application.

The sole issue under review in ELPC’s Application is the appropriate calculation

of Ameren's spending caps for its gas programs under Section 5/8-104(d) of the Public Utilities Act ("PUA").

ELPC argues the Final Order should be amended to require Ameren to recalculate its spending limits based on the amounts paid for gas by all retail customers without exclusion. Staff argues the Final Order is correct and that for purposes of calculating the spending caps, "amounts paid by retail customers in connection with natural gas service" should exclude Ameren's large transportation customers who do not purchase their gas from the utility, but who transport the gas or use other services of the utility. The Final Order is supported by the statute and consistent with the legislative intent as reflected in the legislative history. Therefore, the Final Order should not be modified with respect to this issue.

BACKGROUND

In addressing the calculation of savings goals and spending caps under the statute in the Final Order, the Commission held:

The Commission is persuaded by Staff's analysis and arguments that it was proper for Ameren to exclude the dollars paid to alternative gas suppliers by Ameren's large transportation customer from the computation of its gas spending limit, but it was incorrect for Ameren to exclude the volumes of gas purchases by those same transportation customers from the computation of its savings goals.

Final Order at 45.

There are two separate sections of the statute on Natural Gas Energy Efficiency Programs under the PUA that address both gas savings goals and spending limits of a utility. (220 ILCS 8/104)

Gas Savings Goals

Subsection 8-104(c) of the PUA states, in part:

(c) Natural gas utilities shall implement cost-effective energy efficiency measures to meet at least the following natural gas savings requirements, ***which shall be based upon the total amount of gas delivered to retail customers, other than the customers described in subsection (m) of this Section***, during calendar year 2009 multiplied by the applicable percentage.

(220 ILCS 5/8-104(c), emphasis added)

The subsection (m) referenced in the above statutory excerpt deals with certain customers who, if their applications are approved by the Department, are exempt from paying into and directly participating in the efficiency programs offered by the utility. Thus, aside from the subsection (m) exclusion, the Act clearly provides that the basis for computing natural gas savings requirements begins with the total amount of gas delivered to retail customers.

Spending Limits

Subsection 8-104(d) of the PUA states, in part:

(d) Notwithstanding the requirements of subsection (c) of this Section, a natural gas utility shall limit the amount of energy efficiency implemented in any 3-year reporting period established by subsection (f) of Section 8-104 of this Act, by an amount necessary to limit the estimated average increase in the ***amounts paid by retail customers in connection with natural gas service*** to no more than 2% in the applicable 3-year reporting period.

(220 ILCS 5/8-104(d), emphasis added)

The degree to which Ameren may spend ratepayer funds on its natural gas energy efficiency programs is limited by this statute. It is apparent from the above statutory language that, over the course of each three year plan, expenditures should

be limited to 2% of the “amounts paid by retail customers in connection with natural gas service.”

ARGUMENT

ELPC asserts in its Application that the two statutory sections cited above both reference “retail customers” and that the same meaning should be given to this term in both sections. (Application at 5) Staff disagrees. ELPC’s interpretation is an oversimplification of the language used in these statutory provisions and is inconsistent with legislative intent.

Staff’s view is that the computation of the natural gas plan spending limit in Section 8-104(d) should start with a definition of “amounts paid by retail customers in connection with natural gas service” that excludes amounts paid by large customers to non-certified alternative gas suppliers.

While the statute is clear that expenditures should be limited to 2% of the “amounts paid by retail customers in connection with natural gas service,” it is not clear how the “amounts paid by retail customers in connection with natural gas service” should be computed. In support of this assertion, Staff cites a portion of the legislative debate that took place on Senate Bill 1918, which was the bill that ultimately led to the inclusion of 8-104 in the PUA. In particular, pages 181-182 of the transcripts of the House debate, which took place on May 28, 2009, include the following exchange:

Reitz: “... On the gas efficiency provisions, I'd like to make sure I understand how the charges to customers will be calculated. There are some customers, such as merchant electric generators, who purchase all or part of their gas at wholesale and then transport that gas over the distribution system of the local gas utility. When the utility is calculating the charge to

customers, will the utility include the cost of the gas that is purchased by the user at wholesale?”

Flider: “No.”

Reitz: “Stated differently, does the legislation intend to cover for purposes of assessing charges, delivery service revenues and retail gas commodity purchases, but exclude wholesale gas purchases?”

Flider: “Yes.”

Reitz: “So, what is excluded is the wholesale commodity cost; the utility's cost for transportation for that wholesale commodity is included, right?”

Flider: “That’s correct, yes.”

Reitz: “And you were talking about excluding only wholesale commodity purchases; retail gas purchases from public utilities and certified alternative gas suppliers are included, right?”

Flider: “Yes.”

As the documented exchange between Representatives Reitz and Flider, above, attests, Representative Reitz sought clarification about what amounts paid by retail customers would be excluded and what amounts paid by retail customers would be included in connection with the computation of energy efficiency program charges, stating, “On the gas efficiency provisions, I'd like to make sure I understand how the charges to customers will be calculated.” In the course of the exchange, it becomes clear that the bill’s sponsor intended that the costs for this computation would **exclude** “wholesale commodity cost,” but would **include** “the utility's cost for transportation for that wholesale commodity,” along with “retail gas purchases from public utilities” and “retail gas purchases from **certified** alternative gas suppliers.”

It is a well-established principle of statutory construction that “In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse

to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress.” (*United States v. Great Northern Ry.*, 287 U.S. 144 (1932)) Explanatory legislative history is also consulted for narrowly focused explanation of the meaning of specific statutory language that a court believes is unclear.¹ In Illinois Courts, “a statute’s legislative history and debates are ‘[v]aluable construction aids in interpreting an ambiguous statute.’” (*Krohe v. City of Bloomington*, 798 N.E.2d 1211, 1214 (Ill. 2003) (quoting *Advincula v. United Blood Servs.*, 678 N.E.2d 1009, 1018 (Ill. 1996)) Further, a statute is ambiguous “when it is capable of being understood by reasonably well-informed persons in two or more different senses.” (*In re B.C.*, 176 Ill. 2d 536, 543, 680 N.E.2d 1355, 1359 (1997)) In this instance, there is no better evidence of the statutory language being ambiguous and requiring explanation than the lawmakers themselves finding it necessary to have the meaning of the terms clarified through a colloquy on the House floor. Thus, Staff finds it appropriate to rely on the exchange between Representatives Reitz and Flider to better explain the legislative intent of Section 8-104(d).

It is somewhat unfortunate that Representative Reitz, while trying to clarify which costs should be excluded, uses the term “wholesale.” The use of the term “wholesale” could lead one to think that he is not even talking about **retail** customers. However, it is clear from the surrounding sentences that this cannot be the case. It is clear from the context that the only reasonable interpretation is that “wholesale commodity cost” is being used as shorthand for the cost of gas purchased by a subset of the utility’s retail transportation customers—in particular those non-residential customers who are large

¹ See, e.g., *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 704-06 (1995) (relying on committee explanations of word “take” in Endangered Species Act)

enough that **non-certified** alternative gas suppliers may sell to them but who then use the utility to transport the gas. Pursuant to Article XIX of the PUA² and Part 551 of the Commission's rules,³ to serve "residential customers"⁴ and/or to serve "small commercial customers" (non-residential customers that use less than 5000 therms of natural gas per year⁵), an alternative gas supplier must be certified by the Commission.⁶ Serving non-residential customers that use **more** than 5000 therms per year does not require certification.⁷ As already noted, the House debate clearly establishes that gas purchases from the utility and from **certified** alternative gas suppliers are to be included in the computation of charges, leaving out "wholesale" purchases, which, in context, and by a simple process of elimination, can only mean **non-certified** alternative gas suppliers.

While ELPC argues that there is no evidence that "wholesale commodity costs" is shorthand for the cost of gas purchased by a subset of the utility's retail customers (Application at 4), the language used by the legislators references customers who purchase all or part of their gas at wholesale and then transport that gas over the distribution system of the utility that is purchased. ELPC offers no other plausible explanation of what was being discussed by the legislators.

² 220 ILCS 5/19-100, *et seq.*

³ 83 Ill. Adm. Code 551.10, *et seq.*

⁴ Pursuant to 220 ILCS 5/19-105, a "residential customer" is "a customer who receives gas utility service for household purposes distributed to a dwelling of 2 or fewer units which is billed under a residential rate or gas utility service for household purposes distributed to a dwelling unit or units which is billed under a residential rate and is registered by a separate meter for each dwelling unit."

⁵ 220 ILCS 5/19-105

⁶ See 220 ILCS 5/19-110(a) ("The provisions of this Section [requiring Commission certification] shall apply only to alternative gas suppliers serving or seeking to serve residential or small commercial customers and only to the extent such alternative gas suppliers provide services to residential or small commercial customers.")

⁷ *Id.*

According to Ameren's response to Staff Data Request RZ 1.01, there are no residential or small commercial customers in the Ameren service territory that purchase gas from Certified Alternative Gas. (AG Group Ex. 1 at 23-25) But Ameren does sell to larger transportation customers (which Staff submits are those whom Representative Reitz calls "wholesale" customers). Thus, the correct computation excludes the cost of gas sold by alternative suppliers to larger transportation customers.

**ELPC'S RELIANCE ON THE PROPOSED ORDER FROM THE PEOPLES/NORTH
SHORE DOCKET IS MISPLACED**

In addition, ELPC argues that the Proposed Order issued by the Administrative Law Judge ("ALJ") in the Peoples/North Shore energy efficiency plan docket (Docket No. 10-0564) lays out the proper analysis regarding the appropriate calculation of Ameren's spending cap for its gas programs under Section 5/8-104(d). Staff disagrees.

First, ELPC argues, in essence, that a Proposed Order should be given more weight and authority than a Final Order voted on and issued by the Commission. ELPC would urge the Commission to ignore an order it has already issued in favor of an ALJ's Proposed Order that ELPC favors. This is illogical and off base. The Final Order regarding this issue was fully laid out in the Commission Analysis and Conclusion. (Final Order at 45) The Commission found Staff's argument and rationale compelling and accepted Staff's position on this issue. As set forth above, there is a question of what is meant by the phrasing of the statutory section and the legislative history provides useful insight on the intent of the statutory provision. Obviously, if there was not some disagreement on what the language meant, there would not be two

interpretations by the Commission and the ALJ.

Second, ELPC asserts that the ALJ's Proposed Order in Docket 10-0564 "rejects" the conclusion from page 45 of the Final Order in this docket. (Application at 1) Staff disagrees with this interpretation. Staff notes that the ALJ's Proposed Order in Docket 10-0564 states: "in calculating the savings requirements, the Commission finds that Staff's calculation of the rate impact cap is consistent with Section 8-104 of the Act." (Docket 10-0564, ALJ Proposed Order, at 41) That Staff position is described elsewhere in the proposed order, in brief, as follows:

Staff's view, apparently shared by Peoples/NS, is that the computation of the natural gas plan spending limit should start with a definition of "amounts paid by retail customers in connection with natural gas service" that excludes amounts paid by large customers to non-certified alternative gas suppliers.

(Docket 10-0564, ALJ Proposed Order, at 15) Clearly, except for the names of the utilities, this is precisely the same conclusion reached by the Commission with respect to Ameren at page 45 of its Final Order in the instant docket.

Finally, ELPC asserts that the ALJ in the Peoples/North Shore Proposed Order was correct in finding that the key factor in determining the applicability of Section 8-104 is whether the customer uses the commodity or resells it. ELPC offers no basis for why this interpretation is any more correct than the Commission's interpretation made in its Final Order in this docket. There is no definition of "retail customers" for use in the context of Section 8-104(d) or even Section 8-104(c) of the PUA. The use of the language "retail customers" has to be considered within the context of the statute itself, so it is possible that more than one interpretation of who may or may not be included as a retail customer can be made. As set forth above and in Staff's Initial Brief in this docket, Staff believes the arguments it has made lead to the conclusion that large

transportation customers are excluded from the calculation of spending caps.

Staff offers no substitute language for the Final Order as it maintains the Final Order correctly reflects the language and intent of the statute to exclude large transportation customers from the calculation of spending caps.

CONCLUSION

WHEREFORE, for all the above reasons, Staff of the Illinois Commerce Commission respectfully requests that the Commission's Final Order on Rehearing reflect all of Staff's recommendations in this Initial Brief on Rehearing and not modify the Final Order.

Respectfully submitted,

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March 10, 2011

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