

**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 CITIZENS UTILITY BOARD'S RESPONSE
TO NICOR GAS COMPANY'S APPLICATION FOR REHEARING**

NOW COMES the Citizens Utility Board (“CUB”), by and through its attorneys, in response to the Application for Rehearing (“Application”) filed in this docket on June 23, 2011, by the Northern Illinois Gas Company d/b/a Nicor Gas Company (“Nicor” or “the Company”). This Response addresses one issue¹: the request by Nicor for rehearing of the Illinois Commerce Commission’s (“ICC” or the “Commission”) decision to strike Nicor’s testimony relating to the Company’s proposal to recover any revenues lost as a result of implementation of its statutorily mandated energy efficiency measures, which the Company presented as a part of its Energy Efficiency Plan (the “Plan”) and associated Rider 30, Energy Efficiency Plan Cost Recovery Rider (“Rider 30”). Nicor claims that the Commission improperly struck its evidence through application of the incorrect legal standard, and further claims that this error prevented the Commission from considering “critical evidence regarding its proposal to recover the fixed cost portion of the volumetric charges, as approved by the Commission in the 2008 Rate Case, that

¹ Though CUB takes no position on the two other arguments presented by Nicor in its Application, CUB’s decision not to address those arguments should not be interpreted as implicit acceptance of the appropriateness of those issues for rehearing.

are not received by the Company because of the energy conservation efforts of the Plan.”

Application at 3-4.

Rehearing on an issue that was the subject of an interlocutory review is barred by the Commission’s rules. 83 Ill. Admin. Code 200.520. Nicor’s request here falls squarely within that boundary—the Company’s testimony was stricken, the Company petitioned for interlocutory review, and that petition was denied. There is no further remedy on this issue. Rehearing “can serve only one constructive purpose, that is, to call the court’s attention to matters overlooked which might induce the court to change its decision.” *Illinois Cent. R.R. Co. v. Michigan Cent. R.R. Co.*, 18 Ill.App.2d 462, 499, 152 N.E.2d 627, 644 (1st Dist. 1958). The Commission did not overlook Nicor’s request. To the contrary, the Commission explicitly ruled that Nicor’s request had no place in a docket approving a Plan and Rider 30.

I. PROCEDURAL HISTORY

Nicor filed a Petition with the Commission on September 29, 2010, requesting approval of its Plan pursuant to Section 8-104 of the Public Utilities Act (“PUA”). 220 ILCS 5/8-104(f). Along with Rider 30, which would recover the costs of its Plan, Nicor proposed to include a “fixed cost recovery mechanism” that would recover what it claimed were “lost” revenues associated with the implementation of its statutory duties. Nicor Gas Petition at 4-5; Nicor Gas Ex. 3.0 at 7:166-173; Nicor Gas Ex. 3.0 at 9: 199-204. Nicor’s Plan described the “lost revenues” as “the fixed cost portion of the volumetric charges, approved by the Commission in Nicor Gas’ last rate case, Docket Number 08-0363, that are not received by the Company because of the energy conservation efforts of the Plan.” Nicor Gas Ex. 3.0 at 7:163-165.

CUB and the People of the State of Illinois (“the People”), collectively the “Consumer Advocates” in this proceeding, filed a Motion to Strike all testimony related to this request as irrelevant to Commission approval of a statutory energy efficiency plan governed by Section 8-104. Motion to Strike at 1. The motion was supported by the Staff of the Illinois Commerce Commission (“Staff”) and ultimately granted by the Administrative Law Judge (“ALJ”) on November 12, 2010. ALJ Decision of November 12, 2010. Nicor filed an Emergency Petition for Interlocutory Review and Request for Expedited Decision on November 15, 2010. Staff and the Consumer Advocates filed responses opposing Nicor’s Emergency Petition on November 18, 2010, incorporating the same arguments set forth in the Consumer Advocates’ Motion to Strike and Staff’s supportive response to that motion. The Commission properly denied Nicor’s Emergency Petition on December 2, 2010 without comment and Nicor did not file a notice of appeal. Commission Bench Meeting of December 2, 2010.

CUB incorporates by reference the same arguments here that were set forth in the Motion to Strike and Deny the Request for an Expedited Schedule of the Citizens Utility Board and the People of the State of Illinois.

II. ARGUMENT

This is the third time Nicor has presented this Commission with the same arguments on the issue of “lost revenues” and fixed cost recovery. The Commission first heard this argument three years ago when it specifically rejected Nicor’s request to recover any reduction in revenues due to conservation and energy efficiency through a rider. ICC Docket No. 08-0363, Order of March 25, 2009, at 156 (“2009 Nicor Rate Order”). In that case, the Company argued it was being penalized for offering energy efficiency measures: “Nicor’s current rate design penalizes

it financially when consumers conserve energy, even though conservation is in the public interest and in the best interest of ratepayers.” *Id.* at 140-141, *citing* Nicor Ex. 12.0 at 22, 24-25.

Therefore, the Company claimed it was entitled to recoup reductions in customer usage due to conservation, weather and economic conditions in order to fully recover its fixed costs. *Id.* at 139. The Commission correctly rejected Nicor’s proposal, and instead approved an “alternative rate structure” which significantly increased Nicor’s fixed customer charge to recover 80% of the Company’s fixed costs, with the remaining costs being recovered in variable charges. *Id.* at 137. The Commission expressed particular concern in that docket “that recovery of lost revenue, without more, in a rider, could be illegal.” *Id.* at 156, *citing* *A. Finkl & Sons Co. v. Ill. Commerce Comm.*, 250 Ill. App. 3d 317, 620 N.E.2d 1141 (1st Dist. 1993).

The second time Nicor proposed cost recovery for its “lost revenues” was when the Company filed its Plan for approval pursuant to PUA Section 8-104 with the Commission in September 2010. In its Petition and Plan, the Company included a request to recover “lost revenues” through Rider 30. The recovery of “lost revenues” though a cost recovery mechanism, however, is not permitted under Section 8-104. 220 ILCS 5/8-104(f). The proper avenue for Nicor to recover its claimed “lost revenues” would have been through Section 9-201 of the PUA. This is the express provision of the PUA which gives utilities the opportunity to file a general request to increase its delivery service rates if they feel they are unable to recover their costs. 220 ILCS 5/9-201(c). Nicor did not explain or argue in its Petition or Plan why it should be entitled to recover its “lost revenues” when the purpose of filing a Plan in this docket was to comply with Section 8-104. Petition at 2.

The ALJ rejected Nicor’s second attempt at recovering “lost revenues” though a rider by granting the Consumer Advocates’ Motion to Strike. ALJ Decision of November 12, 2010.

When Nicor petitioned for interlocutory review of the decision, the ALJ's Memorandum to the Commission stated that the Motion to Strike was "properly granted" and reiterated that "Section 8-104 of the [PUA] does not provide for a fixed cost recovery mechanism as part of the Energy Efficiency Plan filings required by the Act." ALJ Memorandum of November 19, 2010 at 7.

The ALJ directed the Commission's attention to three subsections, (a), (e), and (f), to support his conclusion that the PUA "allows for the recovery of expenses for those measures and programs designed to increase energy efficiency **only**." *Id.* (emphasis added). The ALJ concluded that Section 9-201 would be the proper place for Nicor to pursue a fixed cost recovery mechanism:

The issue of recovery of fixed costs related to delivery services and for lost revenue that are a result of energy efficiency measures, and which are not actual energy efficiency measures, are not relevant. Nicor's evidence regarding a fixed cost recovery mechanism was properly stricken. The relief which Nicor seeks is more appropriately sought under Section 9-201 of the Act.

Id. at 7-8.

Nicor's attempt to litigate this issue for the third time should be rejected. Nothing has happened to change the facts on which the Commission relied to deny the Company's first two requests. Nicor makes three claims in its Application for Rehearing: 1) evidence related to "lost revenues" was excluded in error, 2) that exclusion prevented the Commission from determining "with a full and complete record" whether a rider to recover those revenues was appropriate, and 3) the Commission did not apply the correct legal standard "for dismissing the Company's claim or obtaining summary judgment and, thereby, dispos[ing] of a substantive claim on grounds that are procedurally flawed." Application at 2. Nowhere in its Application does Nicor offer what it believes to be the proper legal standard, or why striking testimony amounts to dismissal or summary judgment. As for Nicor's first two claims, each is barred from being reheard by the Commission's rules. The administrative rules state:

On review of a Hearing Examiner's ruling, the Commission may affirm or reverse the ruling in whole or in part, and may take any other just and reasonable action with respect to the ruling, such as declining to act on an interlocutory basis. Petitions to rehear or reconsider Commission action taken under this Section shall not be entertained by the Commission and are not allowed under this Part, except as to persons who have been denied leave to intervene by such action.

83 Ill. Admin. Code 200.520(b). In this case, the Commission properly "declined to act on an interlocutory basis" on December 2, 2010, without comment. 83 Ill. Admin. Code 200.520(b). Opportunities for Commission review of the issue of "lost revenues" ended there.

None of the other utilities requested Commission approval for any "lost" revenues or "fixed cost recovery" associated with the implementation of statutorily mandated energy efficiency plans. See ICC Docket 10-0564, *North Shore Gas Company* ("North Shore") and *The Peoples Gas Light and Coke Company* ("Peoples"); Docket 10-0568 *Central Illinois Light Company d/b/a Ameren CILCO*, *Central Illinois Public Service Company d/b/a AmerenCIPS Illinois Power Company d/b/a AmerenIP* ("Ameren Illinois"); Docket 10-0570, *Commonwealth Edison Company* ("ComEd"). For example, in its Final Order approving the Ameren Illinois Company's Plan, the Commission found the Company's cost recovery proposal to be "reasonable, [and] consistent with the statutory requirements." ICC Docket 10-0568, Final Order at 92.

The Consumer Advocates' Motion to Strike was properly granted because the Company's references to "lost revenues" were not relevant to the Commission's approval of its Plan under Section 8-104. The only times the Commission is permitted to reconsider its denials of interlocutory review is if a person has "been denied leave to intervene." 83 Ill. Admin. Code 200.520(b). That is clearly not the situation here. Nicor's petition for interlocutory review was

properly considered by the Commission in December of 2010, at which time the Commission denied their request. Any further consideration by the Commission is improper.

III. CONCLUSION

WHEREFORE, CUB respectfully requests that the Commission deny Nicor's Application for Rehearing on the issue of the fixed cost recovery.

Dated: July 5, 2011

Respectfully submitted,



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