

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

**Northern Illinois Gas Company** :  
**d/b/a Nicor Gas Company** : **10-0567**  
:  
**Petition Pursuant to Rider 29 of Schedule** :  
**of Rates for Gas Service to Initiate a** :  
**Proceeding to Determine the Accuracy of** :  
**the Rider 29 Reconciliation Statement** :

**PROPOSED ORDER**

By the Commission:

**I. Procedural History**

The Illinois Commerce Commission (the "Commission") approved Northern Illinois Gas Company d/b/a Nicor Gas Company's ("Nicor Gas" or the "Company") Rider 29 – Energy Efficiency Plan ("Rider 29" or "Rider EEP") in Docket No. 08-0363, Nicor Gas' last rate case. Docket No. 08-0363, Order at 156-59 (Mar. 25, 2009 and Oct. 7, 2009, collectively "Rate Case Order"). Rider 29 requires Nicor Gas to file annually, no later than September 30 each year, a Rider 29 Statement of Activity for the Previous Plan Period and a report showing the determination of the Reconciliation Adjustment to be in effect during the Reconciliation. Ill. C.C. No. 16- Gas, Second Revised Sheet No. 82.2, Section C. Accordingly, on September 30, 2010, Nicor Gas filed a petition with the Commission seeking to initiate this docket for the annual reconciliation to determine the accuracy of Nicor Gas' Rider 29 Statement of Activity. The petition covers Nicor Gas' reconciliation of revenues and EEP Statement of Activity for the Plan Period of June 1, 2009 through June 30, 2010. In support of the petition, Nicor Gas filed the direct testimony of Mr. Donald F. Martino, Senior Rate Analyst at Nicor Gas, and Mr. James J. Jerozal, Jr., General Manager, Energy Efficiency at Nicor Gas.

Staff of the Commission ("Staff") entered an appearance. Petitions to intervene were filed by the Citizens Utility Board ("CUB"), the Illinois Attorney General (the "AG"), and the Environmental Law and Policy Center ("ELPC"). The petitions to intervene were granted by the Administrative Law Judge ("ALJ").

Pursuant to due notice as required by law and by the rules and regulations of the Commission, prehearing conferences were held in this matter before a duly-authorized ALJ of the Commission at its offices in Chicago on October 26, 2010, December 16, 2010, May 17, 2011 and August 3, 2011.

Staff and CUB/AG filed direct testimony on April 14, 2011. Staff filed the direct testimony of Ms. Burma C. Jones, Accountant, Accounting Department, Financial Analysis Division at the Commission. CUB/AG jointly filed the direct testimony of Ms. Rebecca Devens, the Environmental Policy and Outreach Associate at CUB.

On July 28, 2011, Nicor Gas filed the rebuttal testimony of Mr. Martino and Mr. Jerozal. On September 7, 2011, Staff filed the rebuttal testimony of Ms. Jones and CUB/AG filed the rebuttal testimony of Ms. Devens. Nicor Gas filed the surrebuttal testimony of Mr. Martino and Mr. Jerozal on September 21, 2011.

On November 10, 2011, Staff filed a Motion for Leave to File Supplemental Testimony Instantly, which the ALJ granted on November 18, 2011. Nicor Gas filed the supplemental testimony of Mr. Martino on December 1, 2011.

Pursuant to due notice as required by law and by the rules and regulations of the Commission, a final hearing was held in this matter before a duly-authorized ALJ of the Commission at its offices in Chicago on December 13, 2011. The parties agreed to waive cross examination of witnesses and submitted all testimony by affidavits filed by December 13, 2011. The record was marked "Heard and Taken" on December 14, 2011.

The parties filed their respective Initial Briefs ("IB") on January 19, 2012 and Reply Briefs ("RB") and Draft Orders on February 16, 2012.

The parties have agreed on all but three issues, as outlined below.

## **II. Background and Uncontested Issues**

Each year, Rider 29 requires Nicor Gas to file charges (called the "Effective Component") with the Commission. The Effective Component is a monthly per-customer charge based on the Annual Plan Budget as approved by Order of the Commission. Rider 29 is applicable to Rate 1 – Residential Service, Rate 4 – General Service and Rate 74 – General Transportation Service. There is a separate Effective Component for Rate 1 – Residential Service and Rates 4 and 74 are combined and categorized as Non-Residential Service. In accordance with Section C of Rider 29, Nicor Gas seeks a reconciliation of Energy Efficiency Plan Revenues ("EEPR") collected, compared with the Energy Efficiency Plan Expenses ("EEPE") incurred, as recorded on the books of the Company, for the period of June 1, 2009 through June 30, 2010. Section C of Rider 29 requires Nicor Gas to file annually, no later than September 30, a statement of activity and a report showing the determination of reconciliation adjustments under the rider and the reconciliation adjustment that will be in effect during the nine-month period beginning October 1. Nicor Gas witness Mr. Martino addressed the determination of reconciliation adjustments in testimony, and Nicor Gas witness Mr. Jerozal testified about the EEP statement of activity.

As to each of the uncontested issues below, the Commission finds that Nicor Gas complied fully with its obligations under Rider 29.

### **A. Plan Period**

Rider 29 requires a reconciliation of revenues for each Plan Period, which is typically the twelve-month period beginning July 1; however, the Plan Period has been extended by one month because the first adjustment under Rider 29 began in June 2009. Accordingly, the Plan Period for this docket is June 1, 2009 through June 30, 2010.

Additionally, the Nicor Gas EEP Advisory Board requested the Company seek Commission approval to modify the Plan Period from a calendar year to a heating season year. The approved revisions were effective January 1, 2010. Thus, while the Plan Period would normally include only one Effective Component filing for residential service and one for non-residential service, here, the first Plan Period includes a filing that established Effective Components for the period June 2009 through December 2009, and a second filing of the Effective Components for the period January 2010 through June 2010.

### **B. Statement of Activity**

Section C of Rider 29 states that “[c]ommencing in 2010, the Company shall also file annually with the Commission, no later than September 30, a Rider 29 statement of activity, including program descriptions, for the Previous Plan Period and a report showing the determination of the Reconciliation Adjustment to be in effect during the Reconciliation Period.” Ill.C.C. No. 16-Gas, Second Revised Sheet No. 82.2, Section C.

Mr. Jerozal presented Nicor Gas Exhibit 2.1, the Rider 29 Statement of Activity for the first Plan Period. The Statement of Activity contains a description of the EEP, including: (1) the programs implemented; (2) the program administration; (3) expenses and measures; and (4) performance metrics. According to the Statement of Activity, the programs actually launched to customers to achieve energy efficiency goals include a residential prescriptive program, a home retrofit assessment and install program, a multi-family program, a business prescriptive program and a custom business program. No other party presented testimony regarding the Statement of Activity.

### **C. Statement of Reconciliation Adjustments**

Rider 29 calls for Nicor Gas to submit a report showing the reconciliation adjustment (“RA”). Mr. Martino presented Nicor Gas Exhibit 1.1, which is the report showing the determination of each RA in effect for the nine-month period beginning October 1, 2010 and ending June 30, 2011, with the supporting documentation of the RA components that applied for each month of the nine-month period (collectively, the “Statement”). Page 2 of the Statement demonstrates how Nicor Gas calculated the RA for Residential Service – Rate 1 and Non-Residential services, collectively Rates 4 and 74. For each of these rates, the following information was included in the RA calculations: (1) the Carry Over Budget Amount; (2) the Total Reconciliation Adjustment dollar amounts, including Carry Over amount and Interest; and (3) the monthly per-customer RA.

#### **D. Accuracy of Accounting**

There is no dispute over the accuracy of Nicor Gas' accounting for its costs and revenues under Rider 29 and the RAs. Staff witness Burma Jones recommends that the Commission accept the Rider 29 reconciliation, except for two disallowances she proposes, which are described in the contested issues below.

Although not accounted for in her direct testimony, on rebuttal Ms. Jones agreed with Nicor Gas that Section B of Rider 29 requires the determination of the reconciliation adjustment to include a factor *i* which represents the interest rate established by the Commission and in effect when each adjustment under this section is calculated.

#### **E. The Advisory Board**

In the Rate Case Order, the Commission required that Nicor Gas establish an Advisory Board to determine which energy efficiency programs would best serve Nicor Gas' customers, and begin setting up such programs. Rate Case Order at 162-63. Established in accordance with the Rate Case Order, Efficiency Programs, Inc. ("EPI" or the "Advisory Board") is a not-for-profit organization created and operated to serve as the Advisory Board overseeing the development of energy efficiency programs in Nicor Gas' service territory. The Advisory Board consists of six voting members who are currently representatives from the Natural Resources Defense Council ("NRDC"), CUB, the North American Insulation Manufacturers Association ("NAIMA"), the AG, Commonwealth Edison Company ("ComEd"), and Nicor Gas. Staff is a non-voting member of the Advisory Board.

### **III. Contested Issues**

Nicor Gas calculated \$1,646,824 as being returnable to Rate 1 – Residential Service customers over the nine-month period starting October 1, 2010, resulting in a credit of 9 cents to each customer per month. Nicor Gas also calculated \$609,947 as being returnable to Rates 4 and 74 – Non-Residential Service customers over the nine-month period starting October 1, 2010, resulting in a credit of 35 cents to such customers per month.

As reflected above, there is no dispute over the accuracy of Nicor Gas' accounting for its costs and revenues under Rider 29 and the RAs. However, Staff witness Burma Jones proposes two disallowances to the EEPE relating to incentive compensation and wages and benefits. Additionally, AG/CUB witness Rebecca Devens recommends a disallowance to the EEPE relating to certain costs paid to outside consultants working on the EEP.

#### **A. Employee Wages and Benefits**

##### **1. Staff Position**

Staff proposes adjustments to disallow incentive compensation costs and certain wage and benefit costs included in the Company's Energy Efficiency Plan ("EEP")

expenses. Staff contends that these costs were provided for in base rates, moreover the incentive compensation costs are not based on benefits to customers in the context of energy efficiency. Because there is no nexus between the incentive compensation costs and the EEP, they should not be recovered through Rider 29.

Although the Company claims that the wage and benefit costs that Staff proposes to disallow represent new costs incurred by Nicor as a result of establishing its new EEP department, there is no record evidence that supports this position and the Company's audit report does not bolster this claim. Nicor's proposal in this docket results in a double recovery of employee wages and benefits - once through already existing employee costs built into base rates, and again through Rider 29.

The Company posits that the wage and benefit costs that Staff proposes to disallow represent entirely new costs incurred by Nicor as a result of establishing and implementing its EEP. (Nicor Gas Ex. 5.0, p. 2.) Staff disagrees. Nicor Gas' newly formed Energy Efficiency Department is staffed by two individuals who were transferred from other departments within the Company. The wages and benefits for the transferees were included in the test period costs on which base rates were set in the Company's last rate proceeding, Docket No. 08-0363. One of the vacated positions was filled with a new hire and one was filled through a reorganization of existing employees. The Company incurs no additional expense related to the transferred employee whose position was filled through a reorganization of existing employees, since no new employee was hired to fill that position. The Company continues to recover the already existing employee costs built into base rates. (Staff Ex. 1.0, p. 3.) All else being equal, if allowed to recover the costs at issue through Rider 29, the Company will recover the costs twice – once through base rates and once through Rider 29 – until base rates are determined in the next rate proceeding; i.e., Nicor is being made whole for the wages and benefits at issue apart from Rider 29. (Staff Ex. 3.0, p. 3.)

The Company references the internal audit performed per Section F of Rider 29 to bolster its claim that it is not recovering the wages and benefits at issue through base rates and, therefore, should be allowed to recover the costs through Rider 29. (Nicor Gas Ex. 3.0, p. 4.) Staff reviewed the workpapers for the internal audit and found nothing to indicate that any consideration was given to whether any of the costs incurred by or assigned to the Energy Efficiency Department are recovered in base rates. (Staff Ex. 3.0, p. 2.) The internal audit tests were simply designed to determine that costs identified as energy efficiency were recorded to the activity code specifically for Rider 29 and that the activity code was not used to accumulate costs for other tariffs.

## **2. Nicor Gas Position**

Nicor Gas argues that the Commission should reject Staff's proposed wages and benefits disallowance for several reasons. First, Nicor Gas states that it has demonstrated that these costs were prudently incurred and reasonable, and that no party disputes that the costs were prudently incurred, reasonable and necessary, or that

they were actually incurred by Nicor Gas related to the administration of the EEP for the first plan year. Accordingly, the costs qualify as “EEP Expenses” under Rider 29 and are recoverable under the provisions of the rider.

Second, the Company asserts that Staff’s disallowance incorrectly relies on the assumption that the disputed sum is already being recovered through base rates. In support of this statement, the Company argues that Staff presented no evidence in support of this assumption because no evidence exists to support such a claim. Instead, Staff argues that half of the wages and benefits of the two employees who were dedicated to the administration of Rider 29 during the first plan year are being “recovered through base rates” because overall only one “incremental” employee was hired since the last general rate case to handle the former job responsibilities of those two employees, who were both employees of Nicor Gas at the time of its last general rate case with different job responsibilities.

Nicor Gas further argues that Staff’s position is inconsistent with general ratemaking principles. Unlike certain riders, base rates established in a general rate case do not track and recover actual costs incurred by Nicor Gas in future periods. Nor do they assure Nicor Gas will earn any particular rate of return in any year or be able to recover any specific actual expenses incurred in any year.

Nicor Gas explained that its current base rates were established using a forecasted 2009 test year with financials that did not include any expenses related to the Energy Efficiency Department, including the wages and benefits for that department. The wages and benefits associated with employees in the Energy Efficiency Department, and as to which recovery is at issue here, represent entirely new costs that Nicor Gas incurred as a result of establishing and implementing its EEP. The Company states that Staff acknowledged this point when it conceded that approval of the cost of Mr. Jerozal’s salary “in allowable Rider 29 expenses.” The only distinction Ms. Jones draws between Mr. Jerozal and the other employee in the Energy Efficiency Department is that Nicor Gas did not fill the other employee’s former position with another employee when he transferred to the Energy Efficiency Department, but another employee was hired for Mr. Jerozal’s position. This is an artificial distinction because both employees began working solely on the EEP after their transfer to that department, and their former activities are entirely performed by other Nicor Gas personnel or have been discontinued.

Finally, Nicor Gas states that it presented evidence demonstrating that these were new costs, specifically related to the administration of the EEP. Nicor Gas pointed to Nicor Gas Exhibit 3.1, which is the internal audit report prepared by the Company pursuant to Section F of Rider 29. One of the tests to be conducted as part of the audit is whether the costs being recovered under the rider are not otherwise being recovered through other existing, Commission-approved tariff mechanisms. Nicor Gas conducted the required internal audit and the final audit report found that the costs being recovered through Rider 29 for the first plan year are not being recovered through other existing, Commission-approved tariffs. Furthermore, the audit provides additional support for the conclusion that Nicor Gas’ EEP employees worked solely on EEP as the auditors

specifically examined whether Rider 29 EEP charges or credits are being identified and recorded properly for calculating rates and the reconciliation. The audit report was filed with Staff on January 26, 2011 and no party contested its conclusions.

### **3. Commission Analysis and Conclusion**

Staff contends that Nicor Gas' newly formed Energy Efficiency Department is staffed by two individuals who were transferred from other departments within the Company. The wages and benefits for the transferees were included in the test period costs on which base rates were set in the Company's last rate proceeding, Docket No. 08-0363. One of the vacated positions was filled with a new hire and one was filled through a reorganization of existing employees. The Company incurs no additional expense related to the transferred employee whose position was filled through a reorganization because no employee was hired to fill that position. The Company continues to recover the already existing employee costs built into base rates.

The Company asserts that this is not true but it fails to provide compelling proof to the contrary. The evidence demonstrates that the subject wages and benefits costs were wages were part of base rates and that no new expense was incurred by the transfer of an employee whose previous responsibilities were absorbed by the existing workforce. Staff reviewed the workpapers for the internal audit provided by the Company and found nothing to indicate that any consideration was given to whether any of the costs incurred by or assigned to the Energy Efficiency Department are recovered in base rates. Accordingly, the Commission rejects Nicor Gas' recovery through Rider 29 of the contested \$17,936 in wages and benefits related to the administration of the EEP.

#### **B. Incentive Compensation**

##### **1. Staff Position**

The incentive compensation costs the Company seeks to recover through Rider 29 are associated with the incentive compensation plan that the Commission approved in the Company's last general rate case, Docket No. 08-0363, and are already provided for in base rates. Just because the Company allocates a portion of the incentive compensation earned by all eligible employees to the EEP department does not make those costs automatically eligible for recovery through Rider 29. In addition to already being provided for in base rates, the incentive compensation costs are not based on benefits to customers in the context of energy efficiency and, thus, should not be recovered through Rider 29, which is the recovery mechanism for costs specific to the EEP.

The Company provided no evidence that the incentive compensation claimed in this reconciliation period has any nexus to the EEP, a requirement for recovery under Rider 29. To the contrary, the Company has stated that incentive compensation plans currently in effect for Nicor Gas are not applicable to EEP employees. This position is reinforced by the fact that the Company established no incentive goals specific to Rider

29 performance metrics. Presumably, without relevant goals by which to measure an EEP employee's performance, there would be no incentive compensation awards that qualify as an EEP expense. Staff recommends that the Commission disallow such costs because they have no nexus to the EEP and are already provided for in base rates

## **2. Nicor Gas Position**

Nicor Gas argues that the Commission should reject Staff's proposed incentive compensation disallowance for several reasons. Similar to the wages and benefits adjustment, Nicor Gas states that it has demonstrated that this was a prudent and reasonable cost that Nicor Gas incurred related to the administration of the EEP for the first plan year. As such, those costs qualify as "EEP Expenses" and are recoverable under Rider 29.

The Company asserts that disallowing this expense would be inconsistent with Nicor Gas' current, Commission-approved incentive compensation plan, which is set forth in the Rate Case Order. The Company states that in the 2008 Rate Case, the Commission approved its incentive compensation plan, which applies to all management employees, excluding executive management because it is sufficiently based on customer performance metrics. Rate Case Order at p. 25. Eligible management employees participate in the plan without specifically demonstrating their department's relationship to specific customer performance metrics serving as the basis for the plan. Nicor Gas asserts the EEP incentive compensation was awarded squarely within these standards. Nicor Gas IB at 9. EEP programs under Rider 29 by their very nature are intended to reduce customers' energy consumption through the implementation of conservation measures, heightened awareness, and/or the installation of more energy efficient equipment.

The Company further states that the Commission has not required Nicor Gas to establish performance metrics specific to Rider 29, which would nonetheless be unreasonable given the short duration of Rider 29 as an approved pilot. The Commission approved Rider 29 as a 4-year pilot program and did not include specific therm savings goals, nor did it have any formal performance metrics. At the time the Commission approved the Company's Rider 29 proposal, legislation was already pending that would supersede Rider 29; that legislation, now in effect, requires gas utilities to implement energy efficiency programs with significantly higher spending requirements. The Company argues that the fact it agreed to implement a separate incentive compensation plan with metrics specific to the success of a future energy efficiency plan – now the Company's Commission-approved Rider 30 – is irrelevant to the determination of whether Rider 29 costs are prudent, reasonable and recoverable.

Nicor Gas also disputes Staff's argument that these Rider 29 EEP expenses are being recovered from base rates. All expenses related to Rider 29 were excluded from Nicor Gas' current base rates when they were established in accordance with the Rate Case Order. In particular, the Rate Case Order approved a specific revenue requirement, excluding any costs associated with Rider 29 expenses, inclusive of incentive compensation. Nicor Gas states that because no Rider 29 expenses were

included in base rates, Staff is incorrect in arguing that there would be double recovery under Nicor Gas' proposal. Nicor Gas IB at 10.

### **3. Commission Analysis and Conclusion**

The Company provided no evidence that the incentive compensation claimed in this reconciliation period has any nexus to the EEP, a requirement for recovery under Rider 29. To the contrary, the Company has stated that incentive compensation plans currently in effect for Nicor Gas are not applicable to EEP employees. The Company established no incentive goals specific to Rider 29 performance metrics. Without relevant goals by which to measure an EEP employee's performance, there would be no incentive compensation awards that qualify as an EEP expense. For these reasons, the Commission finds that the \$520 in incentive compensation costs related to the administration of Rider 29 during the first plan year are not recoverable.

#### **C. Consultant Expenses**

##### **1. CUB/AG Position**

The Commission structured the functioning of the Board so that the Board would have oversight on expenditures during 2009 so that "in the beginning of the program there is less risk of imprudent or malfeasant expenditures." The Commission further specified that after January 1, 2010, the Board would "act solely in an advisory capacity." *Id.*

If the Commission expected the Board to be "solely" advisory in 2010, it is clear the Commission intended a different role for the Board in 2009. The Final Order makes clear that the Commission intended the Board to act in a manner that would decrease the risk of imprudent or malfeasant expenditures. In creating the Board, the Commission specifically contrasted the Board's role in 2009 with that of the advisory boards that participate in the electric utilities' energy efficiency dockets. Those boards "merely advise" and the Commission stated that if the Board in this case were to do the same, this would "delay implementation until the winter heating season of 2010. Such a delay compromises the efficacy of Nicor's program."

In addition, the testimony of Nicor witness Nichols, which served as the basis for the approved efficiency program, specifically stated:

...the Advisory Board's voting procedures would not give any one entity the ability, acting alone, to approve or reject any matter coming before it. That is, no single member, including the Nicor Gas representative, could determine how funds are spent.

Nicor Gas Ex. 13.0 at 7, ICC Docket No. 08-0363. In summarizing the position of Nicor in the Docket, the Commission Order also noted that "[a]ccording to Nicor, its proposed Energy Efficiency Program is designed to place the decisions regarding what portfolio of programs would best serve Nicor's customers and service territory under the control of

a qualified, experienced and independent board.” ICC Docket No. 08-0363, Final Order at 160.

The Commission, relying on the Nicor proposal, thus clearly intended the Board to have financial oversight of program expense during 2009, and the Board’s oversight must be respected. Otherwise, the Commission’s intent in creating this Board would be thwarted if, as Nicor suggests, expenditures that the Board did not approve for recovery were allowed for recovery anyway.

**a) The Expense Should Be Disallowed Because It Was Not Approved By The Board.**

The issue in this case is whether the Commission gave the Board the authority to approve expenses for recovery. If the Commission did not give the Board such authority, then the fact that the Board did not approve the RFP expenses would have no bearing on whether Nicor can recover them. However, the Commission did give the Board such authority, and the fact that the Board did not approve the RFP expenses bars Nicor from recovering those expenses.

Mr. Jerozal spends much of his testimony arguing that the RFP expenditures were reasonable and prudent. See Nicor Ex. 4.0 and 6.0. The facts and the Commission’s establishment of the Advisory Board function, however, argue the contrary. In creating the Board, the Commission showed a concern that the program not be delayed until the winter season of 2010, but rather that the program be implemented in time for the winter season of 2009. Final Order at 162, ICC Docket No. 08-0363. KO and Bass were purportedly brought in to help design the EEP program, but for various reasons, the program did not become available to customers until May 1, 2010, well after the heating season of 2009.

Also, the manner in which the expenses were billed and reported was questionable. The Board approved Ms. O’Toole of KO’s services as Board Facilitator. KO billed for that expense as well as RFP Consultant expenses, which were actually payable to Bass. KO Solutions passed on \$61,700 of Bass’s expenses, but then Bass also billed \$8,800 of its own expenses, resulting in a disallowance of \$70,500. This is based on AG 1.2 Exhibit 1. KO billed indiscriminately for the two services Board Facilitator and RFP Consultant Expenses. It is difficult to determine exactly which of their charges on BCJ 1.02, which are included in Nicor Gas Ex. 1.1 page 3 columns C and D, were for approved “Board Facilitator” expenses and which were for rejected “RFP Consultant” expenses. Fundamentally though, it’s clear that the Board never approved KO Solutions to bill for RFP services even after careful review and discussion in multiple board meetings. The Board was given the authority, as the ICC intended to do so in its Final Order, to oversee the program development and its expenses. Therefore, the entire amounts billed by KO Solutions and Bass and Company, totaling \$108,375, are questionable.

**b) The Board Purposefully Denied The Expenses.**

On November 3, 2009, the Board approved the entirety of the 2009 budget, except for the RFP Consultant Expenses. Then on November 18, 2009, Nicor moved for consideration of the RFP expenses, and the vote on the motion was tied. NAIMA was

not present at the vote, ComEd and Nicor voted to approve the expense, CUB and AG voted against the motion, and the NRDC abstained from voting. Therefore the motion did not pass.

Nicor argues that 1) the costs were neither accepted nor rejected by the Board, and 2) that the Board's approval is not necessary for costs to be recovered. Nicor Gas Ex. 4.0 at 2 and 8. This is incorrect.

If the motion to approve the costs failed to pass, then the costs were rejected by the Board. When the Board approved the entirety of the 2009 budget, it specifically excluded the RFP expenses and held the matter for a later date. This shows a purposeful decision by the Board not to approve the RFP expenses when it approved the rest of the budget.

When the matter came up again at the November 18, 2009 meeting, the Board rejected the motion to approve the expenses when it, as a whole, did not pass the motion. That the vote was close is irrelevant and does not indicate that the Board did not reject the motion. The Board acts as a whole. Its individual members do not have the authority to make decisions for the Board. Their only authority is to vote and only when a majority vote is reached does the Board make decisions. When a majority vote to approve the motion was not reached, the Board as a whole rejected the motion by not passing it. Therefore, Nicor's request for approval of these expenses was denied twice by the program's governing Board.

## **2. Nicor Gas Position**

### **a) The Commission-Approved Advisory Board**

As an initial matter, Nicor Gas points out that in approving the management structure of the Advisory Board in the Rate Case Order, the Commission balanced competing proposals and ultimately settled on a compromise approach. Rate Case Order at 162-63. In the first year of the EEP, which is the time period at issue here, the Commission approved Nicor Gas' proposal "to place the decisions regarding what portfolio of programs would best serve Nicor's customers and service territory under the control of a qualified, experienced and independent board." *Id.* at 160. Nicor Gas proposed this arrangement because it recognized that it had limited experience in offering energy efficiency programs and desired to implement such programs as quickly as possible. *Id.* After the first year of the EEP, the Commission determined that the Advisory Board would "act solely in an advisory capacity." *Id.* at . 163. In choosing that compromise, Nicor Gas cites to the following Commission conclusion in the Rate Case Order:

Logically, in the beginning the Advisory Board will be determining what programs best suit ratepayers in Nicor's service territory. It will also commence the process of setting up those programs. Thus, the funds spent during this period of time would largely be on setting up energy efficiency programs. Therefore, in the beginning of the program there is less risk of imprudent or malfeasant expenditures.

*Id.* at 162.

Nicor Gas emphasizes that the expenses that CUB/AG now seek to disallow were spent on the exact activities contemplated by the Commission for the first year of the EEP, *i.e.*, “setting up energy efficiency programs.” Because Nicor Gas did not have sufficient experience or capability to implement the EEP (see Rate Case Order at 160), Nicor Gas looked to outside consultants—KO Solutions (“KO”) and Bass & Company (“Bass”)—to provide the necessary experience and capabilities to guide Nicor Gas in (i) understanding how an Advisory Board would be constituted and who would be involved, (ii) performing research and planning on the Advisory Board’s design, and (iii) coordinating the Advisory Board’s initial efforts. KO and Bass did, in fact, provide critical expertise and assistance to Nicor Gas and the Advisory Board to develop and implement the EEP as evidenced by the fact that the Advisory Board unanimously elected KO to take on multiple roles and tasks throughout the process, including operating as the Board Facilitator and selecting other entities to involve in the implementation of the EEP. The Company notes that CUB/AG presented no evidence contesting these facts.

Nicor Gas further notes that the evidentiary record contains specific detail regarding the services provided by the consultants in the fall of 2009, particularly by the primary consultant at Bass, which included management advice, technical research, authorship of two implementation RFPs, negotiation with parties, and coordination among the organizations involved. As detailed in Nicor Gas Exhibit 6.1, Bass expended significant time and effort to achieve the goal of establishing and implementing Nicor Gas’ EEP. Without the assistance from Bass and KO, the start-up process for Nicor Gas’ EEP would have taken longer, resulting in a later starting date for the EEP. Nicor Gas states that the efforts by the consultants were within the scope of the implementation work endorsed by the Commission in the Rate Case Order.

In response to CUB/AG’s attempt to cast doubt on the consultant expenses given that Nicor Gas began incurring such expenses before the Advisory Board convened, approved its Bylaws or a consultant contract was in place, CUB/AG IB at 3-4, Nicor Gas points to the Commission’s determination to allow “Nicor to commence the process of setting up its programs immediately....” Rate Case Order at 163. Nicor Gas states that CUB/AG also ignore the fact that the referenced delays were not caused by Nicor Gas. For example, the Company asserts that the delay in passing the Bylaws was due almost entirely to the fact that the AG representative on the Board failed to timely comment on the proposed Bylaws introduced at the very first board meeting on July 21, 2009. See, *e.g.*, Nicor Gas Ex. 4.1 at 2 (July 21, 2009 meeting minutes noting that comments on the proposed bylaws were due by July 31, 2009 and contemplating approval of the bylaws at meeting on August 12, 2009); CUB/AG Ex. 1.3 at 1 (August 31, 2009 meeting minutes showing that the board member from the AG’s office had not returned comments on the draft bylaws as of that date). The Company further points to the evidence showing that even when the Bylaws were finalized, the AG dissented from approving. CUB/AG Ex. 1.5.

**b) No Approval of the Expenditures was Required**

In response to CUB/AG's contention that the Advisory Board was somehow required to approve the consultant expenses, Nicor Gas states that no such approval was required. The Company cites to the Rate Case Order where, in approving Rider 29, the Commission did not require the Advisory Board to approve EEP-related expenditures. Instead, the Commission expressly recognized the limited authority of the Advisory Board: "the Advisory Board will be determining what programs best suit ratepayers in Nicor's service territory. It will also commence the process of setting up those programs." Rate Case Order at 162. The Company further points to the fact that there is nothing in the Advisory Board's duties, as outlined in the Bylaws, requiring approval of expenses beyond approval of the budget for 2009. See, e.g., CUB/AG Ex. 1.1.

Nicor Gas also states that CUB/AG concede that the Commission did not mandate that the Advisory Board approve EEP-related expenditures in their brief. CUB/AG IB at 5. Despite this fact, the Company asserts that CUB/AG still raise arguments intended to show that the Advisory Board is "to have financial oversight of program expense during 2009" as a means to convince the Commission to retroactively require such approval. See, e.g., CUB/AG IB at 2-3, 5-7. Nicor Gas points out that there is absolutely no requirement that the Advisory Board *approve* the EEP expenses in order for them to be recoverable under Rider 29, whether in any statutory authority, Commission rule or Order.

Nicor Gas also asserts that the unrefuted evidence shows that Nicor Gas engaged, consulted, and updated the Advisory Board as the EEP was being developed, which the Commission envisioned in the Rate Case Order. For example, the Advisory Board was heavily involved in implementing Nicor Gas' EEP, including, (i) by unanimously choosing KO Solutions to operate as the Board Facilitator, (ii) approving the Board Facilitator Roles and Responsibilities that reflect that, as Board Facilitator, KO Solutions would be responsible for assisting in the search for the Plan Administrator and other entities involved in the implementation of the EEP, and (iii) requesting the negotiation of charges with Bass, which resulted in reduced charges. Nicor Gas Exs. 4.1-4.3. In light of this evidence, Nicor Gas concludes that there can be no question that the Advisory Board was well aware of the work that both KO Solutions and Bass were doing with respect to setting up Nicor Gas' EEP.

In the alternative, Nicor Gas states that, even assuming that the Advisory Board had some type of role in approving EEP expenditures, CUB/AG have provided no evidence that the Advisory Board disallowed, rejected or "purposefully denied the expenses" at issue. CUB/AG IB at 8. In support of this statement, the Company points to the November 18, 2009 Advisory Board meeting, where two members voted in favor of approving \$70,800 for the RFP Consultant Support Budget (Nicor Gas and Commonwealth Edison), two members against (CUB and AG), one member abstained (NRDC), and one member was not present (NAIMA). Nicor Gas Ex. 4.4. In short, the Advisory Board did not reject the subject expense and the Company noted that Nicor Gas witness Jerozal was present at the meeting, in contrast to the CUB/AG witness.

Finally, Nicor Gas notes that the evidence shows that CUB and the AG never voted to approve any Rider 29 EEP expenses, while at the same time they have voted to have work performed and expenses incurred.

**c) There is No Evidence that the Disputed Expenditures Were Imprudent**

Nicor Gas states that CUB/AG attempts to cast the disputed expenditures as imprudent are contrary to the evidence. Specifically, the Company asserts that claims that the EEP was not available to customers until after the heating season of 2009 and the allegedly “questionable” manner in which the expenses were billed and reported by the consultants are baseless. First, Nicor Gas states that the Commission did not establish a deadline for implementing the EEP. Instead, the Commission simply targeted the beginning of the 2009/2010 heating season for implementation. Second, the Company asserts that any delay in implementing Nicor Gas’ EEP was due to the fact that the consultants were trying to follow and implement directives from the Advisory Board. For example, the AG and CUB representatives on the Advisory Board demanded that Nicor Gas partner with or make EEP offerings similar to those offered by Chicagoland Natural Gas Program (“Chicagoland”), the then existing energy efficiency program affiliated with The Peoples Gas Light & Coke Company and North Shore Gas Company. Nicor Gas Ex. 6.1. The Company further states that the evidence shows that the Advisory Board’s efforts to align with Chicagoland changed the scope of Bass’ work, thereby impacting timing of deliverables. *Id.* The additional work included Bass serving as “the primary drafting agent for both Chicagoland and Nicor for the joint RFP creation, review and finalization process” and supporting “the review and vetting process of these joint RFPs with Chicagoland Plan Administrator, Chicagoland Board, Illinois Stakeholders, and the Nicor EEP Advisory Board.” *Id.*

Finally, as far as CUB/AG’s argument about the manner in which the expenses were billed, Nicor Gas argues that there is nothing in the record to show that EEP expenses must be documented in a particular fashion in order to be recoverable under the rider. And, to the extent the disputed expenditures were ultimately higher than initially estimated, that is because the amount payable to the consultants increased along with the additional work necessary to follow the directives of the Advisory Board, including, for example, trying to partner with or mirror the efforts of Chicagoland at the specific request of the Advisory Board.

Nicor Gas further notes that: (1) CUB/AG have never attempted to refute these facts and they actually ignore the causal connection between their demands as part of the Advisory Board and the lengthened process and increased expense; and (2) CUB/AG also fail to recognize that the Commission concluded that EEP expenses were highly unlikely to be imprudent or malfeasant to the extent they were spent on “setting up energy efficiency programs.” Rate Case Order at 162.

#### **d) The Amount of the Disputed Expenditures**

Nicor Gas also argues that, to the extent the Commission finds that Advisory Board approval was somehow required, CUB/AG's proposed disallowance overstates the disputed amount of expenditures. Specifically, CUB/AG recognize that the Advisory Board approved \$50,000 for services from KO. Thus, using CUB/AG's own standards, the Commission should, at a minimum, approve the \$50,000 estimate that was approved by the Advisory Board, thereby reducing the amount in dispute to \$58,375.

### **3. Commission Analysis and Conclusion**

When the Board approved the entirety of the 2009 budget, it specifically excluded the RFP expenses and held the matter for a later date. This shows a purposeful decision by the Board not to approve the RFP expenses when it approved the rest of the budget. The matter came up again at the November 18, 2009 meeting, the Board again rejected the motion to approve the expenses.

Nicor's proposed Energy Efficiency Program in its own words was initially designed to place the decisions regarding what portfolio of programs would best serve Nicor's customers and service territory under the control of a qualified, experienced and independent board." ICC Docket No. 08-0363, Final Order at 160.

This Commission structured the functioning of the Board so that the Board would have oversight on expenditures during 2009 so that "in the beginning of the program there is less risk of imprudent or malfeasant expenditures." The Commission further specified that after January 1, 2010, the Board would "act solely in an advisory capacity."

Although the Board approved a rough budget estimate of \$50,000 for the project facilitator, it failed to approve bills exceeding twice that amount for the facilitator and RFP proposal work. The Commission finds that the \$50,000 estimate that was approved by the Advisory Board was an appropriate expenditure. In keeping with the delegation of authority to the Advisory Board for 2009 the Commission rejects the additional expenditures of \$58,375.

### **IV. Findings and Ordering Paragraphs**

The Commission, having given due consideration to the entire record and being fully advised in the premises, is of the opinion and finds that:

- (1) Northern Illinois Gas Company is a corporation engaged in the sale and distribution of natural gas in Illinois and, as such, is a public utility within the meaning of the Public Utilities Act;
- (2) the Commission has jurisdiction over the Company and the subject matter of this proceeding;
- (3) the statements of fact set forth in the prefatory portion of this Order are supported by the evidence and the record and are hereby adopted as findings of fact;

- (4) the costs and expenses sought to be recovered by Northern Illinois Gas Company regarding Rider-29 Energy Efficiency Plan with the exceptions noted above were reasonably and prudently incurred;
- (5) the Company's calculations for its Rider 29 reconciliation covering a cost period of June 1, 2009 through June 30, 2010 and an adjustment period of October 1, 2010 through June 30, 2011 are accurate; and
- (6) the Company's Rider 29 Reconciliation Adjustments summarized in Nicor Gas Exhibit 1.1 shall be amended in conformity with this Order;

IT IS THEREFORE ORDERED that the reconciliation submitted by Northern Illinois Gas Company of the, and is hereby approved subject to the adjustments contained in this Order.

IT IS THEREFORE ORDERED that the Reconciliation Adjustments submitted by Northern Illinois Gas Company under Rider 29 – Energy Efficiency Plan for a cost period of June 1, 2009 through June 30, 2010 and an adjustment period of October 1, 2010 through June 30, 2011 and summarized in Nicor Gas Exhibit 1.1 amended as indicated in the foregoing Order is hereby approved.

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

DATED:	October 17, 2012
BRIEFS ON EXCEPTIONS DUE:	October 31, 2012
REPLY BRIEFS ON EXCEPTIONS DUE:	November 7, 2012

Terrance A. Hilliard  
Administrative Law Judge