

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)	
on its own motion)	
)	Docket No. 01-0705
Northern Illinois Gas Company d/b/a NICOR)	
Gas Company)	
)	
Reconciliation of Revenues collected under)	
Gas Adjustment Charges with Actual Costs)	
prudently incurred)	
)	
Illinois Commerce Commission)	
on its own motion)	
)	Docket No. 02-0067
Northern Illinois Gas Company d/b/a NICOR)	
Gas Company)	
)	
Proceeding to review Rider 4, Gas Cost, pursuant)	
to Section 9-244(c) of the Public Utilities Act)	
)	
Illinois Commerce Commission)	
on its own motion)	
)	Docket No. 02-0725
Northern Illinois Gas Company d/b/a NICOR)	
Gas Company)	
)	
Reconciliation of Revenues collected under)	
Gas Adjustment Charges with Actual Costs)	
prudently incurred)	

**REPLY BRIEF ON EXCEPTIONS OF
NICOR GAS COMPANY**

December 5, 2012

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REPLY BRIEF ON EXCEPTIONS OF
NICOR GAS COMPANY

Northern Illinois Gas Company d/b/a Nicor Gas Company (“Nicor Gas”) respectfully submits its Reply Brief on Exceptions in accordance with Section 200.830 of the Rules of Practice of the Illinois Commerce Commission (“Commission”), 83 Ill. Adm. Code § 200.830, and the schedule established by the Administrative Law Judges (“ALJs”).

I. INTRODUCTION

The ALJs’ Proposed Order (“Proposed Order” or “PO”) properly focuses on analyzing the applicable law and the facts actually in the evidentiary record. In doing so, the Proposed Order correctly rejects the positions of the Illinois Attorney General (“AG”) and the Citizens Utility Board (“CUB”) that were either premised on a fundamental misapplication of the law, factual claims that have no foundation in the evidentiary record, or both. In its Brief on Exceptions (“BOE”), Nicor Gas emphasized that the Proposed Order correctly rejects (1) the claims by the AG and CUB concerning Nicor Gas’ 2001 storage cycling, (2) CUB’s claim concerning alleged storage carrying charges, and (3) CUB’s claim concerning the benefit of low-cost last-in first-out (“LIFO”) layers of gas inventory. In their BOEs, the AG and CUB each reiterate claims that continue to misconstrue the law or rely on unsupported assertions, not facts. The Commission should again reject their positions.

Turning first to the applicable law, the AG continues to advance a legal standard that is not found in the Public Utilities Act (“Act”) and that is inconsistent with the Commission’s Order approving Nicor Gas’ Gas Cost Performance Program (“GCPP”). AG BOE at 2-4, 34-37. In approving the GCPP, the Commission expressly determined that Nicor Gas’ actions under the GCPP would not be subject to a prudence review. In fact, the Commission approved tariffs to that effect. Docket No. 99-0127, Order at 37 (Nov. 23, 1999). Further, contrary to the AG’s claim, nothing in Section 9-244 of the Act suggests that the Commission should engage in a hindsight review of the performance of an alternative regulation plan for purposes of making retrospective changes to the plan and its results. 220 ILCS 5/9-244. Similarly, CUB’s attempt to impose *post hoc* prudence standards on the Company’s gas purchasing activities also is misplaced. CUB BOE at 13-15.

Apparently acknowledging the paucity of evidence supporting its legally flawed claims, CUB instead seeks to inflame the Commission and divert its attention by making a host of sensational claims about Nicor Gas and its GCPP—none of which has any evidentiary support.¹ Indeed, none of these assertions has anything to do with the three outstanding issues concerning the GCPP.² For example, CUB states that the Company’s actions related to the GCPP were subject to “several federal indictments.....” CUB BOE at 3. That statement is false, and CUB fails to cite to *any* record evidence to support this claim—this failure must be attributed to the fact that no such evidence exists. In reality, all of Nicor Gas’ actions associated with the GCPP were investigated fully by the United States Attorney’s Office for the Northern District of Illinois

¹ The AG did not, and could not engage in such hyperbole, as its sole witness David Effron testified that he was not accusing Nicor Gas of manipulating anything or of any “wrongdoing” whatsoever. Tr. 1343:1-3.

² CUB’s BOE addresses a variety of claims that were resolved pursuant to the Stipulation entered into between Commission Staff (“Staff”) and Nicor Gas. Nicor/Staff Ex. 1.0. CUB does this despite the fact that CUB conceded in its Initial Brief—and its witness Jerome Mierzwa admitted at evidentiary hearings—that the Stipulation addressed, in identical or substantially similar amounts, the refunds CUB seeks on the same issues. CUB Init. Br. at 19, 41, 59, 61, 62, 64, 65; Tr. 1109:9-1110:7.

and a former United States Attorney, and neither investigation concluded that Nicor Gas had engaged in fraudulent activity or that it had improperly manipulated its gas storage activities—no criminal indictments were ever issued.

Similarly, CUB attempts to distract the Commission by likening this proceeding to a docket involving The Peoples Gas Light & Coke Company (“PGL”), Docket No. 01-0707.³ CUB BOE at 8-11. This claim is a red herring. First, CUB never presented *any* evidence to support such an analogy, instead raising this claim for the first time in briefs. Second, CUB’s attempted analogy patently conflicts with Illinois law, wherein the Commission must base its decision solely upon the applicable law and evidentiary record in *this* proceeding. *See, e.g.*, 220 ILCS 5/10-103; 220 ILCS 5/10-201(e)(iv)(A); *Bus. & Prof’l People for Pub. Interest v. Illinois Commerce Comm’n*, 136 Ill. 2d 192, 227, 555 N.E.2d 693, 709 (1989) (“*BPI I*”)⁴ (“Any order of the Commission must be based exclusively on the record.”) (internal quotation marks and citation omitted). Thus, CUB invites the Commission to commit reversible error by attempting to inject untested facts and issues from an unrelated proceeding for the Commission’s consideration here. Third, the referenced PGL docket is inapposite to the matters at issue here, both legally and factually. The PGL docket involved the management of utility assets through an unregulated subsidiary and the prudence of related costs; it had nothing to do with a Commission-approved performance-based regulation program authorized pursuant to Section 9-244 of the Act. 220 ILCS 5/9-244.⁵

³ CUB also makes a completely irrelevant comparison between the per-customer value of the settlements in the two cases. CUB BOE at 9.

⁴ CUB is clearly aware of this authority, as it relies upon *BPI I* in its BOE (at 15-16).

⁵ Given that CUB failed to present any evidence to support its factual analogy regarding the referenced PGL docket, Nicor Gas requests that the Commission strike those portions of the CUB BOE as being improper and irrelevant to the disposition of this proceeding—specifically, those passage set forth on pages 8-11.

In the end, the AG and CUB BOEs cannot escape the fact that they failed to present any competent evidence to support their remaining claims. Even assuming that some type of prudence review of actions undertaken during the three years that the GCPP was in effect was appropriate, which it is not, neither the AG nor CUB witness presented any *facts* to support these claims, including Nicor Gas' 2001 storage cycle. Not only are their assertions based upon assumptions or inferred "facts," these "hypothetical world" claims are contradicted by real world explanations. Indeed, they did not, and could not, refute the fact that during the term of the GCPP Nicor Gas customers enjoyed the lowest gas supply cost among Illinois' six largest natural gas utilities. Gorenz Reb., Nicor Gas Ex. 3.0, 15:302-11; Nicor Gas Ex. 3.1; Moes/Gulick Reb., Nicor Gas Ex. 7.0, 4:62-5:76. And, of course, CUB's claim concerning storage carrying costs is unrelated to the GCPP altogether. In sum, the AG and CUB utterly failed to meet their burden of proving the claims that remain at issue in this proceeding.

Meanwhile, the BOE of the Retail Energy Supply Association ("RESA") and Interstate Gas Supply of Illinois, Inc. ("IGS") (collectively "RESA/IGS") concerning the allocation of any refunds to customers, ignores the fact that their position lacks evidentiary support. While their BOE goes on at length about the virtues of their proposed refund methodology, RESA/IGS cannot refute the fact that, despite the pending status of this case for almost a decade, they chose not to present any affirmative testimony supporting their position. Thus, other parties did not have the opportunity to test the reasonableness of that proposal. Accordingly, the Proposed Order properly rejects the refund methodology proposed by RESA/IGS.

Finally, Nicor Gas has no objection to Commission Staff's proposed exceptions. Therefore, as described in detail below, the Commission should reject the claims made on exceptions of the AG, CUB and RESA/IGS.

II. APPLICABLE LEGAL STANDARDS

A. The AG And CUB Ask The Commission To Apply The Wrong Legal Standard

This proceeding was originally initiated pursuant to Section 9-244(c) of the Act, while the Company's GCPP was still in effect. *See* Docket No. 02-0067, Initiating Order (Jan. 24, 2002).⁶ This Section provides in its entirety as follows:

The Commission shall open a proceeding to review any program approved under subsection (b) 2 years after the program is first implemented to determine whether the program is meeting its objectives, and may make such revisions, no later than 270 days after the proceeding is opened, as are necessary to result in the program meeting its objectives. A utility may elect to discontinue any program so revised. The Commission shall not otherwise direct a utility to revise, modify or cancel a program during its term of operation, except as found necessary, after notice and hearing, to ensure system reliability.

220 ILCS 5/9-244(c). The AG and CUB recognize that Section 9-244 defines the scope of these proceedings, yet they present a distorted and incorrect view of what Section 9-244(c) requires and allows. Although that section does provide for a Commission review of whether the approved performance-based regulation program is “meeting its objectives,” it is also clear that the purpose and scope of that review is to determine whether changes need to be made to the program and, if so, to “make such revisions, no later than 270 days after the proceeding is opened, as are necessary to result in the program meeting its objectives.” The “meeting the objectives” review, therefore, is designed to provide the Commission an opportunity to modify the program, not to impose sanctions on the utility or award reparations to customers. Thus, contrary to CUB’s assertion (BOE at 31) the Proposed Order was absolutely correct in its conclusion that “[t]here is no provision under section 9-244(c) to order this type of refund.”

⁶ The Commission subsequently consolidated Docket No. 02-0067 with two purchased gas adjustment (“PGA”) reconciliation cases, Docket Nos. 01-0705 and 02-0725. Docket No. 02-0067, Interim Order (Dec. 17, 2002). These PGA reconciliation dockets were consolidated because the annual results of the GCPP (detailed in Rider 4) would flow through Nicor Gas’ PGA rider mechanism (known as Rider 6).

Moreover, contrary to the arguments of the AG and CUB, *nothing* in Section 9-244(c), nor any other subsection of Section 9-244, authorizes the hindsight review they claim the Commission now should conduct either of the proceeding in which the GCPP was approved or the Company's actions under the GCPP. *See* AG BOE at 2-3, 34-37; CUB BOE at 13-15. In approving the GCPP, the Commission specifically recognized that the Company's actions under the GCPP are not subject to a *post hoc* prudence review under Section 9-244:

Instead of the traditional prudence review, Section 9-244(c) requires that the Commission review the program two years after its implementation to determine whether it is meeting its objective.

Docket No. 99-0127, Order at 37 (Nov. 23, 1999). This standard of review also is reflected in Nicor Gas' Commission-approved tariffs, which state, in pertinent part: "The Commission shall *not consider the prudence of gas costs incurred* for any period included in Rider 4, Gas Cost Performance Program." Ill. C. C. No. 16-Gas, 3rd Revised Sheet No. 62 (emphasis added).

Meanwhile, the AG relies on a provision of the Commission's Rules that are also entirely inapplicable to this proceeding. Specifically, the AG cites to Part 525.40 claiming that the Company should not have taken any actions "that will increase the cost of gas." AG BOE at 3. Of course, Part 525 applies to gas utilities operating under traditional regulation, where the prudence of gas purchasing is subject to review. *See* 83 Ill. Adm. Code Part 525. However, Nicor Gas' gas costs were not subject to traditional regulation during the term of the GCPP. As described above, the Commission allowed the Company to operate under an alternative regulatory model that expressly precluded prudence reviews. Moreover, the Commission expressly recognized that the GCPP may *increase* costs to customers, but required the Company to absorb 50% of the increment of cost that exceeded the Benchmark. Docket No. 99-0127, Order at 36-37 (Nov. 23, 1999) ("Therefore, the Commission will modify Nicor's proposal to eliminate the 90/10 sharing of losses and savings in excess of \$30 million, thereby leaving a

50/50 sharing of *all savings and losses.*”) (emphasis added). As such, the AG’s claim is undermined by the Commission’s decision recognizing that customer costs could increase under the GCPP.

B. Burden of Proof

CUB erroneously claims that pursuant to § 9-201(c) of the Act, Nicor Gas has the burden of proof in this proceeding. CUB BOE at 16-17.⁷ This docket was not initiated pursuant to this Section of the Act, nor is it a proceeding in which the “justness and reasonableness of the proposed rates or other charges” is at issue. Therefore, this proceeding has nothing to do with Section 9-201. More importantly, CUB fails to cite to anything that links this docket to Section 9-201(c). *Id.* Simply put, Section 9-201(c) is inapplicable to this proceeding. Clearly, this is a section 9-244 proceeding, and CUB addresses Section 9-244 at length in its discussion of the “Relevant Legal Standards.” CUB BOE at 13-17.

Notably, Section 9-244(d) allows the Commission to investigate a program at any time other than at the two-year review; if the Commission finds, based on such a review, that the utility is not implementing the program in accordance with the order approving the program, the Commission may “order the utility to comply with the terms of the order.”⁸ With respect to any complaint that the utility’s program is not meeting the objectives for a performance-based regulation program specified in 9-244(b), the complainant bears the burden of proving its allegations. Both CUB and the AG argue, in substance and effect, that the Nicor GCPP as implemented, did not meet the objectives of 9-244(b); accordingly, it is the AG and CUB who bear the burden of proving those allegations. Moreover, whatever the Commission ordered in

⁷ CUB also claims that the Proposed Order fails to articulate the standard of proof. CUB BOE at 16. While Commission orders rarely, if ever, discuss the appropriate standard of proof, there was no need to do so here as no party claimed the standard to be something other than a preponderance of the evidence.

⁸ CUB claims the GCPP was “improperly operated.” CUB BOE at 15.

the Second Interim Order cannot “broaden the scope of review” under Section 9-244 as CUB claims it did (BOE at 3) or change the burden of proof with respect to allegations that a performance-based regulation program failed to comply with the objectives of Section 9-244.

Notwithstanding the foregoing, Nicor Gas presented overwhelming evidence to support its position. *See generally* Nicor Gas Initial Brief; Nicor Gas Reply Brief. It is unrefuted that Nicor Gas’ financial presentation concerning its restated performance for the GCPP was subject to the scrutiny of a variety of expert federal agencies, including the United States Attorney’s Office for the Northern District of Illinois and the Securities and Exchange Commission (“SEC”). Bartlett Dir., Nicor Gas Ex. 1.0, 7:147-8:164. Nicor Gas’ restated financial information was also examined by its outside independent auditors, Deloitte and Touche. *Id.* at 4:84-85.

To the extent that Nicor Gas bore the burden of proof, Nicor Gas met this burden through its *prima facie* case. *See generally* Nicor Gas Initial Brief; Nicor Gas Reply Brief. The burden of production then shifted to CUB (and the AG) to support claims in opposition to Nicor Gas’ position. *See, e.g., Illinois Bell Tel. Co. v. Illinois Commerce Comm’n*, 327 Ill. App. 3d 768, 776, 762 N.E.2d 1117, 1123-24 (3d Dist. 2002); *Anderson v. Dept. of Public Property*, 140 Ill. App. 3d 772, 777-78, 489 N.E.2d 12, 16 (4th Dist. 1986); *City of Chicago v. Illinois Commerce Comm’n*, 133 Ill. App. 3d 435, 442, 478 N.E.2d 1369, 1375 (1st Dist. 1985). Here, CUB (as well as the AG) failed to present competent and/or compelling evidence to support their remaining GCPP claims. Moreover, Nicor Gas presented substantial testimony to refute the positions of CUB and the AG. *See generally* Nicor Gas Initial Brief; Nicor Gas Reply Brief.

Importantly, the question of which party bears the burden of proof ultimately has no bearing on the largest refund request that remains in the case. Even if Nicor Gas is found to bear

the burden of proof as to CUB's and the AG's claims that it manipulated storage withdrawals, it is clear that the record as a whole admits of only one conclusion: that Nicor Gas did not manipulate storage withdrawals in 2000 or 2001 out of an intent to benefit itself at the expense of its customers.

In sum, CUB and the AG have each failed to meet their burden of proof, and the Proposed Order correctly rejects their assertions.⁹

III. ARGUMENT

A. **The AG's Exception Nos. 2-7 And CUB's Exception No. 1 Should Be Rejected Because The Proposed Order Correctly Concludes That Their Claims Concerning Nicor Gas' 2001 Storage Cycling Are Unsupported By The Law And The Facts**

1. Introduction

Recognizing that the evidence supports the conclusion that inventory levels were not improperly manipulated, CUB and the AG resort to a variety of other techniques to convince the Commission to award additional tens of millions to customers: (1) invoking an old Peoples Gas docket and inaccurately claiming the existence of "uncanny" similarities between that case and this; (2) asking the Commission to draw adverse inferences against Nicor Gas because certain witnesses did not testify; and (3) arguing that because Nicor Gas no longer contests certain issues that are the subject of the Stipulation, the Commission should conclude that Nicor Gas engaged in other wrongdoing. None of these arguments have merit, as discussed more fully in this Reply.¹⁰

Additionally, CUB implies that this is a case of fraud, when it claims that "Nicor's failure to divulge to the Commission its intentions for the GCPP in Docket 99-0127, and continuing

⁹ Nicor Gas continues to argue that the Proposed Order erred with respect to its conclusion on the delivered storage service ("DSS") withdrawal issue, as set forth in the Company's BOE. Nicor Gas BOE at 6-9.

¹⁰ Although the AG commends Staff for its "thorough analysis" of issues that were resolved by the Stipulation, it fails to acknowledge that despite that "thorough analysis," Staff *never* supported the massive adjustments that CUB and the AG continue to pursue.

evasion of detection of these schemes are the prevailing issues the Commission must address in this proceeding, because those actions undermined the regulatory compact and caused Nicor's ratepayers to pay excessive rates far beyond the amount Nicor already agreed to refund." CUB BOE at 2. This is simply another attempt to prejudice the Commission against Nicor Gas by making exaggerated and irrelevant claims about what happened in Docket No. 99-0127. These allegations, even if true, provide no basis for any regulatory action against Nicor Gas at this time. Whether Nicor Gas "hid the true purpose of the GCPP from the Commission" (CUB BOE at 8) is completely irrelevant to anything at this juncture. And, if it were, Nicor Gas presented evidence overwhelmingly demonstrating that the Company did not mislead the Commission "with regard to its intent to exploit low-cost LIFO gas." CUB BOE at 8. *See, e.g.*, Nicor Gas Ex. 19.0 at 56:20-58:3, 66:18-67:5 (Deposition of Philip Cali, former Nicor Gas Executive Vice President of Operations); Nicor Gas Ex. 17.0 at 24:10-13, 25:20-26:7 (Deposition of Leonard Gilmore, then Nicor Gas Manager of Pipeline Regulation and Supply Planning); Nicor Gas Ex. 13.0 at 24:8-11, 200:4-11 (Deposition of Albert Harms, former Nicor Gas Manager of Rate Research); Nicor Gas Ex. 15.0 at 188:14-20 (Deposition of Beth Hohisel, former Nicor Gas Manger of Supply Services); Nicor Gas Ex. 18.0 at 27:6-12, 28:4-9, 63:14-64:2 (Deposition of Theodore Lenart, former Nicor Gas Assistant Vice President of Supply Operations).

CUB goes so far as to suggest that "deception" has continued in these dockets. CUB BOE at 11. That is an entirely unfounded and baseless claim. Absolutely no suggestion has been or could be made that once the whistleblower fax resulted in the Second Interim Order and these lengthy proceedings began, anything has been withheld by Nicor Gas from the Commission or any party. Indeed CUB's witness Mierzwa admits that he was provided with

over 360,000 documents in response to CUB's discovery requests; no allegation has been made that anything was withheld. CUB (and the AG) had the unprecedented opportunity to interrogate, under oath, thirteen current or former Nicor Gas employees, including executives and management connected to the GCPP or the gas cost supply reconciliations that are the subject of this proceeding.¹¹ CUB witness Mierzwa testified that he personally developed questions for these depositions. Tr. 1180:14-22.

2. The Evidence Demonstrates That Nicor Gas Did Not Manipulate The Storage Cycle

As to the principal issue before the Commission in this case, CUB cites testimony from 1996 and 1999 dockets before this Commission, in which Nicor Gas witnesses claimed that the Company had a limited ability to accelerate or defer withdrawals. CUB BOE at 19-20. No evidence in this case refutes that testimony. Those witnesses, in short, testified that the Company's discretion with respect to withdrawals was limited by the physical characteristics of Nicor Gas' aquifer storage fields, by contractual limitations on purchased storage, by weather and by other operational requirements. *Id.* Nothing presented in this docket suggests that those factors do not have a limiting effect on Nicor Gas' withdrawal/purchase decisions. Indeed, the AG's witness, Mr. Effron, testified that "I do not claim that the Company necessarily would have, *or even could have*, implemented the increased levels of 2001 withdrawals reflected in my calculations, given the relatively low stored gas inventory at the end of 2000." Effron Reb., AG Ex. 1.4 Rev., 8:174-9:176 (emphasis added). Instead, he simply presents academic calculations of how gas costs might have been lower if circumstances had been different.

¹¹ The deponents were Al Harms, Jeff Metz, Dave Brown, Beth Hohisel, George Behrens, Rose Gorman, Ted Lenart, Rich Rayappan, Phil Cali, Lonnie Upshaw, Kathleen Halloran, Len Gilmore, and Tom Fisher. *See* Staff's May 30 and July 22, 2003 Motions for Leave to Conduct Discovery Depositions and ALJs' Rulings of June 3 and July 23, 2003 granting same. *See also* Tr. 1155:10-15.

Indeed, the CUB and AG witnesses simply disregard real limitations and constraints in favor of their own “version” of what motivated Nicor Gas; however those theories are completely refuted by the facts in this docket:

- 1) Weather and pricing conditions in 2000 and 2001 had extremely powerful effects on inventory levels both at Nicor Gas and nationwide, and accounted for Nicor Gas’ low inventory and correspondingly low withdrawals. Nicor Gas BOE at 11-14.
- 2) The claims that “the lower level of withdrawals in January 2001 was the result of the reduced storage gas inventory at the end of 2000 and that the lower levels of withdrawals in the subsequent months were the result of the Company’s greatly reduced storage cycle in its attempt to beat the storage component of the Benchmark,” specifically “Nicor Gas’ attempt to access the low-cost layers of gas in inventory” (AG BOE at 28-29), are inconsistent with the unanimous testimony of every witness in this case that physical withdrawals from inventory *were completely unnecessary to access the low cost LIFO*. Nicor Gas BOE at 15-16. Thus, the basic premise of the CUB and AG argument—the premise from which they ask the Commission to speculate on the same terms and reach the same conclusion as they do—does not exist.
- 3) The Lassar Report, upon which CUB and the AG place so much reliance,¹² expressly stated that the Lassar investigators “did not find evidence indicating that [2001 withdrawals] [were] because of improper attempts to manipulate the storage cycle.” CUB Ex. 1.02 at 52, n.24. Despite this heavy reliance by CUB and the AG (including citation from the very footnote in which the previous quote appears), neither advises the Commission of this finding, which is flatly contrary to the inference they seek to have the Commission draw.

In a twist on the “depletion of inventory argument,” CUB argues that the low inventory levels at the end of 2000 were attributable to Nicor Gas’ own activities, not to the severe weather that occurred in late 2000. CUB BOE at 25-26. In particular, CUB points to low inventory levels of contract storage inventory on the Natural Gas Pipeline Company of America (“NGPL”) system. CUB’s fixation on one small piece of Nicor Gas’ inventory is understandable from a litigation point of view but unreasonable from a real-world perspective. It is comparable to measuring a person’s assets by looking only at how much she has in a checking account and

¹² The only piece of evidence the AG cites other than its own witness is the Lassar Report, from which it quotes extensively. AG BOE at 27, 28, 29.

ignoring everything else. As Nicor Gas expert witness Dr. Carpenter explained, and as should be obvious in any event, what matters is the total inventory, not the individual components that comprise that total inventory. Although CUB purports to cite Dr. Carpenter's testimony at the hearing on the NGPL issue to buttress its case, it does so inaccurately and incompletely. Dr. Carpenter did not testify that "he did not investigate the level of NGPL storage inventory." CUB BOE at 26. As the cited transcript pages show, he testified only that he did not know why the NGPL inventory levels were what they were, but "it didn't matter; total inventories were in line with historical averages." Tr. 1407:6-10 (Carpenter).¹³ And whatever the situation was with respect to NGPL inventory at the end of October 2000, the fact is that overall Nicor Gas inventories at that point in time were consistent with historic averages.

Given the foregoing information, it was unnecessary for Nicor Gas to have presented any witness to explain why NGPL inventory levels were at the levels they were in October 2000, and no negative inference may be drawn against Nicor Gas because it did not present a *Company* witness on the NGPL issue or any other aspect of operation of the GCPP. *See* CUB BOE at 29. Under the case cited by CUB (BOE at 29), CUB and the AG would be able to comment adversely upon the failure of Nicor Gas to produce a witness, and the Commission as the finder of fact would be entitled to draw an unfavorable inference against Nicor Gas, *only* where at least the following two factors have been shown: such a witness was (1) reasonably available to Nicor

¹³ CUB also misrepresents other aspects of Dr. Carpenter's testimony on the subject of NGPL inventories. CUB cites Dr. Carpenter's cross-examination for the proposition that "if NGPL inventory levels were higher, Nicor could have withdrawn more gas from storage in January 2001." CUB BOE at 26. However, in the transcript cited, no reference appears to NGPL inventory; instead the discussion concerned only "storage inventory" in general and Dr. Carpenter agreed with the unsurprising proposition that if Nicor Gas had more inventory its capability to withdraw it would probably be higher, but with a necessary qualification: "I hasten to point out that operational factors also influence [the] ability to withdraw gas at any point in time, and so it's not just what you have in inventory, but what market conditions are and what your operational characteristics are." Tr. 1403:3-10. Similarly, CUB asserts (BOE at 26) that "[Dr.] Carpenter also agreed that at the end of October 2000, Nicor's NGPL storage inventory was 17.5 Bcf below Nicor's historic average," citing the March 1, 2012 transcript at 1401:1-6. No such "agreement" or even discussion appears there, or on any other nearby page.

Gas and (2) not equally available to CUB or the AG. *Schaffner v. Chicago & N. W. Transp. Co.*, 129 Ill. 2d 1, 22, 541 N.E.2d 643, 651 (1989). The reality is that Nicor Gas had no available employee who was capable of providing meaningful testimony, given the significant turnover in its work force in the years since 2000. Moreover, in typical fashion, CUB (BOE at 29) omits reference to the factor that is most detrimental to CUB’s position—that the witness(es) were not equally available to the other party, namely CUB or the AG. Whatever witness may have been available to Nicor Gas, the AG and CUB could have equally accessed that individual via subpoena or through deposition testimony. CUB failed to take any steps whatsoever to call any such witnesses to testify at the evidentiary hearings. For example, in response to an inquiry by the ALJ, CUB’s counsel admitted that CUB did not make any attempt to get Mr. Harms to participate in the evidentiary hearings. Tr. 1484:16-20. Thus, although CUB at one time specifically contemplated calling adverse witnesses and issuing subpoenas to have those individuals appear at the evidentiary hearings, those steps were indisputably not taken. Tr. 1485:18-1486:4. Because CUB and the AG have failed to meet these standards, no adverse inference against Nicor Gas is warranted.

CUB asserts that “[t]he Proposed Order ignores substantial *evidence* demonstrating that the Company manipulated its 2001 storage withdrawals to affect the benchmark to its benefit and to the detriment of ratepayers” (CUB BOE at 17),¹⁴ and that the *evidence* shows that Nicor Gas reduced its inventory levels to access low-cost LIFO gas.¹⁵ CUB BOE at 26 (emphasis added). CUB further claims that “[w]itnesses from CUB and the AG each presented *detailed evidence*

¹⁴ Some of the “indisputable” facts that CUB claims supports this finding are in fact very much in dispute. Although others may be facts, the inferences that CUB draws from these facts are unreasonable and unwarranted in light of other facts.

¹⁵ “The *driving force* behind the GCPP was Nicor’s desire to capture the value of low-cost gas that had been on its books for decades.” CUB BOE at 4-5 (emphasis added); *see also id.* at 12 (accessing low cost LIFO gas the “driving intention of the GCPP”); *id.* at 24 (“the Company’s chief goal of the PBR was to access low-cost LIFO storage inventory”).

refuting all of Nicor’s consultants’ claims and substantiating the called-for refunds for their 2001 storage manipulation adjustments.” CUB BOE at 8 (emphasis added). These overblown arguments mischaracterize what *evidence* consists of. The CUB and AG witnesses presented no *evidence* at all, they simply presented theories and speculation based on isolated facts. The Commission cannot properly rely on such speculation. *See, e.g., Ameropan Oil Corp. v. Illinois Commerce Comm’n*, 298 Ill. App. 3d 341, 348, 698 N.E.2d 582, 587 (1st Dist. 1998) (“speculation has no place in the ICC’s decision”); *Allied Delivery System, Inc. v. Illinois Commerce Comm’n*, 93 Ill. App. 3d 656, 667, 417 N.E.2d 777, 785 (1st Dist. 1981) (“The speculation indulged in by the Commission is clearly an unsatisfactory and unacceptable basis for its decision.”).

CUB in fact cites no “evidence” at all to support the view that Nicor Gas reduced its physical inventory to access low-cost gas to benefit it knowing that to do so would be to the detriment of customers. To the contrary, as previously stated, every witness in this case who addressed the subject—Mierzwa, Effron, Zuraski, Moes and Gulick—as well as the findings of the Lassar Report, reached the identical conclusion: physical withdrawals of gas from inventory were not necessary to allow Nicor Gas to access LIFO inventory. Nicor Gas BOE at 15-16. For CUB to continue to argue, in the face of this unanimous testimony and evidence and without any evidentiary support of its own, that Nicor Gas manipulated physical withdrawals in order to access LIFO shows a level of advocacy that is both misleading and disingenuous.

The lack of CUB and AG evidence is not for lack of opportunity to investigate Nicor Gas. It bears repeating that CUB and the AG had the unprecedented opportunity to depose, in 2003, current or former Nicor Gas employees, and did depose thirteen such witnesses. Mr. Mierzwa, CUB’s consultant, participated in drafting questions to ask those witnesses. Tr.

1180:14-22. Mr. Mierzwa also claims to have reviewed 360,000 documents produced by Nicor Gas. Notably, despite that extensive investigative effort, CUB does not cite a single piece of testimony or a single Nicor Gas document that tends to suggest in any way that Nicor Gas intentionally manipulated NGPL or other inventory to give Nicor Gas a benefit to the detriment of its customers. CUB's assertion that the "evidence in this record shows that Nicor reduced its contract storage in fall of 2000 in order to access additional LIFO layers" (CUB BOE at 26) is not only unsupported by any citation to the record, but is affirmatively disproven by all of the relevant facts.

The AG argues that the Proposed Order appears to suggest, with respect to its finding that Nicor Gas followed the withdrawal percentages used to construct the Benchmark, that these percentages "were intended to dictate the Company's management of its gas inventory." AG BOE at 14, 16. Nothing in the Proposed Order can be fairly read to support this conclusion. Instead, the observation should be read as further support for the conclusion that in managing its inventory during the GCPP Nicor Gas did not act in any way that was either abnormal or aberrational. Instead, it adhered to historic withdrawal percentages even though actual withdrawals in 2001 had to be reduced due to of the highly unusual weather and market conditions prevailing during 2000 and 2001.

Although the AG claims (BOE at 18) that "there was ample reason to believe that suppressing the storage withdrawals to keep the withdrawals in line with the [Storage Credit Rate] percentages in the early months of 2001 would be costly to customers." it produces no citation to the record to support that conclusion. Indeed, like the case with CUB, one of the most remarkable aspects of the AG's BOE is its total and complete failure to cite any evidence on the issue of 2000 and 2001 withdrawals other than the testimony of its consultant, David Effron,

who is an accountant with no experience in inventory management. Despite that absence of evidentiary support—not a single document, not a single shred of testimony from any of the depositions in which the AG actively participated—the AG does not hesitate to make a variety of inflammatory statements such as that “by late January [2001], Nicor *knew* that it was highly likely that its greatly reduced storage cycle for 2001 would be costly to customers”; or “[g]iven that the Company *knew* that its actions would be detrimental to customers,...”; or “as of the end of January 2001, Nicor *knew* that that (sic) it was highly likely that reducing its storage withdrawals in the coming months would be costly to customers,...” AG BOE at 21, 23 (emphasis added). That may be the AG’s theory of what happened, but the AG presents absolutely no evidence as to what anyone at Nicor Gas knew on that subject or if Nicor Gas did anything in response to such unproven knowledge.

Significantly, these unequivocal assertions are quite different from the important concession the AG made only a few months ago, when it acknowledged that “[n]obody is arguing that Nicor Gas *knew* at the outset of 2001 that the reduced storage cycle in that year was going to harm customers to the tune of \$145 million - \$182 million in increased gas costs.” AG Init. Br. at 35 (emphasis added). The record was the same then as it is now, and the AG’s sudden change of mind is indefensible.

Finally, if Nicor Gas had the foreknowledge *now* attributed to it by the AG, and if Nicor Gas had been manipulating inventory to benefit itself, it is very odd that its alleged “strategy” of reducing withdrawals to beat the Benchmark in 2001 turned out to be such a dismal failure, wherein the increase in the cost of gas exceeded the increase in the Benchmark by over \$42 million, according to Mr. Mierzwa’s analysis. *See* Nicor Gas BOE at 16, n.3; CUB Ex. 1.18. Moreover, as Nicor Gas pointed out in its BOE, the interplay between the cost of gas and the

Storage Credit Adjustment (“SCA”) together with the Benchmark, taking into account how variations in the amount of withdrawals would affect that relationship, was a matter of great complexity. If, as the AG and CUB contend, Nicor Gas had reduced its withdrawals in 2001 in an effort to lower the SCA and increase the Benchmark, it would have been forced to buy more market gas, and one would expect to have seen some kind of analysis of the net effect of such lowered withdrawals. No such analysis can be found in the 360,000 documents Mr. Mierzwa claims to have reviewed, and none of the thirteen current or former Nicor Gas employees deposed by CUB and the AG provided a scintilla of testimony that any such analysis had ever been done. It is inconceivable that a utility intent on engaging in such a serious practice as altering its withdrawal cycle—with the potentially devastating safety and reliability impacts such an alteration might have—would embark on that course without a serious and rigorous analysis of the safety, reliability and economic impacts such a course of action might produce.

3. Impact On Customers Cannot Be Determined Based On One Year, And Certainly Not Two Months, Of Experience Under The GCPP

CUB and the AG continue to insist that although the GCPP was a three-year program it is appropriate to look at only one year of the program—2001—to judge the impact on customers. CUB claims that it and the AG did not “cherry pick” 2001 in order to show a big loss to customers, and claims that Nicor Gas could have presented evidence on the impact in other years if it had so chosen. CUB BOE at 31. All of this misses the much larger and more important picture. First, Nicor Gas did not perform any kind of analysis similar to the CUB (and AG) “damages” analysis because those analyses are based upon hypothetical and speculative “what if” scenarios that require modeling of assumptions that cannot be validated and ignore what happened in the real world. The one truly unrebutted *fact*—not based on speculation or hypothetical reconstructions of what might have been—is that throughout the entire GCPP

period Nicor Gas was the low cost provider of natural gas among major Illinois gas utilities. *See* Gorenz Reb., Nicor Gas Ex. 3.0, 15:302-11; Nicor Gas Ex. 3.1; Moes/Gulick Reb., Nicor Gas Ex. 7.0, 4:62-5:76. That comprehensive view—which has never been questioned by either CUB or the AG—is the most powerful rebuttal to the claims of harm to customers because of the GCPP made by CUB and the AG. This single fact shows that the aim of the GCPP—to result in lower rates than otherwise would have prevailed (Section 9-244(a)(1))—in fact was met.

The AG would have the Commission take an even more narrow view of customer impact, and focus only on the months of February and March 2001; during these months, the AG claims that “unrebutted” evidence shows that Nicor Gas incurred “unjust and unreasonable” gas charges that entitle customers to a refund of \$64 million for those two months (as compared to between \$144.5 and \$181.9 million for all of 2001).¹⁶ AG BOE at 4-5. The AG points to no evidence of anything that happened during those two months that justifies singling them out for special consideration. Accordingly, all of the other arguments regarding the insufficiency of evidence of inventory “manipulation” and the speculative nature of these “analyses” apply equally to this narrow analysis. Moreover, this February-March claim is premised upon the unfounded assumption that gas inventories had “recovered” by the end of January to near normal levels, whereas the evidence shows that, in fact, end-of-January 2001 inventories were 30% lower than the recent historical average, hardly “near normal.” Tr. 1360:6-1362:18. And, while Mr. Effron agrees that a number of factors other than inventory levels affect the ability to rely on storage withdrawals (Tr. 1358:18-1359:4), his analysis does not address any of those other factors. The AG also claims that no evidence was offered to rebut Mr. Effron’s testimony that “withdrawals in February and March could have been *safely and prudently* increased by 24.5 Bcf, with

¹⁶ Neither Mr. Mierzwa nor Mr. Effron claim that Nicor Gas paid more than market price for gas during this period, or could have paid a lower price than it did.

substantial savings to customers.” AG BOE at 24 (emphasis added; quoting AG Initial Brief). The fact is that Mr. Effron never testified that withdrawals could be safely or prudently increased in February or March 2001¹⁷; to the contrary, he testified that “I do not claim that the Company necessarily would have, *or even could have*, implemented the increased levels of 2001 withdrawals reflected in my calculations, given the relatively low stored gas inventory at the end of 2000.” Effron Reb., AG Ex. 1.4 Rev., 8:174-9:176 (emphasis added).

Additionally, and perhaps most importantly, the focus of this argument on only two months of one year of the 36-month GCPP period emphasizes why it is so improper to take only a pinpoint-in-time view of the effects of the GCPP. The AG claims a loss of \$145-182 million for the entire year of 2001; that would average out to be between about \$12 and \$15 million per month. Because the two months chosen for this analysis average \$32 million per month, this necessarily means that in other months the loss would be much less or even negative. Indeed, if Mr. Mierzwa’s damages “analysis” is to be believed (which it is not), Nicor Gas’ customers were *better off* by \$70 million in July and August because of the way Nicor Gas managed storage in 2001 than if Nicor Gas had operated the way Mr. Mierzwa assumed in his “but for” damages case. *See* CUB Ex. 1.18.¹⁸

¹⁷ In any event, given his utter lack of experience in the area of inventory management, he would have been incompetent to express any such opinion.

¹⁸ The AG argument that the evidence as to February and March 2001 is unrebutted because Glenn Labhart’s testimony was withdrawn is absurd. As long as the AG believes it is appropriate to launch a discussion about evidence that was never presented to the Commission, it is important to note that Mr. Labhart’s discussion of the first three months of 2001 was hardly the centerpiece of his testimony; he devoted a mere nine lines of his surrebuttal testimony to it. Mr. Labhart was an experienced gas commodity risk manager, and the principal thrust of his testimony was to explain the complexity of gas inventory management operations, and how hindsight analyses of such complicated operations conducted by people with no operational experience—like Messrs. Effron and Mierzwa—and based on extrapolations of historical experience to a later year having different circumstances, while at the same time ignoring actual contemporaneous information about storage activities supplied by Company personnel who had been deposed by CUB and the AG, are simply entitled to no weight. Nicor Gas justifiably believed at the time it elected to withdraw his testimony that that point was made through the cross examination of Messrs. Effron and Mierzwa and it was unnecessary to prolong the hearing. At the same time, Nicor Gas withdrew the testimony of Dr. Philip O’Connor, a former Chair of this Commission.

Finally, with respect to 2001 itself, as mentioned earlier, CUB's own evidence shows that had Nicor Gas intended the GCPP to act as a "profit-enhancing program" (as the AG claims, BOE at 9) it failed miserably; although it may have been in Nicor Gas' interest to increase the Benchmark, the cost of gas increased by much more than the Benchmark did, resulting in "underperformance" in that year by about \$42.3 million.

4. Conclusion

For all the above reasons, and those provided in Nicor Gas' prior briefing, any adjustment related to the 2001 "storage cycle" issue would be improper and unlawful. The AG and CUB presented no credible evidence that Nicor Gas acted improperly in any way. Instead, they rely purely on hindsight speculation and inference. All of the relevant evidence is entirely to the contrary. The Commission should adopt the Proposed Order's conclusion rejecting in their entirety the proposed AG and CUB refunds based on the 2001 withdrawal cycle.

B. CUB's Exception No. 2 Should Be Rejected Because The Proposed Order Correctly Concludes That There Is No Merit To CUB's Adjustment Related To Allegedly Higher Storage Carrying Charges

The Proposed Order (at 21) correctly rejects CUB's argument that Nicor Gas' customers should be refunded the higher storage inventory carrying costs resulting from allegedly replacing low-cost LIFO layers with high-cost layers. It bears repeating that CUB is alone in advocating for this refund of more than \$40 million as neither the AG nor Staff proposed such a refund and neither party ever supported CUB's claim. CUB Ex. 2.02. It also bears repeating that CUB's adjustment related to carrying costs is unrelated to actions taken during the period the GCPP was in effect (2000-2002) and, instead, relates to actions in 2003. Thus, on its face, the issue is unrelated to the GCPP.

In arguing that the Proposed Order "misses the point" of its carrying charges adjustment, CUB generalizes the conclusion in the Proposed Order as "essentially, that the increased costs

relating to base rate storage gas are perfectly acceptable because Nicor refunded the profits it generated.” CUB BOE at 32. CUB conveniently ignores the multiple reasons the Proposed Order provides in rejecting CUB’s adjustment. First, the Proposed Order recognizes that “there is nothing in the Commission’s Rules prohibiting a utility from adding a new LIFO layer of gas to its inventory, regardless of the cost associated with that layer of gas.” PO at 21. Second, the Proposed Order concludes that it would be inconsistent with the uniform system of accounts for gas utilities, “which permits withdrawals of gas to ‘be priced according to the first-in-first-out, last-in-first-out, or weighted average cost method’, and requires the Commission to approve ‘any other pricing method, or change in the pricing method adopted by the utility.’” PO at 21 (quoting 83 Ill. Adm. Code § 505.1170(C)). Third, the Proposed Order finds that the issue was previously rejected in Nicor Gas’ 2004 rate case, Docket No. 04-0779 (“2004 Rate Case”), where the Commission found no significant cash flow advantage accrued to Nicor Gas by selling gas to customers at the current year’s LIFO prices, given the storage charges borne by the Company. *Id.*

On this last point, CUB argues that the Commission deferred its carrying charges adjustment to this proceeding and, therefore, the Proposed Order is incorrect in stating that the Commission previously rejected the adjustment. CUB BOE at 34. For support, CUB includes a lengthy quotation from the 2004 Rate Case Order that appears in that order under the heading “LIFO.” *Id.* at 36. As demonstrated in the plain language quoted by CUB, the issue deferred to this proceeding was whether “it was reasonable for Nicor to liquidate certain low-cost Gas in Storage inventory while the GCPP was in effect.” Docket No. 04-0779, Order at 19 (Sept. 20, 2005). That issue has been resolved by virtue of the Stipulation with Staff.

The Commission went on in the 2004 Rate Case Order to consider *and reject* CUB's proposed adjustment related to the carrying costs for gas in storage, as demonstrated in the following excerpt:

Valuation of Gas in Storage

The Commission rejects CUB/CCSAO's proposed adjustment of \$57,999,286 to Nicor's computation of Gas in Storage. While the parties do not dispute that Nicor purchased gas in the first-in LIFO layers at lower prices, they do dispute the cost of carrying charges to Nicor. Nicor claims that its last-in first-out method and charging customers for gas at current annual LIFO prices is fair given the carrying costs Nicor has to endure because of the gas storage it provides. The Commission does not find that there is a significant cash flow advantage accruing to Nicor by selling gas to ratepayers at the current year's LIFO prices, given the storage charges borne by Nicor.

Id. The Proposed Order correctly refers to this language from the 2004 Rate Case Order as support for rejecting CUB's adjustment on the same reasoning in this proceeding.

Additionally, permitting CUB's proposed adjustment on this point would require the Commission to re-calculate rates that it previously found just and reasonable, including in the 2004 Rate Case. In that proceeding, the Commission found Nicor Gas' valuation of gas in storage, which included the cost of the 2003 incremental LIFO layer (the layer targeted by CUB), just and reasonable. Docket No. 04-0779, Order at 19; *see also* Docket No. 08-0363, Order (Mar. 25, 2009 and Oct. 7, 2009). To order refunds as CUB proposes would constitute improper single-issue and retroactive ratemaking. *See, e.g., Citizens Util. Bd. v. Illinois Commerce Comm'n*, 166 Ill. 2d 111, 136-37, 651 N.E.2d 1089, 1102 (1995) ("The rule against single-issue ratemaking ... prohibits the Commission from considering changes to components of the revenue requirement in isolation. Consideration of any one item in the revenue formula in isolation risks understatement or overstatement of the revenue requirement.") (citations omitted);

Citizens Utilities Co. v. Illinois Commerce Comm'n, 124 Ill. 2d 195, 210-11, 529 N.E.2d 510, 517 (1988) (“Allowing the rate base reduction to stand would sanction retroactive ratemaking, a practice that this court has long condemned as inconsistent with the statutory scheme and the Commission’s role in the ratemaking process.”).

Moreover, CUB’s adjustment is not supported by the Act, the Commission’s Rules, or the evidentiary record. Indeed, CUB witness Mierzwa freely admitted that this \$40 million refund would only be appropriate “if the Commission wanted to punish Nicor” Gas. Tr. 1237:11-15. But the Commission has no authority to award punitive damages, and CUB has repeatedly failed to cite to any authority permitting such punitive relief. In fact, the only legal authority cited by CUB for its position is Section 9-244(b)(1) of the Act. CUB BOE at 35-36. However, that subsection of the Act pertains to the initial, forward-looking approval of a utility’s performance-based regulation program, not the review that is at issue here under Section 9-244(c).

Furthermore, nothing in the Act or the Commission’s Rules prohibits a utility from either (i) using gas in inventory or (ii) adding a LIFO layer of gas that is priced higher than a previous layer of gas, both points to which Staff witness Richard Zuraski agreed. Tr. 1284:7-15. Indeed, nothing in the Act or the Commission’s Rules suggests that a utility should be penalized when it adds a LIFO layer of gas that is priced higher than prior layers. To the contrary, utilities routinely include in their rate base higher cost assets that replace lower cost, depreciated assets. And CUB’s adjustment is completely inconsistent with the Commission’s acceptance of the LIFO methodology of accounting for gas in storage, which implicitly recognizes that additional layers will be added to storage inventory with different prices. *See, e.g.*, 83 Ill. Adm. Code § 505.1170(C).

Finally, CUB ultimately admits that the basis for its proposed refund is the return of “the profit ... resulting from a scheme hatched and implemented outside regulatory purview.” CUB BOE at 35. Yet, the imposition of a prudence standard is legally improper in a performance-based regulation context. *See, e.g.*, Docket No. 99-0127, Order at 37 (Nov. 23, 1999) (citing Section 9-244 of the Act). And, even if prudence was an appropriate standard in this case, CUB utterly failed to support its claim that Nicor Gas acted imprudently in accessing the low-cost inventory. Carpenter Reb., Nicor Gas Ex. 5.0R, 26:492-27:507.

For all these reasons, the Commission should adopt the Proposed Order’s conclusion rejecting CUB’s proposed carrying costs adjustment.

C. CUB’s Exception No. 3 Should Be Rejected Because The Proposed Order Correctly Adopts Staff’s Calculation Of The LIFO Benefit Due To Nicor Gas’ Customers

As its largest single adjustment, Staff proposed a refund in the amount of \$21,871,934 to account for the benefit due to Nicor Gas’ customers incurred from low-cost LIFO layers of gas inventory withdrawn from accounting inventory during the Company’s operation of the GCPP. Zuraski Dir., Staff Ex. 1.0R, 23:447-58; Nicor/Staff Ex. 1 at 4. The Stipulation between Nicor Gas and Staff addressed this issue at the exact value attributed to it by Staff. Nicor/Staff Ex. 1. CUB is alone again in continuing to press its request for a higher calculation of the LIFO benefit as the AG has now conceded that the Stipulation between Nicor Gas and Staff fully addresses this issue. *See* AG Ex. 1.3 Rev., Sch. DJE-7; AG Init. Br. at 38.

The Proposed Order correctly adopts Staff’s method for calculating the value of LIFO derived savings because it is (i) consistent with the PGA methodologies and (ii) based on deliveries to customers in accord with the Commission’s concern with making customers whole. PO at 25. CUB wisely chooses not to take issue with these irrefutable conclusions. Instead, CUB argues that its calculation is more appropriate because it is more “closely aligned with the

Company's own valuation." CUB BOE at 37. Yet, in making this argument, CUB cannot abandon its reliance on CUB Exhibit 1.04, which is the very document that the Proposed Order (at 25) criticizes CUB for relying on. CUB BOE at 36-37. CUB now openly admits that the CUB Exhibit 1.04 "is not dispositive;" however, CUB tries to force the document's relevance by arguing that it is "a reliable source of the Company's own valuation of the benefit of the LIFO liquidation." CUB BOE at 36-37. Yet, CUB's statement that a document is "reliable" does not make it so. Indeed, CUB's argument that an undated and untitled presentation by an unidentified individual is "a reliable source" strains credulity. CUB pushes the limits on its argument one step further by arguing that the Commission must consider a single figure in this presentation as "evidence" of the value of the LIFO benefit. CUB BOE at 37. The Commission should reject CUB's invitation to infer support for CUB's adjustment where CUB has wholly failed to provide the support its adjustment requires.

Because the evidence supports Staff's LIFO benefit adjustment, the Commission should adopt the Proposed Order's conclusion accepting that adjustment.

D. RESA/IGS's Exception Nos. 2-4 Should Be Rejected Because The Proposed Order Correctly Adopts Staff's Refund Allocation

The Proposed Order (at 31) correctly adopts Staff's refund allocation proposal as the only methodology supported by the evidence in this proceeding. Specifically, Staff proposed that any refund in this proceeding be made to Nicor Gas customers via the Commodity Gas Charge and the Non-Commodity Gas Charge through an Ordered Reconciliation Factor reflected in the Company's Purchased Gas Adjustment ("PGA") filing. Staff Init. Br. at 13-14; Everson Reb., Staff Ex. 6.0, 8:163-9:172; Everson Dir., Staff Ex. 3.0, 18:346-19:369; Tr. 1290:22-1291:10; Tr. 1297:1-4. CUB also "supports Staff's proposal as the most appropriate allocation methodology." CUB Init. Br. at 66.

RESA/IGS argue that their refund mechanism is more equitable than Staff's proposed method "because it would provide a refund to transportation customers." RESA/IGS BOE at 9. More specifically, RESA/IGS argue that there is "nothing equitable about excluding *potentially* 185,000 transportation customers who *could have been* sales customers" during the GCPP period. *Id.* at 10 (emphasis added). The emphasized language demonstrates the problem inherent in their proposal as there is simply no way to know on the record here how many of those customers were, in fact, sales customers during the GCPP as Nicor Gas did not have the opportunity to investigate the proposal made by RESA/IGS.

The Proposed Order (at 31) also correctly concludes that the RESA/IGS proposal cannot be adopted because of the lack of evidentiary support and lack of clarity as to how the proposal would be implemented. RESA/IGS point to two forms of evidence supporting their proposal—the Agreed Stipulation of Facts between Nicor Gas and RESA/IGS and the cross-examination of Staff witness Everson. RESA/IGS BOE at 10. Notably, RESA/IGS submitted no testimony at any time in the proceeding, so Nicor Gas had no opportunity to conduct discovery on their proposal or submit testimony in response. Therefore, there is no evidence explaining how the RESA/IGS proposal would be implemented or examining whether it would impose any unreasonable costs or administrative burdens on the Company. RESA/IGS argue that the implementation of its proposal "is clear" given that it is the same manner utilized by the Commission in its Order in Docket No. 01-0706 for North Shore Gas Company. RESA/IGS BOE at 11. Nicor Gas has already demonstrated above that the matters in Docket No. 01-0706 have no applicability to this proceeding. Moreover, this argument is non-responsive to the concern expressed in the Proposed Order because there is no evidence of how the RESA/IGS proposal would be implemented at Nicor Gas.

Accordingly, the Commission should adopt the Proposed Order's determination to use Staff's proposed refund methodology and reject RESA/IGS's Exception Nos. 2-4 as there is no evidence demonstrating that RESA/IGS's refund mechanism is appropriate in this proceeding.

E. The AG's Exception No. 1 And CUB's Exception No. 4 Should Be Rejected As Without Merit

The AG's Exception No. 1 asks the Commission to revise the Proposed Order to reflect the fact that Nicor Gas withdrew the testimony of certain witnesses. The AG's request is without merit as there simply is no need for the Proposed Order to reflect events that do not form the basis of the Commission's final conclusions. That is because it is the facts in the evidentiary record upon which the Commission must render its decision. *See, e.g.*, 220 ILCS 5/10-103. In short, the AG's request has no place in this proceeding.

CUB's Exception No. 4 similarly attempts to introduce nearly ten full pages of "miscellaneous additional language" in its suggested replacement language that is nothing more than inflammatory rhetoric and argument on the part of CUB. CUB states that this additional language is intended "to provide the necessary context and facts" for the Commission's conclusions. CUB BOE at 38. Yet, the Proposed Order already provides ample background supportive of the Commission's conclusions. Moreover, as discussed above, the "legal standards" language proposed by CUB completely misses the mark as it relies heavily upon standards that do not apply here, including, for example, Section 9-201 of the Act. *See* CUB BOE at 13-17. Finally, the Commission should reject CUB's proposed section relating to "observations" on Nicor Gas' conduct as it has no bearing on any of CUB's requested adjustments and is a patent attempt by CUB to paint Nicor Gas in the worst possible light.

There is no place for the rhetoric proposed by the AG and CUB in the Commission's Final Order. Accordingly, the Commission should reject the AG's Exception No. 1 and CUB's Exception No. 4 and their associated replacement language.

IV. CONCLUSION

WHEREFORE, for the reasons set forth herein, in its Brief on Exceptions and in its Initial and Reply Briefs, Northern Illinois Gas Company d/b/a Nicor Gas Company respectfully requests that the Commission modify the Proposed Order as set forth in Nicor Gas Company's Exceptions and, as modified, be adopted by the Commission.

Dated: December 5, 2012

Respectfully submitted,

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