

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)	

**VERIFIED MOTION TO COMPEL DISCOVERY
FROM STAFF OF THE ILLINOIS COMMERCE COMMISSION**

Northern Illinois Gas Company d/b/a Nicor Gas Company (“Nicor Gas” or the “Company”), through its undersigned attorneys, hereby respectfully moves the Administrative Law Judges (the “ALJs”) pursuant to Section 200.370 of the Commission’s Rules of Practice, 83 Ill. Admin. Code § 200.370, for a ruling compelling Staff to respond to the Company’s First Set of Data Requests to Staff (the “Staff Data Requests”). Staff has refused to respond to this discovery on the unexplained and unsupported basis that the Staff Data Requests are “premature” until after Staff’s witnesses’ direct testimony is pre-filed in this proceeding. The Staff Data Requests were served two months ago, and Staff’s responses to the Staff Data

Requests already are more than one month overdue. Nicor Gas's inability to obtain this discovery from Staff—which is the mirror image of extensive discovery by Staff on the Company—threatens the fundamental fairness of this proceeding. Therefore, Nicor Gas seeks expedited hearing on this Motion within (7) seven days of its filing to avoid material prejudice to the Company's ability to prepare its case for hearing and the possibility of further discovery-related procedural delays in this proceeding.

In support of this Motion, Nicor Gas states as follows:

1. On July 16, 2002, the Commission ordered that all the parties, including Nicor Gas, should proceed with discovery in this matter. Interim Order, p. 3, Docket No. 02-0067, Ill. Comm. Comm'n, July 16, 2003.
2. On August 21, 2003, Nicor Gas by electronic service served the Staff Data Requests on Staff counsel. The Staff Data Requests and transmittal correspondence from Nicor Gas's counsel are attached to this Motion as Exhibit A.¹
3. The Staff Data Requests consist of 58 requests for documents and other information related to this proceeding. (*See* Ex. A). For purposes of this Motion, Nicor Gas has limited the Staff Data Requests on which it is seeking a ruling to the following thirty-eight (38) data requests: NG-ICC 1.01, NG-ICC 1.02 and 1.04, NG-ICC 1.05 and 1.07, NG-ICC 1.08 and 1.10, NG-ICC 1.11 and 1.13, NG-ICC 1.14 and 1.16, NG-ICC 1.17 and 1.19, NG-ICC 1.20 and 1.22, NG-ICC 1.23 and 1.25, NG-ICC 1.26 and 1.28, NG-ICC 1.29-1.37, NG-ICC 1.38-1.40, NG-ICC 1.41-1.43, NG-ICC 1.44-1.46, and NG-ICC 1.58. As demonstrated below, these data requests are unquestionably relevant to the subject matter of this proceeding. They are also purely factual in nature, *i.e.*, they do not seek discovery into opinions that may (or may not) be included in Staff's witnesses' direct testimony to be filed next month.²

¹ As indicated in the transmittal correspondence, Nicor Gas also served initial data requests on the Citizens Utility Board and the Cook County State's Attorney's Office on the same date.

² Nicor Gas has limited this Motion in the interest of compromise and administrative efficiency. In doing so, Nicor Gas in no way waives any right to full and timely discovery from Staff with respect to the Staff Data Requests or any other discovery in this proceeding.

4. While described in greater detail below, the Staff Data Requests in general seek documents and information related to the Gas Cost Performance Program (the “GCPP”) previously operated by Nicor Gas and to Company’s annual purchased gas adjustment (“PGA”) cost reconciliation proceedings as they pertain to the GCPP. These areas of inquiry, in turn, mirror the subject matter of this proceeding on reopening. *See* Second Interim Order, p. 6, Docket No. 02-0067, Ill. Comm. Comm’n, December 17, 2003 (setting forth the scope of these proceedings on rehearing).

5. Much of the discovery sought amounts to no more than the request for documents in Staff’s possession—other than those already produced by Nicor Gas in this proceeding—related to transactions under the GCPP and/or the PGA that are referenced in the October 28, 2003 Report to the Special Committee of the Board of Directors of Nicor Inc. by independent counsel Scott R. Lassar (the “Lassar Report”).³ As the ALJs are aware, the Lassar Report³ was released to the parties upon publication last year and the transactions addressed in the Report have been the subject of extensive discovery on Nicor Gas, including by Staff.

6. The Company requested that Staff respond to the Staff Data Requests by September 4, 2003, or fourteen (14) days from the date of service, consistent with the general practice adopted by Nicor Gas in this proceeding to accelerate discovery, as possible. Staff provided no response to any of the Staff Data Requests by the September 4, 2003 date.

7. Nicor Gas counsel has spoken with Staff counsel on several occasions concerning the Staff Data Requests. Staff counsel initially stated that Staff would require additional time to provide its responses. Nicor Gas was agreeable to providing Staff with additional time within reason. On October 3, 2003, in a subsequent discussion with Nicor Gas counsel, Staff counsel stated that Staff would not respond to the Staff Data Requests until after Staff’s witnesses’ direct testimony was pre-filed. Staff

³ Mr. Lassar is a member of the law firm Sidley Austin Brown & Wood, LLP. He is counsel to the Special Committee of the Board of Directors of Nicor Inc., the non-jurisdictional parent company of Nicor Gas. Mr. Lassar does not represent Nicor Gas as an attorney in this proceeding; however, he has agreed to testify as a witness for Nicor Gas. Nicor Gas identified Mr. Lassar as a witness on or about April 25, 2003. Mr. Lassar’s direct testimony, dated August 5, 2003, has been pre-filed with the Clerk of the Commission.

witnesses' pre-filed direct testimony is due on November 21, 2003 under the current schedule set by the ALJs. Staff counsel stated that Staff would not respond to the data requests, because the requests are "premature" prior to the pre-filing Staff's Witnesses' direct testimony. Nicor Gas counsel requested that Staff counsel put this position in writing. (See John E. Rooney letter to John Reichart and Jan Von Qualen, Oct. 3, 2003, attached hereto as Ex. B). On October 15, 2003, Staff counsel provided written confirmation of its position. (See John Reichart letter to John E. Rooney, Oct. 15, 2003, attached to this Motion as Ex. C).

8. As of the filing of this Motion, Nicor Gas has received no discovery whatsoever responsive to the Staff Data Requests, despite consultation and reasonable attempts to resolve its differences with Staff. See 83 Ill. Admin. Code § 200.350.

9. Staff's refusal to respond to the Staff Data Requests is fundamentally unfair, wholly unsupported by law, and, if not modified, highly prejudicial to the Company which, like any other party, should have the chance to educate itself in discovery as to all relevant and material facts to this proceeding. See 83 Ill. Admin. Code § 200.340. The ALJs should not endorse Staff's attempt to avoid its obligations to respond to discovery in a timely manner.

10. In effect, Staff seeks to impose a double-standard for discovery in this proceeding. Since discovery resumed last year (see ¶ 1 *supra*), Nicor Gas has responded to unprecedented discovery in both amount and kind. Staff alone has served no fewer than 28 sets of data requests on Nicor Gas, consisting (including subparts) of hundreds of questions and document requests. Nicor Gas also has responded to written discovery from Citizens Utility Board ("CUB"), the Cook County State's Attorney's Office, and the Illinois Attorney General's Office, and Staff has been the beneficiary of such discovery. In total, Nicor Gas has produced approximately 115,000 pages of documents to Staff and the other parties since discovery resumed.⁴ At Staff's request, Nicor Gas further agreed to and facilitated the depositions of

⁴ Additionally, some 8,000 pages of documents have been produced to the parties by Mr. Lassar and/or by his consultant KPMG LLP related to Mr. Lassar's investigation including, without waiver, certain of Mr. Lassar's work product in his capacity as attorney to the Special Committee of the Board of Directors of Nicor Inc.

thirteen (13) current and former Company employees, including all managers and senior executives with responsibility for the GCPP. Given the enormous burden in discovery shouldered by Nicor Gas, Staff should not be allowed to reciprocate by summarily declining to cooperate in discovery.⁵ See 83 Ill. Admin. Code § 220.340 (discovery in Commission proceeding should proceed on informal and cooperative basis); see, e.g., *Williams v. A. E. Staley Mfg. Co.*, 83 Ill. 2d 559, 564-66, 416 N.E.2d 252, 255-56 (1981) (parties are encouraged to use discovery process to illuminate actual issues in a case, not to obstruct or harass opposing parties).

11. The Commission's Rules neither contemplate nor permit such conduct in discovery by any party, *including* Staff. Discovery in Commission proceedings should allow each party in timely fashion to obtain full disclosure of all relevant and material facts. See 83 Ill. Admin. Code § 200.340. In discussions with Nicor Gas counsel, as well as in related correspondence, Staff counsel have not asserted that the Staff Data Requests are irrelevant or otherwise improper (and they are not). Rather, Staff unilaterally has determined that it will not respond to this discovery until after its witnesses' direct testimony is pre-filed. (See ¶ 7 *supra*; Ex. C). The Commission's rules make no allowance for a party extending or avoiding its obligations to respond to discovery on such basis, where the discovery sought is factual and objective and is not intended to elicit subjective information responsive to an identified party witness's anticipated testimony.⁶

12. Nicor Gas notes that it previously objected to certain discovery in this proceeding, specifically CUB's 11th Set of Data Requests ("CUB's 11th Data Requests"), on the basis that such discovery was premature, where the discovery was directed at the Company's designated witness, Mr. Lassar, and sought to elicit opinions and other subjective information likely to be contained in Mr.

⁵ Nicor Gas respectfully notes that, in its view, much of the voluminous discovery to which it has been subject over the past year is irrelevant and/or immaterial to the issues actually presented for resolution in this proceeding. See Second Interim Order, p. 6; 220 ILCS 5/9-244 (the statutory provision regulating the GCPP); see generally Article IX of the Public Utilities Act, 220 ILCS 5/9-101 *et seq.* Nonetheless, the Company in good faith and at great time and expense (and without waiver) has cooperated fully with Staff and other parties in discovery.

⁶ As a technical matter, absent a ruling by the ALJs or an agreement between the parties, Staff should have responded to the Staff Data Requests by September 4, 2003, or at the very latest on or before September 18, 2003, twenty-eight (28) days from service of the data requests. 83 Ill. Admin. Code § 200.410.

Lassar's testimony. (*See, e.g.*, John E. Rooney's Letter to Rob Kelter, June 18, 2003, attached hereto as Ex. D). In the interest of compromise, Nicor Gas responded to CUB's 11th Data Requests over this objection (and others) on July 31, 2003—prior to pre-filing Mr. Lassar's testimony. After briefing and argument concerning CUB's 11th Data Requests, Nicor Gas supplemented its responses to this discovery on August 21, 2003—again before pre-filing Mr. Lassar's testimony. Nicor Gas asks the ALJs to take notice that Staff counsel at the August 5, 2003 hearing on CUB's 11th Data Requests supported CUB's and Cook County's arguments for requiring the Company to respond to discovery directed at Mr. Lassar prior to the pre-filing of the witness's testimony. (*See Tr.*, p. 365, lines 13-15, Aug. 14, 2003) ("Mr. Reichart: 'Staff would note that we are in general support of CUB and Cook County's motion as argued today.'"). It is inconceivable that Staff could take such a position as applied to Nicor Gas and its witness, Mr. Lassar—yet refuse to respond to Company discovery, which is not even directed at any Staff witness, until after Staff 's witnesses' testimony is pre-filed.

13. Finally—and most pointedly—the discovery propounded by Nicor Gas on Staff is undisputedly relevant and requires a timely response to preserve the integrity of the pre-hearing process in this matter. Of the thirty-eight data requests that are subject to this Motion:

- Eighteen (18) seek Staff's documents—other than those already produced by Nicor Gas—related to specific transactions and issues referenced in the Lassar Report. (*See Ex. A*, at NG-ICC 1.02 and 1.04, NG-ICC 1.05 and 1.07, NG-ICC 1.08 and 1.10, NG-ICC 1.11 and 1.13, NG-ICC 1.14 and 1.16, NG-ICC 1.17 and 1.19, NG-ICC 1.20 and 1.22, NG-ICC 1.23 and 1.25, NG-ICC 1.26 and 1.28). Staff has conceded the relevance of this discovery by serving discovery of its own on Nicor Gas directed at the Lassar Report (*see, e.g.*, Staff Data Request, Nos. 16.01-16.07, attached hereto as Ex. E) and conducting extensive oral discovery into this subject matter during depositions.
- Nine (9) seek Staff's documents and other information related to the Company's use of the "last-in, first-out" ("LIFO") accounting for gas in storage inventory under the GCPP, including Staff's knowledge of the same. (*See Ex. A.*, at NG-ICC 1.29-1.37). Staff has conducted extensive written and oral discovery into the use of LIFO accounting under the GCPP and the Company's disclosure or alleged non-disclosure of such information to Staff. (For the ALJs' convenience, Nicor Gas has attached to this Motion, as Exhibit F, excerpts from Staff counsel's examination of certain Nicor employees on this subject matter.) Nicor should be allowed to investigate all the facts as they pertain to this line of discovery. Staff has opened the door to this inquiry.

- Another nine (9) seek Staff’s documents and other information concerning three (3) specifically identified Company documents provided to Staff related to the GCPP during the time periods relevant to this proceeding. (*See* Ex. A, at NG-ICC 1.38-1.40, NG-ICC 1.41-1.43, 1.44-1.46). Each of these documents provides information about the Company’s operation of the GCPP, and the Company is entitled to discover which Staff members received these documents and what review and analysis Staff has conducted on them. Such discovery is customary and proper in Commission proceedings and entirely consistent with the Commission’s “full disclosure” policy on discovery. *See* 83 Ill. Admin. Code § 340.
- Finally, two (2) data requests seek the identity of Staff personnel who reviewed or analyzed Nicor Gas documents related to the Company’s 1999-2001 PGA reconciliation proceedings (*see* Ex. B, at NG-ICC 1.01) or participated in audits of transactions related to the PGA for these years (*See* Ex. B, at NG-ICC 1.58). The Commission specifically has identified the operation of the Company’s PGA for these time periods as within the scope of these proceedings on reopening. *See* Second Interim Order, p. 6. Such information, at a minimum, is reasonably calculated to lead to the discovery of admissible information and is discoverable under the Commission’s Rules. *See* 83 Ill. Admin. Code § 340.

14. Staff has offered no objection to the discovery that is subject to this Motion. Rather, Staff unilaterally, and without explanation or legal support, has refused to respond to the Staff Data Requests in a timely manner based on the pretense that they are “premature.” In the event Staff were allowed to persist in this conduct, Nicor Gas would be materially prejudiced in its ability to prepare its case for hearing. Staff is seeking to withhold the discovery sought for more than three (3) months after service and two (2) months after its latest proper due date, until after Staff’s witness’s direct testimony is filed on November 21, 2003. After that date, Nicor Gas will have only eight (8) weeks, which includes Thanksgiving and the year-end holiday season, in which to prepare its rebuttal case. Given these time constraints—and the pressing need to move this matter to hearing without further procedural delay—Staff should not be allowed to deny the Company’s access to discovery until such time as may suit its convenience or advantage.

WHEREFORE, for all these reasons, Nicor Gas respectfully requests a ruling requiring Staff to respond to the Staff Data Requests, as limited by this Motion, no later than seven (7) days from the date of the ALJs' ruling and such other relief as is just and appropriate. Nicor Gas further seeks expedited briefing on this Motion with a hearing to take place, if possible within the ALJs' schedule, no later than Monday, October 27, 2003.

Dated: October 20, 2003

Respectfully submitted,

NORTHERN ILLINOIS GAS COMPANY
D/BA/ NICOR GAS COMPANY

By: _____
One of its attorneys

John E. Rooney
Thomas A. Andreoli
Sonnenschein Nath & Rosenthal
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-8000
jrooney@sonnenschein.com
tandreoli@sonnenschein.com

CERTIFICATE OF SERVICE

I, Thomas A. Andreoli, hereby certify that I served a copy of Northern Illinois Gas Company d/b/a Nicor Gas's Motion to Compel Discovery from Staff Of the Illinois Commerce Commission upon the service list in consolidated Docket Nos. 01-0705/02-0067/02-0725 by email on October 20, 2003.

Thomas A. Andreoli