
**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Citizens Utility Board	:	
	:	00-0620
Request for an investigation into the current structure of the Nicor Customers Sect Pilot Program and the Proposed Changes filed August 10, 2000, Meet the Public Interest Standards and Other Requirements Set Forth in the Public Utilities Act. 220 ILCS 5/4-101; 220 ILCS 5/8-101; 220 ILCS 8-102	:	
	:	(cons.)
Northern Illinois Gas Company d/b/a Nicor Gas Company	:	
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Proposed changes to Riders 15 and 16 and related provisions.	:	

**INITIAL BRIEF OF
THE NATIONAL ENERGY MARKETERS ASSOCIATION**

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This Brief is submitted by The National Energy Marketers Association (“NEM”) in the above-referenced proceeding. NEM is a national, non-profit trade association representing both wholesale and retail marketers of energy and energy-related products, services, information and technologies throughout the United States. NEM’s membership includes: small regional marketers, large international wholesale and retail energy suppliers, billing and metering firms, Internet energy providers, energy-related software developers, risk managers, energy brokerage firms, and information technology providers. NEM’s membership has both affiliated and unaffiliated companies.

Affiliated and independent marketers have come together under the NEM auspices to forge consensus and to help eliminate as many issues as possible that would delay competition. NEM is committed to working with representatives of state and federal governments, large and small consumer groups and utilities to devise fair and effective ways to implement the competitive restructuring of retail electric markets.

The Notice of Hearing Examiner's Ruling dated March 1, 2001, invited parties to submit briefs addressing the following topics organized in the manner set forth in the Ruling. This brief will address the subject-matter identified in the Ruling, but will focus on the important issue of allowing customers to designate competitive natural gas suppliers as their billing recipients. Recognizing valid and legal agency relationships benefits the natural gas marketplace by providing suppliers the flexibility to offer competitive products, services, information and technologies.

II. OVERVIEW OF THE CUSTOMER SELECT PROGRAM

The Illinois Commerce Commission ("ICC" or "the Commission") originally approved Nicor Gas' ("Nicor" or "the Company") Customer Select Pilot Program ("Customer Select" or "the Program") in 1997 to last for three years. The stated purpose of the original Program was to provide small volume commercial and industrial customers a pilot transportation program. The first customers eligible for the Program were able to enroll in Customer Select from January through March 1998. In the Fall of 1998, Nicor proposed and the Commission granted approval to expand the Program to additional commercial and industrial customers as well as 80,000 residential customers. In August 2000 the Company filed revised tariff sheets for Riders 15 and 16 and related changes to

Rider 6 to expand the Program to the remainder of Nicor's service territory. In September 2000 the instant proceeding was initiated.

III. SHOULD THE COMMISSION'S ORDER CONCLUDE THAT THE CUSTOMER SELECT PROGRAM BE EXPANDED TO ALL RESIDENTIAL CUSTOMERS OF NICOR GAS COMPANY?

As a general matter, NEM believes that pilot programs must be implemented in sufficient size to permit competitive marketers to achieve economies of scale. The larger the pilot size, the greater the chance that consumers can benefit from meaningful price competition. This is true because if a marketer can achieve economies of scale, it can pass along the lower costs to consumers. With respect to the proposed Customer Select Program, NEM urges the Commission to conform the program in accordance with the following suggested modifications.

IV. IF THE CUSTOMER SELECT PROGRAM IS ALLOWED TO BE EXPANDED TO ALL RESIDENTIAL CUSTOMERS OF NICOR GAS COMPANY, (a) WHAT CHANGES SHOULD BE MADE TO RIDERS 15 AND 16 FILED BY NICOR GAS COMPANY, AND WHAT ACTIONS SHOULD BE TAKEN BY THE COMMISSION?

Nicor's proposed tariffs introduce prohibitive barriers to suppliers with new language under the provision of "Billing Date" that forbids customers from designating competitive suppliers as bill recipients. (Rider 15, Exhibit AEH-4 at 3) In addition, Nicor added a new condition for suppliers to adhere in the standards of conduct under Rider 16 which states that "[suppliers shall] refrain from changing or causing to be changed, the Customer's mailing address to a location accessible to the supplier." (Rider 16, Exhibit AEH-4 at 11) The remainder of this Brief focuses on why these newly added provisions should under no circumstances be approved by the Commission.

A. TO ACHIEVE CONSISTENCY WITH COMMON BUSINESS PRACTICES, THE COMPANY'S TRANSPORTATION TARIFFS AND THE COMMISSION'S RECOGNITION OF AGENTS' PRACTICES IN A SIMILAR INDUSTRY, THE COMPANY SHOULD BE REQUIRED TO RECOGNIZE THE LEGAL RELATIONSHIP OF AGENCY BETWEEN CUSTOMER AND SUPPLIER

1. NEM Supports Staff's Position on Account Agency with One Refinement

Currently, natural gas suppliers competing in Nicor Gas' Program have two options in which to bill customers. Suppliers can separately bill customers for natural gas supply, and customers receive one bill from the competitive supplier and one bill from Nicor. The second method requires suppliers to elect the Company to bill customers for the supplier's natural gas supply in addition to charges for distribution. (*See inter alia*, GCI Ex. 2.0NP at 15)

To supplement the Company's two proposed billing methods, Staff Witness Iannello proposes two additional arrangements to provide benefits to suppliers and customers without causing customers or the Company undue harm. (ICC Staff Ex. 1.0 at 20, 21)

The first option would allow customers to designate their supplier as the recipient of Nicor's transportation bill, with the requirement that the supplier providing a single bill to customers contain both the Company's and supplier's charges listed as line items. (*Id.* at 21) Mr. Iannello also proposes a second option described as a two-bill/one payment option. Under this scenario, the Company would provide both the customer and the supplier with a copy of the utility's transportation service bill, and the customer would only remit payment to the supplier for both the Company's and the supplier's services.

The Company bill sent directly to the customer would be for informational purposes only.
(*Id.*)

NEM agrees in principle with Staff Witnesses Iannello and Schlaf and GCI Witness Mierzwa that to assist in the development and promotion of a competitive natural gas supply market, the Company should be required to allow suppliers to act as customer account agents. (*See* GCI Ex. 2.0NP at 15; ICC Staff Ex. 1.0 at 21; ICC Staff Ex. 5.0 at 3) However, NEM urges the Commission to consider one refinement to Staff Witness Iannello's proposal of allowing the customer to designate its supplier as the recipient of the Company's transportation bill. Mr. Iannello suggests the supplier issue a bill to the customer in a rigid format containing line item charges from the Company and supplier, NEM submits that customers should be afforded the ability to choose what information they wish to receive from the supplier.

As different products and methods of billing and payment are developed in a competitive market, (i.e. bundled services, credit card payments, direct payments, wire transfers, internet payments) certain information may just serve to confuse customers. Some concrete examples of this problem are discussed in the testimony of Government and Consumer Intervenor ("GCI") witness Alexander (GCI Exhibit 4.0, pp.11-12.). This problem can be avoided by allowing customers to choose not to receive certain information. In the absence of such a selection, Mr. Iannello's position is workable and suppliers would be required to include the distribution company's and the supplier's charges as line items on any bill sent to the customer.

Account agency can be implemented immediately and avoid the legal problems associated with implementing “single-bill options” as regulated methods to receive payment for services rendered. The customer’s right to choose a beneficial method in which to be billed and render payments results in a more efficient competitive market. Recognizing the agency relationship between supplier and customer would also help relieve the problems associated with customer confusion scenarios pointed out by GCI Witness Alexander. (GCI Ex. 4.0 at 11-16)

2. Illinois Law Supports Staff’s Position

Generally, an agent is one who undertakes to manage some affairs to be transacted for another by his authority, on account of the latter who is called the “principal,” and to render an account. (*Brunswick Leasing Corp. v. Wisconsin Cent., Ltd.*, 136 F.3d 521, 460 N.E.2d 331) In the business environment, it is well established that a Principal may empower an Agent with the authority to enter into contracts and transact business with third parties on the principal’s behalf. (cite 235 Ill.App.3d 292) In addition, “[i]t is well established that agency is a consensual, fiduciary relationship between two legal entities, created by law, by which the principal has the right to control the conduct of the agent, and the agent has the power to affect legal relations of the principal.” (*Gunther v. Commonwealth Edison Co.*, 126 Ill.App.3d 595, 467 N.E.2d 1104 (1984)) Indeed, under

Illinois law, acts of the agent are considered to be those of the principal. (*John Deere Co. v. Metzler*, 51 Ill.App.2d 340, 201 N.E.2d 478 (1964))

NEM urges the Illinois Commerce Commission and Nicor to recognize a long-standing business relationship and allow customers to rightfully be able to make business decisions and employ agents in the competitive natural gas marketplace. However, the central issue of requiring Nicor to recognize the legal agency relationship between customer and supplier has potential significant consequences if not adopted. By expressly prohibiting suppliers to enter into agency arrangements with customers, Nicor is interfering in a valid contractual relationship between the supplier and the customer in a transaction.

By proposing language in its Riders prohibiting basic agency agreements between the supplier and customer, Nicor's proposals interfere with existing contractual relationships. (*See generally*, Restatement of Torts, 2d § 766B) As a matter of law and policy, Nicor has no compelling reason to interfere in the contractual agency relationship between the supplier and the customer.

The Commissioners should ask the rhetorical question as to why the utility would interfere in a valid, recognized contractual relationship between the supplier and the customer. Certainly, while Mr. Harms stated several reasons in his opposition to Staff's proposals regarding this issue, (*See Harms Rebuttal*, pp. 15-18) none were ultimately

persuasive to Staff Witness Schlaf (ICC Staff Ex. 5.0 at 10-19), and none are certainly compelling to engage in an interference with a contractual relationship.

Staff's sensible and well-reasoned position avoids the legal problems associated with not recognizing a legal business relationship. Staff's position allows customers to rightfully be able to make business decisions and employ agents in the competitive natural gas marketplace just as customers in every other market can do. By expressly prohibiting suppliers to enter into agency arrangements with customers, Nicor may be interfering in a valid contractual relationship between the supplier and the customer which, as Staff recommends, this Commission should not condone.

Moreover, as alluded to in the testimony of Staff Witness Schlaf (ICC Staff Exhibit 5.0, pp.24-25), Nicor's proposal raises additional legal issues concerning the scope of the Commission's jurisdiction over the customer/agent relationship.

The suppliers' and customers' interest serve the public good, promote competition, and serve the interests of the Commission who are charged with promoting and developing a competitive market. (*See, e.g.* 220 ILCS 5/16-101A(d)) Similarly, the ICC may well be expanding its jurisdiction beyond its statutory boundaries by acquiescing to such behavior. As transportation customers have long established relationships with agents, as well as electric customers taking competitive services, by adopting Nicor's proposed additions to its tariffs, the Commission may well sanction a violation of discrimination provisions contained in the Illinois Public Utilities Act. (220 ILCS 5/9-241)

To avoid undue legal complications, the Commission should adopt Staff's proposal of allowing billing agency to exist in Nicor's Program without the qualification of regulating billing content. Marketers and customers should be allowed to engage in business relationships that are mutually beneficial and not unduly burdensome to the ICC or the utility.

B. TO ACHIEVE CONSISTENCY WITH THE COMPANY'S OWN PRACTICES, THE COMPANY SHOULD BE REQUIRED TO ALLOW CUSTOMERS TO CHOOSE A SUPPLIER TO ADDRESS THEIR NEEDS

According to Staff Exhibit 1.3, the Company permits any customer outside of those served under the Customer Select Pilot Program to designate a billing agent for purposes of receiving bills from the Company. (ICC Staff Exhibit 1.3) To remain consistent with Nicor's own policies with regard to billing recipients, the Customer Select tariffs should be modified to reflect a seamless policy with the Company's bundled rate customers. While the Company's transportation customers currently enjoy the flexibility afforded suppliers, so too should customers choosing a competitive supplier in the Pilot Program.¹

Although transportation customers have enjoyed the benefits of single billing from suppliers without regulation since the 1980's, Staff proposes that the billing function be regulated to require certain information in bills. (ICC Staff Ex. 1.0 at 2) However, no evidence in the record or otherwise suggests that Nicor's current transportation customers

¹ According to ICC Staff Exhibit 5.2, over ninety percent (90%) of non-Customer Select transportation customers utilize the services of agents. (See ICC Staff Exhibit 5.2).

are unduly harmed from the agency activities of suppliers. Indeed, the central theme of this proceeding is to open the market and provide customers with legitimate choices for natural gas supply and service. As GCI Witness Mierzwa stated: “[p]rohibiting suppliers from offering customers their preferred billing option necessarily hinders competition.” (GCI Ex. 3.0 P, at 5)

Staff aptly identified that Nicor’s transportation customers have enjoyed the benefits of single billing for transportation customers, and that “[e]xperience has shown that electric and natural gas suppliers consider the ability to offer single billing services to be a crucial part of successful marketing efforts.” (ICC Staff Ex. 5.0 at 3) In addition, Staff Witness Iannello stated that: “he sees no legitimate reason for the dichotomy between Customer Select and non-Customer Select billing arrangements.” (ICC Staff Ex. 1.0 at 22) ICC Witness Schlaf reaches similar conclusions in agreeing with fellow Witness Iannello, “by allowing suppliers to act as account agents on behalf of customers and allow suppliers to offer single billing services, results in the ultimate benefit of customers. (ICC Ex. 5.0 at 3) Dr. Schlaf states that customers desire the ability to receive single billing services from suppliers, and that suppliers consider the ability to act as account agents and provide billing services to be crucial to the success of marketing efforts. (*Id.*)

There is also evidence that agents can detect billing errors unnoticed by the utilities that may affect multiple customers thereby benefiting the utility, the customer and presumably, the marketplace. (ICC Staff Ex. 5.1 at 6) Furthermore, suppliers acting as customer agents can provide utilities with an additional degree of assurance that bills are

paid promptly, as suppliers typically pay utilities before receiving reimbursement by customers. (*Id.*) Clearly, the record shows that customers and the competitive market will both benefit from the implementation of allowing customers to designate suppliers as bill recipients. NEM recommends the Commission allow suppliers to act in the same manner that many are currently enjoying serving transportation customers.

In short, agency arrangements are deeply rooted in common business practices, Illinois law, and the Company's own business practice for transportation customers. NEM urges Nicor and the Commission to recognize these long-standing relationships.

V. CONCLUSION

For the reasons set forth in its Initial Brief, the National Association of Energy Marketers respectfully requests the Commission enter an Order in this docket consistent with the following:

1. Adopt NEM's proposed changes to the Customer Select Pilot Program with respect to agency modifications contained herein.
2. Enter an Order in conformance with the arguments presented.

Respectfully submitted,

**THE NATIONAL ENERGY
MARKETERS ASSOCIATION**

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