

In fact, the City's "expert" never inspected the Pekin District water system, and when asked about the water system, it was obvious that he had only a limited familiarity. [Tr. 571.] Dr. Adams was unsure of the location and identity of Pekin's seven wells and incorrectly believed that the Pekin District system presently treats water for nitrates with ion exchange equipment. [Tr. 565.] Dr. Adams has never seen any documents detailing the mechanics and workings of that water system. [Tr. 571.] His testimony that the Pekin District system is not a "complex system" was conveniently founded solely on his belief that, in general, ground water systems are simpler than surface water systems. [Tr. 571.] As explained by IAWC witness Johnson, the operation of the Pekin District is actually quite involved given the continuous maintenance and adjustments (including continual calibration and program updates) necessary for proper operation of the Supervisory Control and Data Acquisition ("SCADA") system by highly skilled and trained facility operators, and given the tetrachlorethylene ("PCE") pollution of the aquifer serving Pekin necessitating a complex Granular Activated Carbon ("GAC") facility that also requires constant monitoring. [IAWC Ex. 3.00, pp. 19-20.] Since Dr. Adams had neither the background nor the preparation to give an opinion on the Pekin District system, not only should his testimony on that subject be disregarded as the bought opinion of a "hired gun," it also casts doubt on the veracity of his wastewater opinion — as the testimony makes clear that his threshold of information necessary to set forth an opinion is extraordinarily low.

Furthermore, Dr. Adams' testimony is replete with error and misstatement. Dr. Adams, for example, stated initially that dissolved oxygen ("DO") concentration in the activated sludge process of the wastewater treatment plant is "only a concern when

. . . consistently and persistently below 1.0 mg/L.” [Pekin Ex. 9.0, p. 30.] At the hearing, however, Dr. Adams admitted that IAWC was correct in its assertion that, in fact, the DO concentrations had dropped below 1.0 mg/L for a period of more than one day a total of 67 times over the past 3 years – but said that he had not been aware of that fact because his review of documents in this case did not go into that level of detail.

[Tr. 625-26.] Dr. Adams also stated in his filed testimony that during the last three years the Pekin wastewater treatment plant had not experienced a loss of biomass from the secondary clarifiers. [Pekin Ex. 9.0, p. 31.] When faced with wastewater system documents evidencing numerous losses of biomass within the last three years, Dr. Adams once again admitted that his filed testimony was incorrect and that there have been several occasions where a loss of biomass occurred. [Tr. 633-35.]

The inaccuracies in Dr. Adams’ testimony are not limited to mischaracterizations of the way in which the City operates WTP 1. Aside from the failure to identify other individuals that he relied upon as discussed above, Dr. Adams blatantly attempted to conceal the fact that he did not personally conduct two inspections of the wastewater treatment plant. Despite specifically stating in a data request that he inspected the wastewater treatment plant on March 19-20, Dr. Adams admitted while on the stand that he had actually sent another individual to do the inspection. [IAWC Cross-Exam Ex. 30; Tr. 552.] Thus, not only was the response to the data request (IAWC Cross Ex. 30) incorrect, Dr. Adams revealed yet another individual upon whom he relied but never identified. [Tr. 639.] Furthermore, the same data request states that there were no discharges from any of the City’s combined sewer overflows (“CSO”) during the March 19-20 inspection. [IAWC Cross-Exam. Ex. 30.] Once again, this is an incorrect

statement, as the operator's logbooks for that time period indicate that there was a discharge from a CSO for 8.4 hours. [Tr. 645.]

In support of its argument that the Commission should ignore the wastewater evidence, the City (BOE, p. 18) hangs its hat on a single case, Commonwealth Edison Company v. Illinois Commerce Commission, 181 Ill. App. 3d 1002, 538 N.E.2d 213 (Ill. Ct. App. 1989). Commonwealth Edison, however, provides no support for the City's argument that the Commission is prohibited from considering the wastewater evidence presented in this case. What the City fails to acknowledge is that Illinois-American did not place the wastewater system at issue: the City did. The City chose to meet its burden to prove its condemnation proposal is in the better public interest, in large part, by claiming that it successfully "solved any problem areas of the [wastewater] system (Hierstein Aff. to Pet., ¶ 12); that the City's operations of the wastewater system as a whole, as well as the City's compliance with applicable environmental regulations is "outstanding" (Kief Aff. to Petition, ¶ 8; Pekin Ex. 2.0, p. 10); and that "the City's track record in dealing with the Wastewater Treatment System is a solid basis" for acquisition of the water system (Pekin Ex. 2.0, p. 12). The City did not merely rely on its own witnesses to support this claim - it retained an expert whose sole purpose was to investigate the City's management of the wastewater system "to determine whether the City of Pekin has demonstrated an ability to properly manage and run the drinking water system." [Pekin Ex. 12.0, p. 9.]

In Commonwealth Edison, the Commission denied a petition for approval of the sale of utility property solely because of the adverse environmental impact the residential development proposed by the purchasers would have on a wetlands area

located on the property. Commonwealth Edison, 538 N.E.2d at 216. The court recognized that the Commission's duty is to regulate public utility service, and held that the environmental impact of a residential development on the ecology of a wetlands area is beyond the particular expertise of the Commission. Id. The court was careful to emphasize, however, that the Commission was free to examine all aspects of the proposed sale "in the public utility context." Id. The court noted that the proper scope of the Commission's review would include such factors as "costs to customers, simplification of utility service, operating costs, facility planning, and proximity of service territories." Id. The court held that "[h]ad the Commission correctly determined that the sale would somehow adversely affect utility service, then we would defer to the Commission's expertise." Id. Thus, the sole reason the court reversed the Commission's decision in Commonwealth Edison was because the environmental concerns that formed the basis of the Commission's decision had absolutely no impact on public utility service, and therefore were beyond the jurisdiction of the Commission as defined by the Public Utilities Act. Id.

In this case, the wastewater evidence that was presented has a potential effect that is within the Commission's area of jurisdiction - the effect of Pekin's condemnation proposal on the public interest. The express language of the Public Utilities Act gives the Commission the specific responsibility of ensuring "environmentally safe" operation within its area of responsibility. 220 ILCS 5/9-401; see also ICC v. Utilities Unlimited, Inc., ICC Docket 98-0846, Order, p. 11 (2000) (revoking utility's certificate of public convenience and necessity for utility's failure to comply with environmental statutes, regulations, and conditions of its NPDES permit).

As it turned out, the wastewater evidence demonstrated conclusively that City ownership of the water system would adversely affect utility service, which is precisely the type of analysis the Commonwealth Edison case holds the Commission should undertake. The wastewater evidence demonstrates that, not only does the City's wastewater system have a chronic and ongoing inability to comply with IEPA regulations, the system suffers from operational breakdowns and management inefficiencies within the City's wastewater treatment plant; suspected squandering of funds by the premature shut down of treatment plant 2; inadequate facilities planning by the City; and a continued inability or unwillingness to locate a long-suspected sanitary sewer overflow that could potentially be causing a significant public safety hazard by dumping thousands of gallons of raw sewage directly into the river. [IAWC Ex. 8.0, pp. 15-23.] All of these issues have a direct and adverse impact on the provision of wastewater utility service. All of these inadequacies can impact operating costs, costs to customers, and facilities planning, all of which are factors the Commonwealth Edison court specifically held were within the Commission's purview. And, as the City originally argued, all of its wastewater experience has a direct impact on its ability to run the water system. It is indeed troubling that, with all of the operational problems of the wastewater system, Pekin chose in its direct testimony to characterize the wastewater operation as having a "solid track record" showing "nothing but positives."

For all of these reasons, Pekin's arguments concerning the environmental issues (BOE, pp. 18-20) and its proposed replacement findings (Pekin Exc., pp. 38-39) should be rejected.

## **B. Response to Staff**

For the reasons stated in Illinois-American's Brief on Exceptions (pp. 7-12), the Company agrees with Staff that the Proposed Order's findings at page 38 with regard to Staff witness Johnson's concerns related to the effect of Pekin's proposal on non-residents of the City should be modified. Illinois-American, however, believes that the Proposed Order's language should be modified as shown in the Appendix to Illinois-American's Brief on Exceptions, Section II, and not as proposed by Staff (Staff BOE, pp. 6-7).

In light of Staff's position concerning the appropriate standard for review addressed in Section III(B) of this Reply, Staff (Staff BOE, pp. 9-11) also proposes changes to the Proposed Order's language at pages 39-41. Staff's proposed changes would eliminate the Proposed Order's findings that explain the conclusion that Pekin did not adequately demonstrate that its proposal is in the better public interest. As explained above, Staff's opposition to the better public interest standard is misplaced. Accordingly, the language changes proposed by Staff to pages 39-41 should be rejected.

Staff (Staff BOE, pp. 8-9) recognizes correctly that, under the Staff's "stand-alone" public interest analysis, the City failed to present sufficient facts to establish that its proposed condemnation of the Pekin District is in the public interest. Since the record overwhelmingly supports the denial of the City's petition, even under Staff's proposed standard of review, Illinois-American recommends that, in lieu of the language proposed by Staff (Staff BOE, pages 8-11), the following language be added after the last sentence in Paragraph 41 of the Proposed Order:

As discussed above, the Commission concludes herein that the better public interest standard is the appropriate standard for decision. The Commission notes, however, that, even if the more limited public interest analysis proposed by Staff and, in part, by Pekin, were to be applied, the City failed to present sufficient facts to prove that City ownership of the water system would serve the public interest.

#### **V. FINDINGS AND ORDERING PARAGRAPHS (SECTION VI)**

As discussed above, each of Pekin's argument advanced in support of its Exceptions 3 and 4 should be rejected. For that reason, Pekin's Exception No. 5, which proposes corresponding changes to language of the "Commission Conclusion", also should be rejected. Pekin also objects to language which is standard in Commission Orders, adopting recitals of fact stated in the prefatory portion of the Order "as findings of fact." IAWC believes that the Proposed Order's language in this regard is sufficiently clear and that Pekin's proposal should be rejected.

#### **VI. STATEMENTS OF PEKIN'S POSITION AND STAFF POSITION (SECTION IV (A) AND (C))**

Pekin's suggested revisions to the "Pekin's position" and "Staff position" of the Proposed Order should be rejected as replete with error and mischaracterizations. We will not lengthen this Reply by addressing every mischaracterization and error that Pekin includes in its proposed versions of "Pekin's Position" and "Staff Position." The following examples, however, demonstrate the untrustworthiness of Pekin's depiction of the testimony presented at the hearing and the evidence of record. For these reasons, Pekin's versions of "Pekin's Position" and "Staff Position" lack credibility and should be rejected.

**A. Pekin's portrayal of its and Staff's positions are not trustworthy and should be rejected.**

Even the very first full paragraph of Pekin's Exceptions mischaracterizes Pekin's positions. In that paragraph, Pekin criticizes the Proposed Order for not reciting its supposed "position" on the appropriate legal standard to be applied. [Pekin Exc. at 4.] As noted earlier, Pekin's presentation of its supposed "position" is disingenuous because Pekin's latest filing is the first time that Pekin has voiced the wholly new positions that: a) no public interest requirement exists; and b) that it is not Pekin's burden to prove that the condemnation it seeks would "better" serve the public interest. [Id.] Pekin's wholesale reversal on its positions is apparent by the fact that Pekin referred to the "public interest" standard at least 19 times in its Post-Hearing Brief and at least another 10 times in its Reply Brief. The City's criticism of the Proposed Order for not reciting a position that Pekin never previously took is absurd.

The mischaracterizations and errors only continue in the remaining sections of Pekin's presentation of its and the Staff's positions. In its findings, Pekin sets forth Exceptions that are simply not supported in the record or worse are directly contrary to the evidence of record. The following table sets forth several of the most glaring mischaracterizations and errors contained on the referenced pages of Pekin's Exceptions:

<b>Page</b>	<b>Mischaracterization or Error</b>	<b>True characterization or Actual Statement</b>
6	Pekin states that "IAWC's Vice President of Engineering has acknowledged that many of the distribution mains throughout the system are too small to provide sufficient fire flow capacity."	Pekin cites to pages 946-47 of the transcript, however, these pages contain no such acknowledgment and nothing even close to such an acknowledgment. To the contrary, on page 959 of the transcript, Mr. Johnson testified that there are no demonstrated safety hazards in the Pekin system related to small diameter mains.

Page	Mischaracterization or Error	True characterization or Actual Statement
7	Pekin states that "while IAWC contends no evidence of this gravel problem actually exists, IAWC's own witness, Randy West, testified that he was aware of gravel in a hydrant."	Pekin cites to page 991 of the transcript to supposedly support this contention. However, on page 991, Mr. West simply recalls seeing a newspaper article with a "reference to gravel that supposedly came from a hydrant." Pekin's statement is further directly contradicted on page 987 of the transcript, where Randy West testified "I have never been made aware of a gravel problem in the mains."
9	Pekin states, without citation in violation of ICC Rule 200.830, that "The City further contends that even with respect to IAWC's biggest criticism - Ms. Hals' exclusion of RCNLD - IAWC was unable to prove that Ms. Hals' methodology in this regard was flawed."	Although Pekin cites no portion of the transcript for this statement, it blatantly disregards page 512-514 of the transcript wherein Ms. Hals admitted that "she is not aware of a condemnation proceeding in Illinois or another jurisdiction over the past ten-year period in which the results of only an income capitalization approach was considered in determining value." The absence of any other condemnation proceeding that relies solely on the income approach as Ms. Hals does is most certainly an indication of a "flaw" in her methodology.
9	Pekin states, without citation, again in violation of ICC Rule 200.830, that "the City asserts that IAWC's valuation expert had the opportunity to challenge Ms. Hals relative to the ASA standards, but never cited any specific standard promulgated by ASA, or any other authoritative body, to demonstrate how Ms. Hals failed to meet that standard."	To the contrary, on page 445-446 of the transcript, Ms. Hals admitted that she is not familiar with the Principles of Appraisal practice and the Code of Ethics promulgated by the American Society of Appraisers, and she could not testify that her valuation analysis conforms with the ASA appraisal standards. Nor was she aware that under ASA standards it is a violation of ethics to become an advocate of her client. In addition, to say that IAWC used no other IAWC authoritative body to demonstrate how Ms. Hals failed to meet this standard is disingenuous because IAWC was barred from examining Ms. Hals as to certain appraisal treatises and standards because she claimed to have either no knowledge of them or to have never consulted them. [Tr. 448-49.] Pekin misleadingly attempts to use Ms. Hals' ignorance of appraisal standards and claimed unfamiliarity with appraisal authorities against IAWC. And, when asked to name any

Page	Mischaracterization or Error	True characterization or Actual Statement
		appraisal authority that supports her positions, Ms. Hals was unable to name one. [Tr. 450.]
14	Citing page 759 of the transcript, Pekin states that IAWC's President acknowledged that IAWC has also previously utilized a similar type of market approach reasonableness check.	Pekin's statement is misleading as it once again disregards the remainder of Mr. Gloriod's testimony. First, on the same page of the transcript, Mr. Gloriod clarified his answer stating that he "used the adjective reasonableness check with the caveat that I'm not a valuation expert. They might put a different adjective on what Mr. Bobba did." In addition on page 761, Mr. Gloriod demonstrates how the analysis he described as a "reasonableness check" is inapplicable to the case at hand. There he further explained that the analysis he described as a "reasonableness check" was "really an after the fact analysis that was done primarily in connection with the regulatory proceeding to gain approval."
18	Citing page 889 of the transcript, Pekin states that "The City also emphasizes that Mr. Reilly admitted at the hearing that he does not have any knowledge regarding, and did not consider, the types of properties that Illinois courts have determined not to be special use."	Pekin is again misleadingly referring to only a minute portion of Mr. Reilly's testimony. An accurate depiction of the testimony reveals that Mr. Reilly's approach was, not surprisingly, to evaluate whether or not the Pekin property at issue was special use. [Tr. 877.] In following this approach, Mr. Reilly affirmatively used "the appraisal industry test that includes several factors, not in any particular order but generally in this order. The first was whether the property was designed and constructed to perform one purpose and one purpose only. Second, can the property be adapted to any other purpose. Third, can the property be moved so as to be adaptive to any other purpose. Fourth, if the property is moved to be adapted to any other purpose, does it destroy either the property or the surroundings. Fifth, is there a limited market for the type of property." [Id. 877.]
18	In support of Ms. Hals' use of the market approach analyses, Pekin states that "The City asserts that there have been at least 119 water utility transactions in Illinois alone	Pekin's statement is erroneous as it blatantly ignores the numerous flaws pointed out by IAWC regarding Ms. Hals' list of 119 water utility transactions. First, this statement ignores the fact that Ms. Hals admitted that she had performed no research of any of the

Page	Mischaracterization or Error	True characterization or Actual Statement
	since 1975."	119 transactions she listed. [Initial Br. of IAWC at 65-66.] In addition, this statement disregards the evidence demonstrating that a number of the "transactions" were not sales at all but combinations of entities already owned by a single holding company. [Id.] Finally, Pekin's statements ignores the fact that some of the transactions were listed twice, once for each entity involved, and that the vast majority of the listed transactions were not close enough in time to this proposed action to even be considered in a market approach analysis. [Id.]
22	Pekin states, without citation again in violation of ICC Rule 200.830, "The City asserts that IAWC was unable to present any evidence that extraterritorial customers will be discriminated against if the City is permitted to acquire the Pekin District."	In making this statement, Pekin again blatantly ignores the evidence of record. For example, Mr. Hierstein testified that under the Brush Hill contract, which the City held up as an example of its equal treatment of extraterritorial customers, if there are fires or other emergency situation in both Brush Hill and Pekin, the Brush Hill contract gives priority to the Pekin fires or emergencies, and in fact, gives Pekin the right to pull equipment from a Brush Hill fire to fight a fire within Pekin's city limits. [Tr. 162-166.] In addition, Mr. Kief testified that the City "typically tells people that if you are interested in sewer service, you will need to annex to the community. [Tr. 224.] These are but two examples of the evidence that the City chose to ignore.
22	Citing to pages 82-83 of the transcript, Pekin states "the City notes that Staff witness Johnson specifically testified that there is nothing in the record that indicates or causes him to believe that the City might or would discriminate against extraterritorial customers."	Pekin once again cherry picks one sentence out of the transcript and ignores the surrounding testimony. Right before the testimony referenced by Pekin, in response to the following question: "Do you have any reason to believe, based upon the record, that the City would, after the five-year freeze applicable to all customers, unfairly discriminate against those out of city customers?" Staff Witness Johnson answered: "That's part of the problem. I don't know." [Tr. 82.]
26	Pekin states "Despite this [dye water] testing, neither IEPA nor	Pekin's statement is misleading because Mr. Kief admitted that for almost 10 years now the

Page	Mischaracterization or Error	True characterization or Actual Statement
	the City has confirmed that an SSO in fact exists."	IEPA has contended that there is some type of sanitary sewer overflow ("SSO"). [Tr. 270.] In addition, Pekin's statement ignores the legion of evidence introduced at the hearing regarding the communications from the IEPA to Pekin regarding the IEPA's basis for continuing to believe that a SSO exists. [See, e.g., Tr. 275-85.] For example at page 279 of the transcript, a letter from Mr. Kammuller of the IEPA to Pekin regarding a November 25, 1996 inspection by the IEPA of the Pekin wastewater system was introduced, and Mr. Kief agreed that the letter stated that "It appeared that there was indeed some way sewage was overflowing from the south interceptor somewhere." In additional correspondence from the IEPA discussed at pages 285-86 of the transcript, Mr. Kief admitted that the following quote from an IEPA document discussing a January 6, 1997 letter between the IEPA and the City was a true statement: "Kief acknowledged that it did appear sewage was escaping from the interceptor under surcharged conditions, and he agreed to have city personnel continue an investigation to try to locate the route of escape."
29	Citing page 746 of the transcript, Pekin states "Even the President of IAWC suggested that an RFP may be unnecessary at this stage of the condemnation proceeding."	Pekin's selective quoting is again a mischaracterization of IAWC's President's, Mr. Gloriod, testimony. Mr. Gloriod specifically testified that he "absolutely" believed that Pekin should have spec'd out a contract operator even before the referendum. [Tr. 744-46.] Mr. Gloriod explained that "We're asking people to judge whether a change in ownership is in the better public interest. The existing owner has a track record that's public information anybody can review, and there's nothing to compare that to. How is the Commission going to judge the better public interest when they have one set of data on one owner and mystery on the other. There's no operating plan. There's no capital plan. There's information about maybe a contract operator. What he's going to do no one

Page	Mischaracterization or Error	True characterization or Actual Statement
		knows. What's he going to be responsible for no one knows. That's my concern." [Tr. 744-45.]

Pekin's exceptions to the Proposed Order are replete with errors and mischaracterizations and should be disregarded.

**B. Pekin's proposed versions of its and Staff's positions should be rejected for the additional reason that they contain improper "findings" that are not attributed to either party.**

Within its suggested revisions to the Pekin and Staff positions in the Draft Order, Pekin repeatedly makes conclusory statements that have the appearance of findings instead of clearly indicating that they are presented as a party's position. Pekin's practice in this regard is misleading. Pekin sets the tone for this misleading practice in 13 of the headings of the section of its brief. For example, Pekin's heading A(2) reads "City acquisition is in the public interest." These statements with the appearance of findings continue throughout Pekin's presentation of both its own and Staff's positions. Just a few examples of Pekin's misleading practice in the text of Pekin's Exceptions include:

- On page 9, Pekin states, without citation, in violation of ICC Rule 200.830,: "The record is clear, including support from IAWC's valuation expert, that publicly owned utilities have cost savings that are not available to privately-owned utilities."
- On page 11, Pekin states, without citation, in violation of ICC Rule 200.830,: "The record demonstrates that the rate freeze would not require the City to defer capital and maintenance spending."
- On page 13, Pekin states, the City established that the income capitalization approach is the most appropriate in determining the fair market value of the system."

Although Pekin's practice was less rampant in its proposal for revisions to the Staff's Position, proving that it is aware of the manner in which its own position should have been drafted, the following are a few examples that appear in Pekin's proposed language for Staff's Position:

- On page 32, Pekin proposes the following language be included in the Staff's Position: "In Mr. Johnson's direct testimony, he testified that customers gain certain advantages under City ownership. These advantages include: . . ."
- On page 34, Pekin states: "Using the same assumptions and ratio calculations, Staff witness Phipps concluded that City debt issuance exceeding \$26 million might adversely impact the City's financial strength and flexibility."

As evidenced above, Pekin's suggested changes to the sections of the Draft Order entitled "Pekin's Position" and "Staff Position" are replete with error and mischaracterizations. Furthermore, the Proposed Order's recitation of the positions of Pekin and Staff is both reasonable and accurate. For these reasons, these suggested revisions of Pekin should be disregarded.

## **VII. RESPONSE TO PEKIN'S MOTION FOR ORAL ARGUMENT**

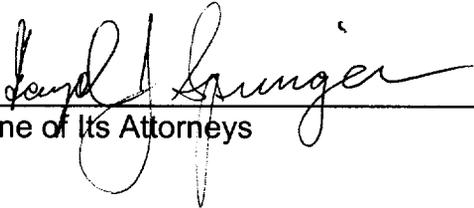
With the Pekin BOE, Pekin filed a Motion for Oral Argument ("Motion"). Illinois-American believes that the arguments of the parties are set forth in the Briefs submitted in this matter. For that reason, Illinois-American believes oral argument is not necessary. In its Motion, Pekin merely re-asserts its arguments, all of which are without merit and addressed above. Pekin offers no reason to believe that the arguments are not fully discussed in the briefs. For this reason, the Motion should be denied. If, however, the Commission determines that oral argument should be conducted, Illinois-American would, of course, participate.

## VIII. CONCLUSION

For the reasons discussed, the Exceptions and replacement findings of Pekin and the Staff should be rejected. The only changes to the Proposed Order should be those proposed by Illinois-American in its Brief on Exceptions and in Section IV (B) herein.

Respectfully submitted,

ILLINOIS-AMERICAN WATER COMPANY

By:   
One of Its Attorneys

Boyd J. Springer  
Susan L. Winders  
JONES DAY  
77 West Wacker Drive  
Chicago, IL 60601-1692  
(312) 782-3939

Joe A. Conner  
Gregory Fletcher  
BAKER DONELSON BEARMAN  
CALDWELL & BERKOWITZ  
Suite 1800 Republic Centre  
633 Chestnut Street  
Chattanooga, TN 37450-1800  
(423) 752-4417

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