

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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<b>ILLINOIS COMMERCE COMMISSION,</b>	)	
ON ITS OWN MOTION,	)	
-vs-	)	
<b>WONDER LAKE WATER COMPANY</b>	)	<b>DOCKET No. 01-0492</b>
	)	
Citation for failure to comply with	)	
Commission order	)	

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**INITIAL BRIEF OF THE STAFF WITNESSES**

James E. Weging  
Office of General Counsel  
Illinois Commerce Commission  
160 North LaSalle Street,  
Suite C-800  
Chicago, IL 60601-3104  
Phone: (312) 793-2877  
Fax: (312) 793-1556  
JWEGING@ICC.State.IL.US

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*Counsel for the Staff Witnesses of  
the Illinois Commerce Commission*

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**INITIAL BRIEF OF THE STAFF WITNESSES**

Now come the Staff Witnesses of the Illinois Commerce Commission (“Commission”) by their attorney, James E. Weging, and present the initial brief of the Staff Witnesses of the Commission (“Staff”).

**I. Respondent’s Violation of the 1999 Commission Order and the Public Utilities Act**

The Citation order of July 11, 2001, pp.1-2, provides in pertinent part:

“The Staff Report alleges that the Company has failed to make the following specified improvements as required by the June 16, 1999 Order:

1. Installation of meters to all customers within 1 year; as of May 2 and 3, 2001, incomplete, with only minor compliance;
2. Quarterly reports indicating location of installed meters and remotes, and quarterly reports documenting the payment of customer refunds with interest; as of May 2 and 3, 2001, not completed;
3. Establish a meter testing program on meters that are 10 or more years old, to be completed within 120 days; as of May 2 and 3, 2001, not completed;

4. Replace or repair four hydrants and correct other discrepancies on Schedule 3.03(a) and (b) of ICC Staff Ex. 3.00 in Ill.C.C. Docket No. 97-0609, to be completed within 1 year; as of May 2 and 3, 2001, not completed;
5. Loop dead-end mains on Thompson Road within one year; as of May 2 and 3, 2001, not completed;
6. Establish 8-inch future main program; no time limit set, no program is established/discernable and no mains have been installed;
7. Establish and maintain continuing property ledger within 6 months; as of May 2 and 3, 2001, not completed.

\* \* \* \*

The Commission, being fully advised in the premises, is of the opinion and finds that:

\* \* \* \*

- (3) the Staff Report dated June 11, 2001, should be admitted into the evidentiary record of this proceeding;
- (4) the Commission should take administrative notice of the Order entered on June 16, 1999, in Docket 97-0609;"

The Supplemental Citation Order of June 24, 2003, pp. 1-2, provides in pertinent part:

"The Commission, being fully advised in the premises, is of the opinion and finds that:

\* \* \* \*

- 4) evidence has been uncovered of a pattern of non-payment of electric bills by Respondents;
- (5) the Respondents' failure to pay their electric bills for years goes to the questions of the Respondents' provision of safe, adequate and reliable service and the Respondents' possession of sufficient technical, financial, or managerial resources and abilities to provide service, which are issues being considered in these Citations; and..."

**A. The Respondent has willfully refused to comply with the simplest of requirements from the 1999 Commission Order**

Paragraph (4) of the Citation Order in this cause took administrative notice of the final order of June 16, 1999, in Docket 97-0609. That order contained the following requirement on page 8:

“Mr. Pregozen testified that WLWC has not properly recorded its bank loan, authorized in Docket No. 97-0317, in its 1996 and 1997 Form 22 ILCC, Annual Report of Water and/or Sewer Utilities...

The Commission finds Staff’s recommendation to be reasonable and supported by the evidence of record. We, therefore, direct the Company to conform to Mr. Pregozen’s suggestions described above in its Form 22 ILCC Annual Report for 1998 and all future years.”

Staff has submitted in this case two pieces of testimony (Exs. 2.0 and 10.0) proving that the Respondent has failed to carry out this simple direction as of May 2002. Technically, the Commission order required the Respondent to refile the 1998 and 1999 Annual Reports. 220 ILCS 5/ 5-109, ¶ 2. However, the Respondent failed to comply with the direction in the subsequent 2000 and 2001 Annual Reports. Further, the Respondent has made no response to Staff’s testimony in the present case.

This failure is emblematic of the willful refusal of the Respondent to comply with the orders of this Commission, its rules or the Public Utilities Act. 220 ILCS 5/ 4-502 (a) (5). This particular failure also dovetails with the Respondent’s general failure to keep books and records as required by the Commission, which will be addressed later in this Brief. The management of the Respondent picks and chooses with what, if any, service requirements to comply.

Beyond the willful violation of a Commission order, this violation shows that the Respondent no longer possesses sufficient technical and managerial resources and abilities to provide utility service. 220 ILCS 5/ 4-502 (a) (2).

**B. The Respondent has failed to comply with most of the requirements from the 1999 Commission Order**

Because of the attenuated schedule of this case, of certain problems with the filing of the prefiled exhibits, and because the present Administrative Law Judges heard only a portion of the case, the following evidentiary table is provided. The various exhibits of Staff Witness Roy A. King were ordered to be refiled in the five dockets as “revised” on December 17, 2002, although only those few marked “corrected” contain any alteration. Those revised exhibits were filed as late-filed exhibits on February 21, 2003, and March 18, 2005.

In addition, Mr. King’s testimony (Exs. 1.0 and 3.0) had followed the table of the final order in Ill. C.C. Dockets 97-0605 through 97-0609 rather than the numbering in Citation Order in the present case. See Direct Testimony (revised) Roy A. King Ex. 1.0, p. 8 [Items ##1 and 3-4 (metering and consumer refunds), ## 5-6 (service improvements), #7 (additional storage), #8 (8-inch main program), #10 (property ledger)] filed February 21, 2003 revising the September 17, 2001 filing; and Rebuttal Testimony (revised and corrected) Roy A. King Ex. 3.0, p. 4 [Items ##1, 3-8, and renumbering #10 as #9] filed March 18, 2005, correcting the March 28, 2002 filing. All 5 of the Respondents had complied with participation in JULIE (Item # 2 King’s list), and Wonder Lake had installed moisture proof electrical receptacles (Item # 9 in King’s list in Ex. 1.0).

The Staff's evidence related to the numbered Items in the Citation Order:

Item 1 – meter installation program (Ex. 1.0, pp. 8-9; Ex. 3.0, pp. 4-6; and Ex. 9.0, p. 11 ).

Item 2 – quarterly reports: meters and customer refunds (Ex. 1.0, p. 10; and Ex. 3.0, pp. 7-8; and Ex. 9.0, p. 8).

Item 3 – meter testing program (Ex. 1.0, pp. 9-10; Ex. 3.0, pp. 6-7; and Ex. 9.0, p. 11).

Item 4 – hydrants and other work (Schedules) (Ex. 1.0, pp. 12-14 and Sch. 1.01; and Ex. 3.0, pp. 8-10 and Sch. 3.01).

Item 5 – loop dead-end mains on Thompson Road (Ex. 1.0, p. 14; Ex. 3.0, 8-9; and Ex. 9.0, pp. 9-10).

Item 6 – 8-inch mains program (Ex. 3.0, p. 12).

Item 7 – continuing property records (Ex. 1.0, p. 15; Schedule 1.02; Ex. 6.0; and Ex. 9.0, p. 4 and Group Schedule 9.01; and Ex. 14).

Staff submitted evidence that the Respondent had issued three or more estimated bills in violation 83 Ill. Adm. Code 280.80 (Staff Ex. 1.0, pp. 10-12). Respondent had also done so during the 1997 case, although this Respondent was not ordered to avoid further violations (Ill.C.C. Docket No. 97-0609, Commission Order of June 16, 1999, p. 11; *Compare* Ill.C.C. Docket No. 97-0605, Commission Order of June 16, 1999, pp. 10-11). However, this issuance of continuous estimated bills relates to the Respondent's metering problems and the general recordkeeping problems.

It should be noted that the Respondent has failed to provide any explanation as to why it has failed to comply with these various requirements from the 1999 Commission Order. The only item receiving any response was the additional storage required by the 1999 Commission Order which requires a relatively significant capital expenditure. (revised Resp. Ex. 1.0, pp. 14-15 and revised Resp. Ex. 2.0, pp. 2 and 4).<sup>1</sup> The summary response to Items 2 and 4 through 6 is that the refunds have been made, and the management of the Respondent sees no need to do such items (revised Resp. Ex. 1.0, p. 10, lines 419-434;<sup>2</sup> and revised Resp. Ex. 2.0, pp. 2 and 4).

However, the present citation cases do not exist merely for the purpose of relitigating the ordered improvements from the earlier cases. Nothing has been presented by the Respondent in this cause that could not have been raised and considered in the earlier dockets. Essentially, the Respondent treats the earlier Commission order as a grant of a (now claimed inadequate) rate increase and a mere armistice in arguing over the improvements ordered in the earlier docket. However, the orders presented in the earlier cases were presented as Draft Joint Orders in April 15, 1999. If the time for doing all of these improvements was inadequate, the timing should have been raised back in 1999.

More to the point, the Respondent has made almost no effort to comply with these requirements in the more than 5 years since the issuance of the 1999 Commission order. That the Respondent never intended to comply with all of the requirements of the earlier Commission order is clear. For example, Item 6

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<sup>1</sup> Respondents Ex. 2.0 (revised) on e-docket does not have pages 3 and 5. It is Staff's understanding that nothing is missing however.

<sup>2</sup> p. 10 of Respondent's Ex. 1.0 (revised) is missing from the e-docket filing on April 13, 2003.

required the Respondent to “establish 8-inch future main program” to replace smaller-sized mains. No specific timelimit was imposed, since the breadth of the problem was very unclear. Similarly, the Respondent was ordered to construct additional storage by June 2004 (Commission Order of June 16, 1999, in Ill.C.C. Docket No. 97-0609, pp. 13-14). At the time the Citation Order was entered in 2001, the Respondent had three years to complete such a project. No progress has been made, and now the additional storage is one year overdue. See Section I (B) (3), Service improvements, below, for citation to the evidence.

In five years since the 1999 Commission order was issued, the Respondent has never looked into the issue of establishing a program to identify undersized mains or constructing additional storage. Respondent never intends to examine what could turn out to be an expensive capital improvement.

**(1) Meter issues (Items 1-3)**

In 1977, the Commission issued its rule imposing, among other things, various requirement vis-à-vis meter testing and replacement (Staff Ex. 9.0, pp. 5 and 11). Although the Respondent was served with the Rule when adopted and no doubt received notices concerning the underlying action to create said Rule, the Respondent never sought to comply with these metering requirements. Issuance of the Commission Order in 1999, requiring compliance, had no effect on the Respondent. Respondent has presented no evidence on this issue at all.

The Respondent has failed to file quarterly reports indicating location of installed meters and remotes. Respondent filed a single report which failed to actually contain such information (Staff Ex. 3.0, p.7). This failure may be

understandable since the Respondent is not complying with the long-established meter testing and replacement rules in the first place. There was evidence in the 1997 citation case that estimated bills had been issued for a long period to customers either without any meter or with inoperative meters (Ill.C.C. Docket No. 97-0609, Commission Order of June 16, 1999, pp. 11-12). In the absence of quarterly reports, there is no evidence from Respondent that these violations have been corrected.

## **(2) Customer refunds (Item 2)**

In the case of this Respondent, the Respondent had charged some of its customers a \$15 Non-Sufficient Fund fee (Commission Order of June 16, 1999, Ill.C.C. Docket 97-0609, pp.11-12). Such a charge had not been part of the Respondent's tariffs. In addition, the Respondent collected a untariffed tap-on fee from Mr. Russell Ehrardt.<sup>3</sup> As the 1999 Commission Order recited, the Respondent agreed to make these refunds with interest as provided in 83 Ill. Adm. Code 280. There is no evidence of a single refund by the Respondent (Staff Ex. 3.0, p. 8 and Ex. 9.0, p.8). Not only does this violate the underlying 1999 Commission Order, but also the lack of proof of repayment is consistent with the Respondent's general failure to keep adequate books and records, let alone Commission required records.

The collection of untariffed tap-on fees is a particularly egregious violation by a public utility. Beyond the issue of an untariffed charge, tap-on and similar fees shift the costs of producing the utility's backbone plant from the investors to

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<sup>3</sup> During the course of Staff's investigation in this cause, claims were made of the collecting of \$300 tap-on fees (Ex. 1.0, p. 12).

the customers. 83 Ill. Adm. Code 600.370 (a). A utility cannot be given a return on an investment its investors never made. *City of Alton v. Illinois Commerce Commission*, 19 Ill. 2d 76, 85-86 (1960) and *Governor's Office of Consumer Services v. Illinois Commerce Commission*, 242 Ill. App. 3d 172, 189 ( Dist. 1993).

### **(3) Service Improvements (Items 4-6 and additional storage)**

Item 4 is one of the only requirements which showed improvement during the course of this proceeding. Compare Schedule 1.01 with Schedule 3.01. However, timely completion did not occur, and service inadequacies identified in the 1997-9 timeframe remained uncorrected as of March 2002 (Staff Ex. 3.0, pp. 8-10). The Commission rule requires much more prompt action in replacing defective or inoperative valves and hydrants. 83 Ill. Adm. Code 600.240.

The Respondent's dead-end main (Item 5) is a safety concern under 83 Ill. Adm. Code Section 600.210 (Staff Ex. 3.0, pp. 8-9 and Staff Ex. 9.0, pp. 9-10). The management of the Respondent clearly has no plans to comply with this requirement from the 1999 Commission Order.

Both Item 5 and the additional storage requirement are the two ignored requirements that got some response from the Respondent, probably because they are the most expensive items with which to comply (Staff Ex. 1.0, pp. 8 and 14). However, the Staff Witness was not persuaded the requirement in the 1999 Commission Order was mistaken or should be altered (Staff Ex. 9.0, pp. 6-10). Essentially, having agreed to do this, the Respondent hopes to make this requirement, with its capital investment, go away. Yet this was the kind of item

which was being addressed concerning “bankable” projects (Staff Ex. 7.0, testimony of Mr. Thomas Mathews in Docket 97-0609, pp. 3-4).

As noted earlier, Item 6 did not have a definite time for completion since a program to identify Respondent’s undersized mains was needed to be started before replacement of such mains could be undertaken. Of course, since Respondent has taken no steps to even start a program, its undersized mains will never be replaced to the detriment of service to the public through inadequate pressure, etc. See Commission order of June 16, 1999, in Docket 97-0609, p. 13. 83 Ill. Adm. Code 600.370.

Similarly, in the Commission Order of June 16, 1999, in Ill.C.C. Docket No. 97-0609, pp. 13-14, the Commission had ordered that the Respondent construct additional storage. The Respondent was given five years to complete this project from June 1999, which was several years after the initiation of this citation. See Staff Report of June 11, 2001, p. 2, Item 7, in this Docket and Ex. 1.0, p.8. The Commission Citation Order herein did put the Staff Report in the record evidence of this case. Staff found no progress on this requirement (Ex. 3.0, pp. 10-11, and Ex. 9.0, pp. 6-8).

**(4) Continuing property records (Item 7)**

Respondent has made no effort to comply with this key recordkeeping requirement. See 83 Ill. Adm. Code 605 (Uniform System of Accounts for Water Utilities); Commission Order of June 16, 1999, p. 4; and Resp. Ex. 1.0 revised, p. 3, lines 108-114. This is one of several failures which makes establishing rates for the Respondent difficult (Ex. 6.0, Rebuttal Testimony of Thomas L.

Griffin). See also Ex. 14, Responsive Testimony of Carolyn Bowers concerning the difficulty in valuating the Respondent. Staff requested but never received a full response to its Data Request, sent August 16, 2001 (Ex. 1.0, p. 15; Schedule 1.02; Ex. 3.0, p.12). This, along with other difficulties in obtaining records, forced the withdrawal of the Respondent's 2001 "short form" rate request, with a 2000 test-year, when the year became 2002 (Ex. 9.0, p. 4 and Group Schedule 9.01; April 14, 2003, hearing, Tr. pp. 360-363).

This failure is at the level of "cutting your nose off to spite your face." The Respondent complains about its rates, yet make no effort to preserve the necessary records in order to establish its rates (Resp. Ex. 1 revised, p. 2, lines 62-68 and Staff Ex. 7.0, p.4, top Q & A). The types of records that the Commission requires and needs to establish rates are nothing new. The Respondent is required to comply with the Uniform System of Accounts. 220 ILCS 5/ 5-102. The failure of the Respondent to keep these necessary records imperils the continuation of its service to the public since, even when the Respondent makes an operating or capital expenditure, the Respondent will be unable to receive recovery in a rate case before the Commission. Yet the management of the Respondent understands how rates are established by this Commission (February 16, 2005, hearing, Tr. p. 460).

**C. The service of the Respondent to public has been unjustifiably threatened by the Respondent's failure to pay its electric bills**

Some time in 1998, Respondent quit paying any of its electric bills to Commonwealth Edison Co (February 16, 2005, hearing, Tr. pp. 445-446).

Staff's testimony concerning the electric bills can be found at Ex. 3.0, pp. 12-14; Schedules 3.02(a) and 3.02(b) (proprietary); Grp. Ex. 8.0 (proprietary); and Ex. 9.0, pp. 10-11). The electric bills are the only item for which Staff received an acceptably complete response to its August 16, 2001 data request (Ex. 3.0, p. 12 and Schedule 1.02). The electric bills from the Respondent were received in December 2001, *only* three months after the requested response date (Ex. 3.0, p. 12).

The prior case, Ill.C.C. Docket No. 97-0609, was both a rate case and a citation case. This case, along with its four companion cases, are unique. Staff witnesses attempted to do that for which the management of the company is responsible: establishing rates through a full-blown rate case. These five cases are, as far as known, the only time Staff has attempted such a thing. The test year used was 1997. Because of the difficulty in getting documents from the Respondent, the order was issued on June 16, 1999.

Thus, while Staff was attempting to determine the just and reasonable rates for the Respondent, the Respondent without notice to the Staff ceased paying any part of one of its main operating expenses. The nonpayment occurred in the year following the test year, but during the pendency of the case. None of the money was saved for a later settlement with Commonwealth Edison Co. (February 16, 2005, hearing, Tr. p. 454). On what the \$1,700 per year in allowed electric expenses were spent is anyone's guess (Ex. 3.0, pp. 12-13).

There are three issues arising from the nonpayment:

**(1) Respondent prepared altered documents to hide nonpayment of electric bills**

The copies of the electric bills received in December 2001 from the Respondent were altered. Compare Schedule 3.02 (a) received from the Respondent with Schedule 3.02 (b) a copy of the bill subpoenaed from Commonwealth Edison Co.<sup>4</sup> The one matter missing from the documents received from Respondent is the running total owed to Commonwealth Edison, approximately \$9,100 in December 2001.

Even in the fourth year of the nonpayment of the electric bill, Respondent was attempting to cover-up that fact from this Commission (Ex. 3.0, pp. 13-14). This undercuts the duty of the Commission to keep informed about the business of this public utility and the public utility's duty to furnish information to the Commission. 220 ILCS 5/ 4-101 and 5-101.

**(2) Insufficient grounds for nonpayment of electric bills**

As noted in the testimony, the nonpayment of electric bills by a water and sewer public utility could lead to a disastrous termination of service to the public in violation of Section 8-101 of the Public Utilities Act, 220 ILCS 5/8-101. The current bankruptcy proceedings avoids that problem. However, a well-managed public utility should not have to depend on the Bankruptcy Court to ensure the continuation of its public service. This is especially true since the unpaid debt to Commonwealth Edison Company was created without sufficient reason and is not based on some unforeseeable debt.

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<sup>4</sup> The complete set of documents received from Commonwealth Edison Company are Staff Group Exhibit 8.

Mr. Mathews has given an unspecific claim that the Respondent was overcharged by Commonwealth Edison Company (“ComEd”) (Resp. Ex. 4.0, p. 1, Answer on the bottom). Cross-examination revealed that this claim arose in 1995 (February 16, 2005, hearing, Tr. p. 445, lines 2-4). The Respondent claims that electronic meters would reduce the Respondent’s bills which had been measured by demand meters (*Id.*, Tr. p. 447, lines 12 to 19). The claim period is for 2 or 2 and one-half years, ending in 1998 at the latest (*Id.*, Tr. p. 450, lines 12-15, and Tr. p. 453, lines 15-20). The claim depends on an obligation of ComEd to have changed these meters on request in 1995 and a measurement of the “overcharge” since the electric bills would not have been reduced to zero by the meter change.

The Respondent claims that employees of Commonwealth Edison advised its management to quit paying its electric bills. There is no verification of this from Commonwealth Edison or those employees. The Respondent as a public utility customer did not file a consumer complaint with this Commission (*Id.*, Tr. pp. 454-455) and the timelimits for such a claim have long expired. 220 ILCS 5/9-252 and 9-252.1 (2 years from time of performance of service or after first knowledge of incorrect billing).

Whatever the merits of this claim, the time for pursuing the claim appears to have expired under Illinois law. More troubling is that the nonpayment of the electric bills by the Respondent is also tied to a clearly improper motive.

### **(3) Improper use of the Respondent as leverage in an unrelated dispute**

One of the informal claims stated to Staff during this proceeding as a reason for the nonpayment of the electric bills by the Respondent was a dispute over the siting of electric lines by Commonwealth Edison Company. Mr. Mathews contends the nonpayment of the electric bills by the Respondent is related to this easement dispute involving a development entitled Thoroughbred Estates (February 16, 2005, hearing, Tr. p. 452, lines 6-9 and p. 455, line 19 through p. 456, line 22). The only connection between the Respondent and this easement dispute is common ownership by Mr. Mathews (*Id.*, p. 456, lines 16-22).

Essentially the management of the Respondent used the Respondent as leverage in a dispute with no relation to the Respondent (*Id.*, p. 456, lines 20-22). The management of the Respondent was willing to risk continued service to its customers, if the electricity had been cut-off for nonpayment of the bills. Curiously, that management would not risk the loss of electric service at its own home over this personal dispute (*Id.*, p. 456, lines 12-15).

Illinois law forbids the encumbrance of the public utility's business, the indirect guaranteeing of the obligation of any other person, and the diversion of the public utility's moneys, property or other resources to any enterprise which is not a direct and essential or proper and necessary part of the public utility's business, unless prior approval of the Commission is obtained. 220 ILCS 5/ 7-102 (c), (f) and (g). Since the Respondent has no relationship to Thoroughbred Estates and its dispute with Commonwealth Edison Company, Staff contends the

nonpayment of the Respondent's electric bills was an unapproved encumbrance of the Respondent's public utility business, the indirect guaranteeing to the owners of the Respondent of a claimed obligation of Commonwealth Edison Company, and a diversion of its moneys, property or other resources to Thoroughbred Estates.

Frankly, Staff contends the aforementioned is the only reason for the nonpayment of the electric bills by the Respondent. In the absence of any proof, other than the statement of the owner-manager of the Respondent, that there was a claim arising somehow from the change of a meter, Staff is unconvinced about any such claim. Certainly, any refund arising from such a claim is clearly disproportionate with the unpaid electric bills over the years (Staff Group Exhibit 8) and does not justify the action (nonpayment of the entire electric bills for years) taken by the management of the Respondent.

#### **D. The record contains sufficient proof of the Respondent's violations**

A public utility has a duty to obey the orders of the Commission. Section 5-101 of the Public Utilities Act, 220 ILCS 5/ 5-101, provides in pertinent part:

“Every public utility shall obey and comply with each and every requirement of this Act and every order, decision, direction, rule or regulation made or prescribed by the Commission in the matters herein specified, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper in order to secure compliance with and observance of this Act and every such order, decision, direction, rule or regulation by all of its officers, agents and employees.”

The Respondent has willfully failed to carry out this duty in relation to the 1999 Commission Order. See Sections I.A. (annual reports) and I.B. (the 8 unfulfilled obligations, which includes the additional storage ordered in the 1999 Commission Order) of this Brief. 220 ILCS 5/ 4-502 (a) (5). The Respondent in failing to pay any portion of its electric bills has willfully failed to meet its statutory obligation of service which is in all respects adequate, efficient, reliable, just or reasonable *per* 220 ILCS 5/ 8-101 and 8-401. See Section I.C. of this Brief. 220 ILCS 5/ 4-502 (a) (5).

Further, the Respondent is failing to provide safe, adequate or reliable service. See Section I.B. of this Brief, Items 1 and 3 through 7 of the 2001 Citation Order, and the additional storage ordered in the 1999 Commission Order. 220 ILCS 5/ 4-502 (a) (1). The Respondent in failing to pay its electric bills is failing to provide safe, adequate or reliable service. See Section I.C. of this Brief. 220 ILCS 5/ 4-502 (a) (1).

Finally, the Respondent no longer possesses sufficient technical, financial or managerial resources and abilities to provide utility service to the public. See Sections I.A., I.B., and I.C. of this Brief. 220 ILCS 5/ 4-502 (a) (2).

The evidence in this case of the Respondent's violations is overwhelming. This conclusion naturally leads to a question of what should the Commission do about these violations.

## **II. Staff Witnesses urge acquisition of the Respondent by a capable public utility**

The Citation order of July 11, 2001, pp. 2-3 provides in pertinent part:

“(5) the Commission should initiate a citation proceeding against the Company to determine whether the Commission:

(A) should seek mandamus against the Company under Section 4-202 of the Act to enforce the Order entered on June 16, 1999 in Docket 97-0609;

(B) should seek the imposition of civil penalties under Section 5-202 of the Act for the failure of the Company to comply with the Order entered on June 16, 1999 in Docket 97-0609;

(C) should seek the appointment of a receiver pursuant to Section 4-501 of the Act because the Company is unable or unwilling to provide safe, adequate, or reliable service, no longer possesses sufficient technical, financial, or managerial resources and abilities to provide safe, adequate, or reliable service, or has failed to comply, within a reasonable period of time, with an order of the Commission concerning the safety, adequacy, efficiency, or reasonableness of service;

(D) should seek the acquisition of the Company by a capable public utility pursuant to Section 4-502 of the Act because the Company is unable or unwilling to provide safe, adequate, or reliable service, no longer possesses sufficient technical, financial, or managerial resources and abilities to provide safe, adequate, or reliable service, or has failed to comply, within a reasonable period of time, with an order of the Commission concerning the safety, adequacy, efficiency, or reasonableness of service;

(E) should seek the penalty prescribed in Section 5-109 of the Act for the Company’s failure to file the required reports.”

Similarly, the Supplemental Citation Order of June 24, 2003, p. 3, provides in pertinent part:

“(6) the Commission should issue this Supplemental Citation Order against the Respondents in these consolidated proceedings to determine whether, for the failure to pay their electric bills, the Commission:

(A) should seek mandamus or injunction against any or all of the Respondents under Section 4-202 of the Act;

(B) should seek the imposition of civil penalties against any or all of the Respondents under Section 5-202 of the Act;

(C) should seek the appointment of a receiver pursuant to Section 4-501 of the Act because any or all of the Respondents are unable or unwilling to provide safe, adequate, or reliable service, no longer possess sufficient technical, financial, or managerial resources and abilities to provide safe, adequate, or reliable service, or have been actually or effectively abandoned by their owner or operator;  
or

(D) should seek the acquisition of any or all of the Respondents by a capable public utility pursuant to Section 4-502 of the Act because any or all of the Respondents are unable or unwilling to provide safe, adequate, or reliable service, no longer possess sufficient technical, financial, or managerial resources and abilities to provide safe, adequate, or reliable service, have been actually or effectively abandoned by their owner or operator, or has willfully failed to comply any provision of the Act, specifically in this case, Sections 8-101 and 8-401 of the Act.”

**A. Acquisition is the only adequate remedy for the present situation**

Staff has suggested that the proper remedy for the many failings of the Respondent and its management is to approve the acquisition of the Respondent by a capable public utility. Staff's evidence in support of a remedy under Section 4-502 of the Public Utilities Act, 220 ILCS 5/ 4-502, includes Ex. 1.0, pp. 15-17; Ex. 3.0, p. 14; Ex. 4.0; Ex. 5.0; Ex. 9.0, pp. 11-12; Ex. 11.0, Ex. 12.0, Ex. 13.0, and Ex.14.0. Staff believes any other remedy is inadequate or will fail to resolve the difficulties caused by the present management of the Respondent.

Issuance of civil penalties against the Respondent under 220 ILCS 5/ 5-109 and 5-202 is an exercise in futility. Taking money from the Respondent will only lead to further service degradation and nonresponsiveness. Since the ownership and management of the Respondent are one and the same (February 16, 2005, hearing, Tr. p. 457, lines 8-9), there are no "independent" owners who can be awakened by a civil penalty and, thereby, be influenced to bring the management of the utility into compliance with the utility's legal requirements.

Receivership under Section 4-501 of the Public Utilities Act, 220 ILCS 5/ 4-501, is unavailable in the absence of a receiver willing to undertake the bringing of the Respondent into compliance with the many failed or missing requirements while keeping the Respondent serving the public. While the Courts may have available receivers to wind down businesses, the intent of Section 4-501 of the Public Utilities Act, *supra*, is to maintain the public service of a public utility (220 ILCS 5/ 4-501 (d)). Also Section 4-501 presumes a temporary measure, since the statute expects the return of the public utility to its owners' control (220 ILCS

5/ 4-501 (g)). However, the present owners and managers who should be financially interested in coming into compliance have shown a willful disregard for such requirements. If some receiver were to get the Respondent into compliance, return of the Respondent to its present owner will negate any progress.

This leaves use of injunctions and mandamus to compel the Respondent to conform to the identified failures in this case under Section 4-202 of the Public Utilities Act, 220 ILCS 5/ 4-202. This involves getting the Circuit Court (or perhaps the Bankruptcy Court in this case) to order the Respondent to come into compliance with the various matters identified in the original 2001 citation order. Thus, although there is a general failing by the Respondent to maintain sufficient and necessary records, the only recordkeeping matter which can be enforced is the creation of a continuing property record (Item 7 in the Citation Order). Whereas, if a capable public utility acquires the Respondent, it can be expected that all of the necessary recordkeeping requirements will be met in the future.

This is not a small matter. As shown especially by the testimony of Thomas A. Griffin, Staff Ex. 6.0, obtaining records from the Respondent is an extended version of “button, button, whose got the button?” The Respondent herein cannot prove to anyone that the refunds ordered have ever been done for which a report to this Commission was ordered (Item 2 in the 2001 Citation Order). Seeking injunction/mandamus relief would constitute a complete forgiveness of the brinkmanship the present management of the Respondent engaged in with its electric bills. The ultimate repayment is in the hands of the

Bankruptcy Court and is not an issue herein. What is the issue is how this debt arose, the presentation to Staff of altered documents, and using the Respondent as leverage in a dispute having nothing to do with utility service or the Respondent.

Further, assuming an injunction/mandamus was issued by an appropriate court, Staff would be required to closely monitor to ensure that whatever is ordered is done and done properly. A court has no personnel skilled in any of these areas who can check on the representation of the Respondent that an item was done or done correctly. Staff would need to look over the shoulder of the Respondent's present management to ensure that everything required was done, essentially inserting Staff into running the Respondent in some way. Such a process for this Respondent would be unworkable in Staff's opinion (Staff Ex. 5.0, pp. 8-9).

#### **B. Illinois-American is a capable public utility**

The issue which has gotten the most response from the Respondent are the requirements of Section 4-502 of the Public Utilities Act, 220 ILCS 5/ 4-502, in selecting Illinois-American Water Company ("Illinois-American") as a public utility capable of acquiring the Respondent (Staff Ex. 11.0, pp. 7-88, adopting Staff Ex. 5.0, pp. 8-11, from Ill.C.C. Docket No. 01-0488). Illinois-American is the only entity which has shown any interest in acquiring the Respondent. Of course, approval of the acquisition by the Commission merely leads to the bringing of an eminent domain action by Illinois-American Water against the

Respondent, assuming that the Bankruptcy Court allows the suit. 220 ILCS 5/ 4-502 (g).

Section I of this Brief has covered the violations allowing for an acquisition under 220 ILCS 5/ 4-502 (a). The Respondent has less than 7,500 customers (Staff Ex. 1.0, p. 5). 220 ILCS 5/ 4-502 (b).

The pertinent portion of Section 4-502 of the Public Utilities Act, 220 ILCS 5/ 4-502, provides:

“(c) In making a determination under subsection (a), the Commission shall consider all of the following:

(1) The financial, managerial, and technical ability of the small public utility or telecommunications carrier.

(2) The financial, managerial, and technical ability of all proximate public utilities or telecommunications carriers providing the same type of service.

(3) The expenditures that may be necessary to make improvements to the small public utility or telecommunications carrier to assure compliance with applicable statutory and regulatory standards concerning the adequacy, efficiency, safety, or reasonableness of utility service.

(4) The expansion of the service territory of the acquiring capable public utility or telecommunications carrier to include the service area of the small public utility or telecommunications carrier to be acquired.

(5) Whether the rates charged by the acquiring capable public utility or telecommunications carrier to its acquisition customers will increase unreasonably because of the acquisition.

(6) Any other matter that may be relevant.”

The various violations identified shows that the Respondent has a lack of financial, managerial and technical ability (Staff Ex. 3.0, p. 14, and Ex. 9.0, pp. 1-12). 220 ILCS 5/ 4-502 (c) (1). The Staff has submitted evidence concerning the financial, managerial and technical abilities for all the proximate public utilities

within the proximity used by Staff in this case (Staff Ex. 1.0, p. 17; Ex. 4.0; Ex. 5.0, pp. 1-2; Ex. 11.0, pp. 3-4; and Ex. 12.0). 220 ILCS 5/ 4-502 (c) (2). Staff has submitted evidence concerning the necessary expenditures (Staff Ex. 5.0, pp. 6-7, and Ex. 11.0, pp. 6-7). 220 ILCS 5/ 4-502 (c) (3). The expansion of Illinois-American's territory would be a further extension for Illinois-American in McHenry County (IAWC Ex. 1.0, pp. 4-5, IAWC Ex. MLJ-2 and Staff Ex. 11.0, p.8, adopting Staff Ex. 5.0 in Ill.C.C. Docket No. 01-0488, p. 9). 220 ILCS 5/ 4-502 (c) (4). Any increase in rates resulting from the acquisition by Illinois-American would not be unreasonable (Staff Ex. 5.0, p. 8; Ex. 11.0, p.8, adopting Staff Ex. 5.0 in Ill.C.C. Docket No. 01-0488, p. 9; and Ex. 13.0, pp. 3-4). 220 ILCS 5/ 4-502 (c) (5).

Staff undertook a significant burden in contacting existing municipal and cooperative utilities to see if anyone was interested in being designated a capable public utility in relation to the Respondent (Staff Ex. 5.0, pp. 2-6 and Ex. 11.0, pp.2-6). These entities are not regulated by this Commission, so a list of such entities which were within five miles was developed by the records of the Illinois Environmental Protection Agency. In Subsection 4-502(d) of the Act, *supra*, municipal and cooperative utilities serving 7,500 or more customers are to be considered capable public utilities, and smaller ones are allowed to elect to be considered. Not one of said entities have filed in this cause and so are excluded from consideration. 220 ILCS 5/ 4-502 (d) (3). Since the establishment of the *prima facie* case for acquisition, the Respondent has not offered any meaningful evidence as provided in 220 ILCS 5/ 4-502 (e).

### C. Illinois-American is a proximate public utility

Illinois-American is not within the 5-mile radius initially used by Staff to determine proximity for this Respondent (Ex. 5.0, pp. 1-4). The Respondent no doubt will make much of this. However, proximity is a nonissue in this case.

Paragraph 4-502 (c) (2) of the Public Utilities Act, *supra*, is the only provision that contains a requirement related to “proximate” public utilities. The statute is silent in how proximity is to be measured for public utilities. Therefore, any construction of the term must be reasonable. *Allstate Insurance Co. v. Menards, Inc.*, 202 Ill. 2d 586, 593 (2002) [the presence of surplusage should not be presumed in statutory construction and each word, clause or sentence must, if possible, be given some reasonable meaning] and *Business & Professional People for the Public Interest v. Illinois Commerce Commission*, 146 Ill. 2d 175, 207 (1991) [When interpreting a statute the primary function is to ascertain and give effect to the intent of the legislature]. Staff has submitted evidence concerning Illinois-American’s financial, managerial, and technical ability to acquire all 5 utilities owned and operated by Mr. Mathews, in the present case (Staff Ex. 11.0, p.8, adopting Staff Ex. 5.0, pp. 8-11 from Ill.C.C. Docket No. 01-0488, and Staff Ex. 12.0).

It is not uncommon with water or water and sewer public utilities to have separate unconnected operating systems. The operating engineer will travel and be responsible for several operating systems. See Illinois-American’s testimony (Ex. MLJ 4 (revised), p.1, and hearing of April 14, 2003 Tr. pp. 271-4, 285-6, and 311-2, and Respondent’s testimony concerning operating the 5 Respondents

(Hearing of February 16, 2005, Tr. pp. 459-460 and 471-473). The various operating systems may be amalgamated into a single rate district, such as Illinois-American's Chicago Metro District (Staff Ex. 13.0, pp. 3-4). The Chicago Metro area has single tariff pricing ("STP"), which consists of the same customer charges, but separate STP consumption charges for lake water and well water. The Commission approved STP for the Chicago Metro area in Ill.C.C. Docket No. 50181\50182 (cons). While it is not exactly certain what will ultimately be done with Mr. Mathews' systems, there is precedent for STP.

The five-mile radius was chosen as an arbitrary starting point for the contact of municipal and cooperative water or water and sewer utilities, which can be included as *capable* public utilities. 220 ILCS 5/ 4-502 (d) (1). Thus, this initial cut was not chosen for determining proximate public utilities under Paragraph 4-502 (c) (2) of the Public Utilities Act, *supra, per se* (see Staff Ex. 1.0, p. 17 [public utilities in the vicinity]). Had no one come forward interested in acquiring the Respondent, the radius would have been increased to see if there was some capable public utility interested in the Respondent (Staff Ex. 11.0, p.3, and hearing of December 17,2002, Tr. pp. 181-2). Given the separateness of operating public utility water and sewer systems even when owned and operated by a single public utility, there is no reason to conclude that proximity under Paragraph 4-502 (c) (2) of the Public Utilities Act, *supra*, could not include in the proper case the whole of an Illinois county and, perhaps, portions of a neighboring county. There is of course no reason to try to set the absolute limits to the statutory term, proximate, in this cause.

The reason why proximity is a nonissue herein is that Illinois-American is proximate to the 5 Respondents collectively. Of course, all 5 of the Respondents are proximate to Illinois-American's Terra Cotta operating system (IAWC Ex. 1.0, pp. 4-5 and IAWC Ex. MLJ-2), even if some of the Respondents are slightly more than 5 miles away. The statute does not require, under the circumstances of this case, that proximity be measured for the 5 Respondents separately. This is not a case where even one of the Respondents is well-run. The five Respondents are operated with same willful violations, insufficient technical, financial or managerial resources and abilities, and failures to provide safe, adequate or reliable service. 220 ILCS 5/ 4-502 (a) (1), (2) and (5).

**D. Staff requests the following findings**

Pursuant to Subsection 4-502 (f) of the Act, 220 ILCS 5/ 4-502 (f), Staff asks that the Commission issue an order providing for the acquisition of the Respondent by Illinois-American Water Company. Said order should provide for the extension of the service area of Illinois-American Water Company to the territory of the Respondent. The following additional findings should be made. See recommendations for Commission Order (Ex. 11.0, p.8, adopting Staff Ex. 5.0 in Ill.C.C. Docket No. 01-0488, p.11) and Staff Ex. 13.0 and 14.0.

The Commission should order

(1) that the price for the acquisition of the Respondent be determined by agreement between the Respondent and Illinois-American within 3 months and that, upon agreement, a joint petition be filed with the Commission for

determination if the price is reasonable in accordance with Subsection 4-502(g) of the Act, 220 ILCS 5/ 4-502 (g);

(2) that, if Respondent and the Illinois-American are unable to agree on the acquisition price within three months, Illinois-American should be authorized in the Commission Order herein to acquire the Respondent by following the procedure prescribed for the exercise of the powers of eminent domain in accordance with Section 4-502(g) of the Act, 220 ILCS 5/ 4-502 (g);

(3) that the Commission accept as the original cost of plant in service for utility accounting and ratemaking purposes, the court-determined purchase price established in a Section 4-502 condemnation proceeding;

(4) that Illinois-American's current depreciation rates be adopted to determine the proper depreciation expense for Mr. Mathews' facilities;

(5) that the Respondent's service area be merged with the Chicago Metro Division of IAWC;

(6) that if, instead of a complete merger, Respondent's former service territory is separately tariffed, any allowed surcharge be accounted as a contribution from the customers; and

(7) that Illinois-American be required to file its plan within 3 months of agreeing on a purchase price or of obtaining a price through condemnation for bringing Respondent's system and business into compliance with applicable statutory and regulatory standards, in accordance with Subsection 4-502(i) of the Act, 220 ILCS 5/ 4-502(i).

### **III. CONCLUSION**

Wherefore the Staff Witnesses of the Illinois Commerce Commission request that the Commission find that the Respondent, Wonder Lake Water Company, has violated the Commission's Order of June 16, 1999 and the provisions of the Public Utilities Act, that acquisition by a capable public utility pursuant Section 4-502 of the Public Utilities Act, 220 ILCS 5/ 4-502, is the appropriate remedy, that Illinois-American Water Company is the capable public utility that should be allowed to acquire the Respondent, Wonder Lake Water Company, and whose territory should be extended to the territory of the Respondent, that all the necessary statutory findings be made as laid out in this Brief, that the additional findings sought by the Staff Witnesses above be granted, and that the Commission issue such other additional, further or substitute findings and conclusions as may be necessary or advisable.

/s/ James E. Weging

JAMES E. WEGING

Office of General Counsel  
Illinois Commerce Commission  
160 North LaSalle Street  
Suite C-800  
Chicago, Illinois 60601  
(312) 793-2877  
Fax (312) 793-1556  
JWEGING@ICC.State.IL.US

*Counsel for the Staff Witnesses of  
the Illinois Commerce Commission*



## **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that copies of the above Notice, together with a copy of the document referred to therein, have been served upon the parties to whom the Notice is directed by first-class mail, postage prepaid, and by e-mail from Chicago, Illinois on the 1<sup>st</sup> day of April, 2005 A.D.

*/s/ James E. Weging*

JAMES E. WEGING

**ICC Docket Nos. 01-0488 – 01-0492  
Energy Service List**

Richard J Curran Jr.  
Atty. for Village of Wonder Lake  
Cowlin, Naughton, Curran & Coppedge  
PO Box 188  
20 Grant St.  
Crystal Lake, IL 60039-0188

Thomas P Mathews  
Crystal Clear Water Company  
7314 Hancock Dr.  
PO Box 189  
Wonder Lake, IL 60097

Bill Johnson  
Case Manager  
Illinois Commerce Commission  
527 E. Capitol Ave.  
Springfield, IL 62701

Sue A Schultz , Esq.  
Juliano Law  
772 Wall Street  
O'Fallon, IL 62269

Steve Knepler  
Illinois Commerce Commission  
527 East Capitol Ave.  
Springfield, IL 62706

Thomas Griffin  
Illinois Commerce Commission  
527 East Capitol Ave.  
Springfield, IL 62706

Ian Brodsky  
Administrative Law Judge  
Illinois Commerce Commission  
160 North LaSalle St., STE. C-800  
Chicago, IL. 60601

Clyde Kurlander  
Atty. for Respondent  
Lindenbaum Coffman Kurlander & Brisky, Ltd.  
2350 Mont Claire Dr., N-202  
Naples, FL 34109

Mark L Goldstein  
Attorney for Respondents  
108 Wilmot Rd.,  
Suite 330  
Deerfield, IL 60015

Mary G Sullivan  
Associate Counsel  
Illinois-American Water Company  
PO Box 24040  
300 N. Water Works Dr.  
Belleville, IL 62223

James Weging  
Illinois Commerce Commission  
160 N. LaSalle St., Ste. C-800  
Chicago IL 60601-3104

Rochelle Phipps  
Illinois Commerce Commission  
527 East Capitol Ave.  
Springfield, IL 62706

Terrence Hilliard  
Administrative Law Judge  
Illinois Commerce Commission  
160 North LaSalle St., STE. C-800  
Chicago, IL. 60601

Elizabeth A. Rolando  
Chief Clerk  
Illinois Commerce Commission  
527 East Capitol Ave.  
Springfield, IL 62706