

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Aqua Illinois, Inc.)	
)	
Proposed General Increase for Water and Sewer Rates for the Woodhaven Division)	Docket No. 05-0071
)	
Proposed General Increase for Water Rates For the Oak Run Division)	Docket No. 05-0072
)	

**PETITION FOR INTERLOCUTORY REVIEW OF
ADMINISTRATIVE LAW JUDGE’S RULINGS**

Aqua Illinois, Inc. (“Aqua”), pursuant to 83 Ill. Admin. Code §200.520, respectfully submits its Petition for Interlocutory Review of Administrative Law Judge’s Rulings before the Illinois Commerce Commission (“Commission”) and, in support thereof, states as follows:

I.
Introduction

Aqua respectfully requests the Commission review and reverse two rulings that the Administrative Law Judge (“ALJ”) made during the evidentiary hearings in these consolidated cases. The first ruling struck a large portion of Aqua witness Mr. Jack Schreyer’s surrebuttal testimony that was pre-filed on July 19, 2005, addressing the issue of rate case expense. The stricken portion included copies of the actual invoices of expenses Aqua has incurred to process these cases,¹ which were attached to Mr. Schreyer’s surrebuttal testimony as Exhibit D. Also stricken was Mr. Schreyer’s surrebuttal response to Staff witness Ms. Bonita Pearce’s rebuttal testimony on the issue. In his testimony, Mr. Schreyer opined, based on the invoices, that Aqua

¹ The ALJ subsequently allowed Aqua to enter the invoices it had submitted to Staff through discovery prior to July 7, 2005—the date Staff filed its rebuttal testimony—but did not allow the admission of any invoices provided to Staff on or after that date.

is likely to incur its original projections of rate case expense for each of its three service areas (“Divisions”) at issue in these cases.²

The second ruling struck Aqua witness Mr. Thomas Bunosky’s second amended rebuttal testimony that was pre-filed on June 21, 2005, but allowed Mr. Bunosky’s original rebuttal testimony that was pre-filed on June 15, 2005. Mr. Bunosky’s second amended rebuttal testimony responded to two issues that the Woodhaven Association raised. The responses were not contained in Mr. Bunosky’s original rebuttal testimony. The effect of the ruling was to strike Mr. Bunosky’s responses to those two claims.

There is no dispute that the stricken evidence is relevant to the issues in these cases. Rather, the ALJ made both rulings based upon Staff motions that were premised on alleged procedural violations. Such alleged procedural violations did not occur. In fact, the ALJ’s rulings are contrary to those made in other Commission cases as well as the common practice before the Commission.

Additionally, there is no showing that any party was unfairly prejudiced by the way in which Aqua submitted its pre-filed testimony. Because the stricken evidence’s entry into the evidentiary record would not prejudice any party, it is proper and reasonable to admit the evidence. Doing so would be consistent with the Commission’s long-standing preference to have a full and complete record upon which to base its ultimate decision.

Indeed, the rulings unreasonably penalize Aqua and are prejudicial to its ability to present relevant evidence. Staff did not voice its objections to the manner in which Aqua pre-filed its testimony until the evidentiary hearings. Further, the ALJ also knew that Aqua pre-filed second

² Aqua’s Oak Run Water Division, Woodhaven Water Division and Woodhaven Sewer Division are at issue.

amended rebuttal testimony for Mr. Bunosky in June 2005, and did not inform Aqua of any purported procedural misstep until evidentiary hearings on July 27, 2005. Had Aqua known of such an assertion at the time it originally pre-filed the amended testimony in June, it could have taken steps to seasonably cure any procedural defect. Because Staff waited until the evidentiary hearing, Aqua has been left with no means to cure other than via interlocutory review to the Commission.

For these reasons as more fully discussed herein, Aqua respectfully requests that the Commission reverse the ALJ's rulings and admit Aqua's testimony into the evidentiary record.

II. **Argument**

A. Mr. Schreyer's Surrebuttal Testimony On Rate Case Expense Should Be Admitted

Staff moved to strike Mr. Schreyer's surrebuttal testimony addressing rate case expense on the alleged ground that it constituted a "major" change in position that Staff was not able to review before the evidentiary hearings. (Tr., pp. 184-85). Staff also claimed the evidence constituted an "update" to a future test year that Part 287 prohibits. (Tr., p. 356). The grounds Staff alleged are in error.

The ALJ rested his ruling on the erroneous grounds Staff alleged. He ruled that the portions of Mr. Schreyer's testimony to which Staff objected should be stricken on the alleged ground that the information presented was untimely provided in surrebuttal and included a significant new proposal. (Tr., p. 198). The ALJ also ruled that Aqua's proffer of its rate case expense invoices constituted an attempt to update the rate case test year. (Tr., pp. 357-58).

Accordingly, the ALJ's ruling is erroneous for the same reasons as Staff's motion to strike. It is also in error because it is inconsistent with the Commission's long-standing practice

to develop a full and complete evidentiary record. Rate case expense invoices are incurred throughout the course of rate cases and, thus, invoices for rate case related services provided in the months closer to the evidentiary hearing are not available until closer to the hearing. In Aqua's last rate case for Kankakee (Docket No. 03-0403), ALJ Brodsky recognized this unique circumstance and allowed Aqua to provide the exact same type of evidence on surrebuttal that the ALJ ruled to strike here. In fact, ALJ Brodsky also let Aqua witness Mr. Schreyer update Aqua's rate case expense projection on the witness stand based on the invoices Aqua had received up to the date of hearing. ALJ Brodsky's ruling in Docket No. 03-0403 is consistent with the Commission's long-standing practice to develop a record that contains all relevant evidence, whereas the ALJ's ruling in this case is not.

1. Aqua Did Not Present A "Major" Change In Position On Surrebuttal

Aqua's Schedules C-2.2, which were part of its original rate case filings, set forth its total rate case expense requests for each of the three Divisions as follows:

Oak Run:	\$129,875 amortized annually
Woodhaven Water:	\$160,950 amortized annually
Woodhaven Sewer:	\$160,950 amortized annually

The actual invoices proffered as Exhibit D to Mr. Schreyer's surrebuttal testimony established how Aqua's actual expenses compare to its original projections. Mr. Schreyer testified that the invoices support Aqua's full recovery of its *original projections* and expressly stated that *Aqua's position on rate case expense is the same now as when it first filed these cases:*

[I]t is my opinion that the amounts Aqua has incurred to date and reasonably anticipates to incur support Aqua's original projection of overall rate case expenses of \$129,875, \$160,950 and \$160,950 for Oak Run, Woodhaven Water and Sewer, respectively. Accordingly, Aqua requests full recovery of its original projection.

(Aqua Ex. 8.0, p. 14, ln. 332-36).³ It is very clear from Mr. Schreyer's stricken testimony that Aqua still requests full recovery of its original rate case expense projections. It is not seeking *any* increase over its original projections for rate case expense.

2. Staff Was Not Prejudiced By The Evidence's Introduction On Surrebuttal

Staff claimed that it was not able to review Aqua's surrebuttal evidence because it was 312 pages, of which 286 were Aqua's rate case expense invoices. (Tr., pp. 184-85). Staff also claimed, incorrectly, that Aqua did not provide its rate case expense invoices "in any particular order." (*Id.*) Staff asserted that it was overwhelmed with the receipt of the information via surrebuttal testimony versus a data request ("DR") response and that, as a result, Staff did not have time to give the information a "proper and thorough review." (Tr., p. 189). Staff's claims bordered on being very serious misrepresentations.

Mr. Schreyer's surrebuttal testimony was only 24 pages and only 6 ½ pages addressed rate case expense. Mr. Schreyer did attach Aqua's invoices as Exhibit D. In total, the invoices comprised 279 pages of Mr. Schreyer's surrebuttal testimony.⁴

However, Aqua did *not* provide these invoices to Staff for the first time via surrebuttal testimony. Aqua has provided these invoices to Staff and the intervening parties throughout the course of this proceeding starting on March 15, 2005. While Staff claimed at the hearing that it was prejudiced from receiving Aqua's invoices through surrebuttal testimony rather than through a DR response, the truth of the matter is that Aqua did provide Staff copies of all invoices as they

³ This is stricken testimony that is included in the record as part of an Offer of Proof identified as Aqua Ex. 11.0.

⁴ As noted above, the ALJ subsequently admitted the portion of the invoices provided to Staff prior to July 7, 2005 because Staff witness Ms. Pearce admitted she reviewed and relied upon them as the basis for her rebuttal testimony.

were incurred via DR responses. Staff's assertions to the contrary lack foundation and in fact were highly inappropriate.

Six business days after the Commission's Suspension Order, Staff witness Ms. Pearce served Aqua with DRs BAP 1.07, 1.08, 2.06, 2.07, 3.05 and 3.06. These six DRs sought information on rate case expense as follows:

BAP 1.07 – outside legal expenses for Oak Run

BAP 1.08 – other expenses for Oak Run

BAP 2.06 – outside legal expenses for Woodhaven Water

BAP 2.07 – other expenses for Woodhaven Water

BAP 3.05 – outside legal expense for Woodhaven Sewer

BAP 3.06 – other expenses for Woodhaven Sewer

Copies of these DRs are provided herewith as Attachment A. Notably, each of these DRs request that Aqua “provide supporting documentation for each respective component included in the total.”

In response to these DRs, Aqua began providing copies of its invoices on March 15, 2005, over four months before the evidentiary hearings. (Aqua Cross Ex. 2; Tr., pp. 340-50; 365-67). Aqua continually supplemented these DRs each month as it received additional rate case expense invoices.⁵ (*Id.*) Aqua also imprinted a bates stamp number to each invoice page provided in response to Ms. Pearce's DRs to track the invoices and when they were provided. Aqua made the following seasonal supplements:

⁵ As noted above, because professional services are typically invoiced at the end of each month, the invoices for rate case related professional services were typically received by Aqua and provided to Staff the month after the services were provided. For example, Aqua would have received invoices for serviced performed in April in May.

<u>BAP 1.07</u>	March 15, 2005	Bates No. OR 000119-121
	March 18, 2005	Bates No. OR 000169-172
	March 25, 2005	Bates No. OR 000191-193
	April 13, 2005	Bates No. OR 000632-636
	May 10, 2005	Bates No. OR 000792-797
	June 14, 2005	Bates No. OR 000862-865
	July 8, 2005	Bates No. OR 000877-880
	July 20, 2005 ⁶	Bates No. OR 000886-893
<u>BAP 1.08</u>	June 3, 2005	Bates No. OR 000803-851
	July 7, 2005	Bates No. OR 000866-871, 873-976
	July 8, 2005	Bates No. OR 000881-885
	July 19, 2005	Bates No. OR000894-900
<u>BAP 2.06 & 3.05</u>	March 15, 2005	Bates No. WH 000179-184
	March 18, 2005	Bates No. WH 000285
	April 13, 2005	Bates No. WH 001248-1251
	May 10, 2005	Bates No. WH 001931-1936
	June 14, 2005	Bates No. WH 002063-2069
	July 8, 2005	Bates No. WH 002094-2099
	July 20, 2005 ⁷	Bates No. WH 002107-2116
<u>BAP 2.07</u>	June 3, 2005	Bates No. WH 001971-2010
	July 7, 2005	Bates No. WH 002071-2077, 2090-93
	July 8, 2005	Bates No. WH 002100-2104
	July 19, 2005	Bates No. WH 002117-2123
<u>BAP 3.06</u>	June 3, 2005	Bates No. WH 002011-2054
	July 7, 2005	Bates No. WH 002078-2089
	July 8, 2005	Bates No. WH 002102-2106
	July 19, 2005	Bates No. WH 002124-2130

⁶ Aqua also provided these eight pages to Staff as part of Exhibit D to Mr. Schreyer's surrebuttal testimony on July 19. Four of the pages were outside legal counsel's invoice for June services, and the other four constituted a pro forma of outside legal counsel's invoice for services provided from July 1 to July 18.

⁷ Again, Aqua provided these ten pages to Staff as part of Mr. Schreyer's Exhibit D on July 19. Six of the pages were outside legal counsel's invoice for June services, and the other four constituted a pro forma of outside legal counsel's invoice for services provided from July 1 to July 18.

Ms. Pearce admitted under cross-examination that she received all of the invoices provided in response to BAP 1.07, 2.06 and 3.05 on the dates noted, and that she received the invoices provided in response to BAP 1.08, 2.07 and 3.06 prior to July 7, 2005. (Tr., pp. 340-50; 365-67). Aqua's counsel was not allowed to introduce evidence as to the invoices Ms. Pearce received in response to BAP 1.08, 2.07 and 3.06 subsequent to July 7, 2005. (Tr., pp. 351-68).

Aqua also provided Staff with summaries of its rate case expenses based on its invoices in response to these DRs. The summaries were prepared by invoice. They identified the service provider per invoice on the left and the expense associated with each invoice on the right. Aqua then totaled the expenses. As such, Aqua provided Staff with a running tab of its rate case expenses. (Tr., p. 372 (Ms. Pearce admitting Aqua provided these summaries)).

Staff had all of these invoices along with Aqua's summaries in more than sufficient time to perform its review. Ms. Pearce testified that the review she performed was very minimal. She described her review as follows:

I reviewed them on the face of it. They appeared to be copies of actual invoices from Aqua, Sonnenschein. And I also reviewed the summaries that were provided by the Company that included the descriptions and amounts, and I compared those to the amounts that were on the invoices.

(Tr., pp. 372-73). Ms. Pearce would have had time to perform this review with respect to all of the invoices provided before the start of the evidentiary hearings on July 27, 2005.

In fact, Ms. Pearce testified under examination that she reviewed all the invoices within a reasonable time of receipt. (Tr., p. 350). Aqua had provided Ms. Pearce with 182 pages of the 279 total pages of invoices before her July 7, 2005, rebuttal testimony.⁸ It only provided 97

⁸ Again, these 206 pages of invoices were subsequently admitted into the record because Ms. Pearce admitted on the witness stand that she had both received and reviewed those invoices prior to filing her rebuttal testimony.

pages of invoices to Staff on or subsequent to July 7, 2005. Of these 97 pages, Aqua provided 33 on July 7, 2005, 25 on July 8, 2005, 21 on July 19, 2005 and 18 on July 20, 2005. Staff had 20, 19, 8 and 7 days respectively prior to the evidentiary hearings on July 27, 2005 to review these invoices. Aqua should not be penalized when Ms. Pearce had these invoices in more than sufficient time to conduct her review.

Staff's claim that Aqua did not present the invoices with sufficient organization in Mr. Schreyer's surrebuttal testimony also has no merit. (Tr., pp. 184-85 (stating Aqua did not provide the invoices "in any particular order"). As noted, Aqua bates labeled all of its rate case expense invoices so that they are easily tracked. Aqua organized the invoices by Division and type of expense in Mr. Schreyer's rebuttal testimony. It is easy to recognize that the invoices are the ones Aqua provided to Staff in response to Ms. Pearce's DRs.

Staff clearly was not prejudiced by Aqua including this evidence as part of its surrebuttal filing. Aqua provided the invoices to Staff as they were received and sufficiently in advance of the evidentiary hearings for review. The Commission should reverse the ALJ's ruling to exclude the invoices based on the factually incorrect assertion that Aqua gave the invoices to Staff for the first time via surrebuttal testimony.

3. Aqua's Stricken Testimony Is Responsive To Staff's Rebuttal Position

Aqua's overall rate case expense projections are estimates that are comprised of different expense areas. In particular, a utility incurs in-house rate department, outside auditing, outside expert witness, outside legal and miscellaneous expenses to process a rate case. These expenses, in total, comprise overall rate case expense.

As noted, Ms. Pearce testified at hearing that she reviewed the invoices after she received them and that her rebuttal testimony position considered the invoices. (Tr., p. 350) In fact, Ms. Pearce's rebuttal position as to the recoverability of Aqua's rate case expense projections was based on whether Aqua's invoices demonstrate, in her opinion, that Aqua is likely to incur its projections.⁹ (Staff Ex. 6.0, pp. 12-17). Ms. Pearce opined that Aqua is not likely to meet its rate department and miscellaneous expense projections. (*Id.*, pp. 14-17). She adjusted those areas of rate case expense downward but did not adjust upward other areas where Aqua's invoices demonstrate it is likely to exceed its original projections. (*Id.*) Staff filed its rebuttal case on July 7, 2005.

Mr. Schreyer responded to Ms. Pearce in his surrebuttal testimony. He reemphasized, as noted above, that Aqua continues to seek recovery of its original rate case expense projections in total. (Aqua Ex. 8.0, p. 14).¹⁰ He also explained that rate case expense projections are good faith estimates that one cannot definitively know until case completion. As cases progress, some rate case expense segments will exceed and other will fall short of original estimates. He explained that Ms. Pearce's proposal to only adjust downward those segments that may fall short while not adjusting upward those that are likely to exceed the original estimates is inherently inequitable.

In this case, Mr. Schreyer testified that there has been a reallocation of expense among various components. In particular, he explained that Aqua's invoices show it will exceed its original projections for the rate case expense components related to outside legal and outside witness fees. He opined that the Commission should allow reasonable increases in those rate

⁹ The single exception was Aqua's rate of return witness expense, the recoverability of which Ms. Pearce assessed based on different criteria. (Staff Ex. 6.0, pp. 8-11).

¹⁰ Again, this is stricken testimony in the record as part of an Offer of Proof identified as Aqua Ex. 11.0.

case expense components if the Commission adopts Staff's rebuttal proposal to decrease other components. (*Id.*, pp. 14-18).

Mr. Schreyer's surrebuttal testimony was clearly responsive to Staff's rebuttal testimony. He explained that if you look at one component of rate case expense you have to look at the others too. Staff opened the door to this issue by proposing one-sided and isolated adjustments to rate case expense components. Aqua's responsive evidence set forth in Mr. Schreyer's surrebuttal testimony is entirely appropriate.

4. Staff's Claim That Part 287 Prohibits Aqua's Evidence Is A Red Herring

The relevant portion of Part 287 provides:

During the suspension period, the assigned Administrative Law Judge may require or allow the utility to update its schedules and workpapers, if a utility has proposed a future test year, according to the schedule established in the proceeding when evidence has been introduced that a significant and material change affecting the revenue requirement as defined in subsection (c) of this Section has occurred.

83 Ill. Adm. Code §287.30(a)(emphasis added).

This section does not apply to the circumstances at issue here. Aqua has not proposed *any* update to its requested *revenue requirements* based on rate case expense. It still requests the recovery of its original rate case expense projections.

Mr. Schreyer's surrebuttal response to Staff's rebuttal position, *i.e.*, that the Commission needs to recognize how rate case expense has been reallocated among all components if it considers Staff's one-sided adjustments to select components, does not change this result. The manner in which Aqua has actually incurred its rate case expense has been different than Aqua originally projected. However, there has been no change in Aqua's projections of total rate case

expense for each of the Division. Because there has been no change in Aqua's rate case expense projections, there also has been no change in Aqua's proposed revenue requirements and Section 287.30(a) does not apply. Accordingly, the ALJ's and Staff's reliance on Section 287 should be rejected.

5. The ALJ's Ruling Directly Conflicts With Those In Other Cases

Docket No. 03-0403 was the last rate case for Aqua's Kankakee Division. In that case, Aqua was allowed to submit its actual rate case expenses invoices as part of Mr. Schreyer's surrebuttal testimony. (Dkt. No. 03-0403 Tr., pp. 106-10). This evidence was allowed even though Aqua provided 80 pages of the invoices to Staff on November 19, 2003, which was two days *after* Staff filed its rebuttal testimony. (*Id.*, pp. 114-15). In addition, Mr. Schreyer was allowed to testify at that hearing to Aqua's updated actual expenses based on the additional invoices Aqua incurred between its surrebuttal filing and the hearing. (*Id.*, p. 117-23). Staff objected to the introduction of this evidence based on the alleged grounds that Aqua did not provide the evidence to Staff timely and that, as a result, Staff was not able to review the information. (*Id.*, pp. 122-23). ALJ Brodsky overruled Staff's objection to the introduction of this evidence. (*Id.*) A copy of pages 114 to 124 of the transcript in Docket No. 03-0403 is Attachment B.

6. Conclusion – First Ruling to Exclude Rate Case Expense Evidence

The bases the ALJ relied upon to exclude Aqua's surrebuttal rate case expense evidence have been shown to be in error. Aqua did not present a major change in position, and Staff received the evidence in a timely fashion sufficiently in advance of hearing for review. In addition, Section 287.30 does not apply because Aqua has not proposed to update its revenue requirement. The fact that ALJ Brodsky issued a contrary ruling in Docket No. 03-0403 further

demonstrates error. The Commission should reverse the ALJ's ruling to exclude Mr. Schreyer's surrebuttal testimony from page 14, line 274 to page 18, line 382, including Exhibit D.

B. Mr. Bunosky's Second Amended Rebuttal Testimony Should Be Admitted

During the initial status hearing, the ALJ established a schedule whereby Aqua was to file its rebuttal testimony on June 15, 2005. Mr. Bunosky's original rebuttal testimony was filed on e-docket and served on the parties on that date. (See Attachment C). At that time, Aqua had not been able to finalize its investigations of two claims raised by an intervening party, the Woodhaven Association. Mr. Bunosky stated that Aqua would provide responses as soon as its investigations into the claims were complete. Aqua completed its investigation into one of the issues on June 16 and into the other on June 21. He incorporated the results of Aqua's investigation into the issue resolved on June 16 in his first amended rebuttal testimony that was filed and served on that date. He then incorporated the results of Aqua's review of the second issue completed on June 21 in his second amended rebuttal testimony that was filed and served on that date. (See Attachments D and E (setting forth in underline and strike through form the changes from Mr. Bunosky's original rebuttal testimony made in his first and second amended rebuttal testimonies, respectively)).

Based on the schedule, there were 16 business days between the time Aqua filed Mr. Bunosky's original rebuttal testimony on June 15, 2005, and the time Staff and Intervenors filed their rebuttal testimony on July 7, 2005. Staff and Intervenors had only one less working day between the filing of Mr. Bunosky's first amended rebuttal testimony on June 16, 2005 and their rebuttal filings, for a total of 15 working days remaining. They had only three less working days from the time Mr. Bunosky's second amended rebuttal testimony was filed on June 21, 2005, at which time 12 working days still remained.

For the first time, at the evidentiary hearing, Staff moved to strike Mr. Bunosky's second amended rebuttal testimony and replace it with Mr. Bunosky's original rebuttal testimony because Aqua did not request the ALJ's leave to file amended testimony. (Tr., pp. 49-56). The ALJ granted Staff's motion for that reason. (Tr., pp. 231-36). The exclusion of the evidence set forth in Mr. Bunosky's second amended testimony is, once again, in error.

1. No Party Would Be Prejudiced By The Admission of Mr. Bunosky's Second Amended Rebuttal Testimony

Staff and the intervening parties did not file rebuttal testimony until July 7, 2005. This means those parties had 15 and 12 business days between Mr. Bunosky's first and second amended rebuttal testimony filings and their rebuttal filings, respectively. Aqua did not file Mr. Bunosky's second amended rebuttal testimony on the eve of the other parties' responsive filings.

Indeed, Staff did not make any showing of harm to any party. As noted, the two issues to which Mr. Bunosky responded in the amended testimony filings were raised by the Woodhaven Association, not Staff. Counsel for the Woodhaven Association expressly admitted that his client had sufficient opportunity to review the 2 ½ pages that constituted Mr. Bunosky's amended testimony and respond to it in rebuttal testimony. (Tr., p. 54). With the single exception of Aqua counsel's cross-examination of Staff witnesses on the issues, Staff did not address the issues at any time throughout the entire case, so it could not have been prejudiced. Indeed, it is arguable as to whether Staff even has standing to raise this objection.

2. The Exclusion Of Amended Testimony Is Contrary To Commission Practice

It is very common for parties to amend pre-filed testimony because the testimony is not admitted into evidence until the time of evidentiary hearing. The pre-filed nature of the

testimony means that other parties are generally not prejudiced by amendments. Sufficient time between parties' testimony filings typically exists for reasonable review and investigation.

In fact, Staff itself commonly files amended testimony without requesting leave.

Following are some examples:

- Docket 00-0812: Staff filed its original direct testimony on October 15, 2001. *Without requesting leave*, Staff filed revised direct testimony on December 20, 2001. Staff's revisions provided new substantive evidence. In particular, Staff added a new schedule 2 to its witness Ms. Marshall's direct testimony. The new schedule 2 set forth Staff's percentage calculations of shared costs for each TELRIC UNE. (Dkt. No. 00-0812, Staff Ex. 4.0 Revised, p. 3). This example is particularly relevant because of the significant delay between Staff's original and revised filings—over two months. Further, Staff filed Ms. Marshall's revised direct testimony immediately before the Christmas and New Years holidays to the prejudice of parties that were required to file rebuttal testimony on January 4, 2002, immediately after the holidays.
- Docket 02-0592: Staff filed its original rebuttal testimony on December 6, 2002. Three days later, and *again without leave*, Staff filed revised rebuttal testimony of its witness Ms. King. The revised rebuttal testimony added four new, substantive schedules.

Aqua has also followed this common practice as demonstrated by the Staff before the Commission. Very recently, Aqua filed revised testimony for three separate witnesses in Docket 04-0362. Neither Staff nor ALJ Jones, who is presiding over that case, raised any objection to Aqua doing so without requesting leave.

Despite the routine practice to file amended testimony without requesting leave, Staff asserts in this case that the Commission's rules require leave. Staff counsel cited a single case, an ALJ Ruling in consol. Docket Nos. 02-0798, 03-0008 and 03-0009, for its proposition. (Tr., p. 54). That case, however, is highly distinguishable. It addressed the unique circumstance whereby Staff, without requesting leave, filed amended rebuttal testimony only three business day before the utility's surrebuttal testimony was due, and the amendment was not limited to 2 ½ pages of a single witness' testimony but rather constituted a brand new Staff revenue

requirement position. In particular, Staff proposed a last minute 25% reduction in its proposed revenue requirement for the utility and filed amended testimony for five different witnesses. Such action, only three days before the utility's surrebuttal testimony filing, clearly raises questions of prejudice which do not exist here.

It is unfair to impose a procedural rule against a single party in a single case. Yet, that is exactly what the ALJ's ruling does here. It imposes on Aqua the requirement that it request leave to file amended testimony *when doing so will impose no harm on any other party*. Had there been a question of prejudice to another party, then the ALJ's rule in consol. Docket Nos. 02-0798, 03-0008 and 03-0009 may have reasonably applied. In the absence thereof, however, application of such a rule to Aqua in this case alone is discriminatory.

3. Staff's Decision To Withhold Its Objection Until Hearing Unfairly And Unreasonable Prejudiced Aqua

Given the common practice of all parties before the Commission, including Staff, to file amended testimony without leave, Staff's motion to exclude Mr. Bunosky's second amended rebuttal testimony obviously took Aqua by surprise. Aqua had no notice that such a rule would apply to it alone in this single proceeding. Indeed, Aqua had served all parties as well as the ALJ when it filed Mr. Bunosky's amended testimony. The day after Aqua did so, the ALJ sent Aqua's counsel an e-mail asking for a copy of the testimony in word version. (See Attachment F). The ALJ did not mention or even hint that Aqua should have asked his leave to file the amended testimony. Nor did Staff raise any concern at that time. If Staff's or the ALJ's preference for a request for leave to file had been made known at the time Aqua filed Mr. Bunosky's amended testimony, Aqua could have cured the procedural defect. Accordingly, Staff decision to remain absolutely silent until the evidentiary hearing was unreasonable and unnecessary.

Indeed, despite the fact that the parties were at the evidentiary hearings when Staff first voiced its objection, Aqua still attempted to cure the procedural defect Staff alleged. Aqua attempted to do so by making an oral motion to file *instanter*. (Tr., p. 232). Such a motion should have cured the alleged procedural misstep because, as noted above, testimony is not moved into the record until the evidentiary hearing. Moreover, there was absolutely no harm to Staff or any other party in admitting such evidence. However, Aqua's effort to cure via the oral motion also was denied.

4. Conclusion – Second Ruling To Excluded Amended Testimony

Like the first ruling, the second ruling also works against the Commission's policy to have a full and complete record upon which to base its ultimate decision. It excludes relevant evidence on an alleged procedural technicality, despite the fact that all parties had notice of the testimony via its pre-filing well in advance of their responsive filings and no party was harmed. It also departs from common practice before the Commission by all parties, including Staff. Further, Aqua was denied any opportunity to cure the purported defect by the fact that Staff only raised the issue at hearing—six weeks after the testimony was filed—and by the fact the ALJ voiced no concern when he acknowledged his receipt of the amended testimony when it was pre-filed. The Commission should reverse the ALJ's ruling and allow into evidence Mr. Bunosky's second amended rebuttal testimony.

III. **Conclusion**

WHEREFORE, for each and all of the foregoing reasons, Aqua Illinois, Inc. hereby respectfully request that the Commission reverse the ALJ's rulings to exclude (i) Mr. Schreyer's surrebuttal testimony from page 14, line 274 to page 18, line 382, including Exhibit D, and

(ii) Mr. Bunosky's second amended rebuttal testimony; admit Aqua's stricken evidence into the record; and grant any and all other appropriate relief.

Dated: August 3, 2005

Respectfully submitted,

AQUA ILLINOIS, INC.

By: _____
One of its attorneys

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VERIFICATION

I, Sarah N. Galioto, being first duly sworn, hereby state that I am an attorney for Aqua Illinois, Inc., that I am authorized to make this Verification on its behalf, that I have read the foregoing Petition for Interlocutory Review in consol. Docket Nos. 05-0071 and 05-0072, that I have knowledge of the facts stated therein, and that the same are true and correct to the best of my knowledge, information, and belief.

Sarah N. Galioto

Subscribed and sworn to before me
This 3rd day of August, 2005.

Notary Public

CERTIFICATE OF SERVICE

I, Sarah N. Galioto, hereby certify that I caused a copy of the Petition for Interlocutory Review of Aqua Illinois, Inc. in consol. Docket Nos. 05-0071 and 05-0072 to be served upon the service list by email on August 3, 2005.

Sarah N. Galioto