

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

KEVIN GRENS)	
)	
-vs.-)	
)	
ILLINOIS-AMERICAN WATER COMPANY)	
Complaint as to billing/charges in Lemont, Illinois.)	
)	Docket No. 05-0681
)	
PEOPLE OF THE STATE OF ILLINOIS)	Docket No. 06-0094
)	
-vs.-)	Docket No. 06-0095
)	
ILLINOIS-AMERICAN WATER COMPANY)	(Cons.)
Investigation of failure to provide service on just and reasonable terms, and violation of the Public Utilities Act and Commission rules.)	
)	
)	
VILLAGE OF HOMER GLEN)	
)	
-vs.-)	
)	
ILLINOIS-AMERICAN WATER COMPANY)	
Complaint as to billing/charges in Homer Glen, Illinois.)	

MOTION TO STRIKE AND DISMISS

Pursuant to 83 Ill. Admin. Code 200.190(a), Illinois-American Water Company ("IAWC" or the "Company"), by and through its undersigned attorneys, moves to strike and dismiss certain allegations of the First Amended Complaint ("Amended Complaint") brought by the Attorney General of the State of Illinois (the "Attorney General") on behalf of the People of the State of Illinois, in their entirety and with prejudice, on the grounds that the Attorney General has failed to offer any evidence to support such claims and has therefore failed to meet its burden of

production of evidence. In support of this motion, the Company states as follows:

Background

1. The Attorney General filed with the Illinois Commerce Commission ("Commission") its Amended Complaint against IAWC in this case on March 8, 2006.
2. IAWC filed an answer on March 29, 2006.
3. Pursuant to a scheduling order issued May 3, 2006, the Administrative Law Judge established June 30, 2006 as the deadline for the Attorney General, as a complainant, to file Direct Testimony.
4. On June 30, 2006, the Attorney General filed the Direct Testimony of Scott J Rubin (AG/HG Exhibit 1.0). The Attorney General filed no other testimony in this case.

The Attorney General's Burden of Production

5. Commission rule 200.610(b) states that "the rules of evidence and privilege applied in civil cases in the circuit courts of the State of Illinois shall be followed." Thus the standard Illinois rules of evidence regarding burdens of proof and production apply to this case. As the complainant in this case, the Attorney General has the ultimate burden of proof in the case, i.e. the burden of persuading the trier of fact on its claims. However, the Attorney General also has the initial burden of producing evidence in support of each allegation in its complaint sufficient to make out a *prima facie* case in support of such allegations. Such burden is generally referred to as the "burden of production," the "burden of producing evidence" or the "burden of going forward" on an issue. *See Consolidated Communications Consultant Serv., Inc. v. Illinois Bell Tel. Co.*, Docket 99-0429, 2001 Ill. PUC LEXIS 568, *12-14 (June 4, 2001) (discussing the two-fold nature of the burden of proof in Commission proceedings).

6. The standard for a making out a *prima facie* case in Illinois can generally be stated as "A plaintiff establishes a prima facie case by proffering at least 'some evidence on every

element essential to [the plaintiff's underlying] cause of action," *Sherman v. Cryns*, 203 Ill. 2d 264, 275 (2003), or "The plaintiff must have presented some evidence, more than a scintilla, on every essential element of his cause of action," *Happel v. Mecklenburger*, 101 Ill. App. 3d 107, 111 (1st Dist 1981). Thus, in order to make a *prima facie* case and meet its burden of production on an allegation, the plaintiff must offer at least some evidence to support the allegation. If the plaintiff fails to meet this burden by producing no evidence on an allegation, the court should enter judgment in the defendant's favor. *Sherman*, 203 Ill. 2d at 275.

7. The Commission's rules, 83 Ill. Admin. Code 200.550, also require that a complainant diligently prosecute its case. Failure to do so is grounds for dismissal of the case or claims that are not diligently prosecuted. *See* 83 Ill. Admin. Code 200.190(a). In cases where a complainant does not produce any evidence in support of claim, the complainant is considered to have abandoned those claims and they are properly dismissed. *Shah v. Illinois Bell Tel. Co.*, Docket 03-0494, Order at 8 (Nov. 23, 2004).

8. The ALJs in this proceeding set a deadline of June 30, 2006, for the presentation of complainants' direct testimony. On that date, the Attorney General was required to produce its direct evidence in support of the allegations in its complaint. To the extent the Attorney General has failed to meet its burden of production as to one more or allegations, the allegations must be dismissed with prejudice.

The Attorney General Has Failed to Establish a *Prima Facie* Case in Support of Certain Allegations in its Complaint

9. At the June 30, 2006 deadline for submitting its direct testimony, the Attorney General filed the Direct Testimony of Scott J Rubin (AG/HG Exhibit 1.0). Mr. Rubin's testimony did not offer any evidence in support of the allegations listed below. The Attorney General has offered no other evidence on these allegations. Therefore the Attorney General has

failed to meet its burden of producing evidence on those allegations and has abandoned them.

As a result, the listed allegations must be dismissed.

- (a) Amended Complaint, second introductory paragraph, p.2, second sentence: ". . . failed to maintain proper water pressure and properly issue boil orders . . . "
- (b) Amended Complaint, p.10, para. 35: "IAWC has sent premature or unjustified collection or shut-off notices to consumers in several communities served by IAWC, including but not limited to Homer Glen and Orland Hills who were disputing their bill even when the consumer paid the undisputed portion of the bill."
- (c) Amended Complaint, p.10, para. 36: "IAWC has not provided or made available to consumers a customer information booklet containing its credit and collection practices."
- (d) Amended Complaint, p.10, para. 37: "From 2003-2005, IAWC failed to properly notify consumers of the need to boil water when a lack of water pressure or other need to boil water arose. From December 17, 2005 through December 21, 2005, IAWC customers in Lisle, Illinois received several notices of the need to boil water by written posting, but customer service representatives told residents on the telephone that they had no record of a boil order. On five occasions between May 30, 2005 and July 31, 2005, in Champaign, Illinois, boil orders were delayed several hours after a drop in water pressure required the issuance of a boil order under Commission rules. Notice of the boil orders was inadequate in each instance."
- (e) Amended Complaint, p.12, para. 40(e), item (ii): "failed to assign sufficient personnel the duty of hearing in person any dispute by a customer."
- (f) Amended Complaint, p.12, para. 40(f): "Violations of 83 Ill. Adm. Code 280.160. IAWC has engaged in a pattern of attempting to terminate service to customers who have disputed a portion of the bill but have paid IAWC the undisputed portion."
- (g) Amended Complaint, p.12, para. 40(g): "Violations of 83 Ill. Adm. Code 280.200. IAWC has failed to provide a customer information booklet to customers concerning the utility's credit and collections practices or to make the booklet available."
- (h) Amended Complaint, p.12, para. 40(h): "Violation of 83 Ill. Adm. Code 600.230, 600.210 and 35 Ill. Adm. Code 607.103. IAWC has failed to maintain water pressure at the required level, and failed to properly issue boil orders when pressure fell below the required level."

10. Dismissal of these allegations will benefit the administration of this case and judicial efficiency, by eliminating allegations that have not been supported and allowing the parties to focus on those allegations for which there are continuing disputes.

11. Failure to dismiss these allegations would also unfairly prejudice the Company in its responses to the Attorney General's allegations. The Attorney General has failed to provide evidence in support of the allegations in paragraph 9 above in accordance with the schedule set by the ALJs. Elimination of these allegations from consideration is proper under 83 Ill. Admin. Code 200.25, which states the goals of Commission discretion of "Fairness," "Convenience" and "Expedition." Dismissal of the allegations above supports these goals by giving defendant, IAWC, certainty with regard to the allegations to which it must respond.

WHEREFORE, Illinois-American Water Company requests that the above-described allegations in the Attorney General's First Amended Complaint be stricken and dismissed with prejudice.

Dated: August 11, 2006

Respectfully submitted,

ILLINOIS-AMERICAN WATER
COMPANY

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