

**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 Verified Original Petition ("Complaint") brought by the Village of Homer Glen ("Homer Glen"), in their entirety and with prejudice, on the grounds that Homer Glen 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. Homer Glen filed with the Illinois Commerce Commission ("Commission") its Complaint against IAWC in this case on February 2, 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 Homer Glen, as a complainant, to file Direct Testimony.
4. On June 30, 2006, Homer Glen filed the Direct Testimony of Scott J Rubin (AG/HG Exhibit 1.0), the Direct Testimony of Mary Niemiec (HG Exhibit 1.0), the Direct Testimony of Deborah Finnegan (HG Exhibit 2.0), the Direct Testimony of Jim Jilet (HG Exhibit 3.0) and the Direct Testimony of Debbie Litoborksi (HG Exhibit 4.0). Homer Glen filed no other testimony in this case.

## Homer Glen'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, Homer Glen has the ultimate burden of proof in the case, i.e. the burden of persuading the trier of fact on its claims. However, Homer Glen 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, Homer Glen was required to produce its direct evidence in support of the allegations in its complaint. To the extent Homer Glen has failed to meet its burden of production as to one more or allegations, the allegations must be dismissed with prejudice.

Homer Glen 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, Homer Glen filed the Direct Testimony of Scott J Rubin (AG/HG Exhibit 1.0), the Direct Testimony of Mary

Niemiec (HG Exhibit 1.0), the Direct Testimony of Deborah Finnegan (HG Exhibit 2.0), the Direct Testimony of Jim Jilet (HG Exhibit 3.0) and the Direct Testimony of Debbie Litoborksi (HG Exhibit 4.0). This testimony did not offer any evidence in support of the allegations listed below. Homer Glen has offered no other evidence on these allegations. Therefore Homer Glen 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) Complaint, p. 15, para. 46: "In addition, there have been instances in which IAW has failed to repair a major water line break on a timely basis by refusing to send out repair crews in evenings and on weekends. The result is that Homer Glen residents must pay for more unaccounted for water while the company is saving on manpower costs for repair crews."
- (b) Complaint, p. 16, para. 47(d): "Violations of 83 Ill. Adm. Code Sec. 280.160. IAW has engaged in a pattern of not assigning any personnel the duty of hearing in person any dispute by a customer."

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 Homer Glen's allegations. Homer Glen 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 Homer Glen's Complaint be stricken and dismissed with prejudice.

Dated: August 11, 2006

Respectfully submitted,

ILLINOIS-AMERICAN WATER  
COMPANY

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