

ILLINOIS COMMERCE COMMISSION

Aqua Illinois, Inc.)
)
) Docket No. 06-0285
)
 Proposed general increase in water)
 rates for the Kankakee Division)

MOTION TO COMPEL DISCOVERY RESPONSES

Now comes The County of Kankakee, an Illinois County and corporate entity operating under the authority of the Illinois Counties Code, 55 ILCS 1001 et seq., by its attorney, The Kankakee County States Attorney and his appointed Assistant States Attorneys, representing said County under the authority of the States Attorneys Code of Illinois, 55 ILCS 5/3-9001 et seq., and hereby respectfully makes motion to compel discovery responses from Petitioner Aqua Illinois, Inc. before the Honorable Administrative Law Judge Larry Jones in the interests of justice under the authority of 83 Ill. Admin. Code Section 200.370.

- 1) Moving party, Kankakee County, through its attorney the Kankakee County States Attorney, has filed a Petition to Intervene in this matter.
- 2) Moving party and petitioner in intervention is a local governmental entity representing the people of Kankakee County. The service area affected by the request of Aqua Illinois, Inc. for a general water rate increase is within the corporate boundary limits of Kankakee County. Aqua Illinois, Inc. is a service provider to Kankakee County residents and businesses. Kankakee County is listed as a municipality served by Aqua Illinois, Inc in its filing in this matter dated April 20, 2006. As a governmental entity entrusted with the welfare of its people it has a duty to protect their interests form excessive rate increases by utilities.
- 3) The people who reside within the affected service area, the municipalities and businesses which are affected by the requested general water rate increase of Aqua Illinois, Inc. are located within Kankakee County.
- 4) Aqua Illinois, Inc. does business within Kankakee County and has Offices within Kankakee County.
- 5) Petitioner In Intervention Kankakee County had served upon Aqua Illinois a second set of discovery requests, Exhibit A herein, on August 9, 2006, under the authority of

Ill. Admin. Code Title 83, Section 200.335. Said discovery requests concerned the attorneys fees to be charged to the People of Kankakee County through this rate increase petition of Aqua Illinois, Inc. as rate request recovery costs. Non-redacted documentation to support the reasonableness and necessity of said fees was requested by moving party. Moving party is unable to adequately review and challenge any such attorneys fees as rate request costs which are not reasonably related to, or necessary, to this general water rate increase as costs which will be passed on to the consumers, whom moving party represents as their local county governmental entity, without unrestricted access to said billing documentation, and therefore moving party has no other remedy to address the issue.

6) Respondent Aqua Illinois, Inc., through its manager of rates, Jack Schreyer, responded to said discovery request on August 23, 2006, by objecting to questions and documents requests in its response by claiming attorney client privilege and attorney work product, Exhibit B herein, without further explanation.

7) Statement of consultation and reasonable attempts to resolve discovery differences. Moving party contacted Aqua in-house counsel Janet Arnold, an out of state attorney which this tribunal allowed to enter into this case on behalf of Aqua Illinois, Inc. in its ruling of May 16, 2006, and Sara Galioto of Sonnenshein, Nath & Rosenthal, outside counsel for Aqua Illinois, Inc., by an electronic mail letter on August 30, 2006, Exhibit C herein, serving a copy on all other parties of record, as a part of a meet and confer in an attempt to resolve this discovery dispute and as required by Illinois Administrative Code Title 83, Section 200.350.

A telephonic conference was held on September 1, 2006, between Janet Arnold, Kathy Pape, Sara Galioto, and John Rooney on behalf of Aqua Illinois, Inc., and Robert McElroy and Frank Astrella of the Kankakee County States Attorneys Office in an attempt to resolve the issues of redacted legal services billing statement narratives. A portion of the outstanding issue were resolved. As a response to ICC staff discovery request MHE 1.02 the moving party accepts the explanation that some of the redacted billing from the legal bills of January 30, 2006, were for matters unrelated to the rate increase request, with the exception of billing dated 11/8/05 and 12/16/05. Aqua Illinois, Inc. also provided updated billing through July 2006 with the narratives entirely redacted as an update to MHE 1.02. Said billing responses are enclosed as Exhibit D herein. Moving party agreed to allow time for Aqua Illinois Inc.'s counsel to confer with their clients and continued the conference to September 5, 2006.

At a further telephonic conference held on September 5, 2006, between Sara Galioto, John Rooney and Janet Arnold on behalf of Aqua Illinois, Inc. and Robert McElroy on behalf of the County of Kankakee. Aqua through its attorneys agreed to provide the monthly August, 2006, billing at a later unspecified date, but again said billing would be narrative redacted. Aqua has not agreed to provide any billing from its in-house counsel which it is charging as a portion of its claimed rate request costs. Aqua sent a letter to county counsel electronically on September 5, 2006, Exhibit E herein, after

the telephonic conference of the same date confirming the denial of the discovery request.

- 8) The discovery dispute remains unresolved and therefore moving party files this motion to compel discovery responses.

ARGUMENT

It is the policy on discovery of the Commission to obtain full disclosure of all relevant and material facts to a proceeding. 83 Ill. Admin. Code Sec. 200.340. This standard by its own wording is lenient as to discoverable facts as it relates to public utility rate cases and increases passed on to the consumer. This is not civil litigation for damages. The moving party has been provided with billing statements for legal services from outside counsel as rate request recovery costs which have the narrative portion of said billing redacted thereby leaving only attorney name and hours which are then translated into monetary costs for unknown services provided. In its rate case expense schedule, C-10, Aqua Illinois Inc., through Jack Schreyer, has estimated outside legal costs as \$262,000 and in-house legal costs at \$88,000.

Aqua Illinois, Inc. has put its legal fees for both outside counsel and in house counsel in issue by making them rate request costs presented for reimbursement to the consumers. Under the case of *Waste Management, Inc. v. International Surplus Lines Insurance Co.* 144 Ill. 2d 178, 196, the court held that ordinary work product which does not disclose conceptual data is freely discoverable. In addition even opinion “core” work product which consists of materials generated in preparation for litigation which reveal the mental impressions, opinions, or trial strategy of an attorney, is subject to discovery upon a showing of impossibility of securing similar information from other sources. *Id.* citing *Monier*, 35 Ill 2d at 360. Moving party has no way to ascertain the reasonableness or even relevance of the subject legal billing to the rate increase request without reviewing the billable hours and relating them to the narrative. This is a simple matter which should not include a lot of strategy nor hidden agendas, it is a rate increase request by a utility before the state agency which will determine the reasonableness of the amount of rate increase and pass judgment upon it. How can the Illinois Commerce Commission itself ascertain the reasonableness of the estimated legal expenses if it cannot review them in their entirety? Aqua’s position is that all of the billing narrative entries are privileged as work product or attorney client privileged. They provided no explanations to their objections as requested in the discovery request of moving party, Exhibit A, in their responses, Exhibit B.

The attorney client privilege is to be strictly confined to its narrowest possible limits under the *Waste Management* decision. *Id.* at 327. The narrative portions of the legal bills are descriptive in nature and should not contain the inner thoughts and communications contents other than general description. This information has been published in bill format and sent to Aqua Illinois, Inc. as to their outside counsel. The content has been placed in issue by Aqua Illinois, Inc. by making a rate increase request and including it as

costs to be paid by someone else, the consumer, thereby waiving the privilege. In-house billing has not been provided in any form except as an estimated cost in Aqua's schedule C-10. The consumer has a right to know what it is paying for through the rate hike costs being attributed to the instant request by the utility. Aqua Illinois, Inc. may withdraw its in-house rate request legal costs, which it intends to pass on to the People of Kankakee County, if they are not truly attributable permissible costs or they choose not to divulge said explanations for the billing. These costs are both relevant and material because Aqua Illinois, Inc. has placed them in issue as rate request recovery costs and therefore they are discoverable under section 200.340.

Outside counsel for Aqua Illinois, Inc. may argue that their legal billing is reviewed by Aqua Illinois, Inc. as their client for its reasonableness. Yet it is not Aqua Illinois, Inc. which is proposed to pay this legal billing, it is a pass through to the consumers as rate request recovery costs. Those consumers are the People of Kankakee County who are in turn represented by moving party as their States Attorneys Office. Aqua Illinois, Inc. has no incentive to review these legal bills with an ever watchful eye and challenge them, as they are not planning on being the ones to eventually pay for these bills. Additionally, no one will review Aqua Illinois, Inc.'s in-house legal billing for reasonableness, necessity and relevance if they are not provided in un-redacted form. Those bills are also proposed to be passed on to the consumer as rate request recovery costs.

The position of Aqua Illinois, Inc. that all and not some of the legal billing narratives are privileged appears as a blatant attempt to keep intervening parties, the public and even the ICC from reviewing legal billing for relevance, reasonableness and necessity. This could result in a legal bill being foisted upon the consumer with no constraints as there is no review. Aqua Illinois, Inc. through its attorneys further alleges that they have never heard of such a discovery request in the past. The fact that they have never heard of or received such a discovery request in the past does not make it an inappropriate discovery request requiring a response.

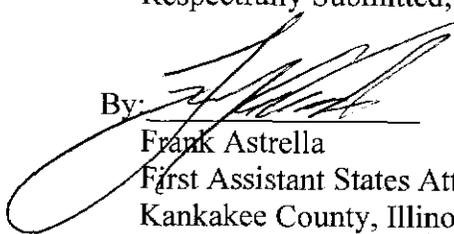
PRAYER

Wherefore the County of Kankakee respectfully requests and prays that the Honorable Administrative Law Judge grant moving party the following relief:

- 1) That respondent Aqua Illinois, Inc. be ordered to fully respond to each and every discovery request, and as determined by the Administrative Law Judge hearing said rate increase case, by providing the up-to-date un-redacted legal billing from its outside counsel in the subject rate request which it intends to pass on to the consumer as rate request costs in the instant case.
- 2) That respondent Aqua Illinois, Inc. be ordered provide un-redacted up-to-date in-house legal billing which it intends to pass on to the consumer as rate request costs in the instant case.

Dated: September 6, 2006.

Respectfully Submitted,

By: 

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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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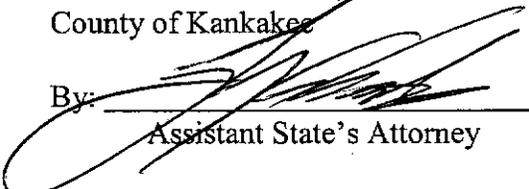
NOTICE OF FILING

TO: Administrative Law Judge Jones, 527 E. Capitol Ave., Springfield, IL 62701
Chief Clerk, Illinois Commerce Commission, 527 E. Capitol Ave., Springfield, IL 62701

See also service list via e-docket

YOU ARE HEREBY NOTIFIED that on September 7th, 2006, Kankakee County filed a Motion to Compel with exhibits A-E and Motion For Leave to File Instanter with the Illinois Commerce Commission located at 527 E. Capitol Avenue, Springfield, IL 62701 by e-docket.

EDWARD D. SMITH, STATE'S ATTORNEY
County of Kankakee

By: 
Assistant State's Attorney

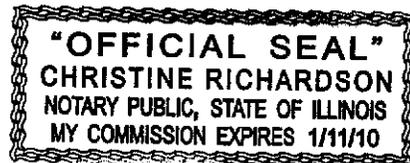
PROOF OF SERVICE

I, the undersigned on oath state that on September 7th, 2006 a copy of Motion to Compel and Motion to File Instanter of Kankakee County was filed via e-docket to the Chief Clerk and the Administrative Law Judge Jones, Illinois commerce Commission before 5:00 p.m. to the names on the service list at their respective e-mail addresses. (see attached service list)

Subscribed and sworn to before me
this 7th day of September 2006.



Frank Astrella
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SERVICE LIST
DOCKET NO. 06-0285

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