

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

Aqua Illinois, Inc.	)	
	)	Docket No. 06-0285
Proposed General Increase for Water	)	
Rates for the Kankakee Division	)	

**REPLY BRIEF ON EXCEPTIONS OF  
AQUA ILLINOIS, INC.**

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## I. RESPONSE TO THE COUNTY OF KANKAKEE (“COUNTY”)

### A. The County’s Brief On Exceptions (“BOE”) Should Be Stricken.

The Commission should strike and not consider the County’s BOE because the County failed to submit substitute language as required by 83 Ill. Adm. Code §200.830 and the Administrative Law Judge’s (“ALJ”) Ruling issued on November 28, 2006. The Commission’s regulations expressly provide that a party’s suggested replacement language “must be” provided. 83 Ill. Adm. Code §200.830. The ALJ’s Ruling reminded the parties of this requirement and held that BOEs “not including such language shall be stricken.” *Id.* (emphasis added). The terms “must” and “shall” are mandatory. *People v. Woodrum*, 2006 Ill. LEXIS 1633 at \*33-34 (Ill. 2006); *People v. Ramirez*, 214 Ill. 2d 176, 182, 824 N.E.2d 232 (2005).

Despite the Commission’s adoption of this explicit requirement in its regulations, of which the ALJ reminded the parties and even forewarned that BOEs not containing the requisite substitute language would be stricken, the County ignored the requirement and did not provide substitute language. Such action is detrimental to the Commission, the ALJ and other parties, none of which are fully able to address the County’s supposed exceptions because the County did not provide its exception language. The County should not be permitted to impair others’ abilities to respond to the its BOE by not providing the requisite substitute language.

Striking the County’s BOE for the County’s own inaction would not come as a surprise. Again, in the ALJ’s Ruling, the ALJ reminded the parties of the Commission’s requirement to provide substitute language. The County has nobody to blame but itself for not doing so.

As such, the ALJ’s advance warning that BOEs in noncompliance with the Commission’s regulation *will be stricken* should be carried out. If the Commission considers the County’s BOE in this case despite the County’s noncompliance, the ALJ’s forewarning would be nothing more

than an empty threat and the Commission's regulation would lose its power. The signal to the parties in this and in future cases would be that the Commission's regulations are optional. The Commission should not send a signal that its regulations are subject to parties' own whims for compliance. It should stand by the ALJ's Ruling and strike the County's BOE.

**B. Aqua Has Met Its Burden Of Proof.**

The County argues incorrectly that Aqua did not meet its burden for the single reason that Aqua allegedly did not address the County's issues in its Initial Brief. County BOE at 1-3. The County's argument is wrong as a matter of law and fact.

**1. The County Does Not Cite Controlling Legal Authority.**

The County argues that Illinois Supreme Court Rule 341(h)(7) controls. County BOE at 2. However, Rule 341(h)(7) is a rule of procedure before the Illinois Appellate Courts. It does not apply to procedure before the Commission. Practice before the Commission is governed by 83 Ill. Adm. Code Part 200. 83 Ill. Adm. Code §200.10(a).

The County next claims that in *Northern Ill. Gas Co. v. Home Ins. Co.*, 334 Ill. App. 3d 38, 777 N.E.2d 417, 267 Ill. Dec. 614 (2002), the court applied Rule 341(h)(7) "to find that a party waived an issue by failing to address it in its initial brief" i.e., in the party's *appellant brief*. County BOE at 2. However, as far as Aqua can decipher, this case does not even mention Rule 341(h)(7). Rather, it addresses a different subsection of Rule 341 -- subsection 341(e)(7).

The County's claim that in *Z-Tel Comm., Inc. v. Illinois Bell Tele. Co.*, Docket No. 02-0160, 2002 Ill. PUC LEXIS 450 (May 8, 2002) the Commission considered Rule 341(h)(7) "and agreed that the same principle should be applied to cases before the Commission" is also wrong. County BOE at 2. The Commission simply did not make the holding the County claims. Rather, Ameritech (now AT&T) argued that Z-Tel, who had filed a multi-count complaint, waived one

of the counts by failing to address the count in its initial brief. 2002 Ill. PUC LEXIS 450 at \*63. The fact that this was merely an argument advanced by Ameritech is obvious from the fact that the Commission discussed the argument under the heading “Ameritech’s Position” in its order *Id.* at \*62-63. The Commission’s holding, however, is set forth under the heading “Commission Analysis and Conclusion.” *Id.* at \*63. While the Commission notes its surprise that Z-Tel did not raise the count in its briefs (presumably in either its initial or reply brief), the Commission the Commission ruled against Z-Tel on other grounds. *Id.* at \*63. As such, the Commission has not held that Rule 341(h)(7) applies to Commission proceedings.

Therefore, the County’s argument is wrong as a matter of law. Illinois Supreme Court Rule 341(h)(7) is a rule of appellate procedure that does not apply to Commission proceedings. The County has not cited any decision that holds otherwise. The Commission should reject the County’s argument as a matter of law.

## **2. The County Also Is Wrong On The Facts.**

Aqua’s Initial Brief cited to the record evidence in support of its requested rate increase overall. In addition, Aqua and Staff jointly submitted the Stipulation, which cites to the record that supports the Stipulation’s resolutions on each of the issues. For example, with regard to the return on equity of 10.45%, which is one of the County’s issues, the Stipulation states “[t]his is supported in the record by ICC Staff Exhibit 3.0 and Schedule 3.01.” Stipulation at ¶ 2. Further, as the Proposed Order recognizes, the Stipulation essentially adopts Staff’s positions on the issues with the exception of a modification to Staff’s rate design position. As such, Aqua’s proposed resolution of all the issues in the case via the Stipulation is also supported by Staff’s Initial Brief. Moreover, Aqua clearly advanced substantial evidence throughout the evidentiary

phase of the case on each and every issue raised. The County's assertion that Aqua's Initial Brief has somehow caused Aqua to fail its burden of proof is wrong and should be rejected.

**C. The Proposed Order's Adoption Of The Stipulation's Resolution On Rate Case Expense Is Just, Reasonable And Supported By Evidence.**

The Stipulation sets forth a reasonable compromise on Aqua's recovery of rate case expense for its outside counsel. Aqua supported its requested projection for its outside counsel expense of \$241,712. Aqua Ex. 7.0R at 19-20, 25-27, Ex. 7.1R; Aqua Ex. 12.0 at 4-12, Ex. 12.3. Aqua based its projection on the amount of fees it incurred to litigate its two most recent rate cases being \$214,906.50 for Vermilion Dkt. 04-0442 and \$309,820.50 for Woodhaven/ Oak Run Dkt. 05-0071/05-0072 (consol). *Id.* at 7. Its projection for this case was below the midpoint of the two prior cases and even below the lower of the two cases as adjusted for today's rates. *Id.* Aqua also showed that it is likely to actually incur its projected amount of outside counsel expense. As of September 11, 2006, it had incurred \$105,265.88 in outside legal fees, and significant portions of the case had yet to be completed, including the evidentiary hearings. Aqua Ex. 12.0 at 8. Yet, Aqua accepts Staff's final position in the case of \$161,808 for purposes of the settlement alone. This constitutes a disallowance of \$80,904 and represents a reasonable compromise on the issue. The Proposed Order's adoption of the Stipulation's compromise amount, therefore, is more than supported by the evidence.

The County's position that Aqua's recovery of its outside legal expense should be limited to \$90,688 is unreasonable. County BOE at 3-5. The \$90,688 that the County would allow is equal to the amount of invoices the County alleges Aqua documented in the record as having incurred. County BOE at 4. In other words, the County's position would limit Aqua's recovery to the amount of rate case expense its invoices show it had incurred as of the filing of its surrebuttal testimony. This is because the record was marked "heard and taken" at the end of the

evidentiary hearings and the last opportunity Aqua had to submit its rate case invoices was its surrebuttal testimony.

The County's position is not just and reasonable because it fails to recognize that utilities incur a significant amount of legal expense subsequent to the amounts invoiced as of surrebuttal testimony. The County would not grant Aqua recovery for any amount incurred to prepare for or handle the evidentiary hearings, briefs, motions, any settlement issues, review of the ALJ and Commission orders, compliance with the Commission's final order and possibly appeal. Aqua is entitled to recover a reasonable amount for the entire case, not just the amount that it can document as having been invoiced as of its surrebuttal testimony.

Therefore, the County's position applies an incorrect standard and is unreasonable. It is not a valid basis for the Commission to reject the Proposed Order's adoption of the compromise set forth in the Stipulation on this issue. As noted, the compromise amount is more than supported by the evidence Aqua submitted and, further, the compromise equals Staff's position in the case. As such, it is also supported by the testimony of Staff witness Ms. Everson. The Commission should not modify the Proposed Order's findings on this issue.

**D. The County's Position On Return On Equity ("ROE") Is Not Supported By Any Evidence.**

The Proposed Order adopts the Stipulation's reasonable compromise on ROE equal to the position of Staff witness Ms. Phipps of 10.45%. This resolution is more than supported by the evidence as Aqua fully supported its requested ROE of 11.00% through the testimony of its expert witness Ms. Ahern. Aqua Ex. 3.0 at 4-33; Aqua Ex. 8.0R at 2-25; Aqua Ex. 14.0 at 1-11. The County, nonetheless, argues that the only reasonable ROE is 10.06%. County BOE at 6-8.

Staff and Aqua were the only parties who presented expert witness testimony on the issue of ROE. The County did not present an expert's opinion on the issue. Thus, the evidentiary record only supports a Commission finding that is based upon the opinion of either Staff witness Ms. Phipps or Aqua witness Ms. Ahern.

Further, the County relies upon an incorrect and distorted interpretation of the analysis of Staff witness Ms. Phipps. County BOE at 6. The County asserts Ms. Phipps "found that her water utility sample required a return on common equity of 10.06%." *Id.* The County's assertion is a complete distortion of Ms. Phipps' analysis, and it also contradicts the expert analysis of Ms. Ahern, the only other expert witness who presented testimony in the case. It must be rejected.

Ms. Phipps and Ms. Ahern both agreed that more than a single model needs to be utilized in determining an utility's ROE. *See* Staff Ex. 3.0R at 12 (Ms. Phipps explaining that she employed two models, the DCF and premium risk models); Aqua Ex. 3.0 at 22 (Ms. Ahern employing the DCF and CAPM models). Ms. Ahern explained the reason for multiple models: "In an attempt to emulate investor behavior, this means that no single common equity cost rate model should be relied upon in determining a cost rate of common equity and that the results of multiple cost of common equity models should be taken into account." Aqua Ex. 3.0 at 22. Ms. Phipps and Ms. Ahern also agreed that the proxy companies needed to be comprised of two groups—one group of water companies and one group of utilities—in order to best approximate Aqua. As such, they each selected one water utility sample group and one utility sample group. Staff Ex. 3.0R at 12-15; Aqua Ex. 3.0 at 18-20.

The County completely ignores the record evidence in regard to both of these two primary aspects of what constitutes a proper ROE analysis. It arbitrarily chooses the results of a

single one of Ms. Phipps' models, the Risk Premium analysis, and the results from that model for a single proxy group, Ms. Phipps' water sample. *See* Staff Ex. 3.0R, Sch. 3.11. The County disregards Ms. Phipps' results from the Risk Premium model for her utility sample as well as the results from her DCF analysis entirely. *Id.* This is completely at odds with the record evidence.

The County also asserts, again incorrectly, that the evidence shows 10.06% is the lowest ROE at which Aqua will be able to attract capital. County BOE at 6-7. The County asserts this is so because Aqua Virginia was recently issued an ROE of 10.0%. *Id.* It further points out that Aqua Illinois has more common equity in its capital structure than Aqua Virginia, and states that Aqua witness Ms. Ahern acknowledged that "other things being equal, a utility with more common equity in its capital structure would require a lower rate of return on common equity." *Id.* at 7. Based upon this statement the County states that "if anything, Aqua Illinois' return on equity should be lower than Aqua Virginia's, not higher." *Id.*

There is a gaping hole in the County's argument—i.e., there is no evidence that "all else" is equal between Aqua Illinois and Aqua Virginia. The County's conclusion that the two are equal and that, therefore, Aqua Illinois' ROE should be lower than Aqua Virginia's is entirely unsupported. The conclusion simply cannot be drawn from the evidence.

As such, there is no evidentiary foundation for the County's proposed ROE of 10.06%. As with any application for rate relief, the regulatory compact and the evidence must, by definition, carry the day. As part of the global settlement between Staff and the Company, the ROE was set at 10.45%, which was the recommendation of Staff witness Ms. Phipps as the ROE that would produce fair rates for customers, the Company and investors alike. The Commission should not modify the Proposed Order's adoption of this compromise resolution.

## **II. RESPONSE TO STAFF**

### **A. The Stipulation Is In Full Force And Effect.**

Staff states incorrectly that the Proposed Order mooted the Stipulation by not adopting the Stipulation in its entirety. Staff BOE at 1. Staff also implies that the Stipulation is contingent on the Commission's adoption of the Draft Order that Aqua and Staff jointly submitted ("Draft Order"). *Id.* at 3-4. Neither is the case.

The Stipulation allows both Aqua and Staff to take positions inconsistent with the Stipulation in their BOEs if the Proposed Order does not adopt the Stipulation in its entirety, which it did not. Stipulation at 7, last sentence. However, Staff's and Aqua's ability to advance alternative positions in their BOEs in no way renders the Stipulation moot. Further, only Aqua has the right to be released from the terms of the Stipulation in the event that the Commission's Order departs from the Stipulation in a manner that Aqua deems to be adverse to its interests. *Id.* at ¶14. As such, while Staff is free to advance its litigation position on rate design given the Proposed Order's departure from the Stipulation on that issue, Staff is still bound by the terms of the Stipulation, and the Stipulation remains in force and effect.

The Stipulation also is not dependent on the Commission's adoption of the Draft Order. A provision to that effect is not contained within the Stipulation. While Aqua submitted the Draft Order jointly with Staff, the Commission is able to adopt the terms of the Stipulation with whatever language it deems fit. The Proposed Order's more concise discussion of the issues is entirely appropriate and can serve as the basis for the Commission's adoption of the Stipulation.

## **B. Rate Design**

### **1. Aqua's Rebuttal Rate Design Is The Most Just And Reasonable.**

Aqua's primary position is that the Commission should adopt the Stipulation's rate design. However, if the Proposed Order is not revised to accept rates included in the Stipulation, rates should be based upon the recommendations made by Aqua in its rebuttal testimony. Specifically, Customer Charges and Consumption Charges should be set at the levels set forth on Aqua Exhibit 9.1, adjusted for the difference in total revenue requirement between Aqua's rebuttal position and the Stipulation. Aqua's rebuttal position tariff design is preferable to the Staff's proposed tariff design because (1) Staff's tariff design sets Customer Charges below current Customer Charges when the Qualifying Infrastructure Plant Surcharge ("QIPS") is taken into consideration, resulting in an actual rate decrease for some very small use customers; (2) Staff's tariff design would result in dramatically higher increases for higher use customers and there has been no reasons shown for implementing such disproportionate increases; and (3) In Aqua's opinion, Staff has agreed that most costs of a utility are fixed such that lowering the proportion of revenues that come from fixed charges increases the range of total revenues received by the Company depending on whether the year is a wet year or a dry year. It should be noted that the County agrees with using Aqua's rebuttal position tariff design rather than the Staff's tariff design. As such, if the Order rejects the rates resulting from the Stipulation, it should implement Aqua's rebuttal position approach to rate design as the best method to recover the Order's revenue requirement by making the following changes to Page 18:

Accordingly, for purposes of this proceeding, the Commission adopts Staff's interclass revenue responsibility recommendations which would set revenue responsibility at or near cost of service. Additionally, the Commission hereby adopts Staff's Aqua's rebuttal position's proposed rate design ~~for the residential customer class. Staff's proposed customer charges and~~

fire protection charges applicable to ~~the residential~~ all classes ~~class~~ are reasonable and are hereby approved. ~~The residential u~~Usage charges should be designed to produce the ~~residential class revenue responsibility resulting from the~~ revenue requirement approved in this Order. ~~and from the application of Staff's cost of service study.~~

Although the Commission has not adopted the County's interclass revenue proposal, the Commission is sympathetic to the concern raised by the County that Staff's proposed rate design may result in relatively significant percentage increases for some large-use customers. Consistent with the findings above, the Commission concludes that the interclass revenue responsibility for ~~the commercial and industrial~~ all customer classes should be determined in the manner proposed by Staff. The Commission, however, will not approve Staff's proposed rate design ~~for these classes~~ because of the significant impact that could result for some large consumers. The Commission will instead adopt the customer charges for ~~the commercial and industrial~~ all classes as were contained in Aqua's rebuttal testimony. Aqua is directed to develop usage rates that produce revenue consistent with the revenue requirement approved in this Order and with the interclass revenue responsibility that results from application of Staff's cost of service study.

## **2. Clarification of PO**

If the Proposed Order is not revised to accept either the rates resulting from the stipulation between Aqua and Staff ("Stipulation Rates"), or rates resulting from Aqua's rebuttal position on tariff design, in recovering the Order's conclusion on revenue requirement, the Proposed Order should be modified to clarify how the rates should be designed. Staff proposed a clarification in rate design on pages 7 and 8 of its BOE. Aqua does not disagree with Staff's basic premise that there should not be different rates for different customer classes. Aqua agrees that no party has proposed the establishment of different rates for different customer classes or the establishment of new customer class rates.

The clear intent of the Proposed Order in its discussion on tariff design is that the Stipulation Rates should be modified so as to provide less of an increase to large users than would be the result of the Stipulation Rates being adopted. The Proposed Order states:

Although the Commission has not adopted the County's interclass revenue proposal, the Commission is sympathetic to the concern raised by the County that Staff's proposed rate design may result in relatively significant percentage increases for some large-use customers. Consistent with the findings above, the Commission concludes that the interclass revenue responsibility for the commercial and industrial classes should be determined in the manner proposed by Staff. The Commission, however, will not approve Staff's proposed rate design for these classes because of the significant impact that could result for some large consumers.

Proposed Order at 18.

Staff's basic proposal, as set forth on page 8 of its BOE, is to have lower relative customer charges for all customers with 5/8 inch, 3/4 inch and 1 inch meters, and higher relative customer charges for customers with meters larger than 1 inch. Staff proposes that any additional customer charge revenues, because of the higher customer charges for customers with larger meters, be offset by a reduction in the second and third usage blocks. Once again, Aqua does not disagree with this basic premise as presented by Staff.

Aqua proposes, however, that the Proposed Order be clarified further to assure that there is a reduction in the percentage increase to large use customers. The Proposed Order states:

Accordingly, for purposes of this proceeding, the Commission adopts Staff's interclass revenue responsibility recommendations which would set revenue responsibility at or near cost of service. Additionally, the commission hereby adopts Staff's proposed rate design for the residential customer class.

Proposed Order at 18. It should be clarified that by "Staff's proposed rate design" the Commission means the rate design as set forth in the Stipulated Rates.

If the Order were interpreted otherwise, i.e., as meaning that the tariff design for residential, or small meter size, customers should utilize Staff's original position on Customer Charges rather than the those proposed in the Stipulation, then the clear intent of the Proposed Order could not be accomplished. This is because the reduction in customer charges from the small meter sizes (or residential customer class) would more than offset the increase in revenues from the increase in the customer charges for customers with larger meter sizes. This is due to the fact that the vast majority of customers have meters no larger than 1 inch and the vast majority of customers are residential. If customer charge revenues were to decrease because of a change to the Stipulated Rates, then the usage blocks would need to be increased rather than decreased causing an even greater disparity between the increases given to larger users as compared to smaller users. It is essential, therefore, that the only change in customer charges to those set forth in the Stipulated Rates should be to increase the customer charge for the larger meter sizes (or the non-residential customer classes) to Aqua's rebuttal position while setting the customer charge for the smaller meter sizes (or the residential customer class) at those set forth in the Stipulated Rates. This is the only way that there will be an actual increase in customer charge revenues over the Stipulated Rates so that the second and third consumption blocks can be decreased and large users not receive as significant an impact.

Therefore, if the Commission clarifies the Proposed Order, Aqua recommends the following language as opposed to that contained in Staff's BOE.

Accordingly, for purposes of this proceeding, the Commission adopts Staff's interclass revenue responsibility recommendations which would set revenue responsibility at or near cost of service. Additionally, the Commission hereby adopts Staff's compromise proposed rate design, as set forth in the Stipulation, for the residential customer class. Staff's proposed customer charges and fire protection charges applicable to the residential class, as set forth in the Stipulation, are reasonable and

are hereby approved. The residential usage charges should be reasonable and are hereby approved. The first usage block that is applicable to the vast majority of residential usage charges should be designed to produce the residential class revenue responsibility resulting from the revenue requirement approved in this Order and from the application of Staff's cost of service study.

Although the Commission has not adopted the County's interclass revenue proposal, the Commission is sympathetic to the concern raised by the County that Staff's proposed rate design may result in relatively significant percentage increases for some large-use customers. Consistent with the findings above, the Commission concludes that the interclass revenue responsibility for the commercial and industrial classes should be determined in the manner proposed by Staff. The Commission, however, will not approve Staff's proposed rate design for these classes because of the significant impact that could result for some large consumers. Since Aqua's rates are generally applicable, regardless of the type of customer, and there are no separately defined rates for commercial and industrial customers, the customer charges established in the Stipulation for 5/8 inch, 3/4 inch and 1 inch meters will apply because the majority of residential customers take service from those meter sizes. For larger meters, the ~~The~~ Commission will instead adopt the customer charges for the commercial and industrial classes as were contained in Aqua's rebuttal testimony. Since large volumes of usage are billed under the second and third usage block rates, Aqua is directed to develop second and third block usage rates that produce revenue consistent with the revenue requirement approved in this Order and with the interclass revenue responsibility that results from application of Staff's cost of service study.

**C. Staff's Revised Appendix - Base Rate Percentage Revenue Change**

The Base Rate Percentage Revenue changes set forth in Appendix A, Schedule 1, page 1 of 2, line 26, column (i) that was attached to Staff's BOE should be modified to 25.74%. The base rate percentage revenue change is a simple calculation and equals the increase in revenues including the QIPS revenues (column i, line 1 – column d, line 1) divided by the base rate revenues (column d, line 1) and expressed in a percentage form. Based on a conversation with Staff, it is Aqua's understanding that Staff agrees that the Base Rate Percentage Revenue Change should be 25.74% rather than the 20.73% shown.

WHEREFORE, for each of the foregoing reasons, Aqua respectfully requests that the Commission adopt Aqua's positions on the exceptions addressed herein, and grant any and all other appropriate relief.

Dated: December 7, 2006

Respectfully submitted,

AQUA ILLINOIS, INC.

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**CERTIFICATE OF SERVICE**

I, Sarah Galioto, hereby certify that I caused a copy of the Reply Brief on Exceptions of Aqua Illinois, Inc to be served upon the service list in Docket No. 06-0285 by electronic mail on December 7, 2006.

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