

**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.	)	

**REPLY BRIEF ON EXCEPTIONS OF  
ILLINOIS-AMERICAN WATER COMPANY**

**I. INTRODUCTION**

This is the Reply Brief on Exceptions of Illinois-American Water Company ("IAWC" or the "Company") with regard to the Revised Administrative Law Judges' Proposed Order ("ALJPO") issued in this proceeding on March 14, 2007. This Reply Brief responds to the Village of Homer Glen's ("Homer Glen") Brief on Exceptions with Proposed Substitute Language ("Homer Glen BOE") and the Brief of the Staff Witnesses on Exceptions to the

Revised ALJPO ("Staff BOE"). The Company generally agrees with the positions taken by the Illinois Commerce Commission ("Commission") Staff in the Staff BOE, with exception of a recommended modification to Staff's proposal regarding training set forth in Section III below. However, IAWC opposes Homer Glen's positions in the Homer Glen BOE in their entirety.

## **II. RESPONSE TO HOMER GLEN BOE**

### **A. General Response to the Homer Glen BOE.**

#### **1. The Homer Glen BOE Establishes No Basis For the Imposition of Civil Penalties.**

Homer Glen argues that civil penalties are warranted in this case. (Homer Glen BOE, pp. 9-14.) The ALJPO, however, concludes correctly (p. 8), ". . . that the legislature intended that the 15 day notice provision [of Section 5-202] requires action initiated by the Commission and is not met by the filing of a complaint. We find that the imposition of civil penalties in this Docket would not be consistent with legislative intent." Homer Glen's argument ignores the fact that, as the ALJPO correctly points out (p. 7), "a complaint is an accusation by an interested party rather than an order or decision from the body empowered by the legislature to decide these issues" and, therefore, cannot be the basis for notice under Section 5-202 of the Public Utilities Act ("Act"), 220 ILCS 5/5-202 ("Section 5-202"). As IAWC explained in its Reply Brief (pp. 32-34), Homer Glen's Complaint contains only unproven *allegations* of violations of the Act and Commission rules (a point that Homer Glen acknowledges in its Brief on Exceptions (p. 10)), and Homer Glen has cited no authority providing that mere allegations of a complaint can provide the requisite notice. Moreover, as IAWC's Reply Brief further explains, it is clear from the Commission's statutory authority with respect to civil penalties, as well as past Commission orders, that the Commission, and not Homer Glen, is responsible for determining when a violation of the Act has occurred and whether penalties are appropriate. Because the

responsibility for determining whether a violation of the Act has occurred and whether prosecution of a violation is warranted rests with the Commission, it is the Commission which has the sole responsibility to determine when the Section 5-202 notice should be issued.

Homer Glen refers to the service by the Commission of Homer Glen's Complaint under 83 Ill. Adm. Code Section 200.150. (Homer Glen BOE, p. 10.) This service of the Complaint, however, does not constitute the issuance of a notice under Section 5-202. As discussed above, Homer Glen's Complaint consisted only of unproven allegations that were disputed by IAWC. Homer Glen also notes (Homer Glen BOE, p. 11) that IAWC did not refer to the fact that notice had not been issued under Section 5-202 as an affirmative defense in its Answer. The issuance of notice under Section 5-202, however, is a procedural requirement that would be followed in the event the Commission were to determine that a party was in violation of the Act or order, regulation, or requirement of the Commission. At the time of Homer Glen's Complaint, IAWC disputed that penalties should be assessed, and Homer Glen itself only alleged that IAWC "*may* be subject to fines and penalties." (HG Compl., p. 16, ¶ 49 (emphasis added).) There is no requirement that a party assert affirmative defenses in its Answer regarding potential procedural steps that may or may not be appropriate in the future. Such defenses would not be "affirmative defenses" because they are speculative and would not "defeat the cause of action set forth in the complaint." 735 ILCS 5/2-613(d). Moreover, as Homer Glen acknowledges (Homer Glen BOE, p. 11), to the extent Homer Glen alleged that penalties "may" be necessary, IAWC denied that allegation. (IAWC Ans., p. 26, ¶ 49.)

Homer Glen's further arguments that Commission notice under Section 5-202 does not require a "citation order" are inapposite. (Homer Glen BOE, pp. 10-11.) To begin, with, nowhere in the "Commission Analysis and Conclusion" section on penalties (ALJPO, pp. 7-8)

does the ALJPO state that a "citation order" must be the form of Section 5-202 notice (although, as IAWC explained in its Reply Brief (p. 33), that is the common practice). Further, the three cases Homer Glen cites to show that Commission proceedings to assess civil penalties are "no different" from this proceeding (Homer Glen BOE, p. 11) do not support Homer Glen's position. Instead, these orders confirm that Section 5-202 notice must be issued by the Commission, as in each case the Commission (not a complainant) issued a citation order directing the utility to show cause why the Commission should not impose penalties. *See Illinois Commerce Comm'n v. Carroll Heights Util. Co.*, Docket 97-0352 (Aug. 28, 1998); *Illinois Commerce Comm'n v. Utilities Unlimited, Inc.*, Docket 98-0846 (June 7, 2000); *Illinois Commerce Comm'n v. Crystal Clear Water Co.*, Docket 97-0605, 1999 (June 16, 1999). These cases also confirm that, contrary to Homer Glen's arguments (Homer Glen BOE, pp. 12-13), a "citation order" initiating a show cause proceeding is the Commission's practice for determining penalties. Far from making the Commission's complaint proceedings meaningless, this procedure ensures that "the party in jeopardy be specifically informed by the Commission that reasonable grounds exist or that a determination has been made that it has committed one or more violations and that, as a consequence, monetary penalties may be imposed" (ALJPO, p. 7), and protects that party from being subject to penalties solely on the basis of unproven allegations in a complaint.

Homer Glen's argument (Homer Glen BOE, pp. 9-10) that the language of Section 5-202 does not "modify" the language of Section 4-203 is also without merit. Homer Glen appears to argue that Section 5-202 applies only to Article V of the Act. However, the plain language of Section 5-202 shows that this is not the case. First, the notice provision provides that "[n]o penalties shall accrue under this provision until 15 days after the mailing of a notice to such party or parties that they are in violation of or have failed to comply with *the Act or order, decision,*

*rule, regulation, direction, or requirement of the Commission or any part or provision thereof. . .*" 220 ILCS 5/5-202 (emphasis added). Thus, this provision by its terms applies to any violations of the Act. Other provisions of Section 5-202 similarly apply to any violations of the Act, not just to Article V. For example, Section 5-202 refers to "[a]ny public utility . . . that violates or fails to comply with *any provisions of this Act. . .*" and "[e]very violation of the provisions of *this Act. . .*" *Id.* (emphasis added). Moreover, Section 5-202 relates expressly to Section 4-203: "Any public utility . . . that violates or fails to comply with any provisions of this Act or that fails to obey, observe, or comply with any order, decision, rule, regulation, direction, or requirement, or any part or provision thereof, of the Commission . . . shall be subject to a civil penalty imposed in the manner provided in Section 4-203." This language makes clear that Section 5-202 governs when penalties may be sought, and Section 4-203 governs how penalties are assessed.

Lastly, IAWC notes that the "*Boles* test" referenced by Homer Glen does not apply in this case. The *Boles* case involved the application of the Illinois Motor Carrier of Property Law (dealing with intrastate motor carriers and since repealed, *see* 625 ILCS 5/20-301(j)) and regulations promulgated thereunder, not the Act. *Boles Trucking, Inc. v. O'Connor*, 138 Ill. App. 3d 764, 770 (4th Dist. 1985). The factors to be considered by the Commission that Homer Glen lists are in fact taken from the Commission's transportation regulations, and do not apply to public utilities. *See* 92 Ill. Adm. Code § 1440.10. As explained in IAWC's Reply Brief (p. 34), Section 4-203 sets out the standard for assessing penalties under the Act. However, in seeking penalties, Homer Glen has not addressed the analysis required by Section 4-203, nor offered evidence directed to the Section 4-203 factors (or, for that matter, the *Boles* factors).

2. The Homer Glen BOE Mischaracterizes the Evidentiary Record and the ALJPO.

Contrary to the requirements of 83 Ill. Adm. Code Section 200.830(e) ("Statements of fact in briefs on exception and replies to briefs on exception should be supported by citation to the record"), the Homer Glen BOE contains few references to the evidentiary record in this case. Instead, the Homer Glen BOE contains numerous misstatements or mischaracterizations of the record in this proceeding, including the following:

- The statement that "The record shows that there is no record that any fire hydrant has been inspected or maintained in Homer Glen" (Homer Glen BOE, p. 5) is false. In fact, the record shows that all fire hydrants in Homer Glen were inspected, exercised and repaired where necessary in 2006 and will continue to be inspected in accordance with Commission rules. (IAWC Ex. 4.0, p. 3; Late Filed Stipulation Ex. 1, Att. A, p. 2.)
- No witness in this proceeding testified that IAWC's conduct imposes "a serious threat to life and property." (Homer Glen BOE, p. 1.)
- There is no evidence in the record that IAWC's conduct shows "total disregard of consumers' rights." (Homer Glen BOE, p. 1.) To the contrary, as set forth in detail in IAWC's Initial Brief (pp. 11-14, 16-23, 25-27, 48-55, 58), Reply Brief (pp. 16-18, 24-26) and Late Filed Stipulation Exhibit 1 (the "Stipulation"), IAWC has taken numerous and extensive steps to address the concerns of customers.
- The Homer Glen BOE (p. 2) is incorrect in stating that the ALJPO "agrees" that IAWC failed to have personnel on duty to resolve customer complaints. The ALJPO (p. 37) states that "Commission rules require that utilities have personnel on duty authorized to act on behalf of the utility in resolving the complaint and available during all business hours," and makes no finding that this rule was violated.
- The Homer Glen BOE (p. 2) mischaracterizes the rule regarding Customer Information Booklets: the rule does not require that such booklets be provided to "residential customers," but rather, to "applicants for service." 83 Ill. Adm. Code § 280.200. Nevertheless, IAWC has agreed to provide such a booklet to all IAWC customers. (Late Filed Stipulation Ex. 1, Att. A, p. 3.)
- The Homer Glen BOE (p. 2) is incorrect that IAWC fails to inform customers that they can have "unresolved issues" reviewed by the Commission. 83 Ill. Adm.

Code Section 280.160(b) requires that the utility direct supervisory personnel to inform a customer who expresses non-acceptance of a utility's decision regarding a dispute of their right to have their complaint heard by the Commission. The testimony of IAWC's witness, Ms. Cooper, confirms that IAWC's ART personnel do inform customers of their right to have their complaint heard by the Commission. (Tr. 480-81.)

- The ALJPO (p. 26) does not agree, as argued in the Homer Glen BOE (p. 3), that IAWC back billed Homer Glen customers for more than 12 months in violation of Commission rules. The ALJPO refers to evidence "that the Company cannot verify the time period for which the back-billing occurred and *could possibly* be beyond the 12 month period (or 24 months for commercial accounts) allowed", (ALJPO, p. 26 (emphasis added)), and makes no finding that Commission rules were violated.
- Contrary to the Homer Glen BOE (p. 3), there is no evidence that IAWC has "continuing disregard" (or any disregard) for Commission rules. To the contrary, the evidence shows that IAWC has agreed to take steps to address the violations alleged in this case. (*See* Late-filed Stipulation Ex. 1.) This shows that IAWC takes compliance with Commission rules seriously. Moreover, Homer Glen can point to no Commission rule that IAWC "continues" to violate.
- With regard to the Homer Glen BOE's (p. 5) statements that IAWC should be required to inform fire departments of hydrant inspection and maintenance, Homer Glen offered no evidence in this proceeding on this subject, but raises it now for the first time in its Brief on Exceptions.
- With regard to the Homer Glen BOE's (p. 7) statements that IAWC should be required to develop written procedures related to regulations concerning billing disputes and complaints, IAWC's evidence showed that written procedures are in place for IAWC's customer service personnel who respond to billing disputes and complaints. (Tr. 444-45, 516.) Homer Glen offered no evidence in this proceeding that IAWC's written procedures were inadequate, but raises this issue now for the first time in its Brief on Exceptions.
- The statement in the Homer Glen BOE (p. 13) that "The company has benefited financially by not performing proper maintenance on fire hydrants and critical valves" is wholly unsupported by the evidentiary record in this case.
- The statement in the Homer Glen BOE (p. 13) that ". . . but for this complaint, IAW would have kept the funds it backbilled customers" is wholly unsupported by the evidentiary record in this case. In fact, the record makes clear that IAWC began the back bill audit and made the determination to issue credits to customers in October, 2005, well before Homer Glen's complaint in this case was filed. (IAWC Ex. 4.0, p. 7.)

- Homer Glen's proposed additional language (Homer Glen BOE, p. 19) that states ". . . due to the fact that only the Company had access to the data" is also unsupported by the evidentiary record. IAWC provided the results of the back bill audit to Homer Glen (*see* IAWC Ex. 1.02), and there is no basis to suggest that only the Company had access to the relevant data.

To the extent Homer Glen relies on these misstatements and mischaracterizations to support the recommendations or proposed language in its Brief on Exceptions, the Commission should reject those recommendations and proposed language.

3. Homer Glen's Request that a New Docket Be Opened Should Be Rejected

Homer Glen also requests that a new docket be opened for the filing of reports required under the ALJPO. (Homer Glen BOE, p. 6.) However, there is no requirement that a new docket be opened to receive the reports required under the ALJPO. Homer Glen offers no details on what the purpose of the new docket would be, what the docket's schedule would be, or how it would otherwise operate. Such a docket would be unnecessary and burdensome. Rather, the proposal in the ALJPO (p. 20) that when a report is filed on e-docket, interested parties may petition the Commission, or the Commission or Staff may take further appropriate action, is reasonable. It is common practice for reports to be filed on e-docket even after the record for a proceeding is closed, and Homer Glen offers no explanation why this would not be reasonable in the present case.

**B. Response to Specific Exceptions in the Homer Glen BOE.**

1. Response to Exception 1

In Exception 1, Homer Glen argues that the 12-month time period for hydrant testing set forth in the ALJPO is too long. (Homer Glen BOE, p. 4.) As stated above, however, this argument ignores the fact that all fire hydrants in Homer Glen were inspected, exercised and repaired where necessary in 2006 and will continue to be inspected in accordance with

Commission rules. (IAWC Ex. 4.0, p. 3; Late Filed Stipulation Ex. 1, Att. A, p. 2.) Thus, the inspections that Homer Glen complains will take "far too long" were completed in 2006, and will continue to be completed on an annual basis. Therefore, the proposed changes under Exception 1 should be rejected. In addition, because this concern has been resolved, and for the reasons stated above, no penalties related to hydrant inspections are appropriate.

2. Response to Exception 2

In Exception 2 (Homer Glen BOE, pp. 5-6), Homer Glen argues that hydrant inspection reports and fire flow tests be provided to the appropriate fire departments and municipalities. Neither Homer Glen, nor any other party, has offered evidence in this case that IAWC does not provide hydrant inspection information to fire departments where appropriate. Rather, this issue is being raised by Homer Glen for the first time in its Brief on Exceptions, without opportunity for IAWC to respond through discovery or testimony. Moreover, Homer Glen cites no requirement that calls for such reporting. Therefore, this recommendation is unsupported by the record and should be rejected.

IAWC addressed the issue of opening a new docket for the filing of reports above. With regard to the provision of reports to municipalities, Homer Glen offered no evidence on this issue during the course of the proceeding, and raises this issue for the first time in its Brief on Exceptions. In addition, IAWC notes that if the hydrant inspection reports are filed on e-docket, they will be publicly available for any municipality to access and review. As a result, it is unnecessary to require IAWC to provide reports to some vaguely defined "appropriate" municipality (a process that would be burdensome and costly given the large number of communities that IAWC serves in Illinois.)

3. Response to Exception 3

In Exception 3, Homer Glen requests that valve inspection reports be provided to "the respective municipality." (Homer Glen BOE, p. 6.) As discussed above, Homer Glen is raising the issue of provision of reports to undefined "respective" municipalities for the first time in its Briefs on Exceptions. In addition, as also discussed above, the valve testing and maintenance inspection report ordered by the ALJPO would be filed on e-docket, and therefore would be publicly available. Thus, there is no basis for a requirement that IAWC provide valve inspection reports to municipalities.

For the reasons stated above, no penalties related to valve inspections are appropriate.

4. Response to Exception 4

In Exception 4, Homer Glen argues that IAWC should be required to develop written procedures to comply with regulations regarding billing disputes and complaints. Homer Glen raises this issue now for the first time in its Brief on Exceptions. However, as described above, IAWC's evidence in this case showed that written procedures are in place for IAWC's customer service personnel who respond to billing disputes and complaints. (Tr. 444-45, 516.) IAWC's evidence also demonstrated that IAWC customer service employees receive comprehensive training in customer service procedures and processes and also receive training on customer relations, courtesy, and handling upset or angry callers. (IAWC Ex. 2.0, p. 5; Tr. 516-17.) Homer Glen can point to no evidence in this proceeding that IAWC's written procedures were inadequate, or that IAWC's training procedures and processes, including training related to

customers complaints, were inadequate. Therefore, Homer Glen has no basis for its recommendations regarding written procedures.

However, as explained in IAWC's Brief on Exceptions (p. 3), while the ALJPO should be clarified to state that IAWC's present customer service procedures are adequate, IAWC has accepted that certain reasonable improvements could be made (*see* ALJPO pp. 37-38). Further, as stated below, IAWC has agreed to Staff's recommendation (with slight modifications) that IAWC establish a training program regarding shut off notices and customer disputes for customer service personnel who interact with Illinois customers. The procedures set forth in the ALJPO (pp. 37-38) and the training program recommended by Staff are sufficient to address the concerns raised by Homer Glen in Exception 4.

For the reasons stated above, no penalties related to the issues raised in Exception 4 are appropriate.

#### 5. Response to Exception 5

In Exception 5, Homer Glen disputes the ALJPO's finding (p. 27) that the independent audit of back bill refunds agreed to by IAWC in the Stipulation is "reasonable" and requests that the results of the audit be filed in a separate docket and filed with an undefined "appropriate" municipality. (Homer Glen BOE, p. 8.) IAWC finds it odd that Homer Glen, having argued for an independent audit of IAWC's back bill credits (*see* Homer Glen Init. Br., p. 42), would now dispute the reasonableness of just such an independent audit. Nevertheless, as discussed above, there is no need to open a new docket for the purpose of receiving IAWC reports required by the ALJPO. Moreover, the "appropriate" municipality with whom the audit should also be filed is not identified. The audit report will be provided to Commission Staff and the Attorney General.

(Late-filed Stipulation Ex. 1, Att. B, p. 1.) There is no support in the record for a requirement that the audit report also be provided to municipalities.

6. Response to Exception 6

In Exception 6, Homer requests that reports on high bills, consecutive estimates and consecutive zero-use bills that IAWC has agreed to prepare under the Stipulation be filed in a separate docket and filed with an undefined "appropriate" municipality. (Homer Glen BOE, pp. 8-9.) As discussed above, there is no need to open a new docket for the purpose of receiving IAWC's reports under the Stipulation. Moreover, the "appropriate" municipality with whom the reports should also be filed is not identified. The reports will be provided to Commission Staff and the Attorney General. (Late-filed Stipulation Ex. 1, Att. B, pp. 2-3.) The record does not support the conclusion that the cost and burden of providing reports to the numerous municipalities that IAWC serves is justified.

7. Response to Exception 7

In Exception 7, Homer Glen continues to argue for the imposition of civil penalties in this proceeding. (Homer Glen BOE, pp. 14.) As discussed in Section II.A.1 above, penalties are neither legally warranted nor supported by the record in this case. Therefore, the proposed changes to the ALJPO discussed in Homer Glen's Exception 7 should be rejected.

**III. RESPONSE TO STAFF BOE**

Staff BOE Exception 5 (Staff BOE, pp. 16-20) argues that there are practical concerns with the initiation of "appropriate action" by Commission Staff in case of a reoccurrence of service shut-off notices to customers during disputes and suggests that IAWC be required to develop additional training procedures. IAWC, however, already has written procedures in place

for IAWC's customer service personnel who respond to billing disputes and complaints, and IAWC customer service employees receive comprehensive training in customer service procedures and processes. (IAWC Ex. 2.0, p. 5; Tr. 444-45, 516-17.) Moreover, there is no evidence that any instances of improper behavior towards customers are ongoing, or represent anything more than alleged isolated events. In fact, IAWC's evidence shows that concerns regarding inappropriate behavior toward customers have been addressed. (*See* IAWC Init. Br., pp. 59-61; Reply Br., pp. 18-25.)

Nevertheless, IAWC is willing to accept Staff's recommendation (Staff BOE, pp. 19-20) for additional training. However, IAWC recommends two modifications to Staff's proposal. First, the language should be clarified to refer only to customer service representatives who interact with "Illinois" customers, because the American Water Customer Service Center responds to customer inquiries from American Water's regulated operations in 19 states, including Illinois. (IAWC Ex. 2.0, p. 3.) The ALJPO's concern is with the Company's customers in Illinois. (ALJPO, p. 38.) Second, given that IAWC already has substantial customer service training materials and procedures in place, IAWC suggests that the proposed training requirement be modified to require the development of new materials only if necessary. Where appropriate, existing materials would be used. Whether new or existing, such materials would be provided to Staff for review. The proposed revisions to Staff proposal (Staff BOE, p. 20) are as follows:

The Commission hereby orders the Company to develop and conduct within 60 days after the issuance of this order a new, in-house, face-to-face training program for all its representatives that interact with Illinois customers (including without limitation customer service representatives and billing representatives). This training program will clearly identify inappropriate and prohibited threatening actions and will include, as necessary and appropriate, the development and distribution of written employee handbooks and materials. The relevant training materials, whether new or existing, will

to be sent to Staff for its prior review and approval. Should this or similar conduct reoccur, the Commission ~~Staff is directed to~~ will take appropriate action including the initiation of a proceeding to seek civil penalties from IAWC.

#### **IV. CONCLUSION**

For all the reasons stated, the Commission should reject the proposed changes to the ALJPO proposed by Homer Glen, adopt the modification to Staff's proposals set forth in Section III, and adopt the changes regarding the ALJPO set forth in IAWC Brief on Exceptions.

Dated: March 26, 2007

Respectfully submitted,

ILLINOIS-AMERICAN WATER  
COMPANY

By: /s/ Albert D. Sturtevant

One of its attorneys

Boyd J. Springer

Albert D. Sturtevant

JONES DAY

77 West Wacker Drive

Suite 3500

Chicago, IL 60601-1692

Phone: (312) 782-3939

Fax: (312) 782-8585

bjspringer@jonesday.com

mprotatori@jonesday.com

adsturtevant@jonesday.com

Mary G. Sullivan

John J. Reichart

Illinois-American Water Company

727 Craig Road

St. Louis, MO 63141

314-996-2287

Mary.sullivan@amwater.com

John.reichart@amwater.com