

II. ARGUMENT

A. AG Has Offered No Reason Why Mr. Pesavento's Testimony Was Not Filed as Direct Testimony.

AG has not explained why it withheld Mr. Pesavento's testimony until rebuttal. The timeline in this case demonstrates that the issues addressed by Mr. Pesavento were placed in issue by IAWC's *direct* testimony, filed in August 2007. AG, therefore, could and should have filed Mr. Pesavento's with its case in chief, along with the testimony of other witnesses addressing the same issue as Mr. Pesavento. It did not, and should not be allowed to cure the untimeliness of Mr. Pesavento's testimony by labeling it "rebuttal."

IAWC filed the testimony of witnesses Bernard Uffelman and Mary Kane on August 31, 2007. They addressed the comparability of rates between IAWC and certain Chicago-area MOUs. (*See, e.g.*, IAWC Exh. 10.00 ("Due to the differences, a comparison of the rates of any investor-owned utility, such as IAWC, to those of a municipally owned utility does not support a conclusion that IAWC's rates are unreasonable."); IAWC Exh. 10.10 (reaching same conclusion).) Thus, in its direct case, IAWC put comparability in issue.

Accordingly, AG responded in its direct case to IAWC's comparability analysis with the testimony of Eric Rothstein. Mr. Rothstein addressed the "general comparability of water and wastewater rates and costs for private water and wastewater utilities and publicly owned water and wastewater utilities" and "the reasons for differences between water rates charged by IAWC and those charged by municipally owned utilities in the Chicago metropolitan area." (AG Exh. 2.0 at 5.) About three months later, on rebuttal, Mr. Pesavento addressed the same issue as Mr. Rothstein—as AG puts it in describing Mr. Pesavento's testimony, "the reasonableness of IAWC's rates when considered in light of neighboring rates that are substantially lower." (AG

Br. at 4.) No reason appears as to why AG could not have offered Mr. Pesavento's testimony in its direct case on January 14, 2008.

AG has submitted direct testimony months after the deadline for such testimony, and this testimony in its entirety should be stricken from the record.

B. AG Has Not Established the Foundation Necessary To Admit the Anonymous Bills Under the Business-Records Exception.

IAWC sought to strike Exhibits 4.3 and 4.4 to Mr. Pesavento's testimony, which were utility bills given to Mr. Pesavento by unnamed neighbors. AG argues that these bills are admissible under the business-records exception found in Supreme Court Rule 236(a). AG, however, has not laid the necessary foundation to use this exception.

To admit documents under the business-records exception, a proper foundation must be laid: "The party offering [such] evidence must demonstrate that the record was made in the regular course of business and at or near the time of the transaction. 145 Ill.2d R. 236(a)." *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill.App.3d 582, 590 (Ill. Ct. App. 2005). "A proponent may lay an adequate foundation through the testimony of the custodian of the records or another person familiar with the business and its mode of operation." *Id.* In that case, "the only foundational testimony came from claimant, who testified that he received the bills." *Id.* at 591. "This testimony clearly did not meet the foundational requirements for admitting the bills. Claimant was not someone who was familiar with the medical providers' business practices" *Id.*

AG, the proponent of evidence, has not laid a sufficient foundation for admission. Mr. Pesavento has not testified that he is the custodian of the records or that he is familiar with the business of the Village of Orland Park and its mode of operation (or that he is familiar with the business of his neighbors). His only testimony on the source of these documents is that his

neighbors gave them to him. And AG otherwise has offered no testimony from anyone familiar with the Village of Orland Park's business. Whether it would be "burdensome" to lay the foundation for this evidence, as AG complains (AG Br. at 9), is beside the point—if AG wants to offer hearsay in evidence, Illinois law requires that AG lay the proper foundation. It has not.

The cases cited by AG support the proposition that utility bills may be relevant to prove identity or residence. IAWC, however, does not dispute Mr. Pesavento's identity or residence. The AG fails to address why utility bills are admissible for the purposes Mr. Pesavento seeks to use them – namely to show the purported "unreasonableness" of IAWC's bills. In addition, contrary to AG's suggestion, it would neither "advance the integrity of the fact-finding process" nor be "fair" to admit into the record foundationless and anonymous hearsay statements and deprive IAWC of meaningful cross-examination.

Exhibits 4.3 and 4.4 and all testimony based on them should be stricken from the record.

C. Mr. Pesavento Offered Testimony Regarding Statements Made by His Neighbors for Their Truth.

IAWC sought to strike Mr. Pesavento's description of what unnamed neighbors told him and what some unnamed seller told an unnamed co-worker to demonstrate that IAWC's rates are affecting the housing market in Mr. Pesavento's neighborhood. AG contends that Mr. Pesavento's testimony on page 8, lines 145–57, was offered only to show the effect on the listener and not for the truth of the matter asserted. (*See* AG Br. at 10–11.)

This is a revisionist reading of his testimony. Mr. Pesavento did *not* offer testimony merely to show how any difference in rates "between Orland Park and IAWC is perceived by Mr. Pesavento" or has "been the subject of discussion in the community." (*Id.*) Rather, he marshals his neighbors' statement to make conclusive statements regarding the effect rates have on home-buyers in his area. For example, he rhetorically asks, "What informed buyer would

purchase a home in an area with water and sewer rates two times that of basically the same type of home a half mile away?” (AG Exh. 4.0 at 8.) He ends this portion of testimony by concluding that the lower rates of MOU “*was a factor*” in a co-worker’s purchase of a home. (*Id.* (emphasis added).) This is a statement of fact, not a statement of his impressions.

These hearsay statements were offered for their truth and should be stricken from the record.

D. Mr. Pesavento Must Testify Based on His Personal Knowledge.

IAWC sought to strike certain testimony of Mr. Pesavento’s because it was not based on personal knowledge. When Mr. Pesavento testified regarding who paid for the installation of the sewer lines in his neighborhood over 25 years ago, he stated that he was offering his “guess.” (AG Exh. 4.0 at 4.) A “guess” is “an opinion not based on certain knowledge” or “a conjecture.”¹ *Shorter Oxford English Dictionary* 116 (5th ed. 2002). Fact witnesses generally cannot offer opinion testimony, and even expert witnesses cannot guess:

The normal function of a witness is to state facts within his personal knowledge. His opinions are, in general, irrelevant. To this general rule there is an important exception making admissible the opinion of an expert. He is considered qualified to provide the often necessary function of drawing inferences from facts which the jurors would not be competent to draw. As a safeguard upon the reliability of such testimony, however, *the expert witness, no matter how skilled or experienced, will not be permitted to guess*

Schwartz v. Peoples Gas Light & Coke Co., 35 Ill.App.2d 25, 31–32 (Ill. Ct. App. 1962)

(emphasis added). Neither of AG’s explanations of Mr. Pesavento’s speculation cures the inadmissibility of this statement by a fact witness.

AG first tries to dismiss Mr. Pesavento’s “guess” as a use of “qualitative language” and argues (without citation to authority) that a motion to strike “based on isolated words” is inappropriate. (AG Br. at 13.) These arguments do nothing more than describe what Mr.

Pesavento did. IAWC agrees that Mr. Pesavento “qualified” his statement—he qualified it as a “guess” and thus showed that the entire statement was not based on personal knowledge.¹

Although AG insists IAWC can explore the issue of Mr. Pesavento’s knowledge on cross-examination, what more can IAWC elicit? The witness himself admits that he does not have personal knowledge of what he speaks.

AG also argues that Mr. Pesavento’s fits the exception for lay opinion testimony where the opinions and conclusions are “obvious.” (AG Br. at 13–14 (quoting *People v. Crump*, 319 Ill.App.3d 538, 542 (Ill. Ct. App. 2001).) AG does not explain how the source of funding for underground infrastructure installed over a quarter-century is “obvious.” If anything, the fact that Mr. Pesavento had to guess suggests that it is not obvious.

By Mr. Pesavento’s own admission, these portions of his testimony constitute speculation and must be stricken from the record.

E. Homer Glen Does Not Provide Any Reason For Denying IAWC’s Motion To Strike.

IAWC moved to strike statements from two public officials of Homer Glen concerning their residents concerns regarding water rates and the alleged effect water rates have on the attractiveness of the community. Homer Glen’s makes two arguments, and each lacks merit.

First, Homer Glen contends “it is unclear whether IAW believes [each line of lines 105–11 is] hearsay.” (HG Resp. at 1.) The first and last sentences of the portion of testimony IAWC sought to strike (concluding that their residents compare rates and that Homer Glen is less attractive because residents are concerned about rates, respectively) are each founded exclusively

¹ The word “guess” was not, in fact, “isolated,” but appeared in a paragraph, and (as AG concedes) qualified the sentences that followed.

on the hearsay statements. Take away the hearsay, and the surrounding conclusions are rendered baseless. Therefore, IAWC has provided a basis for striking the entire paragraph.

Second, Homer Glen argues the testimony “is not hearsay, but rather opinion testimony of lay witnesses . . . based on personal experience and observation.” (*Id.* at 2.) The problem with this argument is that the testimony is not based on personal experience and observation. The officials do not testify regarding any observations or experiences that they have had. They merely testify that certain unidentified residents “do not care . . . who owns the utility” and “are concerned” about their rates. Thus, the witnesses merely testify on behalf of unidentified residents.

MJ Ontario, Inc. v. Daley, 371 Ill.App.3d 140 (Ill. Ct. App. 2007) is not on point. The official in that case did not offer hearsay testimony, but testified in a liquor-license case “to his impressions of traffic congestion” to “his observations of heavy late-night traffic,” and that he “personally observed fights” in the area of the applicant. *Id.* at 142. His opinion—that approving the applicant’s license would increase noise and affect safety—was based on extensive personal observation. No such foundation has been laid here. Homer Glen has offered no basis for admitting these hearsay statements, and they should be stricken from the record.

III. CONCLUSION

For the foregoing reasons, IAWC’s Motion to Strike should be granted and the identified portions of the Rebuttal Testimony of Jeffrey Pesavento and Direct Testimony of Jim Daley and Mary Niemiec should be stricken from the record of this proceeding.

March 19, 2008

Respectfully submitted,

ILLINOIS-AMERICAN WATER
COMPANY

By: /s/ Albert D. Sturtevant

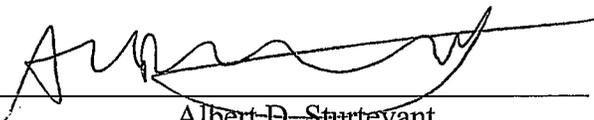
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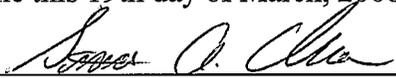
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VERIFICATION

I, Albert D. Sturtevant, certify that: (i) I am counsel for Illinois-American Water Company; (ii) I have read the foregoing Reply in Support of Motion to Strike Certain Portions of the Testimony of Jeffrey Pesavento and the Joint Testimony of Jim Daley and Mary Niemiec and Memorandum in Support; (iii) I am familiar with the facts stated therein; and (iv) the facts stated therein are true and correct to the best of my knowledge.


Albert D. Sturtevant

SUBSCRIBED and SWORN to before
me this 19th day of March, 2008.



Notary Public

**Staci A. Olsen
Notary Public - Notary Seal
State of Missouri
St. Charles County
Commission # 05519210
My Commission Expires: March 20, 2009**

My commission expires: _____