

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

CONSUMERS ILLINOIS WATER COMPANY)	
)	
Petition to put into effect new tariff sheets)	
implementing the recovery of, inter alia, court costs)	Docket No. 02-0155
and attorney's fees incurred in sustaining and)	
enforcing a lien against property owners with)	
delinquent accounts)	
)	

INITIAL BRIEF OF CONSUMERS ILLINOIS WATER COMPANY

Boyd J. Springer
Eacata D. Gregory
JONES DAY REAVIS & POGUE
77 West Wacker
Chicago, IL 60601-1692
(312) 782-3939

August 6, 2002

TABLE OF CONTENTS

	Page
I. NATURE OF THE CASE.....	1
II. SUMMARY OF CIWC’S POSITION.....	2
III. ARGUMENT.....	3
A. BACKGROUND.....	3
B. THE POSITION OF CIWC	6
C. THE FORECLOSURE PROGRAM AS A MEANS OF COLLECTING DELINQUENT AMOUNTS	8
1. CIWC's Collection Methods	9
2. Filing Liens in the Absence of Foreclosure	10
3. Pursuing a Small Number of Foreclosures Without the Foreclosure Program.....	15
4. Relying on the Associations	16
D. THE ENFORCEMENT COST RECOVERY SURCHARGE RIDER	19
1. The Appropriateness of the Rider as a Cost Recovery Mechanism.....	19
2. The Necessity of the Rider for the Foreclosure Program.....	22
3. The Adequacy of the Rider as an Agreement Between CIWC and its Customers	24
E. THE ANNUAL RECONCILIATION	25
F. RATEMAKING ISSUES	29
1. Recovery of Enforcement Costs Under Current Rates.....	29
2. The Effect of the Recovery of Delinquent Amounts.....	31
IV. CONCLUSION.....	34

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

CONSUMERS ILLINOIS WATER COMPANY)	
)	
Petition to put into effect new tariff sheets)	
implementing the recovery of, inter alia, court costs)	Docket No. 02-0155
and attorney's fees incurred in sustaining and)	
enforcing a lien against property owners with)	
delinquent accounts)	
)	

INITIAL BRIEF OF CONSUMERS ILLINOIS WATER COMPANY

I. NATURE OF THE CASE

This proceeding was initiated to review a Petition filed by Consumers Illinois Water Company ("CIWC" or "the Company") on February 20, 2002, seeking approval to put into effect new tariff sheets implementing the recovery of Enforcement Costs incurred in sustaining and enforcing a lien against property owners with delinquent accounts.¹ On March 6, 2002, Citizens Utility Board ("CUB") filed a Petition to Intervene in the proceeding that was granted on

¹ Enforcement Costs are defined as "any sum for: (1) appraisals, (2) surveys, (3) title searches, (4) lien searches, (5) title policies, (6) investigations as to the condition of the property, (7) permits, (8) transfer taxes, (9) attorney's fees, (10) filing fees, (11) court costs, and/or (12) related administrative costs, incurred or expended by the Company to sustain and enforce the lien and its priority, to protect the Company's rights in the lien, and in recovering any of the amounts secured by the lien. Enforcement Costs will be secured by the lien and will become a part of the lien on the property." [CIWC Ex. 1.0R (Revised), Attach. A, p. 2.]

May 10, 2002. A Hearing was held on June 26, 2002. At that Hearing, the Administrative Law Judge requested that the parties submit written answers to a set of supplemental questions.

II. SUMMARY OF CIWC's POSITION

The Enforcement Cost Recovery Surcharge Rider ("ECRS" or the "Rider") is the mechanism by which CIWC will have the opportunity to request that the court presiding over a foreclosure proceeding include the Company's reasonably incurred Enforcement Costs (capped at \$1,200) in the ultimate recovery allowed by the court. The Illinois Mortgage Foreclosure Act ("IMFA") allows a plaintiff to recover attorneys' fees and other costs incurred in connection with foreclosure actions when the right to seek such recovery is set forth in a written agreement between the parties. [CIWC Ex. 1.0SR, pp. 1-2.] The ECRS will serve as the agreement. In this way, CIWC will be able to implement an effective program under which the high costs normally associated with foreclosures will be standardized ("Foreclosure Program" or the "Program") (although the costs may still be substantial overall simply due to the number of delinquent accounts.) The ability to recover Enforcement Costs will allow CIWC to effectively and efficiently prosecute multiple foreclosures and place the resulting Enforcement Costs directly on the customers who cause those costs to be incurred in the first place. The ECRS only gives CIWC the potential to recover its Enforcement Costs. Whether the ECRS is sufficient to constitute the necessary agreement and the amount of Enforcement Costs (if any) that CIWC actually recovers, is left to the discretion of the court following its review of the reasonableness of those costs. [CIWC Ex. 1.0SR, p. 2.]

Once the court has entered its judgment, CIWC is also proposing that the amount awarded, and any allowed post-judgment interest, be placed on that customer's bill. The Enforcement Costs will only be recovered under the ECRS, and not in base rates. [CIWC Ex. 1.0SR, p. 2.] CIWC proposed to include these amounts on the bill to provide the Company and

the delinquent customer with the option, with leave of the court and following the court's final judgment, of settling all of the amounts secured by the lien without having to actually go through with a foreclosure sale of the property. (That this will occur is not assured; it only provides a possible mechanism for avoiding foreclosure.) If the Commission does not find that the Company and the delinquent customer should be allowed this opportunity, CIWC will remove this provision from the Rider. [*Id.* at 16.]

The ECRS functions as the agreement that sets forth the terms and conditions of Enforcement Cost recovery and enables the Company to request recovery from the court. The ECRS does not allow the Company to “automatically” recover any amounts. The Company’s proposal does not dictate how many foreclosures will take place under the Program or how those foreclosures will occur. Whether a lot will be foreclosed upon will be made on a case-by-case basis; the process of foreclosure is controlled by the IMFA. Nor will the Rider function as CIWC’s sole collection method. The Foreclosure Program is only one of several activities that the Company will use to recover amounts owed; the Company will make the decision of what approach is appropriate following reviews of the delinquent accounts. [CIWC Ex. 1.0SR, pp. 2-3.]

III. ARGUMENT

A. Background

CIWC currently provides water and sewer service to 6,157 lots located in Woodhaven and 2,332 lots located in Candlewick. In Woodhaven, these lots consist of campsites with no permanent homes constructed thereon. In Candlewick, the lots may either be undeveloped or improved with residences. The pipes and mains to all lots in each Division were constructed by the original developers so that water and sewer services are available to all customers. Under the Declarations of Covenants, Conditions and Restrictions (“Declarations”) applicable to each lot in

Woodhaven and Candlewick, each lot owner agrees to pay the availability charges for water and sewer service.² This availability is convenient for the owners of the lots and increases the value of the property. The customers who own these lots are served under tariffs that impose charges for the availability of water and sewer service. Availability charges allow the Company to recover the reasonable costs incurred in maintaining the availability of water and domestic sanitary sewer service. [CIWC Ex. 1.0, pp. 4-5.]

Over the past few years, CIWC has experienced increasing difficulty in collecting availability charges. Certain of the lot owners in both Woodhaven and Candlewick (the “Defaulting Owners”) have simply failed to pay the availability charges for the water and sewer services provided by CIWC. Furthermore, the number of such owners has increased each year. In Woodhaven in 2001, of the approximately 6200 lots billed, over 1200 have accounts that are more than ninety (90) days in arrears. The total amount of these past due accounts, approximately \$448,000, represents almost 30% of the total annual revenue billed for Woodhaven. In Candlewick for 2001, approximately 250 accounts are delinquent for a total of approximately \$142,000 owed. [CIWC Ex. 1.0, p. 6.] Unfortunately, traditional means of encouraging compliance, such as disconnection of service, are not effective in these areas. [See Joint Ex. 1.0, CIWC Response to Staff Data Request WRJ 3.06.] In total, CIWC currently has approximately 2,148 delinquent accounts in Woodhaven and Candlewick. [CIWC 1.0R (Revised), p. 9.]

CIWC is authorized by the Declarations and the existing Rules and Regulations, ILL. C.C. No. 47, Section No. 1, Original Sheet No. 26 (water); ILL. C.C. No. 48, Section No. 1,

² The relevant provisions of the Declarations are referenced in the tariff sheets approved by the Commission that impose these charges. See Woodhaven tariffs ILL. C.C. No. 47, Section No. 5, First Revised Sheet No. 2 (water); ILL. C.C. No. 48, Section No. 4, Original Sheet No. 2 (sewer), and Candlewick tariffs ILL. C.C. No. 47, Section No. 6, Original Sheet No. 2 (water); ILL. C.C. No. 48, Section No. 5, Original Sheet No. 2 (sewer).

Original Sheet No. 12 (sewer), to file a lien against the properties of Defaulting Owners and foreclose on those parcels in order to collect the amounts due. [CIWC Ex. 1.0, p. 8.] Pursuant to this authority, CIWC intends to implement the Foreclosure Program, which will standardize the process of filing a lien and pursuing foreclosure actions on lots that have past due accounts.³ The Foreclosure Program will allow the Company to more efficiently pursue Defaulting Owners and recover the funds owed. [*Id.* at 7.]

As part of the Foreclosure Program, CIWC proposed that the ECRS be put in place which would give the Company the opportunity to recover its Enforcement Costs from the Defaulting Owners responsible for those costs being incurred. The IMFA, 735 ILCS 5/15-1101 *et. seq.*, allows a plaintiff to include a request for recovery of attorneys' fees and other costs incurred in connection with the preparation, filing, or prosecution of foreclosure suits in a foreclosure complaint when the right to seek such recovery is specifically set forth in a written agreement between the parties. 735 ILCS 5/15-1510. [CIWC Ex. 1.0, pp. 10-11.] The Rider would constitute that agreement. [CIWC Ex. 1.0R (Revised), p. 5.]

The Rider would also permit CIWC to include the amount of Enforcement Cost recovery allowed by a court on the customer's bill. As Mr. Seehawer explained, the purpose of this is to provide an option to the Company and customer that would avoid a foreclosure sale of the customer's property. [CIWC Ex. 1.0SR, p. 16.] Enforcement Costs would be reflected on the bill only if the Company and customer have worked out a settlement of amounts secured by the Company's lien. [*Id.*] The approach would be used only with leave of the court. [*Id.*]

³ The Program will only apply to "availability" customers in Candlewick as the term "availability" is defined in the Company's tariff. In Woodhaven the Program would apply to all non-commercial customers. [CIWC Ex. 1.0R (Revised), pp. 29-30]. Additionally, CIWC will not pursue a foreclosure action until a bill for a given property is at least one year in arrears. [CIWC Ex. 1.0R (Revised), p. 6.]

B. The Position of CIWC

As discussed above, CIWC requests that the Commission approve the ECRS, which will give the Company an opportunity to request that a court overseeing a foreclosure action allow recovery of Enforcement Costs. [CIWC Ex. 1.0R (Revised), p. 9.] CIWC is doing this because it believes that having the opportunity to potentially recover costs from the Delinquent Owners is a better, more equitable alternative than simply requesting that all such costs be recovered in base rates. [*Id.*] An issue before the Commission in this case relates to whether CIWC should have an opportunity to recover Enforcement Costs from the customers who cause those costs to be incurred rather than in base rates from customers who pay their bills. [*Id.* at 8.]

As noted above, CIWC has experienced severe problems in collecting availability charges in Woodhaven and Candlewick. The Company has used every reasonable method available to it for collection. These efforts, unfortunately, have had limited success and the numbers of delinquent accounts has continued to increase. [*Id.* at 15-16.]

That is why CIWC is now implementing the Foreclosure Program. The Program will allow CIWC to file liens and pursue foreclosures against Delinquent Owners under a structured process. By proceeding against the property itself, the Company will be able to recover past due amounts even where the lot is unoccupied. [CIWC Ex. 1.0R (Revised), p. 16.] Most importantly, the Program will lower costs generally associated with foreclosing on properties in part because the large number of properties involved in the Program will generate economies of scale and result in lower costs. Because several actions will be initiated at one time, many activities such as filings, mailings, and court appearances would be done together as a group, thereby saving the time and money that would otherwise be required if individual lots were pursued one at a time. [CIWC Ex. 1.0SRSUPP, Answer to Question #2.]

Even with standardization, however, costs are still estimated to be approximately \$500 to \$550 per lot. With no mechanism in place providing CIWC with an opportunity to recover its necessary Enforcement Costs, foreclosures will, of necessity, be limited. Given the cost to pursue a Defaulting Owner, without the ability to recover Enforcement Costs, an account would have to be in arrears for several hundred dollars before it would be feasible to pursue a foreclosure action. At lower delinquency amounts, Enforcement Costs would be greater than the amount due for water and sewer service. [CIWC Ex. 1.0, p. 10.] In order to make the Foreclosure Program truly effective, CIWC is proposing the Rider that will allow the Company to potentially recover its Enforcement Costs. [CIWC Ex. 1.0R (Revised), p. 16.]

The Rider is the mechanism by which CIWC will have the opportunity to request that the court presiding over the foreclosure proceeding include the Company's reasonably incurred Enforcement Costs (capped at \$1,200) in the ultimate recovery allowed by the court. [CIWC Ex. 1.0SR, p. 1.] As stated above, the Rider will function as the agreement that sets forth the terms and conditions of Enforcement Cost recovery and will enable the Company to request recovery from the court. In this way, CIWC will be able to implement an effective Foreclosure Program under which the high costs normally associated with foreclosures will be standardized. (The costs may still be substantial overall simply due to the number of delinquent accounts.) The ability to recover Enforcement Costs would allow CIWC to effectively and efficiently prosecute multiple foreclosures and place the resulting Enforcement Costs directly on the customers who cause those costs to be incurred. [*Id.* at 2.]

The ECRS only gives CIWC the potential to recover its Enforcement Costs. Whether the Rider is sufficient to constitute the necessary agreement and the amount of Enforcement Costs (if any) that CIWC actually recovers, is left to the discretion of the court following its review of the

reasonableness of those costs. Once the court has entered its judgment, the amount awarded, and any allowed post-judgment interest, will be placed on that customer's bill to facilitate collection. [CIWC Ex. 1.0SR, p. 2.] In this way, CIWC and the customer can arrange a means of settling the delinquent account, such as entering into a deferred payment agreement, without the need of actually foreclosing on the property. Moreover, the Rider also provides that, pursuant to an annual reconciliation, the Commission will have an opportunity to review the Enforcement Costs that CIWC is allowed to collect to ensure that the rulings of the courts are adhered to. [CIWC Ex. 1.0R (Revised), p. 7.] These Enforcement Costs will only be recovered under the proposed Rider and not in base rates. [CIWC Ex. 1.0SR, p. 2.] The crux of CIWC's proposal is to have Enforcement Costs borne by those who cause the costs to be incurred. [CIWC Ex. 1.0R (Revised), p. 11.]

C. The Foreclosure Program as a Means of Collecting Delinquent Amounts

Staff and CUB believe that the Company should not implement the Foreclosure Program, despite having the legal authority to do so, but should instead utilize any other collection method available, regardless of whether those methods are cost-effective or feasible. In their testimonies, Staff witness Johnson and CUB witness Colton both indicated that the Company should pursue all other available means of collecting past due accounts before implementing a full-scale Foreclosure Program and requesting that the Commission approve the Rider. As will be discussed below, however, Mr. Seehawer clearly explained that the traditional collection methods have not worked and that the suggestions made by Mr. Johnson and Mr. Colton of filing liens in the absence of foreclosure, pursuing only a small number of foreclosure actions, and relying on the Associations are not effective.

1. CIWC's Collection Methods

In his Direct Testimony, Mr. Johnson argued that "it appears that the Company's failure to pursue collection by all available means has led to a steady increase in delinquent accounts...." [ICC Staff Ex. 1.0, p. 9.] Mr. Colton asserted that CIWC "engages in very little credit and collection activity." [CUB Ex. 2.0, p. 10.] Both of these assertions are unfounded.

CIWC has been diligent in the pursuit of delinquent accounts. Mr. Seehawer described the Company's collection procedures in detail in both his testimony and in data requests. [See, e.g., Joint Ex. 1.0, CIWC Response to CUB DR 1.23.] Mr. Colton's statement that "while the Company has referred some accounts to collection agencies, this collection mechanism is very limited,"⁴ has no basis in fact. Mr. Seehawer explicitly stated in a data request that all accounts are sent to a collection agency for collection after they are past due for a certain number of days (187 days for availability customers). [CIWC Ex. 1.0SR, p. 21; Joint Ex. 1.0, CIWC Response to CUB DR 1.23.] The Company has routinely sent letters to the delinquent customers, reminding them that payment is due and then notifying them of the delinquent amounts. [CIWC Ex. 1.0R (Revised), pp. 15-16.] These letters are ignored. The Company has utilized Creditors Collection Bureau and NCO Creditors Bureau to try and collect the delinquent accounts. For every \$1.00 expended on collection agency efforts, however, a little over \$1.40 has been collected. [Id. at 16.] The Company has pursued legal action in court to obtain personal judgments against customers for delinquent bills. [Id.] Pursuing individual court actions, however, is time-consuming and costly. [CIWC Ex. 1.0, p. 7.] The Company has also worked with realtors involved in the sales of properties in the two Divisions and requested that those agencies contact CIWC when the lot of a Delinquent Owner is being sold, but it is not always

⁴ [CUB 2.0, p. 10.]

possible to determine in advance what realtor is handling a sale and not all agencies cooperate with the Company. [CIWC Ex. 1.0SR, pp. 26-27.] Clearly, it is not a lack of diligence that has caused the increase in the number of delinquent accounts.

2. Filing Liens in the Absence of Foreclosure

In his Testimony, Staff witness Johnson stated that the Company's failure to file liens in the past few years indicates that it has not exhausted all reasonable means to collect past due accounts. [ICC Staff Ex. 1.0, p. 8]. Mr. Seehawer, however, explained that CIWC had found that the act of filing a lien alone (without a follow-up foreclosure action) was an ineffective and costly method of collecting past due water/sewer bills. Mr. Seehawer testified that when the Company did file liens, it actually recovered very little, if anything, of the amounts owed. [CIWC Ex. 1.0SR, p. 20]. This is because the filing of a lien becomes significant to the lot owner only when that owner wishes to sell the lot involved; a lien does not have a legal effect in and of itself. [CIWC Ex. 1.0R (Revised), pp. 9-10]. Many of the properties for which liens were filed, however, became subject to tax and judicial sales, a fact that will be discussed in more detail below. When such sales occur, CIWC cannot recover past due water/sewer balances upon sale. Even where a voluntary sale was involved, CIWC would often not recover the full amount owed it because the lot had prior liens recorded on it and/or the sale price did not cover all debt. [CIWC Ex. 1.0SRSUPP, Answer to Question #1.]

Essentially, the reason CIWC does not file liens for lots with past due accounts is because it is not cost-effective to do so in the absence of the ability to foreclose (and recover Enforcement Costs resulting from that foreclosure). As noted above, a lien is most effective when a lot is voluntarily sold. Thus far in 2002, 107 lots have been sold in Woodhaven and approximately 25 lots have been sold in Candlewick. Of that number, 84 of the Woodhaven sales were voluntary and 22 of the Candlewick sales were voluntary. Of those voluntary sales,

36 in Woodhaven and 9 in Candlewick involved overdue water and/or sewer balances.⁵

Subtracting those lots where the Company was able to collect past due amounts in the absence of a lien revealed that CIWC would potentially have received a benefit from having recorded a lien on only 25 of the Woodhaven lots and 3 of the Candlewick lots. [CIWC Ex. 1.0SRSUPP, Answer to Question #1.]

Mr. Seehawer explained that CIWC believed the experience in 2002 to date was representative of normal sale conditions and could be used to project sales transactions for a full five year period. Mr. Seehawer indicated that the following assumptions were also made: (1) that the discount rate was 9.3% (the last allowed rate of return); (2) that the average outstanding Woodhaven and Candlewick water/sewer balances should be used; and (3) that CIWC will recover 50% of the amounts owed to it. Using those figures, Mr. Seehawer determined that, if CIWC had recorded liens in Woodhaven and Candlewick, it would recover \$19,200 per year (based on 50% of the average per lot balance due). The present value of recovery for the five-year period would be approximately \$74,103. [CIWC Ex. 1.0SRSUPP, Answer to Question #1.]

Mr. Seehawer also calculated that, based on the filing fee and administrative costs involved in lien filing, to file a lien on all 2,148 lots that currently have past due accounts (80 days or more) associated with them would cost \$85,920. If the Company were to file liens as accounts become 80 days or more overdue, it would incur an additional cost of \$12,392 per year over the next 4 years for Woodhaven and Candlewick. The present value of total expenditures for the filing of liens over the next 5 years (for accounts past due 80 days or more) would be

⁵ These are properties with water and/or sewer bill balances totaling \$80 or more.

approximately \$125,803.⁶ Clearly, as Mr. Seehawer maintained, to spend **\$ 125,803** on a present value basis in order to potentially recover **\$ 74,103** on a present value basis would not be cost-effective. [CIWC Ex. 1.0SRSUPP, Answer to Question #1.]

Mr. Johnson and Mr. Colton disputed the Company's use of assumptions and questioned Mr. Seehawer's calculations. [ICC Staff Ex. 6.0, Johnson's Rebuttal to CIWC's Answer to Question #1; CUB Ex. 3.0, Rebuttal to CIWC's Answer to Question #1.] Such concerns are unwarranted. While CIWC used projected amounts based on certain assumptions, these numbers were based on reasonable estimates given the Company's past experience in Woodhaven and Candlewick. Mr. Colton, for example, questioned the use of 2002 sales data as representative, implying that the data from 2002 is high. [CUB Ex. 3.0, Rebuttal to CIWC's Answer to Question #1.] Since CIWC would only potentially recover its past due amounts if a lot is sold voluntarily, if the sales data for 2002 is too high then the present value recovery would be even smaller than that calculated. [CIWC Ex. 1.0SRSUPP, Reply to Staff and CUB's Rebuttal to CIWC's Answer to Question #1.] CIWC assumed a 50% recovery in its calculations because, as noted above, the Company often does not fully recover overdue amounts. Many of the lots become subject to tax or judicial sales. In these instances, the Company recovers nothing. Lots also often have prior liens associated with them such as mortgage or Association liens. All of these factors result in reduced recovery for CIWC. With the average delinquent account numbering hundreds of dollars in arrears, it is not unreasonable to assume that CIWC will not fully recover under a lien-only program with an average lot value of only \$8,500 in Woodhaven. [*Id.*]

⁶ These values were calculated using the same assumptions stated above as well as the conservative assumption that 257 new liens and 53 new liens would be recorded annually for Woodhaven and Candlewick, respectively. [CIWC Ex. 1.0SRSUPP, Answer to Question #1.]

Most important, however is the fact that the disagreements expressed by Mr. Colton and Mr. Johnson over the Company's use of certain assumptions do not affect the overall result: that the costs of filing liens (without the ability to foreclose) far exceed the potential recovery. The number of current delinquent accounts (and thus the number of liens the Company would have to currently file) was a known value. The number of lots that become delinquent each year was based on hard data. The average outstanding delinquent balance was also based on known data. That the Company would only have received a benefit from lien filing alone for only a few lots in 2002 was also based on actual data. The reasonable assumptions that CIWC made do not affect the end result. The costs-benefits analysis demonstrated that the cost of a lien-only program as compared to the recovery under such a program was vastly disproportionate. [CIWC Ex. 1.0SR SUPP, Reply to Staff and CUB's Rebuttal to CIWC's Answer to Question #1.]

Mr. Colton's other comments regarding lien filing reveal his misunderstanding of CIWC's testimony. For example, Mr. Colton questioned why the Company used the average balance due and stated that bills do not vary on a month-to-month basis, citing to information CIWC had provided regarding the arrears for accounts more than one year in arrears. [CUB Ex. 3.0, Rebuttal to CIWC's Answer to Question #1.] Mr. Colton was clearly confused because what a delinquent account's balance would be after a year or more was immaterial where Mr. Seehawer's testimony was in regards to the filing of *liens*, not the filing of foreclosures⁷ (as Mr. Colton seemed to think). Mr. Seehawer stated that a lien would be filed on a property with water and/or sewer bill balances totaling more than \$80. The Company would potentially recover on that lien when the lot is voluntarily sold. A lot, however, may be sold soon after the lien is recorded, resulting in a low balance recovery, or it may not be sold for some time, resulting in a

⁷ As previously stated, CIWC will only pursue foreclosure against a particular lot when the account attached to that property is at least one year in arrears. [CIWC Ex. 1.0R (Revised), p. 6.]

higher balance on the account. To account for this variance, the Company used the average balance due to calculate its potential recovery in the costs-benefits analysis. [CIWC Ex. 1.0SRSUPP, Reply to Staff and CUB's Rebuttal of CIWC's Answer to Question #1.]

Mr. Colton also cited to the total number of lots that were sold each year and asserted that the Company did not know how much money it could have collected had CIWC had liens in place on those properties. [CUB Ex. 2.0, p. 12.] Mr. Seehawer, however, pointed out that the total number of lot sales included all availability lots in Woodhaven and Candlewick, not just those customers with delinquent accounts. [CIWC Ex. 1.0SR, p. 26.] As indicated above, only a small percentage of the lots that are sold in a given year are owned by Delinquent Owners (and are thus relevant here). As is also mentioned above, many lots are not subject to *voluntary* sales but instead become subject to tax or judicial sales. When a tax sale occurs, the Company does not recover any of the amounts owed to it and would not recover amounts expended to file liens. Over the past five years, over 165 lots in Woodhaven have been subject to tax sales. In Woodhaven, the amount of unpaid revenue due to tax sales in 2001 equaled \$21,311 or 4 % of the total amount of the unpaid revenue. [CIWC Ex. 1.0R (Revised), p. 26.] In July 2002 alone, 29 lots were sold at a tax auction whose owners were also in arrears to CIWC for a total of \$15,672. Past due water/sewer balances can often not be collected when there is a judicial sale because the sale is generally conducted upon a Petition filed by the property's mortgagee, which has a higher priority (i.e., earlier recorded) lien than does the Company's lien (the mortgage generally being recorded immediately when a new owner acquires a lot). In Candlewick, the amount of unpaid revenue related to judicial sales in 2001 was \$31,010 or 20% of the total amount of the unpaid revenue. [CIWC Ex. 1.0SRSUPP, Answer to Question #1.]

Because of the costs associated with filing liens as compared to the amount that the Company could potentially recover in the eventuality that a delinquent customer sells the property, and given the fact that often the Company will not fully recover, it is not economically prudent for CIWC to file liens on properties tied to a delinquent account when the Company lacks the ability to enforce those liens with a foreclosure action. [CIWC Ex. 1.0SRSUPP, Answer to Question #1.]

3. Pursuing a Small Number of Foreclosures Without the Foreclosure Program

Mr. Johnson stated that the Company should pursue foreclosure actions "even if the cost of doing so is greater than the amount that can be recovered," [Joint Ex. 1.0, Johnson Response to CIWC DR #7], because the pursuit of even a small number of foreclosures may have a broad effect in encouraging delinquent customers to come forward and pay. [ICC Staff Ex. 1.0, p.8.] First, it would be extremely imprudent to adopt Mr. Johnson's method of spending more than can be recovered. [CIWC Ex. 1.0SR, p. 11.] Mr. Seehawer explained that without the Foreclosure Program, the estimated average cost of foreclosure proceedings is \$2,651 per lot. A number of the past due accounts, however, have balances below this amount. CIWC chose to pursue other, more financially reasonable means to recover amounts due rather than spending \$2,651 to recover a \$600 (or even a \$1000) delinquent account. Mr. Johnson's suggestion would also result in spreading the increased costs to all customers, the very thing that CIWC's proposal attempts to avoid.

Most importantly, however, Mr. Johnson's underlying theory is incorrect. CIWC does not believe that the pursuit of a small number of foreclosures in the absence of a program such as the Foreclosure Program and the ability to recover Enforcement Costs would have any real effect. In order for the Program to be effective, CIWC must have the opportunity to potentially recover its Enforcement Costs. Without this opportunity, CIWC will not be able to engage in

lien filings for a large number of accounts and prosecute multiple foreclosure actions. Yet it is primarily because of the large number of actions that the Company will be able to standardize the Program and achieve expense savings (a fact that will be discussed in more detail later.) [See CIWC Ex. 1.0SRSUPP, Reply to Staff and CUB's Rebuttal of CIWC's Answer to Question #2.] Severely limiting the number of possible foreclosures would severely limit (and even eliminate) the ability to generate economies of scale and would thus result in a higher average cost for foreclosure actions.

A scaled down Program would necessarily have to be limited to accounts with high past due amounts or lots with high property values. Payment would not be encouraged because the majority of lot owners would know that their particular lot would probably not meet these criteria and would, therefore, not be subject to the Program. [CIWC Ex. 1.0R (Revised), p. 12.] Moreover, as Mr. Seehawer pointed out, because of the nature of the Woodhaven and Candlewick Divisions, it is likely that pursuing only a small number of foreclosures would have no widespread effect. The properties in Woodhaven are not permanent homes but recreational lots. In Candlewick, many of the lots are vacant and are held by the owners for future development. In both cases, the customer often does not reside on the lot or even in the County. A few scattered foreclosures on unique lots would not have much impact on an absentee owner. Only a full scale program where the possibility of foreclosure and the payment of costs exists could encourage payment on a broad scale. [*Id.*]

4. Relying on the Associations

CIWC engages in a number of collection activities and the Foreclosure Program will be one aspect of CIWC's overall collection strategy. Rather than recognizing the Program as one of the many methods CIWC will use to recover amounts owed, Staff and CUB insist that the Company rely on other methods in lieu of the Foreclosure Program and the proposal for

Enforcement Costs recovery. One such method was that the Company rely on the Woodhaven Lake and Candlewick Lake Associations in addressing the problem of overdue accounts.

Mr. Johnson and Mr. Colton both advised CIWC to approach the Associations of Woodhaven and Candlewick and request their assistance in dealing with Delinquent Owners. Mr. Johnson suggested, for example, that the Company have the Candlewick Association invoke a provision in the Declaration providing for the suspension of voting rights and facility usage. [ICC Staff Ex. 1.0, p. 8.] Mr. Colton recommended, *inter alia*, that CIWC negotiate with the Associations to require that those buying lots escrow the availability charges, much the same way that property taxes are escrowed. [CUB Ex. 1.0, p. 10.] What both men ignored were Mr. Seehawer's statements that CIWC has approached and attempted to work with the Woodhaven and Candlewick Associations in dealing with the problem of delinquent accounts all to no avail.

Mr. Seehawer explained that the Company has kept the Woodhaven and Candlewick Community Advisory Panels and Associations informed about the problem of past due accounts and the lack of success in collection efforts. [CIWC Ex. 1.0SR SUPP, Reply to Staff and CUB's Rebuttal of CIWC's Answer to Question #3.] CIWC has also engaged in a number of discussions with the management of both Associations concerning ways to jointly pursue collections against delinquent owners. [CIWC Ex. 1.0SR, p. 19.] While the Associations have encouraged CIWC to continue its efforts and have indicated support of the proposed Foreclosure Program, the Associations have been unwilling to participate in a joint pursuit of delinquent owners. [CIWC Ex. 1.0SR SUPP, Reply to Staff and CUB's Rebuttal of CIWC's Answer to Question #3.] This is particularly true where the collection procedures essentially shift all

responsibility of collection to the Associations as Mr. Colton's recommendations do.⁸ [CIWC Ex. 1.0SR, p. 22.] The Woodhaven Association informed the Company that certain actions were beyond the scope of its authority and that it legally could not limit access to the property on behalf of a third party to enforce that third party's collection efforts. The Association was also not receptive to the idea of CIWC billing the Association for all of the lots and the Association then including this fee in the Association's dues for its members. [*Id.* at 19.]

Similar collection discussions have also been held with the Candlewick Lake Association over a period of years without any positive collection ideas being developed and no accord reached. [*Id.*] The Association is the only entity that can deny services to a Lake Association member for the non payment of utility bills. The Company cannot force the Lake Association to institute enforcement actions or to implement its own provisions. To date, the Lake Association has not enforced this provision on any of its members, perhaps because the majority of the "availability" customers in Candlewick own vacant lots and do not actually vote or use the facilities of the Association. The enforcement of such a provision, therefore, would not have much of an effect (much the same as the filing of a lien without pursuing foreclosure on a vacant lot would have no real effect). [CIWC Ex. 1.0R (Revised), p. 13.]

CIWC plans to continue to work with the Associations in the hopes of reaching agreement regarding the pursuit of Delinquent Owners and the collection of past due accounts. The Company will also continue with its traditional collection methods and implement those suggestions of Staff and CUB that are feasible. CIWC also hopes to go forward with its Foreclosure Program under which it will file liens and pursue foreclosures on the lots of

⁸ Having the Associations require deposits, escrows, or EFT payments for the sake of CIWC, as Mr. Colton suggested, [CUB Ex. 1.0, pp. 10-12], shifts all of the collection responsibility to the Associations. [CIWC Ex. 1.0SR, p. 22.]

Delinquent Owners. [CIWC Ex. 1.0SR, p. 21.] It is not a matter of finding some alternative collection mechanism to pursue “in lieu” of the Foreclosure Program. All of these mechanisms (including the Foreclosure Program) will be part of an integrated collection effort. CIWC has the legal authority under the IMFA and the Declarations to foreclose on the properties of Delinquent Owners. The issue in this proceeding is whether CIWC should have the opportunity to potentially recover its Enforcement Costs from the customers who cause those costs to be incurred. [*Id.* at 22-23.]

D. The Enforcement Cost Recovery Surcharge Rider

The ECRS is a modification of CIWC's original proposal⁹ that addressed concerns raised by Staff and CUB. Indeed, it was Staff witness Johnson who suggested that the Company submit its proposal in the form of a rider.¹⁰ [ICC Staff Ex. 1.0, p. 13.] Despite this, and despite the fact that Mr. Colton admitted the Rider “address[ed] many of the foreclosure-related concerns [he had] previously expressed,”¹¹ Staff and CUB nevertheless questioned the appropriateness, necessity, and adequacy of the Rider.

1. The Appropriateness of the Rider as a Cost Recovery Mechanism

Mr. Johnson and Mr. Colton both argued that a rider should not be used to potentially recover Enforcement Costs because those costs are predictable and under CIWC's control. [ICC Staff Ex. 3.0, p. 8; CUB Ex. 2.0, p. 13.] Mr. Griffin, in turn, questioned the use of the ECRS

⁹ CIWC's original proposal was to change portions of the Rules and Regulations for water and sewer service and the rate schedules applicable to Woodhaven and Candlewick to provide CIWC with the opportunity to recover from Defaulting Owners the Enforcement Costs. This also involved changes to additional sheets for "housekeeping" purposes. [See CIWC Ex. 1.0, pp. 11-13.]

¹⁰ Mr. Johnson stated that if the Commission finds that Enforcement Costs should be recovered, a rider might be a more appropriate method that would eliminate the number of tariff sheet changes. [ICC Staff Ex. 1.0, p. 11.]

¹¹ [See CIWC Ex. 1.0SR, p. 4.]

because it "would be unique in the State of Illinois." [ICC Staff Ex. 2.0, p. 7.] Neither of these arguments are persuasive.

Section 9-220.2 of the Public Utilities Act (220 ILCS 5/9-220.2) allows a utility to use a rider to seek recovery of costs that "fluctuate for reasons beyond the utility's control or are difficult to predict." The costs associated with the Foreclosure Program are not under the Company's control. As Mr. Seehawer explained, the actual costs for a foreclosure will vary depending on such things as the scope of the work involved and the length of the court proceeding. [CIWC Ex. 1.0R (Revised), pp. 4-5.] Some cases may result in Enforcement Costs below the stated average while other cases may result in Enforcement Costs above the average. The Company cannot predict which will occur. [CIWC Ex. 1.0SR, p. 13.]

Contrary to Mr. Johnson's and Mr. Colton's assertions, CIWC cannot control the number of foreclosures it pursues except in the most general sense. As Mr. Seehawer stated, the Company could decide not to pursue any foreclosures or strictly limit the number of lots that are foreclosed upon. [CIWC Ex. 1.0SR, p. 13.] This, however, would be contrary to the goals of the Foreclosure Program. The Foreclosure Program is not designed so that the Company will automatically foreclose on any lot that meets certain standardized criteria. Instead, the ultimate decision to pursue a foreclosure and when to pursue the foreclosure will be made by CIWC on a case-by-case basis taking into account various factors to determine whether it is reasonable and feasible to foreclose on the property. [*Id.*] Mr. Seehawer explained that these include factors such as: the number of delinquent accounts, the size of the outstanding balances, the value of the subject property, the number of prior liens (if any) that are already in place on the subject property, and the status of the current real estate market are all circumstances that will influence any decision to pursue foreclosure. CIWC therefore is not able to predict how many lots may be

eligible for foreclosure or are worth pursuing in any given year. Mr. Seehawer testified that the volume of accounts in the Program will fluctuate – that is the nature of the Program – with many accounts potentially involved in some years and few involved in others.¹² [*Id.* at 13-14.] It is impossible to predict with any degree of certainty how many properties the Company will find suitable for foreclosure or how many the Company will actually foreclose on.

Added to this is the fact that the Company cannot predict the amount of Enforcement Costs, if any, that the court will actually allow it to recover. The court presiding over the foreclosure is an equity court and as such is not obligated to allow the Company to recover the full amount of its Enforcement Costs. As Mr. Seehawer testified, CIWC believes that its potential Enforcement Costs are significant and inherently unpredictable and fluctuating for reasons beyond the Company's control to warrant their potential recovery through a rider. [CIWC Ex. 1.0SR, p. 14.]

Mr. Griffin questioned using the Rider because it would be unique in Illinois and notes that one utility, Lake Wildwood, has the authority to file liens on the property of delinquent customers but has not requested a rider to recover its costs. [ICC Staff Ex. 5.0, Griffin Response to ALJ Question.] Mr. Griffin, however, did not assert that Lake Wildwood has experienced the same problems with collecting availability charges that CIWC has, that it files liens and pursues foreclosures against customers who are delinquent in the payment of their bills, or that it has included costs incurred in filing liens and pursuing foreclosures in its rate case. Mr. Seehawer pointed this out in his Testimony. [CIWC Ex. 1.0R (Revised), pp. 24-25; CIWC Ex. 1.0SRSUPP, CIWC Rebuttal to Griffin Response to ALJ Question.] There is nothing in this

¹² In addition to the fact that decisions to pursue foreclosure will be made on an individual basis, the number of properties involved will also vary as customers become more likely to pay their bills to avoid foreclosure. [CIWC Ex. 1.0SR, p. 14.]

record to dispute CIWC's contention that the situation at the Woodhaven and Candlewick Divisions is unique or that the proposed Rider is inappropriate. [CIWC Ex. 1.0R (Revised), p. 25.]

2. The Necessity of the Rider for the Foreclosure Program

Staff witness Johnson insisted that "the Company has provided no reason why it cannot standardize the foreclosure process and prosecute multiple foreclosure actions without the need for the proposed [Rider.]" [ICC Staff Ex. 1.0, p. 10; ICC Staff Ex. 3.0, pp. 1-2.] Mr. Seehawer, however, did provide an explanation. Mr. Seehawer explained that the Foreclosure Program is meant to standardize the process of filing a lien and pursuing foreclosure actions, allowing the Company to more efficiently pursue delinquent customers and recover the funds owed. [CIWC Ex. 1.0SR, p. 10.] Without such standardization, the cost to foreclose on a property are prohibitively high (estimated at \$2,651), particularly given the number of delinquent accounts that exist. (Thus, CIWC chose to pursue other, more financially reasonable means to recover amounts due.) Under the Foreclosure Program, the lower costs will make it possible for CIWC to pursue more past due accounts. Even with the standardized program, however, Enforcement Costs may still average hundreds of dollars per lot. Given the number of past due accounts, the fact that a large number of those accounts have unpaid balances below \$600, and the fact that many of the lots in Woodhaven have relatively low property values, the level of Enforcement Costs involved (in the absence of the potential to possibly recover those costs) would substantially limit the Program. [CIWC Ex. 1.0SR, p. 10.]

Mr. Johnson maintained that the Company could implement many of the "standardization" procedures discussed in CIWC's Answer to Question #2 (CIWC Ex.

1.0SRSUPP),¹³ thereby lowering the costs to pursue a foreclosure, and then pursue foreclosures without the ability to recover Enforcement Costs. [ICC Staff Ex. 6.0, Johnson Rebuttal of CIWC's Answer to Question #2.] What Mr. Johnson ignored, however, was the fact that many of the "standardization" procedures mentioned can only be achieved with the implementation of a full-scale Foreclosure Program under which numerous foreclosures are filed because the savings are realized through economies of scale. If CIWC were only able to pursue a few scattered foreclosures a year then these savings would be lost. [CIWC Ex. 1.0SRSUPP, Reply to Staff and CUB's Rebuttal of CIWC's Answer to Question #2.] In that situation, it would not be economically feasible or prudent, given that the Company would have the debt of the past due account as well as the expense of any Enforcement Costs, to spend hundreds of dollars in Enforcement Costs to pursue accounts with smaller amounts past due or those that are connected to a lot with a low property value,¹⁴ even though those accounts make up a substantial portion of the delinquency problem. [CIWC 1.0R (Revised), p. 3; CIWC Ex. 1.0SR p.10.]

Simply put, in order to implement a Program that will allow CIWC to pursue multiple foreclosure actions simultaneously, thereby realizing additional savings through economies of scale, the Company must be able to potentially recover its Enforcement Costs. To potentially recover Enforcement Costs, the Company needs the ECRS. [CIWC Ex. 1.0SRSUPP, Reply to Staff and CUB's Rebuttal of CIWC's Answer to Question #2.]

¹³ These procedures include: development of standardized forms for certain documents that will enable these documents to be completed either automatically by a computer or with minimal input required by a legal assistant; performing many activities together as a group, thereby saving the time and money that would otherwise be required if individual lots were pursued one at a time; and working with one firm for the long term. This is based on the idea that the Company will be pursuing numerous foreclosures in a given year.

¹⁴ As mentioned previously, CIWC does not believe that it would be prudent to adopt Mr. Johnson's recommendation that CIWC pursue "foreclosure actions even if the cost of doing so is greater than the amount that can be recovered." [Joint Exhibit 1.0, Johnson Response to CIWC DR #7.]

3. The Adequacy of the Rider as an Agreement Between CIWC and its Customers

Under the IMFA, a party is entitled to attorney's fees and other costs in connection with the foreclosure action "to the extent set forth in the mortgage or other written agreement between the mortgagor and mortgagee." 735 ILCS 5/15-1510. Mr. Colton takes the position that the ECRS proposed here is insufficient to constitute such a written agreement. [CUB Ex. 2.0, p. 17.] This, however, is a question for the court, not Mr. Colton, to determine.

The evidence shows that an agreement does exist between CIWC and its customers. The proposed Rider will become a part of CIWC's tariffs. [CIWC Ex. 1.0SR, p. 18.] Tariffs constitute a binding contract between the utility and its customers. [CIWC Ex. 1.0SR, p. 18; Petition ¶ 14; *see also Illinois Cen. Gulf R.R. Co. v. Sankey Bros. Inc.*, 67 Ill. App. 3d 435 (1978) (stating that approved tariffs become law); 64 Am. Jur. 2d Pub. Util. § 61 (2001).] Furthermore, customers must sign an application if they wish to receive water and/or sewer service.¹⁵ [CIWC Ex. 1.0SR, p. 16.] In that application, it provides that the customer agrees that the Company may file a lien on the lot of a delinquent customer. [*Id.* at 18.] That application also clearly states that the customer agrees "that the charges for such service, the times and methods of payment, and other matters shall be as provided in Tariffs or Rate Schedules and Regulations and Conditions of Service published and filed by said Commission as the then effective Rate Schedule of Tariff of said utility." Thus, there is a written agreement between CIWC and customers that the provisions of the tariffs apply. [*Id.* at 16-17.] Mr. Colton even included copies of these applications in his Rebuttal Testimony. [CUB Ex. 2.0, Attach. 2.4.] CIWC believes that, under the circumstances, the courts will conclude that the ECRS is adequate for

¹⁵ If the application is taken orally, under CIWC's Rules and Regulations, the taking of service constitutes a binding contract. [CIWC Ex. 1.0SR, p. 16.]

purposes of the IMFA. [CIWC Ex. 1.0SRSUPP, Reply to Staff and CUB's Rebuttal of CIWC's Answer to Question #4.]

E. The Annual Reconciliation

In accordance with the requirements of Section 9-220.2 of the Act, the Rider contains a provision for an annual reconciliation during which the Commission may review the level of Enforcement Costs that the Company has collected and determine if any adjustments/refunds are necessary. The Rider also provides that the Company will reflect on the bill of a customer the amount of Enforcement Cost recovery allowed by a court in the event of a foreclosure [CIWC Ex. 1.0R (Revised), Attachment A.] Staff witness Johnson expressed uncertainty about the inclusion of Enforcement Costs on the customer's bill, [ICC Staff Ex. 3.0, p. 9.], while Staff witness Griffin and CUB witness Colton questioned the reconciliation process itself. [ICC Staff Ex. 5.0, Griffin Rebuttal to CIWC's Answer to Question #4; CUB Ex. 3.0, CUB Rebuttal to CIWC's Answer to Question #4.] Rather than raising any real issues of concern, Staff and CUB's comments merely reveal their misunderstanding of CIWC's proposal.

Mr. Johnson stated the he was confused because he believed that "in a foreclosure the Company would have obtained ownership of the property. Upon the sale of the property, the bill would be paid off." [ICC Staff Ex. 3.0, p. 9.] Mr. Seehawer explained that Mr. Johnson's belief was not altogether correct. Once a foreclosure judgment is entered by the court, CIWC has to petition for a judicial sale of the subject lot. For a certain period before the sale takes place, the lot owner has the opportunity to pay off the amount secured by the lien. CIWC may not necessarily be the entity that takes title to the lot at the judicial sale. Also, the proceeds of the sale may not be sufficient to cover the delinquent amounts owed. Most importantly, because CIWC proposed to include these amounts on the bill, the Company and the delinquent customer are provided with the option, with leave of the court and following the court's final judgment, of

settling all of the amounts secured by the lien without having to actually go through with a foreclosure sale of the property. [CIWC Ex. 1.0SR, pp. 15-16.]

In regards to the reconciliation process, under CIWC's proposal, the Commission would compare the total amount recovered as Enforcement Costs for the reconciliation period to the total amount allowed for the period. [CIWC Ex. 1.0SRSUPP, Answer to Question #4.] The data submitted would show the allowed and recovered amounts for each delinquent account so comparisons could be made on an individual basis. [CIWC Ex. 1.0SR, p. 18.] While individual account comparisons may not normally be needed in reconciliations filed under other riders,¹⁶ the primary purpose of CIWC's proposal is to recover Enforcement Costs from the responsible customer(s). Accordingly, an examination of individual account data is appropriate here. [CIWC Ex. 1.0SRSUPP, Reply to Staff and CUB's Rebuttal of CIWC's Answer to Question #4.]

Under the ECRS, an adjustment would be made only if required to equalize actual Enforcement Cost revenue for the reconciliation period with the amount of enforcement cost prudently incurred. Adjustment may be necessary in three situations: if there is an over-recovery, if there is an under-recovery, or if the Commission makes a prudence adjustment. Over-recovery could occur due to an inadvertent error in billing or payment by the customer. Under-recovery could occur if there was an inadvertent error in billing or payment by the customer or if the customer failed to pay the court-ordered amount. A prudence adjustment could occur if the Commission determined that the amount the Company sought to recover on the bill was imprudently incurred. [CIWC Ex. 1.0SRSUPP, Answer to Question #4.]

Mr. Griffin and Mr. Colton questioned how the Company could provide an adjustment to a customer's account when there would be no continuing customer account that could be adjusted

¹⁶ [See ICC Staff Ex. 5.0, Griffin Rebuttal of CIWC's Answer to Question #4.]

because of a foreclosure. [ICC Staff Ex. 5.0, Griffin Rebuttal of CIWC's Answer to Question #4; CUB Ex. 3.0, Rebuttal of CIWC's Answer to Question #4.] As noted above, placing the court-ordered Enforcement Costs on the water/sewer bill would provide an option of settling amounts secured by the lien after judgment without having to go through a foreclosure sale. [CIWC Ex. 1.0SR, p. 16.] If the customer was billed for Enforcement Costs allowed by the court, that would be pursuant to an agreement between the customer and Company regarding the billing and collection of these costs. Thus, there would always be a continuing customer account, unless the customer closes the account for some other reason. If there was an over-recovery, as Mr. Seehawer explained, the Company would propose at the reconciliation that the over-recovery be refunded to the customer account that made the over-payment. When an account with an over-recovered balance has been closed, a check for such balance would be sent to the customer. [CIWC Ex. 1.0SRSUPP, Reply to Staff and CUB's Rebuttal of CIWC's Answer to Question #4.] If there was under-recovery, the Company would attempt to collect the amount due from the responsible customer. [*Id.*] Mr. Griffin stated that he did not know what CIWC believed the appropriate Commission action would be in instances of under-recovery. [ICC Staff. Ex. 5.0, Griffin Rebuttal of CIWC's Answer to Question #4.] Mr. Seehawer, however, did not indicate that any Commission action was needed in such a situation. The attempt to collect the balance due is the responsibility of the Company. [CIWC Ex. 1.0SRSUPP, Reply to Staff and CUB's Rebuttal of CIWC's Answer to Question #4.]

Mr. Griffin also suggested that the Commission would not have authority to disallow Enforcement Costs awarded by a court. [ICC Staff. Ex. 5.0, Griffin Rebuttal of CIWC's Answer to Question #4.] As Mr. Seehawer explained, however, placing Enforcement Costs on the utility bill allows the Commission to conduct a prudence review of those costs. The Commission

would have jurisdiction to determine whether or not Enforcement Costs that the Company seeks to recover on the utility bill are prudently incurred. Section 9-220.2 expressly authorizes use of a reconciliation procedure and related prudence review where costs are recovered on the utility bill under a rider. [CIWC Ex. 1.0SR SUPP, Reply to Staff and CUB's Rebuttal of CIWC's Answer to Question #4.] If Enforcement Costs are recovered in a manner other than through collection on the utility bill (e.g., through foreclosure proceeds), the Commission would have no jurisdiction over the amount recovered. Recovery would be under the jurisdiction of the equity court under the Illinois Mortgage Foreclosure Act. [*Id.*] In reviewing the prudence of Enforcement Costs, the Company believes that the Commission should give a high degree of deference to the equity court's determination with respect to the reasonableness of the allowed Enforcement Costs. The Commission, however, could determine that the amount of Enforcement Costs allowed by the court was not prudently incurred. This determination of the Commission would be reviewable by an appellate court on administrative review. The nature of a required prudence adjustment would depend on the Commission's finding of imprudence. Depending on the finding of one or more customer accounts could be affected, as determined by the Commission. [*Id.*]

Under the ECRS, the Company will recover Enforcement Cost only from the customer responsible for causing the cost. If there is over-recovery, under-recovery, or a prudence adjustment, CIWC will either refund amounts or seek to collect additional amounts as required. No Commission action is needed for these efforts and any adjustment ordered by the Commission at the reconciliation would only be to the extent that the Company has not already made the necessary adjustment to the account of the customer involved.

F. Ratemaking Issues

Staff and CUB both argued that CIWC's proposal should be made and analyzed in the context of a full rate case proceeding. [ICC Staff Ex. 1.0, p. 10; ICC Staff Ex. 2.0, p. 7-8; CUB Ex. 1.0, p. 3.] In so doing, Staff and CUB advocate that the costs involved in filing and pursuing foreclosures (if found to be prudent) be spread to all customers, not just those responsible for the costs being incurred. Staff witness Mr. Griffin asserted that the Company's base rates already include a level of expense for costs associated with the collection of bad debt that that the proposal would result in double recovery. [ICC Staff Ex. 4.0, p. 3.] Mr. Colton raised a number of so-called "ratemaking" concerns involving offsetting expense savings. [CUB Ex. 1.0, p. 3.] CIWC's proposal, however, does not raise any ratemaking concerns; instead, it is Staff and CUB who persist in attempting to drape CIWC's proposal in rate issues. As has been discussed, a primary purpose of CIWC's proposal is to avoid injecting issues related to recovery of Enforcement Costs in base rate proceedings.

1. Recovery of Enforcement Costs Under Current Rates

Mr. Griffin observed that in CIWC's last rate case, costs were included for "Contractual Services." [Joint Ex. 1.0, Griffin Response to CIWC DR #2.] Mr. Griffin also asserted that Enforcement Costs are a subset of costs recovered through Contractual Services. Mr. Griffin then concluded that "because 'Enforcement Costs' are a subset of costs recovered through Contractual Services, those types of costs were represented in previous rate cases. The Company has not shown that it will be incurring a new level of expense for Contractual Services." According to Mr. Griffin, the Company's proposal to recover Enforcement Costs by using the proposed Rider would therefore result in double recovery. Mr. Griffin then concluded that the proposal must be considered in a rate case "where the costs can be properly analyzed before being included in rates." [ICC Staff Ex. 2.0, p. 5.]

Mr. Griffin admitted in a data request, however, that he did not review the underlying documents and exhibits from the prior rate cases, but only reviewed final orders, [Joint Ex. 1.0, Griffin Response to CIWC DR #1], and that he did "not know how much money was projected by the Company for legal costs associated with the collection of delinquent accounts." [*Id.* at Griffin Response to CIWC DR #2.] Mr. Seehawer explained that the amounts of contractual service costs reflected in the existing rates for Candlewick and Woodhaven are minor and do not reflect the costs associated with a program such as the Foreclosure Program. No amount for legal costs was reflected for Candlewick-Sewer (1997 test year) or Woodhaven-Sewer (1996 test year). For Candlewick-Water, \$777 was reflected in the 2000 test year for Account # 633 (Docket 99-0288) and, for Woodhaven-Water, only \$21 was reflected in Account #633 for the 2001 test year (Docket 00-0339). The minor amounts shown for contractual services are associated with collection efforts such as the pursuit of personal judgments or small claims and are completely separate from and are not covered by the Foreclosure Program. [CIWC Ex. 1.0R (Revised), p. 18.] If the costs associated with such traditional methods do increase (and CIWC believes that they will), the Company agrees the issue should be properly dealt with in a rate case. [*Id.* at 19.]

In contrast, the costs associated with pursuing the Foreclosure Program are separate, new costs that are properly dealt with in the Rider proposed here because they are a new type of expense. Such costs are not reflected in CIWC's rates. [CIWC Ex. 1.0SR, p. 6.] Indeed, Mr. Griffin conceded that the current rates for Woodhaven and Candlewick would not "provide for costs at levels that were not included in the current test year." [Joint Ex. 1.0, Griffin Response to CIWC DR #3.] Mr. Griffin even admitted that "it may be true that the Company will incur different legal and administrative costs than are currently included in base rates" and that "these

are new and different costs.” [ICC Staff Ex. 4.0, p. 3.] Given that CIWC will be incurring "new and different costs" that are not included in the Company's current rates but will instead be recovered only under the Rider, there can be no double recovery and there is no logical reason to delay review (and thus further compound the problem) until a rate case. CIWC's proposal will not have an impact on base rates.

2. The Effect of the Recovery of Delinquent Amounts

CUB witness Colton and Staff witness Griffin testified that because the Company will be collecting on delinquent amounts owed, a rate inquiry is needed. Mr. Griffin focused on his belief that the Company's bad debt expense will be significantly reduced as a result of collection. [ICC Staff Ex. 4.0, p. 4.] However, as Mr. Seehawer testified, past due accounts are "written off" only when: 1) the property has been involved in a bankruptcy, tax sale, or judicial sale and that sale has been approved; or 2) a bill has been left unpaid for 105 days for those lots where service can be shut-off. All other unpaid balances are reflected as Accounts Receivables. [CIWC Ex. 1.0R (Revised), pp. 23-24.] CIWC has not expensed the total amount of past due accounts.¹⁷ To do otherwise and include such costs in base rates, thereby spreading the costs among all CIWC customers in those Divisions, would place an unfair burden on those customers who pay their bills on time. Not only would this increase the charges all customers have to pay, but it would essentially result in a forgiveness of the amount owed and provide no disincentive to customers who do not pay. [*Id.*]

Mr. Colton, on the other hand, asserted that the collection mechanism will generate offsetting expense savings, most significantly a reduction in working capital [CUB Ex. 1.0, p. 3],

¹⁷ Indeed, if the total amount of the unpaid Accounts Receivables were converted to bad debt expense, it would be impossible to earn a fair rate of return. [CIWC Ex. 1.0R (Revised), p. 24.]

and will cause the Company's cost-of-service to decline.¹⁸ [CUB Ex. 3.0, Rebuttal of CIWC's Answer to Question #3.] Mr. Seehawer explained that while in theory if CIWC were to collect Enforcement Costs and recover past due amounts the Company would have less cash working capital requirements, such recovery would have no effect on the formula used by the Commission to determine cash working capital for ratemaking purposes. [CIWC Ex. 1.0R (Revised), p. 22.] Under that formula, amounts in Accounts Receivables have no impact on cash working capital. Whether CIWC will or will not collect revenue on past due accounts will not affect working capital as determined for rate-making purposes. [*Id.*] Moreover, the Company has not sought recovery of the amounts recorded as Accounts Receivables in prior rate cases as Uncollectibles. Any collections increase as a result of the Foreclosure Program will not affect costs-of-service and base rates. [CIWC Ex. 1.0SR SUPP, Reply to Staff and CUB's Rebuttal of CIWC's Answer to Question #3.] The fact of the matter is that the collection of delinquent amounts will have little to no effect on base rates.

Staff and CUB want the costs of filing liens and pursuing foreclosures against Delinquent Owners to be included in base rates so that the burden is born by all CIWC customers. Mr. Griffin explicitly asserted that "it is reasonable for all customers to contribute to collection costs." [ICC Staff Ex. 4.0, p. 4.] CIWC disagrees with Staff and CUB. As Mr. Seehawer stated, CIWC believes that it is only fair to have Enforcement Costs paid by those who are responsible for such costs being incurred rather than having those customers who do pay their bills subsidize those who do not. CIWC's proposal seeks to place the costs on the responsible parties while benefiting those customers who pay their bills. [CIWC Ex. 1.0SR, p. 9.] In his Direct Testimony, Staff witness Johnson even stated that he "agree[ed] with the concept that costs

¹⁸ It is interesting to note that Mr. Colton makes these assertions after admitting that he never reviewed any documents from CIWC's prior rate cases. [Joint Ex. 1.0, Colton Response to CIWC DR #1, #4.]

should be placed on cost-causers rather than spread over the entire customer base." [ICC Staff Ex. 1.0, p. 6.]

The Rider will recover these costs, dollar-for-dollar from those customers who cause a need for the Company to institute foreclosure proceedings. [CIWC Ex. 1.0R (Revised), p. 21.] The possible collection of Enforcement Costs will not impose an unfair burden on the non-paying lot owners because CIWC is not guaranteed recovery. CIWC must still plead its case for recovery in court and the delinquent customer may raise any valid defense. [CIWC Ex. 1.0SR, pp. 9-10.] The entire foreclosure proceeding is presided over by an equity court, which will review any request for Enforcement Cost recovery that CIWC submits to determine, *inter alia*, whether the costs are reasonable and necessary, and then decide if recovery is appropriate. There is, therefore, no danger of over-recovery. Both the expenses and revenues related to the Rider would be removed from a base rate proceeding. [CIWC Ex. 1.0R (Revised), pp. 21-22.]

IV. CONCLUSION

For the reasons discussed, the Commission should approve the Enforcement Cost Recovery Surcharge Rider proposed by CIWC in this proceeding which will give the Company the opportunity to potentially recover Enforcement Costs incurred in sustaining and enforcing a lien against property owners with delinquent accounts.

Respectfully submitted,

CONSUMERS ILLINOIS WATER COMPANY

By: _____
One of its Attorneys

Boyd J. Springer
Eacata D. Gregory
Jones, Day, Reavis & Pogue
77 West Wacker, Suite 3500
Chicago, IL 60601
(312) 782-3939
(312) 782-8585 (facsimile)
bjspringer@jonesday.com
edgregory@jonesday.com