

**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	)	
	)	

**REPLY BRIEF OF CONSUMERS ILLINOIS WATER COMPANY**

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## **I. INTRODUCTION**

In its Initial Brief, Consumers Illinois Water Company (“CIWC” or the “Company”) explained that in order to implement a Foreclosure Program that will allow CIWC to pursue multiple foreclosure actions simultaneously, thereby realizing savings through economies of scale, the Company must be able to potentially recover its Enforcement Costs. To seek recovery of Enforcement Costs in judicial foreclosure proceedings the Company needs the Enforcement Cost Recovery Surcharge Rider (“ECRS” or the “Rider”). [CIWC Initial Br., pp. 22-23.] The Rider will serve as the written agreement required under the Illinois Mortgage Foreclosure Act (“IMFA”) and give CIWC the opportunity to request that the court presiding over a foreclosure proceeding include the Company’s reasonably incurred Enforcement Costs in the ultimate recovery allowed by the court. [*Id.* at 24-25.] CIWC pointed out that recovery of Enforcement Costs is not automatic or assured but rests with the discretion of the court overseeing a foreclosure proceeding. [*Id.* at 7-8, 24-25] Moreover, the Rider contains a provision that allows the Commission to review the level of certain Enforcement Costs that the Company collects pursuant to the Rider. [*Id.* at 25-28.] If the Rider is approved, Enforcement Costs will only be recovered under the Rider, and not in base rates. [*Id.* at 29-33.]

CIWC also pointed out that the Foreclosure Program is not the only collection method that the Company plans to utilize. The Company explained that the Foreclosure Program would be a part of an integrated collection effort. The Program, however, is important because traditional collection methods have been insufficient in addressing the problem of past due availability accounts in Woodhaven and Candlewick. The Company makes the determination of what collection approaches are appropriate based on reviews of the delinquent accounts [CIWC Initial Br., pp. 8-19.]

## **II. ARGUMENT**

### **A. CIWC Has Used all Reasonable Methods to Address the Problem of Delinquent Accounts in Woodhaven and Candlewick**

In their Initial Briefs, Staff and CUB argue that CIWC's proposal is premature because the Company has not pursued the entire spectrum of potential collection methods available.

[Staff Initial Br., pp. 2-5; CUB Initial Brief, pp. 10-12.] CUB even questions the magnitude of the problem that CIWC faces in Woodhaven and Candlewick. [CUB Initial Br., pp. 11-12.] In making these assertions, both Staff and CUB ignore Mr. Seehawer's testimony.

#### **1. The delinquent accounts represent a substantial part of the Company's annual revenue**

CUB states that the data on the debt created by the Candlewick and Woodhaven property owners is misleading because the figures represented cumulative amounts rather than the debt owed for each year. [CUB Initial Br., pp. 11-12.] CIWC, however, has explained that far from being misleading, the cumulative numbers reveal the true problem that the Company is facing in the two Divisions. As Mr. Seehawer explained, the number of additional accounts that become delinquent varies from year to year, as does the total dollar amount, as some of the accounts are paid off in whole or in part and new delinquent accounts are added. The impact on annual revenues comes not only from the increase in revenue owed for each new year, but also from the aging of the existing delinquent accounts. [CIWC Ex. 1.0R (Revised), p. 25.] The cumulative balance of Accounts Receivables has increased each year over the past few years. [CIWC Ex. 1.0SR, p. 23; Joint Ex. 1.0, CIWC Response to Staff WRJ 3.14.] In Woodhaven in 2001, the total amount of revenue owed increased by approximately \$99,519. In Candlewick in 2001, the increase was approximately \$76,738. These additional amounts represent 6.8% and 3% of the annual revenue in 2001 for Woodhaven and Candlewick, respectively. Again, however, as Mr.

Seehawer explained, these numbers only represent the amounts by which the balance of Accounts Receivable increased during 2001. [CIWC Ex. 1.0R (Revised), p. 25.] In Woodhaven, the total dollar value of Accounts Receivables represented approximately 7.5% of annual revenue for the Division in 1997, 7.7% in 1998, 17.83% in 1999, 35% in 2000, and 36% in 2001. In Candlewick, Accounts Receivables comprised approximately .2% of annual revenue for the Division in 1997, .5% in 1998, over 1% in 1999, over 6% in 2000, and approximately 8% in 2001. [*Id.*]

**2. CIWC has pursued all reasonable legal action and has worked with the Associations in addressing the problem of delinquent accounts**

Staff witness Johnson conceded in his Rebuttal Testimony that the Company may have taken the typical steps used in collecting delinquent accounts. [ICC Staff Ex. 3.0, p. 4.] Similarly, in its Initial Brief, Staff acknowledges that CIWC has pursued legal action against lot owners and has sought personal judgments establishing liability. [Staff Initial Br., p. 2.] Staff insists, however, that the Company must file liens and pursue a limited number of foreclosures before it implements the Foreclosure Program. [*Id.* at 2-3.] CIWC has demonstrated why Staff's suggestions are infeasible. [CIWC Initial Br., pp. 10-16.] As noted in CIWC's Initial Brief, the Company does not currently file liens for lots with past due accounts 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). CIWC's cost-recovery comparison demonstrated that, under a lien-only program, the present value recovery over a five-year period would be approximately \$74,103, while the present value of total expenditures over that same five-year period would be approximately \$125,803. As Mr. Seehawer maintained, to spend \$125,803 on a present value basis in order to recover potentially only \$74,103 on a present value basis would not be cost-effective. [CIWC Initial Br., pp. 10-12.]

Pursuing foreclosures without the standardization of procedures that will occur under the Foreclosure Program would also not be cost-effective or prudent on the part of the Company. Without the Foreclosure Program, the estimated average cost of a foreclosure proceeding is \$2,651 per lot. The average delinquent account balance, however, is substantially below this amount. CIWC, therefore, has chosen to pursue other, more financially reasonable means to recover the amounts due rather than spending \$2,651 to recover a \$600 delinquent account. [CIWC Initial Br., p. 15.] Moreover, as stated in CIWC's Initial Brief, CIWC does not believe that the pursuit of a small number of foreclosures in the absence of the Program and the ability to recover Enforcement Costs would have any real effect. It is primarily because of the large number of actions that the Company expects to pursue under the Foreclosure Program that it will be able to standardize procedures under the Program and achieve expense savings. Severely limiting the number of possible foreclosures would limit or eliminate the ability to generate economies of scale and would thus result in a higher average cost for foreclosure actions. [*Id.* at 16.] With the higher average cost, a scaled down Program would necessarily be limited to accounts with high past due accounts or lots with high property values. Payment would not be encouraged because the majority of lot owners would know that their particular lot would not be subject to the Program. [*Id.*] Staff believes that CIWC 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.] CIWC believes that it would be extremely imprudent to adopt that approach. [CIWC Ex. 1.0SR, p. 11.]

In contrast to Staff's position that CIWC should pursue foreclosures no matter what the cost, CUB argues that CIWC "should not be so quick to resort to foreclosure." [CUB Initial Br., p. 11.] CUB maintains that the Company should pursue "less-intrusive collection mechanisms,"

such as credit reporting and collection agencies and that CIWC has not demonstrated that such mechanisms are ineffective. [*Id.* at 12.] CUB further asserts that “the only collection activity that the Company pursues is the use of computer-generated late payment reminders and letters.” [*Id.* at 10.] These claims are not supported by evidence in the record and are baseless. Mr. Seehawer stated expressly that the Company not only routinely sends reminder letters to defaulting customers, but also sends *all* accounts to collection agencies after they are past due for a certain number of days and pursues legal action to obtain personal judgments against certain customers for delinquent bills. [CIWC Initial Br., pp. 9-10.] CIWC also works with realtors involved in the sales of properties in the two Divisions, requesting that those agencies contact CIWC when the lot of a delinquent customer is being sold. [*Id.*] The ever-increasing number of delinquent accounts shows that these methods do not work. As Mr. Seehawer noted, for every \$1.00 expended on collection efforts, a little over \$1.40 has been collected. [CIWC Ex. 1.0R (Revised), p. 16.]

What CUB seems to want is for CIWC to adopt without question the “alternative collection methods” proposed by CUB witness Colton. However, Mr. Seehawer demonstrated that many of Mr. Colton’s suggestions were unenforceable, infeasible, or ineffective. [CIWC Ex. 1.0SR, p. 22.] For example, Mr. Colton suggested that the Company impose a cash security deposit at the time a lot is sold. [CUB Ex. 1.0, p. 10.] Under Section 280.50-70 of the Illinois Administrative Code, however, the Company cannot automatically require that all new customers pay a deposit. Even when a deposit is justified under the terms allowed in the regulations, it is not an effective mechanism for ensuring that customers pay their bills. [CIWC Ex. 1.0R (Revised), p. 14.] First, the deposit amount is limited to only 33% of the annual average bill for the property (the amount is not open to negotiation as Mr. Colton asserts), an

insignificant amount when compared to the balances on certain of the past due accounts.

Second, the means of enforcing payment of the deposit is disconnection of water and/or sewer service. Disconnection, however, is not feasible for “availability” customers in Woodhaven and Candlewick. There is no real incentive for lot owners to pay a requested deposit just as there is no incentive for them to pay their bills in the absence of the Foreclosure Program and possible Enforcement Cost recovery. [*Id.*]

Mr. Colton’s second suggestion was that the Company 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.] Under this proposal, the Company would essentially be shifting responsibility for collecting availability charges onto the Associations. As explained in CIWC’s Initial Brief [pp. 16-19], however, CIWC has spoken with both Associations about the problem of past due accounts. To date, the Associations have not been willing to take on this burden. [*Id.*]

Mr. Colton also recommended that the Company use automatic payments (e-commerce technology) to collect bill payments. [CUB Ex. 1.0, pp. 11-12.] Mr. Seehawer stated that CIWC is well aware of EFT systems and already allows customers to pay by automatic payment. It has not helped the situation. [CIWC Ex. 1.0R (Revised), p. 15.] Even Mr. Colton conceded that the Company cannot force customers to use this mechanism to pay their bills. [CUB Ex. 1.0, p. 12.]

Finally, both Staff and CUB continue to insist that the Company work with the Associations of Woodhaven and Candlewick to address debt collection (Staff Initial Br., pp. 3-5; CUB Initial Br., p. 12), and thus continue to ignore the fact that CIWC has worked and will continue to work with the Associations to do just that. CIWC has kept the Community Advisory Panels and Associations informed about the problem of past due accounts in Woodhaven and

Candlewick, and the lack of success in collection efforts and has attempted to gain the cooperation of the Associations. 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 Initial Br., pp. 16-18.] Staff continues to bring up the provision in the Candlewick Declarations that provides that the voting rights and the right of any member to use the facilities may be suspended. [Staff Initial Br., pp. 3-4.] It is not a matter of the Company “availing itself” of the provision as Staff asserts. As Mr. Seehawer explained, CIWC cannot use this provision without the cooperation of the Candlewick Association. Only the Association can enforce this provision and it has never done so. [CIWC Initial Br., p. 18.] Moreover, enforcement of the provision would not be effective since the majority of the “availability” customers in Candlewick own vacant lots and are unlikely to actually vote or use the Association facilities. [*Id.*]

The reality of the situation is that standard collection procedures simply do not work in Woodhaven and Candlewick. That is why the Company has decided to initiate the Foreclosure Program. [CIWC Ex. 1.0R (Revised), p. 15.] The Foreclosure Program will not be CIWC’s only collection mechanism or even its most utilized method. As appropriate, the Company will continue to work with the Associations and with realtors, the Company will continue to use collection agencies and will seek personal judgments. As stated in the Initial Brief, all of these mechanisms will be part of an integrated collection effort. [CIWC Initial Br., p. 19.] To ensure that the Foreclosure Program is an effective part of that collection effort, enabling the Company to recover the amounts that are owed (and to prevent the burden of these costs from being placed on all customers), CIWC is requesting that the Commission allow it the opportunity to recover its

Enforcement Costs from those customers who, by failing to pay their bills, cause those Enforcement Costs to be incurred. [CIWC Ex. 1.0R (Revised), p. 15.]

**B. It is Appropriate to Approve the Rider for Recovery of Enforcement Costs**

**1. No ratemaking issues are raised by CIWC's proposal**

Despite Staff and CUB's protestations to the contrary, CIWC's proposal to recover Enforcement Costs directly from the customers who cause those costs to be incurred does not raise any base ratemaking concerns. Staff and CUB assert that the types of expenses proposed to be collected are already being collected. [Staff Initial Br., p. 9; CUB Initial Br., p. 6.] CIWC, however, has demonstrated that the amounts of contractual service costs reflected in the existing rates for Candlewick water/sewer and Woodhaven water/sewer are minor and do not reflect the costs associated with the Foreclosure Program. [CIWC Initial Br., pp. 29-31.] Neither Staff nor CUB have presented any evidence to refute CIWC's evidence in this regard. CIWC also explained that, contrary to Staff's continued assertions (Staff Initial Br., p. 10), there will not be a significant reduction in bad debt expense as a result of the collection of Accounts Receivable (since those amounts have not been written off or expensed for ratemaking or other purposes). [CIWC Initial Br., p. 31.]

**2. The Rider should be implemented pursuant to Section 9-220.2 of the Public Utilities Act**

Staff and CUB argue that the Company should not establish the Rider under Section 9-220.2 of the Public Utilities Act (220 ILCS 5/9-220.2), in part because the costs associated with the Foreclosure Program are predictable. [Staff Initial Br., p. 10; CUB Initial Br., p. 9.] Section 9-220.2 expressly 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." CIWC explained that it cannot control the number of foreclosures pursued in a given year, except in the most general sense.

Because determinations of whether to foreclose will be made on a case-by-case basis taking into accounts various factors, it is impossible to predict how many lots will be subject to the Program in any given year. [CIWC Initial Br., pp. 20-21.] The number of lots will fluctuate, the Enforcement Costs involved in pursuing foreclosures against those lots will differ, and the amounts of Enforcement Costs that the Company will actually recover (as this is dependent on the ruling of the court) will vary. [*Id.*]

Staff and CUB point to the \$1200 recovery cap as proof that the costs are controllable. [Staff Initial Br., p. 10; CUB Initial Br., p. 9.] The \$1200 recovery limit is a self-imposed cap that CIWC proposed as an additional method of ensuring that Enforcement Costs recovered under the Rider remain reasonable. Mr. Seehawer explained that CIWC developed the \$1200 cap based on quotes regarding what a “typical” foreclosure entails, which were received from local attorneys who have been involved in foreclosure proceedings. [CIWC Ex. 1.0R (Revised), p. 17.] Using this information, CIWC determined that a “typical” foreclosure would result in Enforcement Costs averaging \$2,651.00. The Company then compared this data to the projected costs under the Foreclosure Program, which is estimated at \$530 on average for each account if the process continues through to actually selling the property. To allow for extreme cases, CIWC developed a maximum cap of \$1200. [*Id.*] The recovery cap does not make total costs predictable. Enforcement Costs may still vary anywhere from below the average of \$530 up to the self-imposed limit of \$1200, and the annual number of foreclosures is not known. Also, the amount of recovery for a given foreclosure is dependent on the court’s final judgment. Earlier in this proceeding, Staff agreed that some form of recovery cap should be put in place. [Joint Ex. 1.0, Johnson Response to CIWC DR #10.]

Moreover, the proposal is not, as CUB argues (Initial Br., p. 4), analogous to single-issue ratemaking. As Mr. Seehawer stated, the purpose of the Rider is to provide the Company with the opportunity to seek recovery of Enforcement Costs from the defaulting customers, those who, by non-payment of their water and/or sewer bills, cause the costs to be incurred. Because the base rates of the Company will not be impacted by this charge, it is not single issue ratemaking. [Joint Ex. 1.0, CIWC Response to WRJ 1.09.] The Illinois Supreme Court recognized that the rule against single-issue rulemaking applies only to costs recovered through base rates. In *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111, 137-38 (1995) (citing *Business and Prof'l People for the Pub. Interest v. Illinois Commerce Comm'n*, 146 Ill. 2d 175, 244 (1991) (“BPI II”)), for example, the Court stated that the rule against “single issue ratemaking” requires that “in a general base rate proceeding, the Commission must examine all elements of the revenue requirement formula to determine the interaction and overall impact any change will have on the utility’s revenue requirement, including its return on investment.” The Court held that the rule against single issue ratemaking as enunciated in *BPI II*, applies in the context of a proposed change in base rates and, therefore, “does not circumscribe the Commission’s ability to approve the direct recovery of unique costs through a rider when circumstances warrant such treatment.” [*Id.* at 138.] In particular, the Court held that the rule against single issue ratemaking does not preclude the Commission from approving a rider which “merely facilitates direct recovery of a particular cost, without direct impact on the utility’s rate of return.” [*Id.*]

Similarly, in *Archer-Daniels-Midland Co., et. al., v. Illinois Commerce Commission*, 84 Ill. 2d 391 (1998), the Illinois Supreme Court affirmed a Commission Order that allowed an electric utility to recover contract restructuring costs through its fuel adjustment clause. In doing

so, the Court again emphasized that the rule against single-issue ratemaking “does not apply ‘except in the context of a complete base rate proceeding.’” [*Id.* at 402 (citing *Citizens Util. Bd.*)] The Court held that because “it is undisputed that the proceeding before the Commission was not a complete base rate proceeding, [the] rule against single-issue ratemaking has no application in the present case.” [*Id.*]

The rule against single-issue ratemaking does not preclude the Commission from approving riders, such as the Rider proposed here, which provide for recovery of specific costs from the customers causing the costs to be incurred. [Joint Ex. 1.0, CIWC Response to WRJ 1.09.] Under CIWC’s proposal, no adjustment to the Company’s base rates is necessary. The addition of the charge to the bills of Defaulting Owners will merely facilitate the potential dollar-for-dollar recovery of Enforcement Costs (to the extent authorized by the court). Therefore, the addition of the charge does not violate the rule against single-issue ratemaking. [*Id.*]

**3. The Rider is sufficient to constitute an agreement allowing the Company to potentially recover Enforcement Costs**

In arguing that the Rider does not constitute an agreement, CUB makes several erroneous statements and raises a new argument. CUB states that “Consumers’ ECRS Rider states ‘under the ECRA, CIWC and its customers . . . agree that the Company may recover from defaulting owners Enforcement Costs . . .’” [CUB Initial Br., p. 14.] This language, however, does not appear in the Rider (although it was included in tariff language initially suggested by CIWC, but later revised based on comments of the parties). [See CIWC Ex. 1.0SR, pp. 16-17; Attachment A.] CUB also states that “the only contractual agreement is between the owners and their respective property associations.” [CUB Initial Br., p. 14.] This also is incorrect. CIWC demonstrated that an agreement does exist between CIWC and its customers. [CIWC Initial Br., p. 24.] The proposed Rider will become a part of CIWC’s tariffs. Tariffs constitute a binding

contract between the utility and its customers. [*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); CIWC Initial Br., p. 24.] Furthermore, customers must sign an application if they wish to receive water and/or sewer service. The application states that the customer agrees that the Company may file a lien on the lot of a delinquent customer. The application also 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, and as noted above, the Rider, if approved, will be one of CIWC’s tariffs. [CIWC Initial Br., p. 24.] Mr. Colton may believe that there is not enough for a court to conclude that the Rider is sufficient to constitute a required written agreement for purposes of the IMFA. CIWC, however, believes that this is a question for the court, not Mr. Colton, to decide. If the court determines there is no agreement, CIWC will not be authorized by the court to collect Enforcement Costs.

CUB then suggests that CIWC does not have a right to foreclose on properties. This argument was not raised previously during this proceeding. CUB states that CIWC’s proposal is premised on its “purported entitlement,” [CUB Initial Br., p. 10], to foreclosures on the property of delinquent account holders. [CUB Initial Br., pp. 12-13.] According to CUB, while CIWC “claims that this right is derived from the communities’ respective Declarations of Covenants, Conditions and Restrictions,” . . . “there is no evidence that the individual property owners assented to debt recovery in this fashion.” [*Id.*]

This argument is completely groundless. The Declaration for Woodhaven Lakes expressly provides that the charges for service set forth in the tariffs and Rules and Regulations shall become a lien on each property as of the date the charges become due and payable. Also, the tariffs for Woodhaven authorize CIWC to file a lien against the property of anyone who is delinquent in the payment of water or sewer bills. ILL. C.C. No.47, Section No. 5, First Revised sheet No. 5 (water); ILL.C.C. No. 48, Section No. 4, Original Sheet No. 4 (sewer). [CIWC Ex. 1.0, p. 8.] The tariffs for Candlewick also authorize CIWC to file a lien against property in the development that is owned by any party who is delinquent in the payment of water or sewer bills. ILL.C.C. No.47, Section No. 6, Original Sheet No. 5 (water); ILL.C.C. No. 48, Section 48, Section No. 5, Original Sheet No. 4 (sewer). The Declaration for Candlewick refers to CIWC's right to collect availability charges for services and/or file a lien against property for non-payment as well. [*Id.*] As noted above, the customer also signs a service agreement that states the customer agrees that: (1) the Company may file a lien on the property for delinquent payment and (2) the provisions of the Company's tariffs apply to the customer. [CIWC Initial Br., p. 24.] The way that a lien is enforced is through foreclosure, the process of which is controlled by the IMFA. [See 735 ILCS 5/15-1504.] CIWC can avail itself of the procedures established by the IMFA as can any other corporate entity. Under the IMFA, foreclosure is an authorized form of debt recovery.

**C. The Enforcement Costs to be Collected by CIWC are Subject to Adequate Levels of Review**

In its Initial Brief, CUB asserts that, under CIWC's proposal, there is no review of the costs sought to be recovered and that such cost recovery is subject to abuse by the Company. [CUB Initial Br., pp. 4-8.] Staff, in turn, questions the role of the Commission in the reconciliation process. [Staff Initial Br., pp. 11-12.] Under CIWC's proposal, however,

Enforcement Costs would be subject to review by both the court and the Commission, and CUB has no basis to contend that CIWC would somehow abuse the rights to seek recovery of Enforcement Costs.

1. **Enforcement Cost Recovery is subject to review by both the court and the Commission**

a. **Review by the Court**

CUB makes the inexplicable assertion that CIWC's proposal would eliminate least-cost and just and reasonable review, and not provide for Commission oversight. [CUB Initial Br., pp. 4-5, 7.] What CUB ignores is that CIWC is not guaranteed "automatic" recovery of Enforcement Costs. Under the IMFA, the court presiding over a foreclosure would review the request for Enforcement Cost recovery. As Mr. Seehawer explained, foreclosure is an equitable action in which the mortgaged property is sold at a public sale, and the proceeds of such sale are applied first to secured debtors, with any remainder paid to the debtor. [CIWC Ex. 1.0R (Revised), p. 7.] Under the IMFA, creditors in foreclosure actions are entitled to *reasonable* attorney's fees from the proceeds of the judicial sale. Because a foreclosure is a proceeding in equity, the court examines such factors as whether the Enforcement Costs are reasonably and prudently incurred, and makes a decision based on fairness after considering the situation of all of the parties. [*Id.*]

CUB argues, for example, that it is unclear whether the legal costs would be paid in-house or externally and that "there is a substantial question as to whether out-sourcing the enforcement responsibilities is more cost-effective than performing such tasks in-house" and indicates that only the Commission can make such a determination. [CUB Initial Br., pp. 5-6.] However, Mr. Seehawer explained that CIWC utilizes outside counsel when it is cost-effective to do so and that this often occurs where the level of legal work fluctuates or where the work

requires special skills. CIWC stated that to properly perform the activities required under the foreclosure process, it will be necessary for the Company to retain the services of an outside attorney. [CIWC Ex. 1.0SR, p. 7.] The court overseeing a foreclosure, in turn, would review the components of the requested Enforcement Costs and determine whether they are reasonable. The court looks at a number of factors in determining whether to award fees and costs and how much to award such as: (1) whether the work was necessary; (2) the skill and standing of the attorney; (3) the nature of the case; (4) the novelty of the issues involved; (5) the degree of responsibility required; (6) the customary costs for comparable services; (7) the reasonable connection between the costs sought and the dollar amount involved in the case; (8) whether any of the requested costs are redundant; and (9) whether the costs are properly documented. [Joint Ex. 1.0, CIWC Response to CUB DR 1.17; *J.B. Esker & Sons, Inc. v. CLE-PA's P'ship*, 325 Ill. App. 3d 276, 283 (1<sup>st</sup> Dist. 2001)]. There is no reason why the court cannot determine whether the Enforcement Costs were appropriately incurred (and neither Staff nor CUB have provided such a reason). Indeed, given that the court has jurisdiction over and experience in handling foreclosure actions, the court is the proper arbiter of whether the requested Enforcement Costs are typical and reasonable.

CUB also suggests that the Company has failed to consider a number of “critical enforcement cost components” and does not take into account costs such as insurance, marketing, property taxes, and association fees needed to effectuate the foreclosure. [CUB Initial Br., p. 6.] These arguments should be rejected for two reasons. First, Mr. Seehawer explained that the Company is not responsible for paying property insurance, taxes, or association fees because it will not take possession of properties prior to foreclosure sales. [CIWC Ex. 1.0R (Revised), p. 28.] Mr. Seehawer also observed that CIWC may elect to avoid

taking title to any of the lots under the Foreclosure Program by establishing a contractual arrangement under which a third party would take title to and assume the related costs of the lots sold at judicial sales in return for a payment to CIWC. [*Id.* at 27.] CUB witness Colton subsequently acknowledged that “Mr. Seehawer is correct in his observation [that CIWC will not be taking possession of a property prior to a foreclosure sale] and I withdraw my comments regarding the costs associated with taking title to the property.” [CUB Ex. 2.0, p. 17.] CUB cannot now attempt to resurrect an argument that it previously conceded. Second, even if the issues CUB raises were relevant, CIWC has not requested that the costs referenced by Mr. Colton (property insurance, taxes or association fees) be subject to recovery either as Enforcement Costs or in base rates. [CIWC Ex. 1.0R (Revised), p. 29.]

**b. Review by the Commission**

In addition to review by the court, under the reconciliation provision in the Rider, the Commission would also have the opportunity to review the prudence of Enforcement Costs that CIWC recovers through the utility bill. CUB asserts that the Rider “does not provide for Commission review of the charges (Enforcement Costs plus delinquencies) to be billed to customers.” [CUB Initial Br., p. 7.] This statement is incorrect. First, the Rider clearly does contain a provision for an annual reconciliation, and CIWC detailed how the annual reconciliation process would work in its Initial Brief and in the record of this proceeding. [CIWC Initial Br., pp. 25-28; CIWC Ex. 1.0SR, Attach. A; CIWC Ex. 1.0SR Supp., Answer to Question #4; CIWC Ex. 1.0SR Supp., CIWC Reply to Staff and CUB’s Rebuttal of CIWC’s Answer to Question #4.] By including Enforcement Costs on the bill, the Company and the customer have the option of settling this amount without having to go through foreclosure sale. If the customer is billed for Enforcement Costs allowed by the court, it would be pursuant to an

agreement, such as a deferred payment plan, between the customer and the Company that would be worked out before the reconciliation. [CIWC Initial Br., pp. 26-27.]

At the reconciliation proceeding, the Commission would have the power to adjust upward or downward based on whether the Company has over or under-recovered its court awarded Enforcement Costs. The Commission would also have the power to conduct a prudency review, (*Id.*), which could include, *inter alia*, a review of the cost- effectiveness of outside counsel as compared to in-house services. [CIWC Reply to Staff and CUB's Rebuttal of CIWC's Answer to Question #4.] While CIWC believes that the Commission should give a high degree of deference to the equity court's finding with respect to the reasonableness of the allowed Enforcement Costs, placing these costs on the bill does give the Commission jurisdiction to determine whether the amount of Enforcement Costs reflected on the bill was prudently incurred. This determination of the Commission would be reviewable by an appellate court on administrative review. [CIWC Initial Br., pp. 27-28.]

CUB suggests that the Commission should review the delinquent amount owed by customers (and not just the billed Enforcement Costs) at the annual reconciliation. The ECRS, however, only relates to the recovery of Enforcement Costs. The delinquent balance of water/sewer bills, however, is the result of the customer's failure to pay the Commission approved rates and charges of water/sewer service. As Mr. Seehawer noted, in addition to the regular bill, customers also receive late payment notices that indicate how much the customer owes. [CIWC Ex. 1.0R (Revised), pp. 15-16.] If there is an error on the part of CIWC in computing how much a customer owes, the customer would utilize the bill dispute and informal/formal complaint procedures established by the Commission. [*See* 83 Ill. Adm. code 280.160-280.170.]

Staff notes that there is no provision in the Rider that requires the Company to issue a refund check in instances of over-recovery. [Staff Initial Br., pp. 11-12.] CUB, in turn, asserts that the Rider does not identify how costs will be reconciled. [CUB Initial Br., p. 8.] CIWC, however, fully explained the reconciliation process in the evidentiary record (CIWC 1.0SR SUPP, Answer to Question #4; Reply to Staff and CUB's Rebuttal of CIWC's Answer to Question #4), and has no objection to the inclusion of additional detail regarding the process in the Rider if such detail is deemed necessary. The remaining arguments of Staff and CUB regarding the Commission's ability to review enforcement costs were fully addressed in the Company's Initial Brief. [pp. 24-28.]

**2. There is no evidence to show that the proposal is subject to abuse**

CUB asserts that the Company's proposal has "great potential for abuse" and that "clearly the Company holds open the possibility of collecting on a bill that is smaller than the enforcement costs." According to CUB, CIWC would thus gain a "financial windfall" by recovering Enforcement Costs on small delinquencies. [CUB Initial Br., p. 7.] CUB bases this assertion on the fact that a delinquent account in Woodhaven would not have arrears exceeding \$530 (the typical enforcement cost) until it is 22 months past due. [*Id.*] CUB, however, ignores the fact that the amount of \$530 is an estimate for what a *typical* enforcement cost will be. It is an average. Mr. Seehawer explained that Enforcement Costs will vary on a case-by-case basis and it is possible that the costs will be less than \$500. [CIWC Ex. 1.0SR, p. 12.] An account must be *at least* one year in arrears before CIWC would initiate foreclosure proceedings. The Company does not plan to automatically foreclose on every account that reaches the one-year mark. Indeed, numerous factors will weigh in the determination of whether to pursue a foreclosure against the property of a delinquent owner. An attempt to collect Enforcement Costs

where the bill is smaller than those costs would not be cost-effective for the Company. Furthermore, it would be highly unlikely that the court would allow the Company to recover Enforcement Costs under these circumstances. [*Id.*] As a court of equity, it is the principles of fairness and reasonableness that guide the decision of the court in a foreclosure proceeding. The only person, however, that has suggested that the Company “hold open the possibility of collecting on a bill that is smaller than the Enforcement Costs” as a matter of course is Staff witness Johnson. [Joint Ex. 1.0, Johnson Response to CIWC DR #7.] Moreover, recovery of Enforcement Costs could never result in a “windfall” because CIWC will have incurred the costs and, under the IMFA, cannot recover more than it actually spent.

CUB also argues that the collection of late fees is a “profit generator,” rather than a justifiable offset to collection costs and asserts that this casts doubts on the “true objective” of CIWC’s proposal. As an example of how late fees “exceed the costs created by the original delinquency,” Mr. Colton states that the late fees accrued in Candlewick on a 60-day delinquent account are \$67, while the original collection cost is only \$13. [CUB Initial Br., p. 11.] Mr. Colton misunderstands the late payment provision. In Illinois, late payment fees are set by rule and are intended to cover the cost to the utility customers paying late. Section 280.90 of the Commission’s rules (83 Ill. Adm. Code 280.90(d)) clearly states that a utility may set a late charge “at an amount equal to one and one half percent (1-½%) per month on any amount, including amounts past due, for utility service.” [CIWC Ex. 1.0SR, p. 4.] Mr. Colton also disregards the most significant costs associated with late payment, the “cost of money” or interest expense. Nor does Mr. Colton consider the fact that postage, labor, telephone calls, and various other activities are all a part of the collection process and thus seriously understates collection costs. The late fees do not exceed the costs created by the delinquency. [*Id.* at 4-5.]

Moreover, late fees have no connection to Enforcement Costs. As previously stated, late fees cover the cost of late payment. Also, the revenue generated by late payment fees is a component of operating revenue, which is reflected in base rates. Late payment fees serve to reduce the level of revenue that the base rates must provide to meet the rate case revenue requirement. [CIWC Ex. 1.0SR, p. 5.] Enforcement Costs, in contrast, are the amounts that CIWC must expend to file and enforce liens. Under CIWC's proposal, Enforcement Costs will not be recovered in base rates, but only from delinquent customers under the Rider. [*Id.*]

CIWC's proposal is that the Company be given the opportunity to seek recovery of Enforcement Costs from the delinquent customers who cause those costs to be incurred. The IMFA provides for the recovery of attorney's fees and costs. The Rider is a cost-recovery mechanism by which the Company has the opportunity to seek recovery of Enforcement Costs in foreclosure proceedings. Staff recognized that Enforcement Costs, if prudently incurred, are recoverable in rates. [Joint Ex. 1.0, Johnson Response to CIWC DR #13.] If the proposal to allow an opportunity for recovery of Enforcement Costs from the responsible customers is rejected, CIWC may have no choice but to propose that Enforcement Costs be reflected in the rates of all customers in a future rate case. [CIWC Ex. 1.0SR, pp. 3-4.] CIWC, however, believes that the more equitable and reasonable solution is to recover Enforcement Costs from the customers causing foreclosure, thereby not burdening those customers who do pay their bills, and also encouraging payment on a broad scale.

### III. CONCLUSION

For the reasons discussed here and in the Initial Brief of CIWC, the Commission should approve the Enforcement Cost Recovery Surcharge Rider proposed by CIWC in this proceeding that will give the Company the opportunity to seek recovery of Enforcement Costs incurred in sustaining and enforcing a lien against the property of customers with accounts overdue by one year or more.

Respectfully submitted  
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