

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

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

**BRIEF ON EXCEPTIONS OF CONSUMERS ILLINOIS WATER COMPANY**

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## APPENDIX A

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**BRIEF ON EXCEPTIONS OF CONSUMERS ILLINOIS WATER COMPANY**

**I. INTRODUCTION**

This is the Brief on Exceptions of Consumers Illinois Water Company ("CIWC" or the "Company") in response to the Administrative Law Judge's Proposed Order ("ALJPO") issued on January 3, 2003. The ALJPO determines that the record does not support a finding that the Enforcement Cost Recovery Surcharge Rider (the "Rider") that is before the Commission in this case is in the public interest or "necessary to the prevention and collection of arrearages among availability customers in Woodhaven and Candlewick." (ALJPO, p. 20.) For the reasons discussed below, CIWC takes exception to the entire Section III, "Analysis and Conclusions," and Section IV, "Findings and Ordering Paragraphs" of the ALJPO. Replacement language for Sections III and IV of the ALJPO is set forth in Section I of Appendix A to this Brief. A proposed change that corrects two minor errors is set forth in Section II of Appendix A.

**II. SUMMARY OF CIWC'S PROPOSAL**

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.]<sup>1</sup> The ECRS will serve as the agreement. In this way, CIWC will be able to implement an effective program ("Foreclosure Program" or the "Program") under which the activities normally associated with foreclosures will be standardized, thereby reducing the cost for each foreclosure (although the costs may still be substantial overall simply due to the number of delinquent accounts.) The ability to recover Enforcement Costs under the ECRS will allow CIWC to effectively and efficiently prosecute multiple foreclosures and recover the resulting Enforcement Costs directly from the customers who cause those costs to be incurred in the first place. The ECRS only gives CIWC the potential to recover 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 under the IMFA 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, the Rider would permit the recovery of allowed Enforcement Costs, and any allowed post-judgment interest, on the customer's utility bill. Enforcement Costs would be recovered under the ECRS, and not in base rates. [CIWC Ex. 1.0SR, p. 2.] CIWC proposes 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

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<sup>1</sup> Enforcement Costs include costs incurred 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) attorneys' fees, (10) filing fees, (11) court costs, and/or (12) related administrative costs, incurred or expended by the Company to sustain and enforce a lien and its priority, to protect the Company's rights in the lien, and in recovering any of the amounts secured by the lien.

provides a mechanism to avoid 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. Decisions regarding foreclosure 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. 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 all lots in both Woodhaven and Candlewick, each lot owner agrees to pay the availability charges for water and sewer service.<sup>2</sup> The availability of service is convenient for the owners of the lots, and

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<sup>2</sup> 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

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 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 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, 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

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(continued...)

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).

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. 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.] As discussed above, 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.*]

Because the recovery of Enforcement Costs in any proceeding will depend on a finding by the equity court that the Enforcement Costs are appropriately included in the ultimate recovery authorized by the court, the Commission's approval of the Rider would not guarantee CIWC's recovery of Enforcement Costs. Recovery must be authorized by the court presiding over the foreclosure proceeding under the IMFA, which must first find that there is an agreement

between CIWC and the customer establishing CIWC's right to seek recovery of the Enforcement Costs and that CIWC's recovery of those costs from the customer is appropriate. Even after the equity court has permitted the recovery of Enforcement Costs from the delinquent customer, when CIWC seeks to recover Enforcement Costs on the utility bill, there would be an annual reconciliation proceeding in which the Commission may review the level of Enforcement Costs collected by the Company on utility bills and determine whether adjustments are necessary.

#### **IV. ARGUMENT**

##### **A. The ALJPO Mistakenly Concludes that the Rider is Not in the Public Interest**

Despite acknowledging that it is reasonable to recover costs from the cost-causers when a minority of customers generates "a grossly disproportionate indebtedness," the ALJPO concludes that "there are characteristics and probable consequences of the Rider proposed here that are likely to reduce public benefit." (ALJPO, p. 8.) That conclusion is based on incorrect assumptions regarding the effect of the Rider.

The ALJPO mistakenly suggests, several times, that approval of the Rider would "facilitate" foreclosures by "eliminating or reducing" foreclosure costs. (ALJPO, pp. 7, 9, 10, 17.) The Rider, however, does not eliminate or reduce foreclosure costs any more than a utility's ability to reflect other operating costs in rates can be said to "eliminate" or "reduce" costs. Illinois law requires that utilities be allowed an opportunity to recover prudently incurred operating costs in rates, and this opportunity does not eliminate or reduce the costs involved. If the Rider is approved, the costs of bringing foreclosure actions would still be incurred by the Company. As explained above, the Rider (i) gives the Company the opportunity to recover those costs from the cost-causer; and (ii) allows cost recovery through the customer's utility bill,

provided that the equity court approves such recovery and that the Company and the customer agree on a payment plan for recovery of Enforcement Costs through the bill.

The Rider does not create any collection tools. As explained above, 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), and ILL. C.C. No. 48, Section No. 1, Original Sheet No. 12 (sewer), to file a lien against the properties of defaulting owners and to foreclose on those properties to collect the amounts due. [CIWC, Ex. 1.0, p. 8.]<sup>3</sup> Nor does the Rider permit recovery of costs that the Company is not now permitted to recover. By law, the Company is entitled to have an opportunity to recover its prudently incurred operating costs. Citizens Utility Board v. Commerce Comm., 166 Ill.2d 111, 121 (1995); Illinois Bell Telephone Co. v. Commerce Comm., 414 Ill. 275, 286 (1953). The only issue is the proper mechanism for doing so. The purpose of the Rider is to permit CIWC, when authorized by the equity court, to recover Enforcement Costs from the specific customer who causes those costs to be incurred. In this regard, the Rider differs from other rates primarily in that it provides for cost recovery directly from the cost-causer and, as required by law (220 ILCS 5/9-220.2), provides for a reconciliation and prudence review.

The ALJPO concludes that the public interest would not be served by approval of the Rider because it would give CIWC "both the ability and the incentive to foreclose to recover amounts smaller than the cost of lien enforcement." (ALJPO, pp. 8-9.) That conclusion ignores the fact that to recover its Enforcement Costs, CIWC would be required by the IMFA to demonstrate to the equity court in each case that Enforcement Cost recovery is appropriate. The court's determination of whether the recovery of Enforcement Costs should be allowed will

depend on the facts of each individual case. The point is that, under the Rider, the Company would make the initial determination, on a case-by-case basis, following review of the delinquent accounts and other circumstances, whether to initiate foreclosure action in court. [CIWC Ex. 1.0SR, pp. 2-3].<sup>4</sup> The equity court, also on a case-by-case basis, would decide in accordance with the IMFA whether the Company's decision to foreclose, and its costs of doing so, were reasonable and equitable. The ALJPO's concern about providing an incentive for the imprudent use of foreclosure actions is, therefore, misplaced.

The ALJPO also suggests, without reference to the record, that the rationale for asking for authority to put enforcement costs on customer bills is that "when customers learn that CIWC no longer bears the burden of enforcement costs, they will pay their bills to avoid the increased likelihood of foreclosure, as well as foreclosure costs, or, if they do not pay, CIWC will in fact foreclose and recover arrearages." (ALJPO pp. 26-27.) It goes on to find that this "rationale" will be undermined by putting the Enforcement Costs on customer bills because it "merely adds debt to an already long-delinquent account, without acquiring any new leverage." The ALJPO's finding, however, is based on a mistaken assumption regarding the purpose of the Rider.

Even when a foreclosure judgment has been entered by the court, the sale of the property is not automatic. CIWC would have to petition for a judicial sale of the lot. For a period of time before the sale takes place, the lot owner has the opportunity to pay off the amount secured by

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(continued...)

<sup>3</sup> The ALJPO (p. 6, n. 12) suggests that "[t]he relationship between the Declarations and Section 15-1301 [of the IMFA] was not addressed by the parties here." The parties, however, should not be faulted for failing to address that issue, as it was never raised during the proceeding.

<sup>4</sup> The Company proposes to pursue foreclosure against a particular lot only when the account associated with that property is at least one year in arrears. [CIWC Ex. 1.0R (Revised), p. 6.] If the Commission is concerned about situations in which the Enforcement Costs are greater than the delinquency, CIWC would agree that rather than limit the situations in which foreclosure would be used to those where the account is more than one year in arrears, the test would be whether the account balance is more or less than the Enforcement Costs. CIWC would agree not to pursue foreclosure where the unpaid account balance is less than the estimated amount of Enforcement Costs.

the lien. The purpose for inclusion of Enforcement Costs on the utility bill is not to establish a threat to customers that they will have additional amounts to pay. As explained above, the purpose of this language of the Rider is to permit CIWC to collect unpaid charges for utility service and Enforcement Costs without actually having to sell the property. As the record makes clear, the Enforcement Costs would be reflected on the utility bill only with the agreement of the customer to a payment plan and approval of the equity court. [CIWC Ex. 1.0SR, p.16.]

A concern of the ALJPO is that the Rider would "facilitat[e] real property divestiture." (ALJPO, p. 17.) The ALJPO's analysis, however, loses sight of the circumstances in which the Rider would be used. As discussed above, rather than "facilitating real property divestiture," the Rider would permit the Company and the customer to agree on a payment arrangement that would avoid the sale of the customer's property. The Rider would permit CIWC to include on the customer's bill the amount of the Enforcement Cost recovery allowed by a court. This would give the customer and the Company a payment option that would avoid a foreclosure sale of the customer's property. [CIWC Ex. 1.0SR, p. 16.] Enforcement Costs would be reflected on the customer's bill only if the Company and the customer have worked out a settlement of the amounts secured by the Company's lien, and only with the approval of the court.

CIWC will make customers aware of the Foreclosure Program, and this could, as the ALJPO (p. 13) suggests, provide an incentive to some customers to pay their arrearages. [CIWC Ex. 1.0SR SUPP, Response to ALJ Question #3.] As explained above, however, the primary purpose of CIWC's request for authority to collect Enforcement Cost through utility bills was not to provide such an incentive. Thus, contrary to the statement on page 14 of the ALJPO, the question raised by CIWC's proposal is not "whether the deterrent effect of foreclosure would be materially enhanced if customers understood that they would be liable for foreclosure costs in

addition to their arrearages." The question is whether it is reasonable for CIWC to seek recovery of Enforcement Costs from the delinquent customer who has caused those costs to be incurred. Well-accepted cost recovery principles dictate that the answer to that question should be "yes." The ALJPO concedes that "when a minority of customers generate a grossly disproportionate indebtedness, it is in the interest of customers generally to consider specifically targeted recovery strategies." (ALJPO, p. 8.) That principle should dictate the result here.

**B. The ALJPO's Analysis of the Alternative Collection Methods Does Not Support Rejection of the Rider**

Much of the ALJPO consists of a discussion of CIWC's past use of various collection measures and whether CIWC has availed itself of all opportunities to collect the amounts owed by the availability customers in Woodhaven and Candlewick. CIWC's proposal in this case, however, is not to recover Enforcement Costs or uncollectible cost in base rates. As the record makes clear, CIWC's proposal is only to implement the Rider, so that foreclosure will become one of the collection options reasonably available to CIWC in light of the lack of effectiveness experienced with other methods. [CIWC Exs. 1.0R (Revised), pp. 9-16, 1.0SR, pp. 19-23.]

The ALJPO expresses concern that the Rider will cause foreclosures to increase and "traditional, less drastic utility collection mechanisms [to] be under-utilized." (ALJPO, p. 9.) As the record makes clear, however, CIWC has no intention of giving up on "traditional" collection mechanisms. [CIWC Ex. 1.0SR, p. 20.] The record shows, however, that the traditional collection methods employed by CIWC have not been enough in Woodhaven and Candlewick. [CIWC Exs. 1.0R (Revised), pp. 9-16; 1.0SR, pp. 19-23.]

The Company presented considerable evidence regarding the collection methods that it has used, and why those collection methods have not been successful. [See Jt. Ex. 1.0, CIWC response to CUB Data Request 1.23; CIWC Exs. 1.0R (Revised), pp. 9-16; 1.0SR, pp. 19-23.] It

explained why filing liens in the absence of foreclosure is an ineffective and costly method of collecting past due bill. [CIWC Exs. 1.OR (Revised) pp. 9-10; 1.0SR; p. 20; 1.ORSUPP, Answer to Question #1.] It explained why relying on the Woodhaven Lake and Candlewick Lake Associations is not a viable option. [CIWC Ex. 1.OR (Revised), pp. 14-15; 1.0SR, p. 19; 1.ORSUPP, CIWC Reply to Staff/CUB Rebuttal to Question #3.] And it explained why pursuing only a small number of foreclosure actions, which is what the Company would be left with in the absence of the Rider and the Foreclosure Program, is not effective. [CIWC Ex. 1.0R (Revised), p. 12; Ex. 1.0SR SUPP. Reply to Staff and CUB's rebuttal of CIWC Answer to Question #2.] The record clearly shows that standard collection procedures have been employed without success in Woodhaven and Candlewick. [CIWC 1.0R (Revised), pp. 15-16.]

The ALJPO examined the cost/benefit analysis provided by the Company in support of its conclusion that filing liens in the absence of foreclosure is ineffective. The cost/benefit analysis shows that the present value of the expenditures for the filing of liens over the next five years would be approximately \$125,803, while the present value of the potential recovery would be approximately \$74,103. [CIWC Ex. 1.0SRSUPP, Answer to Question #1.] The ALJPO indicates that the calculations are "seriously flawed in several respects." (ALJPO, p. 12.) The ALJPO's criticisms, however, are not well-founded. For example, the ALJPO suggests that had the Company been filing liens during the past four years, some number of the delinquencies would have been satisfied by property sales. But that suggestion ignores the fact CIWC would have incurred costs in connection with the filing of those liens, which would also have to be factored into the analysis. And the ALJPO's criticism that the analysis did not presume any reduced costs resulting from standardization ignores the fact that standardization in the absence of the Rider is not possible. (*See* Section "C" below.)

Approval of the Rider will not provide an incentive for CIWC to pursue foreclosure in every instance. As CIWC has explained, foreclosure is just one of the tools that CIWC can and will use to recover amounts due. The Company will pursue foreclosure after it has examined the delinquencies on a case-by-case basis, and determined that foreclosure should be sought in a particular case. [CIWC Ex. 1.OSR, pp. 2-3.] The Rider, by permitting the recovery of Enforcement Costs from the cost-causer when found by the court to be reasonable and appropriate, merely makes foreclosure reasonably available as an option to collect past due amounts. Furthermore, the proposed recovery of Enforcement Cost on the utility bill provides an additional option which could render foreclosure unnecessary but still provide for recovery of both the balance past due and Enforcement Cost incurred in collecting overdue bills.

**C. The ALJPO Mistakenly Determines that Standardization Can Be Implemented Even in the Absence of the Rider**

The ALJPO suggests that foreclosure would be more viable, even without the Rider, if CIWC institutes the standardization that it described in this proceeding. The ALJPO goes so far as to suggest that it would be "imprudent to act without implementing measures that would achieve the dramatic cost reductions . . . that standardization would purportedly achieve." (ALJPO, p. 7.) The ALJPO, however, misapprehends the reason for cost reductions under the Foreclosure Program. The ability to recover Enforcement Costs under the Rider will enable CIWC to pursue multiple foreclosure actions simultaneously, and thus reduce the average cost for an individual foreclosure actions due to economies of scale. [CIWC Ex. 1.OSRSUPP, Reply to Staff's Rebuttal to CIWC Response to Question #2.] The Company, however, cannot feasibly undertake a large number of foreclosures to obtain economies of scale unless it can recover its Enforcement Costs under the Rider. Even with standardization, the average cost to pursue a foreclosure action is approximately \$530 per account. [*Id.*] Under those circumstances, it would

be feasible to pursue a foreclosure action only where an account is in arrears for several hundred dollars or is associated with a lot with a high market value, and thus the Foreclosure Program would be limited and ineffective. [*Id.*] There has been no ability to file a sufficient number of foreclosures to generate economies of scale in the past, and there will be no ability to do so in the future unless the Rider is approved.

**D. The ALJPO's Discussion of the Appropriateness of the Rider is Contrary to the Record Evidence**

Although the ALJPO concludes that there is no need for the Rider, it goes on to address certain legal issues raised in the case, in order to provide "guidance for the future." (ALJPO, p. 21.) Its discussion of the appropriateness of the Rider incorrectly concludes that the evidence on the issue was "incomplete." (*Id.*, p. 23.)

The ALJPO finds that the record is insufficient on this issue, because the parties did not compare lien Enforcement Costs to other costs recovered under other riders. Section 9-220.2, however, makes clear that a rider can be used to recover, not only the costs specifically referenced -- "purchased water" and "purchased sewage treatment service," but also any "other costs which fluctuate for reasons beyond the utility's control or are difficult to predict." The record shows that Enforcement Costs are recoverable under this standard.

The Company presented evidence that the costs of a foreclosure will vary for reasons beyond the Company's control or cannot be predicted. The amount of Enforcement Costs will depend on such factors as the scope of the work required to foreclose and length of the court proceeding. As a result, Company cannot predict whether a particular case will result in Enforcement Costs above or below the average. [CIWC Exs. 1.0R (Revised), pp. 4-5; 1.0SR, pp. 13-14.] Moreover, the Company cannot control the number of foreclosures it is required to pursue, except in the most general sense. It will determine whether to pursue foreclosure in each

individual case by examining a variety of factors, including the size of the outstanding balance, the value of the subject property, the number of prior liens, if any, that are in place on the property, and the condition of the then current real estate market. [CIWC Ex. 1.0R (Revised), pp. 4-5] Consequently, CIWC cannot predict how many lots would be worth pursuing in any given year. The evidence clearly supports a finding that the Rider is appropriate under Section 9-220.2 of the Act.

Having found that it could not decide whether the Enforcement Costs are sufficiently similar to other costs recovered through riders approved by the Commission, the ALJPO (pp. 23-24) goes on to discuss the issue of recovery of Enforcement Costs through the Rider as compared to base rates. The ALJPO suggests that it is not clear that the recovery of Enforcement Costs is more appropriate through the Rider than through base rates. It suggests that "the Company's explanation of why additional debt collection would not lower its bad debt expense (and thereby lower its revenue requirement) is not altogether clear." (ALJPO, p. 24.) The ALJPO's conclusion that the recovery of Enforcement Costs could reduce uncollectibles, however, misses the point. As the evidence confirms, the overdue balances in question have not yet been expensed as an uncollectible cost-- they are still reflected on the Company's books as accounts receivable. [CIWC Exs. 1.0R (Revised), pp. 23-24; 1.OSRSUPP, CIWC Reply to Staff/CUB Rebuttal to Question #3.] The purpose of the Foreclosure Program is not to reduce current uncollectible expenses, but rather to provide a more effective means to collect receivables, and avoid the effect on rates that would result from a future transfer of the amounts at issue to uncollectible expense.

The ALJPO's discussion on this point also ignores another purpose of the Rider, which is to recover Enforcement Costs from the delinquent customers who cause those costs to be

incurred. Base rate recovery of these costs would spread these costs over all of CIWC's customers in Woodhaven and Candlewick, which would place an unfair burden on those customers who pay their bills on time. It would also essentially result in a forgiveness of the amount owed and provide no disincentive to customers who do not pay. [CIWC Ex. 1.OR (Revised), pp. 23-24.] That is not a reasonable result. If the court agrees under the IMFA that it is reasonable and equitable to recover Enforcement Costs from the specific customer who, by non-payment, causes a need for foreclosure, the Commission should not deny the Company the opportunity to seek recovery under the IMFA.

**E. The Commission Need Not Decide the Remaining Legal Issues Discussed by the ALJPO**

**1. The IMFA Written Document Requirement**

The ALJPO (pp. 21-22) questions whether the Rider will fulfill the requirement of the IMFA that there be a written agreement authorizing recovery of foreclosure fees and costs. The ALJPO indicates that although tariffs may have the force and effect of law, they do not constitute a contract for purposes of the IMFA. While CIWC disagrees with that conclusion, there is simply no need for the Commission to address this point.

As discussed above, the written agreement required by the IMFA is made up of both the Rider and the service agreement required for every customer that expressly incorporates by reference CIWC's tariffs. While the ALJPO (p. 22) acknowledges that the customer signs an agreement incorporating the tariffs, it suggests that customers may not have "actual knowledge" of what is in the tariff. The ALJPO acknowledges that "[t]he law generally ascribes to customers a knowledge of the tariffs under which they receive services," but then suggests that the law is assuming a fiction. (ALJPO, p. 22.) If, in a given case, there is an issue under the IMFA

regarding whether customers have adequate knowledge of or are deemed to have knowledge of tariffs, this is a matter for determination by the equity court as the IMFA requires.

## **2. Annual Reconciliation**

The ALJPO expresses concern about the fact that the Commission's prudence review would extend only to cases in which no sale of property occurs and in which Enforcement Costs are added to the customer's bill. (ALJPO, p. 26.) The ALJPO's observation in this regard is correct, but that does not provide a ground to reject the Rider. Where a sale of the property occurs, Enforcement Costs would, if allowed by the equity court, be recovered from the sale proceeds, and not through the utility bill. In this situation, the determination of whether Enforcement Costs are recoverable would be made by the equity court. The fact that the Commission's review would apply only when recovery is through the utility bill is appropriate.

The ALJPO (p. 26) also suggests that the Commission in a prudence review would not have authority to reach a different conclusion with regard to the recoverability of Enforcement Costs on the utility bill than is reached by the court under the IMFA. When costs are recovered on the utility bill under a rider, however, Section 9-220.2 expressly authorized a prudence review. [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 IMFA. [*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 Enforcement Costs allowed by the court were not prudently incurred. This determination of the Commission would be reviewable by an appellate court on administrative

review. The nature of a required prudency adjustment would depend on the Commission's finding of imprudence. Depending on the finding, one or more customer accounts could be affected, as determined by the Commission. [*Id.*]

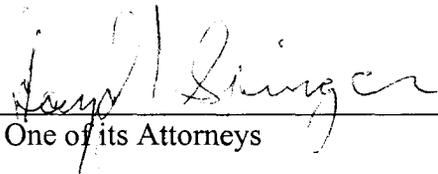
## V. CONCLUSION

The ALJPO rejects the Rider, finding that the record does not show that the Rider is in the public interest or necessary for increasing the collection of delinquent revenue in the Woodhaven and Candlewick subdivisions. The ALJPO's conclusion is unsupported by the record. CIWC is not seeking cost recovery of either Enforcement Cost or uncollectible expense in this proceeding. CIWC is asking only that the Commission give CIWC the *opportunity* to seek recovery of Enforcement Costs in foreclosure proceedings, from customers that have not paid their bills for at least one year and, thereby, cause Enforcement Costs to be incurred. The Rider permits CIWC to recover Enforcement Costs from the cost-causer in circumstances where it is permitted to do so under the IMFA, and where it has shown in the equity court that the recovery of Enforcement Costs is reasonable and appropriate. The ability to recover Enforcement Cost in this manner would enable CIWC to use foreclosure as an additional mechanism to address the increasing level of unpaid bills in the Woodhaven and Candlewick Divisions. Approval of the Rider would benefit all customers who pay their utility bills in a timely manner.

For all of the reasons discussed in this Brief on Exceptions, the Commission should reject the ALJPO's conclusion that CIWC's request for approval of, and permission to file, the Rider should be denied.

Respectfully submitted,

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