STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Petition Of The City of Pekin, A Municipal Corporation, For Approval Pursuant To 735 ILCS 5/7-102 To Condemn A Certain Portion Of The Waterworks System Of Illinois-American Water Company.	)))))))	Docket 02-0352

REPLY IN SUPPORT OF THE MOTION TO STRIKE OF ILLINOIS-AMERICAN WATER COMPANY

Illinois-American Water Company ("Illinois-American") hereby submits its Reply to the Motion to Strike of Illinois American Water Company. In its reply, the City of Pekin's ("City") position is that Section 200.610, which states: "In contested cases and licensing proceedings, the rules of evidence and privilege applied in civil cases in the circuit courts of the state of Illinois shall be followed. However, evidence not admissible under such rules may be admitted if it is of a type commonly relied on by reasonably prudent persons in the conduct of their affairs," trumps the rules of evidence. As held by the Illinois Commerce Commission on several occasions, this is simply not the case.

I. TESTIMONY BASED ON HEARSAY

The City cites to Section 200.610, which allows for the admission of evidence if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs, as authorization for the submission of three portions of hearsay testimony. In a hearing dealing with issues very similar to those that are the subject of this Motion to Strike, the Illinois Commerce Commission rejected a broad reading of this section and reiterated the importance of the rules prohibiting hearsay evidence. Illinois Commerce Commission Hearing Report, No. 86-

0256 (attached as Exhibit A). Moreover, the ICC's rejection of Pekin's argument as set forth in Docket No. 86-0256 has been consistently followed. *See* ruling and relevant portions of transcript from 99-0288 attached as Ex. B. As stated at page 3 of the Hearing Report in Docket No. 86-0256, such a broad reading would "render the fundamental prohibitions against the admission of hearsay evidence meaningless." The allowance of hearsay evidence essentially nullifies the fundamental right of cross-examination that is afforded each party. *See, e.g.*, Ex. at 3 (this position "ignore[s] the fundamental right of cross-examination). *See also Kendor v. Dept. of Corrections*, 126 Ill. App. 3d 648 (1984) ("The opportunity to test a witness by personal cross-examination is fundamental to our fact-finding process, which process includes the adjudicative function of administrative bodies, and so hearsay evidence is generally inadmissible in administrative proceedings."). The City cites to *Discovery South Group, Ltd. v. The Pollution Control Board*, 275 Ill. App. 3d 547, 656 N.E.2d 51 (1995) as justification for the admission of its testimony, but fails to note the difference in the evidence allowed in *Discovery South Group* compared to that which is the subject of this motion to strike. In *Discovery South Group*, evidence consisting of a police department's log entries detailing telephone complaints was permitted over hearsay objections. *Id.* In contrast, the City of Pekin is attempting to submit testimony that is based upon unsupported and undocumented conversations with individuals not a party to this case. Specifically:

A. On page 11, lines 233-35 of his direct testimony, Mr. Kief testifies: "In talking with the Fire Chief, I know the Fire Department is especially pleased with the prospect of local personnel manning the communication systems . . . ."

B. On page 10, lines 211-212 of his rebuttal testimony, Mr. Hierstien states that "We have heard from several customers who were placed on hold for over half an hour and gave up when they needed service."

C. On page 2, lines 31-32, of his rebuttal testimony, Mr. Janssen testified that "I have spoken again with the person trying to open that hydrant. He had previously tried to open frozen hydrants, and this one was broken, not frozen."

Each of the testimony portions cited above relies on conversations with other individuals, *not* on actual, physical documents, which easily distinguishes this case from *Discovery South Group*. Illinois-American has requested that the City of Pekin produce documents supporting these conversations, or at the very least, provide more specific details regarding these conversations. However, in the responses to which the City has responded to to date, the City has admitted in its responses that it has no such support for these statements or for those included in IAWC's supplemental motion to strike. *See* City of Pekin Responses attached as Exhibit C. Allowing the above-quoted portions of testimony is clearly a violation of the hearsay prohibitions and would deprive Illinois-American of the right to adequately cross-examine the City's witnesses.

II. HEARSAY TESTIMONY REGARDING NEWSPAPER ARTICLES

Hearsay is defined as "testimony of an out-of-court statement offered to establish the truth of the matter asserted therein and resting for its value upon the credibility of the out-of-court asserter." *People v. Armstead*, 322 Ill. App. 3d 1, 11, 748 N.E.2d 691, 700 (Ill. Ct. App. 2001). Newspaper articles are clearly hearsay under Illinois law. *See, e.g.*, *McCall v. Devine*, 334 Ill. App. 3d 192, 203, 777 N.E.2d 405, 415 (Ill. Ct. App. 2002) ("contents of newspaper

articles are hearsay an therefore inadmissible"). At issue are two portions[1] of Mr. Janssen's testimony submitted by the City:

- On page 1, lines 16-22 of his rebuttal testimony, Mr. Janssen states that "the article in the Pekin Daily Times, of August 12, 1988, indicated that according to a company spokesman, Illinois-American had launched an investigation into the matter following reports that gravel clogged pump equipment as the Pekin firefighters attempted to douse a house fire in the 300 block of South Capital. Sue Atherton, on behalf of the community, indicated that Illinois-American was investigating the problem, and if there was one, they wanted to find it and take care of it."
- On page 3, lines 47-59 of Mr. Janssen's rebuttal testimony, Mr. Janssen again recites the content of a newspaper article stating "The newspaper article indicates that Illinois-American officials said they were doing the best they can, but 'updating the equipment takes time and money- lots of it.' The article goes on to close with comments by Richard Schwartz, then manager of Illinois-American's Northern District, lamenting the age of the Pekin system, the out datedness of some of the hydrants. It closes with the following: 'Schwartz said the water company budgets so much for fire main replacement here every two years. We just can't do it all at once. We could spend hundreds and hundreds of thousands of dollars,' Schwartz said. 'We have to be careful not to overspend.'"

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[1] Moreover, Mr. Janssen's rebuttal testimony on page 2, lines 25-27 concerning his opinions regarding Illinois-American's handling of the alleged gravel problem should likewise be stricken if the basis for Pekin's gravel allegations are struck. If such allegations are struck, Mr. Janssen's opinion lacks foundation.

The City erroneously argues that each of the above-quoted portions of testimony should be admissible because they constitute exceptions to the hearsay rule under the party-opponent admission theory. This argument fails for several reasons. First, the City offers no evidence, save for its own unsupported assertion, that the individuals quoted in the newspaper articles are in fact representatives of Illinois-American for the purposes of the party-opponent admission exception to the hearsay rule. Not all employees of Illinois-American are capable of acting as a party to this case.

The second, and more glaring, error in the City's argument is the fact that even if the statements made by the individuals referenced in the newspaper articles would constitute a party-opponent admission, the newspaper article is still hearsay as the "out-of-court asserter" in this instance is the author of the newspaper article – to which no hearsay exception applies. What the City overlooks is that a newspaper article quoting an individual is actually double-hearsay, which contains the hearsay of the journalist and the quoted individual, and is not admissible simply because one level of the hearsay falls under an exception. "This is so because the truthfulness of the proposition that the party uttered the statement claimed to be an admission is entirely dependent upon the credibility of the reporter who claims to have heard it. Unless the reporter is called to attest to the truthfulness of her assertion that she heard the party make the statement, the newspaper article is, in itself, inadmissible." *In re Baan Co. Securities Litigation*, 2002 WL 1284295, *7 (D.D.C. June 10, 2002); *see also Larez v. Los Angeles*, 946 F.2d 630, 641-42 (9th Cir. 1991) (holding articles to be inadmissible double hearsay because "[b]y attributing quotations to [a party], the reporters necessarily made the implicit statement, '[the party] said this!' As the reporters' statements were made in newspapers, they were, *a fortiori,* statements made out-of-court where they were not subject to the rigors of cross-examination."); *Moran v.*

Erickson, 696 N.E.2d 780 (Ill. Ct. App. 1998) (discussing double hearsay problem in letter quoting statements made by another). The City's reliance on hearsay statements in newspapers is accordingly inadmissible.

III. TESTIMONY OF WITNESSES OUTSIDE PERSONAL KNOWLEDGE

Witnesses are limited to testifying only regarding "statements of fact of which the witness has personal knowledge." *People v. Crump*, 319 Ill. App. 3d 538, 542, 745 N.E.2d 692, 696 (Ill. Ct. App. 2001). In his direct testimony, Mr. Janssen discusses gravel in the water from a fire hydrant. Specifically, he states on page 6, lines 114-119 of his direct testimony, that "[i]n early August of 1988, we had a fire on South Capital behind the library, again in the old part of the City, Illinois-American had just finished repairing a water main in that area. Because of all of the gravel in the water system, we ruined water valves and the impellers in the pump of Engine 2. This was expensive to repair, and it was the reason we have started flushing the hydrants before use." The City admits that this statement is based upon a discussion Mr. Janssen had with the Chief of the Department at the time of the fire (*see* Ex. C), but attempts to admit this testimony pursuant to Section 200.610's allowance of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs. As stated above, such testimony is contrary to the basic tenets of the prohibitions against hearsay.

IV. TESTIMONY CONSITUTING LAY WITNESS OPINION

Lay witnesses are prohibited from testifying as to their opinions. *Crump*, 319 Ill. App. 3d at 542, 745 N.E.2d at 696 (stating that lay witnesses are not allowed to "express an opinion or draw inferences from the facts.") Opinion testimony has been held to include testimony where a witness draws a conclusion or inference from known facts or evidence. *Poulakis v. Taylor Rental Center, Inc.*, 209 Ill. App. 3d 378, 383, 568 N.E.2d 196, 199 (1991) ("[a] lay witness

must state the facts and not draw conclusions; any inferences to be drawn from the evidence presented is the duty of the trier of fact."). Further, "[o]pinion testimony that is based purely on guess, surmise or conjecture is inadmissible and is tantamount to no evidence at all." *Poulakis*, 209 Ill. App. 3d at 383, 568 N.E.2d at 199. The testimony from a lay witness must instead be based upon concrete facts that are perceived from the witness' own senses. *People v. Novak*, 163 Ill. 2d 93, 102, 643 N.E.2d 762, 767 (Ill. 1994). Further, testimony concerning the opinions of persons not under the control or supervision of parties to the case has been specifically rejected by the Illinois Commerce Commission. *See* Exhibit A at 6 ("This type of evidence is an attempt to present the opinions of persons who are not witnesses in this proceeding on the controverted issues in this case. Acceptance of [the testimony] would diminish Commission proceedings and encourage the submission of unreliable evidence.") There are numerous occasions where witnesses for the City have submitted opinion testimony:

A. On page 13, line 270 of his rebuttal testimony, Mr. Hierstein states that "The Pekin community is overwhelmingly behind acquisition of the water company." Although the City argues that this statement is based upon Mr. Hierstein's observations of the election results favoring acquisition, this does not remove the statement from the category of inadmissible opinion testimony. As stated above, a lay witness is permitted to testify only upon "concrete facts" perceived by his or her own senses. *Novak*, 163 Ill. 2d at 103, 643 N.E.2d 762, 768. In this instance, the "concrete fact" known by Mr. Hierstein is that the election results favored acquisition, and he is fully capable of testifying as to this fact. However, his testimony crosses the line between fact and opinion when he draws an inference from this "concrete fact" and attempts to testify as to the motivation of the citizens of Pekin, even categorizing that motivation

as "overwhelmingly." This is clearly beyond the permissible scope of testimony for a lay witness.

B. On page 13, lines 278-287, of his rebuttal testimony, Mr. Hierstein makes several statements that qualify as impermissible opinion testimony:

(i) First, Mr. Hierstein testifies that the members of the public "overwhelmingly are in support of the City's efforts to acquire their future by acquiring the City's water system." This statement is almost identical to the one discussed immediately above, and proves to be inadmissible for the same reasons. Mr. Hierstein takes a piece of evidence of which he is aware, the election results, and attempts to testify as to the mentality of the Pekin community. Moreover, Mr. Hierstein again uses the word "overwhelmingly" to describe the community's mentality favoring acquisition of the water company – an adjective that is totally without basis. This statement is inadmissible as an opinion as to the mentality of the Pekin community. *See, e.g.*, *City of Evanston v. City of Chicago*, 279 Ill. App. 3d 255, 270, 664 N.E.2d 291, 301 (1996) (finding testimony concerning the fears of a community to be "purely speculative.").

(ii) Next, Mr. Hierstein states "I think the voters ultimately understood that unless the City acquired the system, Pekin's water would be a small part in the corporate games and strategies of global corporations like Thames and RWE." This statement is pure speculation on the part of Mr. Hierstein, as he is attempting to speak to the mental impressions of the entire class of voters in the Pekin community. With this statement, the very fact that Mr. Hierstein qualifies his statement with the words "I think" indicates that he is speculating. Indeed, Webster's Seventh New Collegiate Dictionary defines "think" as "to have as an opinion" and Roget's College Thesaurus states that "speculate" is a synonym for "think." The only way in which Mr. Hierstein could testify to the understanding of the voters is if it was a "concrete fact"

that he was aware of – meaning that each of the voters would have had to verbally state in the presence of Mr. Hierstein what their understanding was concerning the acquisition of the water company. Since this obviously did not happen, Mr. Hierstein is speculating as to the mentality of the entire Pekin community based upon comments he may have received from a few voters.

(iii) "The public is sophisticated enough to see through statements from Illinois-American like 'there has been no change, and no sale.'" The City cites to Mr. Hierstein's position as City Manager to substantiate his testimony concerning the level of sophistication of the public. In actuality, the position of City Manager brings with it no benefits in the area of psychology. Further, the fact that the most recent election in the City of Pekin ousted several members of the local government from their positions would indicate that Mr. Hierstein does not have a particularly good insight as to the level of sophistication of the citizens of Pekin.

(iv) "There has been enough corporate news coverage in the past several years to justify the Pekin public's decision that they didn't want to be a pawn in global water games." Once again, Mr. Hierstein is attempting to speak on behalf of the entire Pekin community that, according to his rebuttal testimony, based their decisions concerning acquisition of the water company on the fact that "they didn't want to be a pawn in global water games." Once again, unless each and every member of the Pekin public approached Mr. Hierstein and expressed this rationale as an explanation for the vote concerning acquisition of the water company, the testimony is nothing more than conjecture on the part of Mr. Hierstein as to the motivation behind the Pekin community's actions.

(v) "The stakes for their future, and their present are too great, and I think they saw that." The City has rightfully admitted that the second portion of the quoted statement, that "and I think they saw that" is opinion testimony, but fails to acknowledge that the first portion of the

statement is opinion testimony as well. In his statement, Mr. Hierstein gives his opinion that the stakes for the future and the present are "too great." There is no specific evidence on which he basis this statement, and it should be struck as inadmissible opinion testimony.

C. On page 14, lines 294-95 of his rebuttal testimony, Mr. Hierstein states that "The City gained the support because the population realized it was in their best interest to acquire the water system." As discussed in detail above, Mr. Hierstein is again speculating as to the understandings of the Pekin citizens. The fact that Mr. Hierstein holds the office of City Manager gives him no unique insight on the citizens, nor do the election results favoring acquisition of the water company allow Mr. Hierstein to make such a statement concerning the realizations or understandings of the citizens of Pekin.

D. On page 5, lines 111-112 of his rebuttal testimony, Mr. Hiersein states that "we are confident that the proposed valuation on which all of Illinois American's testimony is based is not what will be upheld in court." Illinois-American withdraws its objection to this statement.

V. CONCLUSION

For all of the foregoing reasons, Illinois-American's Motion to Strike should be granted and the identified portions of the Direct Testimony and the Rebuttal Testimony of Richard Hierstein, Dennis Kief, and John Janssen should be stricken from the record of this proceeding.

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Respectfully Submitted,

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