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**ILLINOIS COMMERCE COMMISSION**

February 17, 2000

Consumers Illinois Water Company	:	
	:	99-0288
Proposed general increase in water rates.	:	

**NOTICE OF HEARING EXAMINERS RULING**

TO ALL PARTIES OF INTEREST:

Notice is hereby given that the Hearing Examiner has granted the motion to strike those provisions of the intervenors initial brief and initial reply as identified in Consumers motion.

Sincerely,

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Chief Clerk

SC  
Hearing Examiner: Ms. King

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1 A. I have that.

2 Q. Okay. And is the -- is it correct that you  
3 were asked in that data request to provide the basis  
4 for your assertion that the number of customers  
5 experiencing iron problems is small and primarily  
6 confined to dead-end mains and cul-de-sacs; is that  
7 correct?

8 A. Yes.

9 Q. And you were also asked to provide all  
10 documents relied upon you in support of that  
11 assertion; is that correct?

12 A. Yes.

13 Q. And is it correct that your response to that  
14 data request reads in its entirety as follows:  
15 "Statements made at the field hearing"?

16 A. Yes.

17 Q. The field hearing to which you refer was the  
18 public forum conducted under the auspices of the  
19 Illinois Commerce Commission at the Candlewick Lake  
20 Association clubhouse on July 21, 1999; is that  
21 correct?

22 A. Yes.

1 Q. You did not attend that field hearing; is that  
2 correct?

3 A. That's correct.

4 Q. When you prepared your direct testimony, your  
5 understanding of what occurred at the field hearing  
6 was based entirely upon discussions which you had with  
7 counsel for the Candlewick Lake Association in this  
8 proceeding; is that correct?

9 A. Yes.

10 Q. Neither you nor the Candlewick Lake  
11 Association has performed any survey which supports  
12 your assertion that the number of customers actually  
13 experiencing red water or iron-related problems is  
14 small and primarily confined to small dead-end mains  
15 in cul-de-sacs; is that correct?

16 A. Yes.

17 Q. Now, refer to Page 7 of your rebuttal  
18 testimony -- this is on the same general topic --  
19 Lines 15 to 20.

20 A. I have it.

21 Q. Okay. Neither you nor the Candlewick Lake  
22 Association has performed any survey which supports

1 the assertion that, quote, customers do not want CIWC  
2 to undertake iron removal, unquote; is that correct?

3 A. We performed no formal study, no.

4 Q. Performed no formal survey?

5 A. Study or survey.

6 Q. And, similarly, neither you nor the Candlewick  
7 Lake Association has performed a survey to determine  
8 the number of customers who, quote, already have  
9 installed their own point of entry devices, unquote;  
10 is that correct?

11 A. Yes.

12 Q. Now, when you refer to, quote, point of entry  
13 devices, unquote, you are including water softeners as  
14 well as filters; is that correct?

15 A. Yes.

16 Q. Is it correct, you do not know how many  
17 customers have installed, quote, point of entry,  
18 unquote, devices?

19 A. I don't have a precise number.

20 Q. You don't know how many customers have  
21 installed those devices; is that correct?

22 A. I don't have a precise number; that's correct.

1 Q. Of the number -- of the customers who may have  
2 installed point of entry devices, you also do not know  
3 what types of devices such customers may have  
4 installed; is that correct?

5 A. I know that they've installed water filters  
6 and water softeners.

7 Q. But you don't know the relative numbers of  
8 each?

9 A. No.

10 Q. Please refer -- now, I promise, I think this  
11 will be the last switch. We're switching back to your  
12 direct testimony and this is my last line of  
13 questions.

14 Please refer to Page 4, Lines 14 through 17  
15 of your direct testimony.

16 There, you state that you, quote, have been  
17 advised that a regional representative of IEPA has  
18 stated to a member of the association that IEPA would  
19 explore less costly alternatives than the proposed  
20 iron removal facility and will take no enforcement  
21 action until all lesser-cost options are exhausted,  
22 unquote; is that correct?

1 A. Yes.

2 Q. The advice which you have attributed to a,  
3 quote, regional representative of IEPA, unquote, was  
4 allegedly made in a statement to a member of the  
5 Candlewick Lake Association; is that correct?

6 A. Yes.

7 Q. And in preparing this portion of your direct  
8 testimony, you were relying solely on a memorandum  
9 prepared by that association member which was  
10 addressed to counsel for the association; is that  
11 correct?

12 A. Yes.

13 Q. You did not have any communications of any  
14 kind, either in writing or orally, with the IEPA  
15 regional representative to whom you refer at Page 4,  
16 Line 15 of your direct testimony; is that correct?

17 A. Yes.

18 Q. Is it also correct that in connection with  
19 preparing that portion of your direct testimony, you  
20 did not speak directly to the member of the Candlewick  
21 Lake Association to whom the statement of the regional  
22 IEPA representative was supposedly made?

1           A.     That's correct.

2           MR. ANDERSON:     At this time, Madam Hearing  
3 Examiner, I would move to strike Page 4, Lines 14  
4 through 17 of Mr. Harwig's direct testimony on the  
5 grounds that it constitutes classic hearsay and that  
6 there's no foundation laid for its admission into the  
7 record.

8                     Mr. Harwig is relying, essentially, on two  
9 statements made out of -- made by out-of-court  
10 witnesses who are not -- or out-of-court persons who  
11 are not witnesses to this proceeding. And, therefore,  
12 there's no opportunity to test or cross-examine those  
13 persons who allegedly made these statements.

14          MR. KUCERA:     Two comments.

15                     The rigid rules of the hearsay rule that  
16 applies in courts do not apply to the Commission  
17 proceedings. The purpose of the Commission proceeding  
18 is to develop as much information in the record as  
19 possible and to weigh that evidence and determine the  
20 value of that evidence.

21                     Secondly, the heart of the hearsay rule is  
22 the opportunity to cross-examine or investigate. And

1 in a data response at the very beginning of this  
2 process, after the direct testimony was tendered,  
3 Mr. Harwig was asked a basis for the particular  
4 statements that are at issue here, and he revealed the  
5 name of the person at the association from whom he  
6 learned this information. He produced a copy of the  
7 memorandum he received from that association member,  
8 and he identified the name of the IEPA regional  
9 representative.

10 So the company has had ample opportunity  
11 for months to make whatever investigation, including  
12 calling those people to attend this hearing for  
13 examination purposes. So the hearsay rule would not  
14 apply in this circumstance, anyway.

15 MR. ANDERSON: May I respond, briefly?

16 JUDGE KING: Yes.

17 MR. ANDERSON: The basis of the hearsay rule is  
18 that the admission of the testimony -- or the  
19 admission of out-of-court statements of the nature  
20 which are the basis for Mr. Harwig's testimony, which  
21 is the subject of the motion, would deny the company  
22 its fundamental right of cross-examination.

1                   The hearsay rule does apply in  
2 administrative proceedings. It does apply in  
3 proceedings of the Illinois Commerce Commission. As  
4 the court in Kendor (phonetic) versus Department of  
5 Corrections stated, and the cite is 126 Ill. App. 3d  
6 648, "The opportunity to test a witness by personal  
7 cross-examination is fundamental to our fact-finding  
8 process, which process includes the adjudicative  
9 function of the administrative bodies. And so hearsay  
10 evidence is generally inadmissible in administrative  
11 proceedings."

12                   The principle is equally applicable to  
13 Illinois Commerce Commission proceedings as evidenced  
14 by the Supreme Court's case in Atchison, Topeka and  
15 Santa Fe Railroad Company versus Commerce Commission,  
16 335, Ill. -- 624 in which the Illinois Supreme Court  
17 held that the Commission's, quote, findings must be  
18 based on evidence presented in the case with an  
19 opportunity to all parties to know of the evidence to  
20 be submitted or considered, to cross-examine  
21 witnesses, to inspect documents and to offer evidence  
22 and explanation or rebuttal, and nothing can be

1 treated as evidence which is not introduced as such.

2 The rules of the Commission do provide that  
3 an expert may -- that evidence may be admissible if  
4 it's considered by an expert and it's evidence that an  
5 expert may reasonably rely upon in forming an opinion  
6 or which otherwise falls within a recognized exception  
7 to the hearsay rule.

8 There's no exception to the hearsay rule  
9 that's been identified here. I do not believe that an  
10 expert who's testifying regarding the -- what the  
11 IEPA's position may or may not be would reasonably  
12 rely upon one statement made by an association member  
13 who's not a witness regarding what another person  
14 supposedly told that person. This is a classic case  
15 of double hearsay. It's not a business record. It's  
16 not an official document that he's relying on from the  
17 IEPA or any other evidence of the nature on which an  
18 expert would reasonably rely.

19 MR. KUCERA: The arguments that are -- or  
20 assertions that Mr. Anderson made go to the weight or  
21 value to be given to the evidence.

22 But at the heart of the hearsay rule, as

1 he's stated, is the opportunity to cross-examine.  
2 They have had the opportunity to cross-examine because  
3 they have -- they have had identified for them the  
4 names of the association person and the IEPA person  
5 and the basis for Mr. Harwig's conclusions for months.  
6 And so they've not been denied an opportunity to  
7 cross-examine.

8           They've been given a full opportunity to  
9 cross-examine and -- or to investigate the statements  
10 made by those persons by bringing them in directly or  
11 talking to them indirectly or serving them with data  
12 requests or whatever.

13           The hearsay rule has been satisfied in this  
14 instance very clearly.

15           JUDGE KING: All right.

16           I've listened to the arguments and I'm  
17 going to grant the motion to strike Line 14 through 17  
18 of Page 4 of Mr. Harwig's direct testimony beginning  
19 with the sentence "in fact" and ending with the word  
20 on Line 17 "exhausted."

21           MR. ANDERSON: That completes our  
22 cross-examination of Mr. Harwig.