

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

IN THE MATTER OF THE PETITION OF THE)
CITY OF PEKIN, a municipal corporation,)
FOR APPROVAL PURSUANT TO) Docket 02-0352
735 ILCS 5/7-102 TO CONDEMN A CERTAIN)
PORTION OF THE WATERWORKS SYSTEM)
OF ILLINOIS AMERICAN WATER COMPANY)

**MOTION OF THE CITY OF PEKIN
TO STRIKE REBUTTAL TESTIMONY OF THOMAS STACK**

The City of Pekin hereby moves to strike certain portions of the rebuttal testimony of Thomas Stack, who submitted testimony on behalf of Illinois American Water Company. The testimony that is the subject of this Motion to Strike is itemized herein.

As discussed below, each of the identified portions of testimony are inadmissible under Illinois law and Illinois rules of evidence and therefore should be stricken from the record in this proceeding.

I. LEGAL STANDARD.

Pursuant to the Rules of Section 200.610 of the Rules of Practice of the Illinois Commerce Commission provides that “in contested cases, and licensing proceedings, the rules of evidence and privilege applied in civil cases in the Circuit Courts in the State of Illinois shall be followed. However, evidence admissible under such rules may be admitted if it is a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.” Accordingly, the rules of evidence, and

specifically the evidentiary rules regarding the inadmissibility of opinions, testimony as to questions that are a matter of law and the inadmissibility of hearsay, apply to this proceeding.

II. OPINION TESTIMONY OF LAY WITNESS.

Generally, a lay witness cannot “express an opinion or draw inferences from the facts.” People v. Crump, 319 Ill. App. 3d 538, 542, 745 N.E. 2d, 692, 696 (2001). Lay witnesses are, however, allowed to relate their opinions or conclusions on what they have personally observed, such as speed, appearance, odor, flavor, and temperature. People v. Novak, 163 Ill. 2d 93, 102, 643 N.E. 2d 762, 767 (Ill. 2d 1994). The limitation that lay witness opinion testimony be rationally based on that witness’ perception reflects the general requirement that a witness must have personal knowledge of the matter to testify to it. Id., at 102-3, 643 N.E. 2d at 767. The testimony must be based on concrete facts perceived from the witness’ own senses, and personal knowledge of a fact cannot be based on a statement of another.

Mr. Stack’s testimony is almost entirely opinion.

It is not clear whether or not Illinois-American intends to tender Mr. Stack as an expert witness.¹ To the extent that IAW is tendering Mr. Stack as an expert witness, it has not laid sufficient foundation to qualify him as an expert. It has not provided evidence of any specialized experience or knowledge which Mr. Stack may have which would aid the finder of fact in this matter.

¹In response to the City of Pekin’s First Data Requests, which request asked Illinois American to identify each expert Illinois American may call to testify, and for each expert certain background information, Illinois-American responded in its Supplemental Response transmitted on April 10, 2003, with a list of four experts, none of which were Mr. Stack. Presumably, if IAW is tendering Mr. Stack as a witness, it would have properly disclosed him.

Therefore, the following matters are inadmissible lay opinion:

- On page 5, lines 95-97, Mr. Stack states “In addition, it follows that if the proof shows that the public interest would be equally served by either the condemnor’s proposal or continued ownership of the condemnee, in my opinion, the petition should be denied.” (Emphasis added). Clearly, this is his opinion rather than a statement of fact.
- On page 5 at lines 101-104, Mr. Stack testifies “as explained in my testimony, in my opinion, Pekin has not presented sufficient evidence that its proposed condemnation is in the better or greater public interest, and it does not appear that Staff witness Johnson applied the appropriate public interest standard.” (Emphasis added). Again, as he testifies, this is Mr. Stack’s opinion.
- On page 5, at line 105, question 9 asked “Was Staff witness Johnson in a position to conduct the required comparative review at the time that his direct testimony was filed?” (Emphasis added). At line 107, Mr. Stack replies “No”. This is his opinion regarding not only whether a “required” review was performed, but implicitly reflects his opinion of what is actually required. Therefore, it should be stricken.
- Similarly, on page 5, at line 111 in question No. 10: “Is the Commission required to examine every possible option when a condemnation proposal is submitted for approval under the public interest standard?” (Emphasis added). Mr. Stack’s response “No”, is an opinion regarding what is required under the public interest standard.
- On page 6, at lines 131-133, Mr. Stack testifies that “Illinois-American has presented convincing evidence that the Hals “feasibility analysis” does not constitute a proper

appraisal, and that Mr. Riley has presented the only proper appraisal of the District's assets." This is simply his opinion regarding the evidence and does not reflect his personal knowledge. Moreover, no foundation has been presented showing that Mr. Stack has any expertise regarding feasibility analyses or appraisals.

- Similarly, in lines 135-137, Mr. Stack testifies "in the alternative and at a minimum, the valuation evidence submitted by Illinois-American clearly refutes the valuation testimony submitted by Hals." Again, this is simply his opinion and comment on the evidence, and he has no expertise regarding valuation testimony.
- In his response to question 13, found on page 7, beginning at line 148, Mr. Stack simply states opinions. He uses terms such as "in my view" (line 148), "my belief" (lines 153-154), "in my opinion" (line 159), (line 163). Clearly, all of these statements are merely his opinions. Moreover, his statements at lines 151: "All impacts of the proposal on the public should be considered, including the effect on costs incurred to provide service, water rates and quality of service;" and at lines 160-161: "For reasons I will discuss, Illinois-American is clearly the superior choice;" are merely his opinions, and are not facts of which he has personal knowledge.
- On page 8, at lines 169-174, Mr. Stack testifies "I know from personal experience that Illinois-American's operations are highly professional, and that, is part of the American system, Illinois-American has the resources required to address Pekin's needs now and in the future. None of the matters raised by Pekin's witnesses have been the subject of complaints at the Commission. In my opinion, Illinois-American's planning and

operating practices are excellent.” (Emphasis added). This statement is merely his opinion regarding IAW’s resources and Pekin’s needs. He lays no foundation for his knowledge of complaints at the Commission. The final sentence is clearly his opinion.

- In the next paragraph, on page 8, lines 175-181, Mr. Stack renders his opinion regarding the City of Pekin’s “proposal.” There is no testimony regarding any facts of which he has personal knowledge, indeed, at line 180, he states “In my opinion”
- In response to question 15, at pages 8 and 9, line 184-193, Mr. Stack offers his opinion regarding the testimony of IAW. He is not testifying as to facts of which he has personal knowledge.
- Similarly, in lines 194-211, Mr. Stack offers his opinion of Pekin testimony, without any personal knowledge of the facts he discusses.
- In lines 212-219, Mr. Stack continues to offer his opinion regarding testimony of the parties herein. None of his testimony is based on personal knowledge of facts, and therefore should be stricken.
- In his response to question 16, beginning on page 10, and running from lines 223 to 350, nowhere does Mr. Stack testify to any facts of which he has personal knowledge. Instead, he merely comments on the testimony previously filed herein.
- On page 16, at lines 354-356, Mr. Stack testifies “However, for the reasons discussed above, I firmly believe that the customers will be worse off both on an operational and financial basis if Pekin takes over the system.” (Emphasis added). Clearly, his “belief” is his opinion, and not a statement of fact within his personal knowledge.

- Finally, in lines 361-364, Mr. Stack testifies “The Commission cannot assure that Pekin will honor its commitments to maintain constant rates for five years and/or abandon its policy of annexation, as described in Mr. Hierstein’s affidavit. For that reason, I believe the findings proposed by Staff witness Johnson would serve no purpose” (emphasis added). This statement is merely his opinion regarding what the Commission might be able to do and his belief regarding the findings proposed by Staff witness Johnson. Accordingly, they should be stricken.

Because each of the foregoing statements are opinions of a witness not qualified as an expert, they should be stricken.

In addition, Mr. Stack’s testimony is full of legal opinions. Those are detailed in the next section. As they are opinions, and he has not laid a foundation showing any legal expertise, his legal opinions should be stricken.

III. TESTIMONY AS TO MATTERS OF LAW.

In Illinois, a witness, whether or not qualified as an expert, may not be asked by a party to render an opinion as to questions that are matters of law for the court. Michael H. Graham, Clery and Graham’s Handbook of Illinois Evidence, Sec. 704.1, Page 480 (4th Ed. 1984), and citation therein.

There are numerous instances in Mr. Stack’s rebuttal testimony where he testifies as to matters of law:

- On Page 4, lines 78-71, Mr. Stack testifies: “The Illinois Supreme Court determined in 1957 that a municipality could condemn public utility property (Illinois Cities Water Co. v. Mt. Vernon, 11 Ill. 2d 547 (1957)), and the General Assembly soon thereafter added a provision to the Eminent Domain Act that required Commission approval for

condemnation proposals such as that of Pekin.” This “testimony” purports to interpret case and statutory law, which are matters of law. Therefore, this testimony is inadmissible.

- On Pages 4-5, lines 83-104, Mr. Stack testifies “the Commission, however, has made clear that, when such a proposal is filed, the responsibility to protect the public interests requires the selection of the ‘better’ of the alternatives presented. In Fernway Sanitary District v. Citizens Utilities, Docket 52024 (1968), the Commission stated:

‘In this case it is not the duty or function of the Commission to determine specifically or directly the value of the property in question, but instead it is the Commission’s duty to determine whether the public interests will better be served by granting or withholding approval for the district to proceed in an eminent domain action.’

Under this standard, if the condemning authority cannot establish that its proposal is in the better or greater public interest, then the Commission should deny the petition. In addition, it follows that if the proof shows that the public interest would be equally served by either the condemnor’s proposal or continued ownership by the condemnee, in my opinion, the petition should be denied. As applied to the pending case, the Commission should deny the petition if Pekin fails in its burden to prove that its proposed condemnation is in the better or greater public interest or if the proof shows that the public interest would be equally served by Pekin’s proposal or by continued Illinois-American ownership and operations. . . . and it does not appear that Staff witness Johnson applied the appropriate public interest standard.” Mr. Stack’s

testimony regarding the appropriate legal standard to be applied in this case, and how it should be applied, are matters of law, and his testimony should be stricken.

- On pages 5-6, lines 113-120, Mr. Stack testifies: “No. As the Commission has recognized (and the courts have confirmed) in determining the ‘public interest,’ the Commission should compare viable, mutually exclusive alternatives when competing proposals are presented. It is the ‘better’ alternative that should be selected. See Illinois Power Company, Docket 81-0818 (1982) (affirmed in Illinois Power Company v. Commerce Comm., 111 Ill. 2d 505 (1986)). In this case, continued ownership of the Pekin District is certainly a viable alternative to Pekin’s proposal and it is mutually exclusive to Pekin’s proposal that a change of ownership be brought about by a forced sale of the water system.” Again, Mr. Stack has stated a purported legal standard. The legal standard to be applied in this case is a matter of law, which should not be the subject of testimony.
- On page 6, lines 121-123, Question 11 asks “The language quoted above from the Order in Docket 52024 indicates that it is not the Commission’s function to determine valuation. Does this mean that the expected acquisition cost should be ignored in a condemnation approved proceeding?” Mr. Stack responds “No. A condemnation court would, of course, ultimately determine a price for the water system. However, the price paid would have a significant impact on future water rates, which are an important aspect of the public interest. In this context, valuation is an important factor. Thus, the Commission needs to consider evidence regarding valuation to properly

address the relevant public interest issues.” What factors the Commission should consider in this case is a matter of law, and should not be the subject of testimony.

- On page 6, lines 133-139, Mr. Stack testifies: “I believe that the record supports a finding in this regard. The Commission can make this finding without specifically or directly making a determination of the value of the property. . . . As a result, Pekin failed to establish that its proposed condemnation would better serve the public interests from the valuation related standpoint and the petition should be denied.”
Whether the Commission can make any particular finding is a matter of law.
- On page 7, lines 148-153, Mr. Stack states “Absolutely not. In my view, an analysis of the public interest requires review of all aspects of the effect on residents of the State of Illinois of Pekin’s proposal to condemn the facilities of Illinois-American’s Pekin District as compared to the effect of continued ownership and operation of the Pekin District by Illinois-American. All impacts of the proposal and the public should be considered, including the effect on costs incurred to provide service, water rates and quality of service.” The analysis of the public interest and the components to be considered by the Commission constitute a matter of law, which should not be the subject of testimony.
- On page 7, lines 156-159, Mr. Stack states “The question before the Commission is not whether customers of the District would be ‘worse off’ under City ownership. As explained above, the issue is whether Pekin has demonstrated whether the public would be better served by Pekin than by Illinois-American.” This statement purports to relate

the legal standard to be applied in this case. That legal standard is a matter of law and should not be a subject of testimony.

- On page 8, lines 163-164, after repeating Staff witness Johnson's opinion that the public interest would be equally served whether Illinois-American or Pekin owned the System, Mr. Stack testifies "as noted above, in my opinion, such a finding should result in a denial of the petition." Mr. Stack again is stating a legal standard, and should be stricken.
- On page 8, lines 180-181, Mr. Stack states "In my opinion, Pekin's presentation does not meet Pekin's burden to show that its proposal is somehow better than the continuation of service by Illinois-American." This statement purports to state Pekin's burden in this matter, which is a matter of law. Therefore, it should be stricken.
- On page 10, lines 229-231, Mr. Stack states "In any event, the real question in this case is whether the total cost of service to the customers will be less if Illinois-American continues to own the System or if Pekin acquires it." This statement purports to state "the real question", or legal standard, to be applied in this case. As such, it is a matter of law, and is inadmissible.
- On page 16, line 354, Mr. Stack states "As I have explained, this is not the proper standard." Again, the proper standard to be applied in this case is a matter of law, and this statement should be stricken.
- On page 16, lines 361-363, Mr. Stack testifies: "The Commission cannot assure that Pekin will honor its commitments to maintain constant rates for five years and/or

abandon its policy of annexation, as described in Mr. Hierstein’s affidavit.” The powers of the Commission are a matter of law, and not matter appropriate for testimony. Therefore, the statement should be stricken.

IV. TESTIMONY CONSTITUTING INADMISSIBLE HEARSAY

Under Illinois law, 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 (2001). Hearsay evidence is excluded or deemed inadmissible evidence because there is not an opportunity to cross-examine the “out of court asserter” to determine the veracity of the testimony. Id., see also Evans & Associates, Inc. v. Dyer , 246 Ill. App. 3d 231, 238, 615 N.E. 2d 770, 775 (1993) (The “rule that hearsay is generally not admissible is not merely a technical one, but rather is “fundamental” as it is based on the need for cross-examination”). The following instance in Mr. Stack’s rebuttal testimony contains hearsay and should be stricken.

- On page 15, lines 337-339, Mr. Stack states “But based on my years of the Commission and receiving calls from unhappy municipal customers whom I could not assist . . .”. Mr. Stack’s statement regarding calls “from unhappy municipal customers” attempts to introduce statements made by out of court asserters (i.e. municipal customers) and should therefore be stricken as inadmissible hearsay.

V. CONCLUSION.

For all of the foregoing reasons, the City of Pekin respectfully requests that its Motion to Strike be granted, and the identified portions of the rebuttal testimony of Thomas Stack be stricken from the record of this proceeding.

RESPECTFULLY SUBMITTED,

THE CITY OF PEKIN

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CERTIFICATE OF SERVICE

Edward D. McNamara, Jr., an attorney, hereby certifies that he served copies of the foregoing Motion to Strike of The City of Pekin on the individuals shown on the attached Service List, via electronic mail, on Friday, May 16, 2003.

//Edward D. McNamara, Jr.//
Edward D. McNamara, Jr.

VERIFICATION

I, Edward D. McNamara, Jr., certify that: (i) I am one of the attorneys for The City of Pekin; (ii) I have read the foregoing Motion to Strike of The City of Pekin; (iii) I am familiar with the facts stated therein; and (iv) the facts are true and correct to the best of my knowledge.

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