

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

Apple Canyon Utility Company	)	
Proposed general increase in water rates	)	Docket No. 09-0548
Lake Wildwood Utilities Corporation	)	
Proposed general increase in water rates	)	Docket No. 09-0549

**PEOPLE OF THE STATE OF ILLINOIS RESPONSE TO THE VERIFIED PETITION FOR INTERLOCUTORY REVIEW BY LAKE WILDWOOD ASSOCIATION AND APPLE CANYON LAKE PROPERTY OWNERS ASSOCIATION OF THE JUNE 25, 2010 RULING**

The People of the State of Illinois, by LISA MADIGAN, Attorney General of the State of Illinois (“the People” or “AG”), have intervened in this docket for the limited purpose of addressing the “Verified Petition For Interlocutory Review By Lake Wildwood Association And Apple Canyon Lake Property Owners Association Of The June 25, 2010 Ruling of the Administrative Law Judge” (“the Petition”). The People are entitled to intervene as a matter of right, to comment on any matter addressed in the proceeding subject to accepting the record as it stands. See 15 ILCS 205/6.5; 83 Ill. Admin. Code 200.200.<sup>1</sup> This response to the Petition is timely, being due 7 days from the July 1, 2010 filing pursuant to the Illinois Commerce Commission’s (“Commission”) rules. 83 Ill. Admin. Code 200.520.

The ALJ granted a Staff Motion to Strike references in the Initial Brief of Lake Wildwood Association and Apple Canyon Lake Property Owners Association (Applicants) to public comments made at Commission public meetings and comments posted on the public comment section of the Commission’s e-docket system. The People

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<sup>1</sup> Section 200.200(e) provides in part: “Subject to Section 200.850 [oral argument], any intervenor shall be allowed to comment in briefs and oral arguments on any matter addressed in the proceeding, whether before or after his intervention; and such intervenor shall be bound by rulings and orders theretofore entered.”

request that the Commission reverse this ruling and expressly state that both the Commission and ALJs are obligated under the law to consider the public statements and comments made in the context of Commission public meetings or on the Commission's public comment system, and parties are entitled to cite and quote such public comments in briefs and other documents filed with the Commission.

The issues presented by this Petition go to the very heart of the Commission's function as a governmental body responsible for reviewing utility practices that affect the provision and pricing of essential utility service. Striking public comments from briefs submitted in a Commission proceeding misapprehends the role of the Commission in protecting the public and in setting fair, just and reasonable utility rates, and contravenes the value of public participation, recognized and codified by the General Assembly. Striking references to public comments in parties' briefs deprives the public of the ability to comment on matters of record that the Commission and the ALJ are obligated to review. This reduces public participation to a meaningless and hollow act, denies the Commission important insight into public sentiment, and undermines the very purpose of Commission proceedings to set just and reasonable rates for the public.

**1. The Statutory Amendments Authorizing Public Comment on Commission Proceedings Are Essential to Representative Government and Equitable Commission Action.**

In 2006 the General Assembly adopted a multi-section amendment to the Public Utilities Act to address water utility customers. P.A. 94-950. Among the changes was the mandate that water utilities notify their customers when they request a rate increase, and a provision authorizing customers to request an ICC public forum in their community

to address the increase. 220 ILCS 5/8-306(n). The Commission has held public meetings or forums in connection with several water dockets since 2006, including in ICC Dockets 10-0194 (Aqua Illinois – Kankakee District); 09-0548 (Apple Canyon Utility Company); 09-0549 (Lake Wildwood Utilities Corporation); 09-0319 (Illinois American Water Company rate increase request); 08-0218 (Illinois American Water Company purchased water reconciliation); 07-0507 (Illinois American Water Company). The Commission has also held public meetings in connection with non-water rate increase cases, such as the Ameren rate increase in docket 09-0306/0311 and in Illinois Bell’s residential reclassification request, docket 06-0027.

In addition to authorizing public forums or meetings, the General Assembly assured that the Commission would not ignore public participation. The law provides:

Reports and comments made during or as a result of each public forum must be made available to the hearing officials and reviewed when drafting a recommended or tentative decision, finding or order pursuant to Section 10-111 of this Act.

220 ILCS 5/8-306(n). There is a court reporter at the meetings, and transcripts of the meetings, including the comments of the companies, public officials, and consumers, are posted on e-docket in each docket.

A year later, the General Assembly took two more steps to ensure that the public could participate in Commission proceedings. Section 2-107 of the Public Utilities Act, amended by Public Act 95-0127, directs the Commission to establish a public comment line, as follows:

The Commission shall provide a web site and a toll-free telephone number to accept comments from Illinois residents regarding any matter under the auspices of the Commission or before the Commission. The Commission staff shall report, in a manner established by the Commission that is consistent with the Commission's rules regarding *ex parte* communications, to the full Commission

comments and suggestions received through both venues before all relevant votes of the Commission.

220 ILCS 5/2-107. That same amendment also authorizes members of the public to directly address the Commission at its open meetings. *Id.* (“At each regular and special meeting that is open to the public, members of the public shall be afforded time, subject to reasonable constraints, to make comments to or to ask questions of the Commission.”) The Commission adopted rules to govern public comment on its web site at 2 Ill. Admin. Code 1700.2. The rule governing public participation at Commission open meetings is found at 2 Ill. Admin. Code 1700.1.

These changes to the Public Utilities Act demonstrate a clear legislative intent that avenues for public participation be established. This is consistent with the goal of the Public Utilities Act to set equitable rates that are accepted by the public as fair and affordable. Section 1-102 provides in part:

Sec. 1-102. Findings and Intent. The General Assembly finds that the health, welfare and prosperity of all Illinois citizens require the provision of adequate, efficient, reliable, environmentally safe and least-cost public utility services at prices which accurately reflect the long-term cost of such services and which are equitable to all citizens. It is therefore declared to be the policy of the State that public utilities shall continue to be regulated effectively and comprehensively. It is further declared that the goals and objectives of such regulation shall be to ensure ...

(d) Equity: the fair treatment of consumers and investors in order that (i) the public health, safety and welfare shall be protected; (ii) *the application of rates is based on public understandability and acceptance of the reasonableness of the rate structure and level*; ... (viii) *the rates for utility services are affordable* and therefore preserve the availability of such services to all citizens.”

220 ILCS 5/1-102 (last amended June 30, 2001) (italics added). The public participation provisions recently added to the PUA enable the public to inform the Commission about how rates affect them, e.g., whether they are understandable, are accepted by the public,

and are considered affordable. They help inform the Commission’s discretion in assessing whether rate and other utility proposals are fair, just, and reasonable.

Public participation in ratemaking is a key value underlying the Public Utilities Act. Petitions to Intervene are allowed based on a “plain and concise statement of the nature of the petitioner’s interest.” 83 Ill. Admin. Code 200.200(a)(2). Further, any person can bring a complaint, and “[n]o complaint shall be dismissed because of the absence of direct damage to the complainant.” 220 ILCS 5/10-108. The Attorney General can intervene as a matter of right, 15 ILCS 205/6.5, and cities are entitled to receive notice of Commission proceedings and can appear as a matter of right as well. 220 ILCS 5/10-108.

The open nature of Commission proceedings is a hallmark of public utility ratemaking and of democracy. Scholars of regulation have noted that utility regulation incorporates democracy by providing for public participation. “Any and all citizens and groups are invited to take part: individuals, industrial customers, government agencies, consumer groups, trade unions, the utility itself, even its competitors. Everyone affected by the outcome has a right to make their case openly ... In public forums, with all information open to all citizens, the principles of social dialogue and transparency come to life. It is an extraordinary exercise in democracy – and it works.” Palast, Oppenheim and MacGregor, Democracy and Regulation, page 2 (2003). Historically, public outcry over rates that were seen as unfair was the motor of statutory and regulatory action, particularly in rate-setting. McCraw, Prophets of Regulation, page 39-40 (1984).

Public comment, whether at a public meeting, on the Commission’s comment line or at a Commission open meeting, is a necessary part of the process whereby the

Commission determines what rates are fair, just, and reasonable. “[P]articipation by all parties upon whom the decisions will have an impact is usually welcomed by the regulators: it makes their jobs easier.” Palast, Oppenheim and MacGregor at 100-101. The ALJ order granting the Staff Motion to Strike, which limited parties’ right to acknowledge and present transcribed and publicly available comments to the Commission, is contrary to the goals of transparency and citizen participation and deprives the Commission of meaningful input in assessing utility proposals.

**2. The ALJ Decision To Strike Portions Of Applicants’ Initial Brief Misapprehends The Nature Of The Record For Decision, Ignores The Language Of The PUA, And Ignores The Commission’s Own Rules Governing Public Comment.**

The Staff Motion to Strike (granted by the ALJ on June 25) suggested that while the Staff “respects citizen participation,” citizen or public comments are not part of the record for decision. Staff Motion to Strike, pages 3, 4. Attempting to prevent parties, particularly those representing the public and consumers, from presenting citizen comments to the Commission in their briefs, does not constitute respect for citizen participation. In fact, treating public comments as less than entitled to record status effectively makes citizen participation a nullity. Making public comment off-limits to consumer intervenors feeds the public sentiment that their views are ignored, or don’t matter to the decision-makers. Having one record for citizen comments that cannot affect ratemaking or be included in briefs, and another record for utilities and experts, to which the Commission’s and advocates’ attention is restricted, is wrong as a matter of statute, rule and public policy.

In granting the Motion to Strike, the ALJ set up two “records”, one of which is off limits to parties who have formally intervened in the case. The ALJ noted that public comments “must be made available to the Administrative Law Judge and reviewed when rendering a decision. However, the availability of the comments and review thereof by the Administrative Law Judge does not in and of itself, make the comments a part of the record of evidence.” Notice of ALJ Ruling, June 25, 2010. In practice, this allows the ALJ and the Commission to review comments that no party can address. If *ex parte* concerns underlie the Staff’s Motion, forbidding parties from commenting on publicly posted consumer comments creates rather than removes an *ex parte* effect because the ALJ and the Commissioners can review and address public comments, but other parties cannot.

Further, the notion of two records is not supported by the Public Utilities Act, the Administrative Procedure Act, or the Commission’s own rules. First, public meetings should not be considered *ex parte*. They are sponsored by the Commission, notice is given to all parties and to the public, and there are no restrictions on who can speak. These are not typical *ex parte*, private meetings where an interested party tries to influence a result by “extra-record” promises or informal information. On the contrary, they are specifically authorized by law. The PUA specifically directs the Commission to consider reports and comments made at each public forum irrespective of whether they are present.<sup>2</sup> Although the statute does not specifically say the comments are part of the “record”, it clearly expects these comments to be treated as part of the record and to be a

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<sup>2</sup> Although Commissioners and ALJs may or may not attend, no Commissioner or ALJ attended the public meetings concerning these cases.

basis of decision.<sup>3</sup> 220 ILCS 5/8-306(n) (see page 3 supra). They are comments the ALJ and the Commission *must consider*, they are filed in the proceeding, and are available to all.

Similarly, comments filed pursuant to Section 2-107 are to be considered by the Commissioners and are publicly available for all to see. The General Assembly provided that “The Commission staff shall report, in a manner established by the Commission that is consistent with the Commission's rules regarding *ex parte* communications, to the full Commission comments and suggestions received through both venues [telephone and online comments] before all relevant votes of the Commission.” 220 ILCS 5/2-107. Consistent with the *ex parte* provisions of the PUA,<sup>4</sup> public comments are posted on e-docket in each docket and are available for parties and the public to review. There are no private comments or selectively provided information that would raise *ex parte* concerns.

In addition to requiring that all comments be publicly posted on e-docket, the Commission’s rule provides that “the Administrative Law Judge in the case or another Commission employee designated by the Executive Director will report the comments that have been posted to the full Commission, *before* the Commission votes on the matter. Parties to a formal proceeding before the Commission may respond to public comments by filing their own comments in the same section of e-Docket.” 2 Ill. Admin. Code 1700.2 (emphasis added). Clearly, if the Commission is authorized to receive a

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<sup>3</sup> Comments “must be made available to the hearing officials and reviewed when drafting a recommended or tentative decision, finding or order pursuant to Section 10-111 of this Act.” 220 ILCS 5/8-306(n).

<sup>4</sup> See Section 10-113: “In all proceedings, investigations or hearings conducted by the Commission, ... any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case, which shall include only the transcript of testimony and exhibits *together with all papers and requests filed in the proceeding*, including, in contested cases, the documents and information described in Section 10-35 of the Illinois Administrative Procedure Act. 220 ILCS 5/10-103 (emphasis added). Transcripts of public comments are “papers and requests filed in the proceeding” and should not be considered *ex parte*.

report on public comments from the ALJ before it makes its final decision, other parties should be entitled to include references and quotations from the comments in the briefs upon which the ALJ's report is based.

The Administrative Procedures Act ("APA") does not support the notion that agency employees or an ALJ can review and report on material but such material is excluded from the "record." The APA defines the record to include "Any decision, opinion, or report by the administrative law judge" and "All staff memoranda or data submitted to the administrative law judge or members of the agency in connection with their consideration of the case that are inconsistent with Section 10-60." 5 ILCS 100/10-35(6) & (7). Additionally, the APA recognizes that there may be materials that an agency can "entertain" on an *ex parte* basis. Even if public comments, made at a Commission sponsored meeting, with notice to all parties and an opportunity for all parties and persons to be heard (and posted on the docket of the case for all to see and respond to) can be considered *ex parte*, the PUA clearly directs the Commission to consider those comments, and the APA recognizes that the record should contain such matters because the law authorizes the agency to "entertain or dispose of [such matters] on an *ex parte* basis." *Id.*

The notion of two records – one for decision and one for public comment, should be rejected by the Commission. The Staff Motion to Strike is premised on a misunderstanding of the role of the public in utility rate making and a disturbing disregard for the Commission's right to hear from all parties – public participants and intervenors alike. Further, public comments should not be treated as *ex parte*. They are made publicly, upon notice to all parties, are not restricted, are posted on e-docket in full,

and the Commission is directed to consider them pursuant to the PUA. Finally, the APA recognizes that materials authorized by law or prepared by an agency staff or ALJ, such as a report of the public comments, are part of a public record. The APA does not present an obstacle to allowing parties to present public comments in briefs and other arguments before the Commission.

For these reasons, the Commission should reverse the decision of the ALJ to grant the Staff Motion to Strike Applicants' references to public comments in their briefs, and grant the Petition for Interlocutory Review.

**3. The Verified Petition for Interlocutory Review Demonstrates That Statutory Changes Control Over Prior Judicial Interpretations.**

In its Verified Petition for Interlocutory Review, the Applicants cite the statutory changes authorizing public participation through public meetings and public participation and comment. See 220 ILCS 5/8-306(n) and 5/2-107; Petition at 2. They also correctly cite case law that contains the common sense conclusion that when a statute is amended, it controls subsequent actions, and overrides inconsistent rules that might have predated the change in law. See, e.g., Petition at 6-8. In the interests of administrative economy, the People incorporate the legal analysis presented at pages 6-9 of the Applicants' Petition.

**4. Conclusion: The Petition for Interlocutory Review Should Be Granted.**

For the foregoing reasons, the People of the State of Illinois request that the Commission grant the Petition and reverse the ALJ's June 25, 2010 decision to strike portions of Applicants' briefs that refer to, quote or cite the public comments posted on e-

docket in this proceeding.

Respectfully submitted,

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