FIRST DIVISION
March 2, 2015

No. 1-12-2981
2015 IL App (1st) 122981-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel*. LISA MADIGAN, Attorney General of the State of Illinois,	)	Appeal from the Orders of the Illinois Commerce Commission.
Petitioner-Appellant,	)	
v.	)	Ill. C.C. Docket No. 09-0151
ILLINOIS COMMERCE COMMISSION; ILLINOIS-AMERICAN WATER COMPANY; and THE VILLAGE OF BOLINGBROOK,	)	
Respondents-Appellees.	)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

Held: Commission's 2008 reconciliation order did not violate section 8-306(h) of the Act for failing to establish a low-volume water unit rate; order's across-the-board allowance of a 1.25% adjustment for unbilled, authorized water did not violate section 8-306(m) of the Act, the Company's tariffs, or part 655.30 of the Public Utilities section of the Code; affirmed.

¶ 1 In this appeal, petitioner Attorney General Lisa Madigan challenges the decision of the Illinois Commerce Commission (the Commission) approving the annual reconciliation of the Illinois-American Water Company (the Company) for the 2008 calendar year. Specifically, petitioner contends that: (1) the decision violates section 8-306(h) of the Public Utilities Act (the Act) (220 ILCS 5/1-101 *et seq*. (West 2008)), because the annual reconciliation fails to establish a low-volume water unit rate for customers who used less than 1000 gallons of water in a billing period; and (2) the decision's allowance of a 1.25% adjustment to compensate the Company for delivery of authorized, unbilled water is in violation of: (a) section 8-306(m) of the Act, (b) the Company's tariffs, and (c) part 655.30 of the Public Utilities section of the Illinois Administrative Code (the Code) (83 Ill. Adm. Code § 655.30, adopted at 35 Ill. Reg. 16277 (eff. Dec. 19, 2001)). For the following reasons, we affirm the Commission's decision.

¶ 2 BACKGROUND

¶ 3 The Company is a public utility that purchases treated Lake Michigan water (purchased water) and distributes it to customers in eight districts. The Company also purchases sewage treatment services (purchased sewer treatment) for its customers in four Chicago-Metro districts.

¶ 4 The Act allows a utility to "surcharge" customers (*i.e.*, to pass through to the customers) the purchased water and purchased sewage treatment costs. The surcharge adjusts rates and charges to provide for recovery of the cost of purchased water, the cost of purchased sewage treatment services, or other costs which fluctuate for reasons beyond the utility's control or are too difficult to predict. 220 ILCS 5/9-220.2(a) (West 2008). The utility applies the surcharge on the customers' bills at the end of the calendar year. 83 Ill. Adm. Code § 655.60(e), adopted at 35 Ill. Reg. 16277 (eff. Dec. 19, 2001). Pursuant to part 655.60(a) of the Public Utilities section of the Code, a utility proposing a purchased water/sewage treatment surcharge shall file a purchased

water/sewage treatment surcharge rider in accordance with the requirements set forth in the Act. 83 Ill. Adm. Code § 655.60(b), (c), adopted at 35 Ill. Reg. 16277 (eff. Dec. 19, 2001).

¶ 5 Additionally, at the time a utility files its annual reconciliation, the utility shall file a petition seeking approval of its annual reconciliation. 83 Ill. Adm. Code § 655.50(a), adopted at 35 Ill. Reg. 16277 (eff. Dec. 19, 2001). The purpose of the petition is to reconcile the amounts collected under the surcharge by the utility, with the "actual prudently incurred costs recoverable" for the annual period. 220 ILCS 5/9-220.2(c) (West 2008).

¶ 6 On March 13, 2009, the Company filed an “Application for Approval of the Annual Reconciliation of Purchased Water and Purchased Sewage Treatment Surcharges” with the Commission for the 2008 calendar year relating to its eight purchased water districts and four purchased sewer treatment districts. Petitioner and the Village of Bolingbrook were granted petitions to intervene in the proceedings. The Company, Commission Staff (the Staff), and petitioner filed prepared testimony and exhibits. An administrative law judge also held hearings and heard additional live testimony. At the close of the evidence, briefs were submitted. The following is the relevant evidence presented regarding both the flat surcharge on certain purchased sewer treatment customers, as well as the 1.25% adjustment for authorized, unbilled water.

¶ 7 On September 3, 2009, the Company filed prepared "direct testimony" of Richard Kerckhove, a Company manager and accounting and financial expert. Kerckhove, in his prepared direct testimony, explained the Company's water reconciliation process in general. Later, on December 29, 2009, a hearing was held before the Commission. During the hearing, Kerckhove opined that the Company's tariffs with the Commission authorized it to surcharge consumers 1.25% of the total cost of its purchased water because that estimate, provided by the

American Water Works Association M-36 Manual, was pursuant to "reasonable estimation procedures." See 220 ILCS 5/8-306(m) (West 2008) (unaccounted-for water refers to the amount of water that enters the Company's distribution system and is not used for sales to customers or for other known purposes as determined by meter measurements, or where no meter reading is available, by "reasonable estimation procedures"). On February 26, 2010, the Company filed prepared "supplemental direct testimony" of Kerckhove, in which he testified that unaccounted-for water is a subset of "non-revenue water," which includes water lost to main breaks or leakage from the Company's system. He testified:

> "The current level of [unaccounted-for water] for each area is equal to the difference between system input volume and authorized consumption. Because the Company has not historically tracked all forms of authorized consumption, such as unbilled consumption of water used for firefighting, street cleaning and main flushing, the Company estimates unbilled authorized consumption in accordance with the American Water Works Association *** M36 Manual. The M36 Manual provides that, based upon the findings of numerous water audits worldwide, a default value of 1.25% is a reasonable estimate of unbilled, authorized consumption."

¶ 8 On May 25, 2010, the Staff submitted prepared "supplemental direct testimony" of William Atwood, a water engineer. Atwood testified that the Commission had in prior cases determined that "unaccounted for water" was distinct from "non-revenue water" because "unaccounted for water" meant it had unknown usage. Atwood stated that the use of 1.25% was reasonable and not a component of unaccounted-for water. He also stated that the Commission had determined in a prior proceeding that the study and the estimate from the M36 Manual

satisfied the "well-documented support" language of section 8-306(m) of the Act. See 220 ILCS 5/8-306(m) (West 2008) (the rates and surcharges approved for a water public utility shall not include charges for unaccounted-for water in excess of the maximum percentage of unaccounted-for water without "well-documented support"). However, Atwood recommended that the Commission order the Company to start tracking all forms of authorized consumption, such as unbilled consumption of water used for firefighting, street cleaning, and main flushing.

¶ 9 On May 25, 2010, petitioner filed prepared testimony of Scott J. Rubin, an independent water consultant. In opposing the Company's use of the 1.25% adjustment, he tendered copies of a report that the Company filed with the Illinois Department of Natural Resources (DNR) documenting its hydrant usage of Lake Michigan water for the 2008 audit year, which ran from October 1, 2007 to September 20, 2008. Rubin testified that the report, called an "Annual Water Use Audit Form" or "LMO-2" form, contained specific information about hydrant use in firefighting and training, water main flushing, sewer cleaning, street cleaning, and construction. Rubin testified that these categories included "all water uses" making up the company's proposed 1.25% adjustment. He testified that based on his review of the LMO-2, the Company's DNR-reported hydrant usage was only 0.27% of the total water purchased from its vendors, and he believed that this was an accurate and reasonable estimate of its purchased water used for authorized, unbilled purposes.

¶ 10 Rubin went on to testify that it would not be appropriate, however, even to allow a 0.27% surcharge for authorized, unbilled water because part 655.30(d) of the Public Utilities section of the Code states that the "determination of costs recoverable from customers through the purchased water/sewage treatment surcharge shall not include water used in, and/or sewage treated for, facilities either owned or leased by the utility." Rubin testified that the Company

flushes its mains and sewers with unmetered water to clean them, and that the water used this way would not be eligible for surcharging because it is used in the Company's "facilities." Rubin estimated that 81% of the water reported in the LMO-2 was water used for flushing Company mains and sewers, which was ineligible for surcharging customers.

¶ 11 On June 7, 2010, the Company submitted Kerckhove's prepared rebuttal testimony on the question of the 1.25% adjustment. Kerckhove testified that metering water used for firefighting and firefighting training was impractical, particularly where firefighting districts were "not reliable." Kerckhove stated that such entities, that use authorized but unmetered water, were outside the Company's control and therefore could not be tracked. He further stated that even water used by the Company in main flushing, valve and hydrant flushing, and inspection, was difficult to estimate. He testified that the unmetered Company-used water could be measured "on a going-forward basis," but that the cost in time and effort would be substantial "as it involves expanded responsibilities for certain of our operations and administrative personnel."

¶ 12 Also in his prepared rebuttal testimony, Kerckhove responded to Rubin's testimony about the DNR report by stating that the DNR reports were not accurate, and were under-reported. Kerckhove stated that they were under-reported because unaccounted-for flow in the DNR reports was calculated simply by assigning a leakage rate per day/per mile for certain types and ages of pipes, whereas the M36 Manual's 1.25% default adjustment included water used for firefighting, firefighting training, flushing water mains, storm inlets, culverts, and sewers, street cleaning, landscaping, irrigation in public areas, landscaping highway medians and similar areas, decorative water facilities, swimming pools, construction sites, water used for mixing concrete, dust control, trench setting, and water consumption at public buildings.

¶ 13 Kerckhove further stated in his prepared rebuttal testimony that the intent of the language that appeared in part 655.30(d) of the Code, stating that the determination of costs recoverable from customers through the purchased water/sewage treatment surcharge shall not include water used in, and/or sewage treated for, facilities either owned or leased by the utility, was to limit the recovery of water used by the Company that "does not provide a direct benefit to customers," like water used to irrigate Company property or to wash its vehicles.

¶ 14 On June 7, 2010, the Company submitted prepared "rebuttal testimony" of Kevin F. Hillen, a civil engineer and Operations Superintendent for the Chicago Metro Area. He stated that unmetered users of the Company's purchased water had no incentive to accurately report their uses, making it difficult for the Company to estimate unbilled authorized consumption. Hillen agreed with Kerckhove that the M36 Manual's 1.25% adjustment "default" provides a reasonable estimate.

¶ 15 On August 20, 2010, petitioner submitted prepared "rebuttal testimony" of Rubin, in which Rubin stated that American Water Works Association, the association that prepared the M36 Manual, serves the entire water industry in the United States and Canada and that most suppliers of potable water are actually municipal water or other government-owned utilities such as cities, towns, water districts, or regional water authorities. Rubin stated that any of the uses listed in the M36 Manual that supported the 1.25% adjustment assumed that water was being used by a government entity that does not meter its own water uses. Rubin pointed to the fact that the M36 Manual includes in its calculations uses like flushing storm inlets, street cleaning, irrigation in public areas and highway medians, decorative water uses, swimming pools, dust control, and water use in public buildings. Rubin argued that those kinds of uses were not

relevant to the Company's operations because "[t]hose types of uses should not be provided for free by an investor-owned utility." Rubin stated:

> "The M36 Manual lists these types of public uses of water in the category of authorized, unmetered use and suggests that a total of 1.25% of system consumption would be an appropriate estimate for all of them. As I stated, [the Company] does not provide most of these uses through unmetered service. Public buildings are metered, water use in public parks is metered, and so on. Therefore, [the Company's] unmetered, authorized use must be much less than the 1.25% suggested by Manual M36."

Rubin further averred that the differences between the LMO-2 report and the 1.25% surcharge "casts doubt on the credibility of the [Company's] reporting."

¶ 16 Also on August 20, 2010, the Staff submitted prepared "supplemental rebuttal testimony" of Atwood, who testified that after reviewing the other testimony provided, allowing the Company to recover for purchased water consumed in its own facilities was appropriate because they were prudently and reasonably incurred and because water utilities in Illinois "have always been allowed to recover these costs in previous purchased water surcharge reconciliations." Atwood further stated that the costs associated with water used by the Company for proper operation and maintenance of its systems should be recovered. He also noted that the DNR report covered a different time period than the reconciliation because there was a three-month offset.

¶ 17 Atwood stated that with regard to his prior recommendation that the Company track all of its unbilled, authorized uses going forward, the Company should instead be required to monitor authorized unbilled water for only one year. He stated:

> "In recognition of the fact that such tracking is complicated and labor intensive, I modify my recommendation so that the Company only needs to perform this tracking for one reconciliation year after issuance of a final Order in this proceeding in order to verify the M36 [M]anual estimate, as was done in American Water's Pennsylvania districts. Also, realizing that completely accurate tracking of unbilled authorized consumption is difficult to achieve, I recommended that the Company undertake sufficient discussions and correspondence with Staff to develop a satisfactory plan that outlines the various water uses to be tracked as well as the methods that will be used to track them."

¶ 18 On October 13, 2010, the Company submitted prepared "surrebuttal testimony" of Kerckhove, in which he responded to Atwood's suggestion by reiterating his concern that tracking was not practical, and urging the Commission to simply adopt the 1.25% estimate. He further opposed the use of the DNR report as a way to estimate the Company's actual water usage because the report presented an inconsistent time period, had not been designed for use in Commission proceedings, and had never been used in a reconciliation proceeding before.

¶ 19 Kerckhove also stated that petitioner had not objected to the use of the 1.25% adjustment at prior proceedings, and thus the issue should be deemed forfeited. He acknowledged that he did not know whether the 34 districts in the Pennsylvania study were public or private water districts, or whether any were municipal districts.

¶ 20 At the conclusion of the prepared testimony submissions and the hearings, the parties filed briefs. Petitioner opposed the Company's request to add a charge of 1.25% to consumer water bills to account for unbilled, authorized consumption. The Staff argued that the charge should be allowed but that the Company should be required to audit its use of unbilled water in

the affected districts for one year. Petitioner also argued that users in the purchased sewer treatment districts were entitled to a special surcharge rate when use was below 1000 gallons of water in any billing period.

¶ 21 On July 31, 2012, the Commission filed its final order (the Order) in this case. It found that the 1.25% adjustment was appropriate, but adopted the Staff's recommendation regarding tracking of unmetered water usage for one year. The Commission found that it was reasonable to make a distinction between unaccounted-for water and unbilled, authorized water. The Commission stated that unbilled, authorized water is not water that has been "lost" due to leaks, main breaks, or other causes. Rather, it is actually used, but not metered or billed, for various known purposes such as hydrant flushing, street cleaning, and firefighting. The Commission found that the recovery of the costs of unbilled, authorized water was not precluded by part 655.30(d) of the Code, which when viewed as a whole, suggests a narrower reading of the term "facilities" than that suggested by petitioner. The Commission found that the language as used in the context of part 655.30(d) is intended to apply to such places as Company buildings or other structures whether water is used or sewage is generated, and not to water usage occurring in the Company-owned distribution system or hydrants connected thereto.

¶ 22 The Commission also found that the 1.25% adjustment "provides a reasonable and more accurate estimate of the amount of unbilled-authorized consumption for such uses as hydrant and main flushing, firefighting and street cleaning, for the reconciliation year." The Commission further found that the Staff recommendation to order the Company to track unbilled-authorized water consumption for one year should be adopted. The Company was directed to work with the Staff to develop appropriate methods of tracking unbilled, authorized water consumption for a one-year period.

¶ 23 The Commission rejected petitioner's request to establish a low-volume surcharge rate for purchased sewer treatment users who had used less than 1000 gallons of water. The Commission found that the low-use unit sewer rate contemplated in section 8-306(h) of the Act is not statutorily required in a purchased sewage treatment surcharged under section 9-220.2 of the Act. The Commission noted that section 8-306 refers to section 9-220.2 surcharges in a number of places, and specifically applies a number of its subsection requirements to section 9-220.2 surcharges, but it does not do so with respect to section 8-306(h). The Commission stated that, as it had in a previous order, section 8-306(h) does not address purchased sewage treatment services or purchased sewage treatment costs or surcharges, and that the Commission could not identify any language in subsection (h) that could be interpreted as applicable to such services, costs, or surcharges. The Commission further noted that this issue was not raised until the briefs, and that there was not sufficient evidence in the record to show whether a unit charge for low-use customers, or other customers, would be appropriate, or how it should be designed. The Commission noted that these questions may warrant further consideration in further proceedings. Petitioner now appeals.

¶ 24 ANALYSIS

¶ 25 On appeal, petitioner contends that: (1) the Commission’s order violates section 8-306(h) of the Act because the reconciliation fails to establish a water unit rate for customers who use less than 1000 gallons of water in a billing period, and (2) the Commission's across-the-board allowance of a 1.25% adjustment to compensate the Company for the delivery of authorized, unbilled water violates section 8-306(m) of the Act, the Company's tariffs, and part 655.30 of the Public Utilities section of the Code.

¶ 26 Water Unit Rate for Low-Volume Customers

¶ 27 "In reviewing an order of the Commission, '[t]he findings and conclusions of the Commission on questions of fact shall be held *prima facie* to be true and as found by the Commission [and] rules, regulations, orders or decisions of the Commission shall be held to be *prima facie* reasonable ***.' " *Archer-Daniels-Midland Co. v. Illinois Commerce Comm'n*, 184 Ill. 2d 391, 396-97 (1998) (quoting 220 ILCS 5/10(d) (West 1996)). "[T]he Commission is entitled to great deference because it is an administrative body possessing expertise in the field of public utilities." *Id*. at 397. While the Commission's interpretation of a question of law is not binding on a court of review, a court will not substitute its own construction of a statutory provision for a reasonable interpretation adopted by the agency charged with the statute's administration. *Milkowski v. Illinois Department of Labor, Bureau of Employment Security, Division of Unemployment Compensation*, 82 Ill. App. 3d 220, 222 (1983) (the interpretation of a statute by the agency charged with the administration of the statute is entitled to substantial deference and such construction should be and normally is persuasive). The review of a question of law is *de novo*. *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 327 Ill. App. 3d 768, 775 (2002).

¶ 28 Section 9-220.2(a) of the Act allows a utility like the Company to file a surcharge which adjusts the rates and charges to provide for recovery of the cost of purchased sewer treatment services. 220 ILCS 5/9-220.2 (West 2008). Part 655.40(b)(2)(B) of the Code provides: "The residential sewage treatment surcharge shall be a flat rate equal to the average cost per 1,000 gallons or per 100 cubic feet of water used multiplied by the number of residential customers." 83 Ill. Adm. Code § 655.40(b)(2)(B), adopted at 35 Ill. Reg. 16277 (eff. Dec. 19, 2001). The only exception to the flat-rate requirement in the Code is part 655.40(c), which states: "If a utility's cost varies based on the strength of waste treated, the appropriate formula for

determination of the purchased sewer treatment surcharge will be included in the utility's purchased sewage treatment rider." 83 Ill. Adm. Code § 655.40(c), adopted at 35 Ill. Reg. 16277 (eff. Dec. 19, 2001). Here, it was determined that the Company's cost does not vary based on the strength of waste treated, and thus part 655.40(c) is inapplicable.

¶ 29 Petitioner contends that section 8-306(h) of the Act, which states that "[e]ach public utility that provides water and sewer service must establish a unit sewer rate, subject to review by the Commission, that applies only to those customers who use less than 1000 gallons of water in any billing period," supersedes part 655.40(b) of the Public Utilities section of the Code. The Commission found that section 8-306(h) of the Act does not apply to surcharges filed pursuant to section 9-220.2 of the Act, and we agree.

¶ 30 While the Commission initially contends that this issue is beyond the scope of this appeal since this is a reconciliation case pursuant to section 9-220.2 of the Act, and not a rate case pursuant to sections 9-201 and 10-110 of the Act (220 ILCS 5/9-201 (West 2008); 220 ILCS 5/10-110 (West 2008)), we need not reach this issue since we find that it was reasonable for the Commission to find that section 8-306(h) does not apply to surcharges.

¶ 31 The statutory language itself gives the best indication of legislative intent. *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 151 (1997). "Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions." *Id*. at 151-52. Here, section 8-306 of the Act includes 14 subsections. One such subsection, 8-306(m), states that utilities must file tariffs "to establish the maximum percentage of unaccounted-for water that would be considered in the determination of any *rates or surcharges*." (Emphasis added). 220 ILCS 5/8-306(m) (West 2012). Section 8-306 lists the word "surcharges" nine times throughout its 14 subsections. In section 8-306(h), however, the

Act only refers to rates, not surcharges, where it states: "[e]ach public utility that provides water and sewer service must establish a unit sewer *rate* ***." (Emphasis added). We find that it was a reasonable for the Commission to find that section 8-306(h) of the Act does not apply to surcharges where it could not identify any language in subsection (h) that could be interpreted as applicable to surcharges. See *Archer-Daniels-Midland*, 184 Ill. 2d at 397 (a court will not substitute its own construction of a statutory provision for a reasonable interpretation adopted by the agency charged with the statute's administration).

¶ 32 We are unpersuaded by petitioner's argument that subsection (h) of section 8-306 of the Act was meant to encompass surcharges by its use of the word "rates." Specifically, petitioner contends that because the Act defines "rate" as meaning "every individual or joint rate, fare, toll, charge, rental or other compensation of any public utility *** or any schedule or tariff thereof, and any rule, regulation, charge, practice or contract relating thereto" (220 ILCS 5/3-116 (West 2010)), the use of the word "rates" in subsection (h) of section 8-306 encompasses surcharges because a surcharge is either a "charge" or "other compensation." Petitioner points to no authority for the proposition that a surcharge is either a "charge" or "other compensation," and we find none in the statute or otherwise. We find that if we were to adopt the petitioner's broad definition of the word "rate" in this section to encompass surcharges, it would render the word "surcharges" in this section superfluous. For example, subsection (m), which reads: "to establish the maximum percentage of unaccounted-for water that would be considered in the determination of any rates or surcharges," would be rendered redundant if "rates" were also to mean "surcharges." We do not think this was the legislature's intention. *City Suburban Electric Motors, Inc. v. Wagner*, 278 Ill. App. 3d 564, 567 (1996) (every word, clause or sentence of a statute must be applied in a way that no word, clause or sentence is rendered superfluous).

¶ 33 Moreover, we note that even if we were to find that this particular section of the statute was ambiguous, it would not be enough to overturn the Commission's reasonable interpretation of section 8-306(h). *Illinois Consolidated Telephone Co. v. Illinois Commerce Comm'n*, 95 Ill. 2d 142, 152 (1983) (it is generally recognized that courts give substantial weight and deference to an interpretation of an ambiguous statute by the agency charged with the administration and enforcement of the statute); *Sartwell v. Board of Trustees of Teachers' Retirement System of the State of Illinois*, 403 Ill. App. 3d 719, 728 (2010) (same). Accordingly, we find that the Commission's finding that section 8-306(h) is inapplicable to surcharges is reasonable and we will not overturn it on appeal.

¶ 34 1.25% Adjustment

¶ 35 Petitioner's next argument is that the 1.25% adjustment for unbilled, authorized water was in violation of: (1) section 8-306(m) of the Act, (2) the Company's tariffs, and (3) part 655.30(d) of the Public Utilities section of the Code. As stated above, orders of the Commission shall be held to be *prima facie* reasonable on review. *Archer-Daniels-Midland*, 184 Ill. 2d at 396-97 (quoting 220 ILCS 5/10(d) (West 1996)). "The Commission is entitled to great deference because it is an administrative body possessing expertise in the field of public utilities." *Id*. at 397. This issue presents a mixed question of law and fact. Mixed questions of law and fact are questions in which the facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 211 (2008). Under these circumstances, the fact-finder examines the legal effect of a given set of facts and the fact-finding is inseparable from the application of law to those specific facts. *Chicago Messenger Service v. Jordan*, 356 Ill. App. 3d 101, 106-07 (2005). This standard is largely deferential toward the agency rendering the

decision and the decision will be reversed only when it is clearly erroneous. *Id*. An administrative agency's decision will be deemed clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Cinkus*, 228 Ill. 2d at 211.

¶ 36 Section 8-306(m)

¶ 37 Petitioner first contends that the 1.25% adjustment for unbilled, authorized water violates section 8-306(m) of the Act because the Company's unaccounted-for water costs are not "well-documented." Section 8-306(m) states:

> "(m) Water and sewer public utilities; unaccounted-for water. By December 31, 2006, each water public utility shall file tariffs with the Commission to establish the maximum percentage of unaccounted-for water that would be considered in the determination of any rates or surcharges. The rates or surcharges approved for water public utility shall not include charges for unaccounted-for water in excess of this maximum percentage without well-documented support and justification for the Commission to consider in any request to recover charges in excess of the tariffed maximum percentage." 220 ILCS 5/8-306(m) (West 2008).

¶ 38 However, the Company's Purchased Water Surcharge Rider, which establishes the maximum percentage of unaccounted-for water allowed in establishing the rates or surcharges provides in part:

> "Unaccounted-for Water Component of Purchased Water Surcharge for Purposes of this Schedule, the term 'Unaccounted-for Water' or 'UAW' refers to the amount of water that enters the Company's distribution system and is not used for sales to customers or for other known purposes as determined by meter

measurement or, where no meter reading is available, by reasonable estimation procedures."

¶ 39 During hearings and briefing, the Company stated that unbilled, authorized water was not "unaccounted-for water" because it was unmetered water that was used for *known* purposes, like hydrant flushing, hydrant testing, main flushing, fire training, and firefighting. The Company stated that unaccounted-for water, on the other hand, constituted water that was lost due to leaks and main breaks. The Company contended, and the Commission agreed, that because the 1.25% adjustment was for unbilled, authorized unmetered water used for a known purpose, it did not constitute unaccounted-for water, and therefore did not need to have "well-documented support" under section 8-306(m) of the Act.

¶ 40 Petitioner maintains that it was clearly erroneous for the Commission to find that unbilled, authorized water did not constitute "unaccounted-for water." While petitioner's witness, Rubin, discussed the Company increases in unaccounted-for water allowance for known, unmetered use, the Commission was not obligated to accept his definition of unaccounted-for water, as the Commission decides the credibility of expert witnesses and the weight to give their testimony. *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 214 Ill. App. 3d 222, 226-27 (1991) (as the fact finder, the Commission decides the credibility of the expert witnesses and the weight to be given their testimony). Rather, the Commission is given substantial deference and its decision will only be deemed clearly erroneous if we are left with the definite and firm conviction that a mistake has been made, which we are not. See *Cinkus*, 228 Ill. 2d at 211. Accordingly, we find that it was not clearly erroneous for the Commission to find that unbilled, authorized water did not constitute unaccounted-for water, and thus that

section 8-306(m) of the Act, entitled “Water and sewer public utilities; unaccounted-for water”, did not apply to the 1.25% adjustment.

¶ 41 Company Tariffs

¶ 42 Petitioner next contends that the 1.25% adjustment for unbilled, authorized water violates the Company’s tariffs because the Company did not use “reasonable estimation procedures” to arrive at the 1.25% adjustment. As stated above, one of the Company’s tariffs states that unaccounted-for water does not include water that is used for known purposes by “reasonable estimation procedures.” Petitioner contends that the across-the-board 1.25% adjustment for unbilled, authorized water, based on the M36 Manual, is not based on “reasonable estimation procedures.” In support of this contention, petitioner contends that the Company cannot just rely on a universal industry manual because that manual includes in its definition of unbilled, authorized water usage certain activities that are unrelated to the Company’s operations such as landscaping, flushing culverts, street cleaning, filling swimming pools, etc. Petitioner asserts that instead, the Company must "put in place 'procedures' to make those reasonable estimations." Petitioner contends that the Commission’s allowance of the 1.25% estimate was clearly erroneous. We disagree.

¶ 43 Witnesses Kerckhove, Atwood, and Hillen all testified that the M36 Manual satisfied the “reasonable estimation procedures” requirement of the Company’s tariffs because it was based on numerous water audits worldwide, and had been found to be appropriate by the Commission in the past. Petitioner's witness Rubin, on the other hand, testified that reliance on the M36 Manual did not amount to a reasonable estimation procedure because the Manual included governmental water utilities that provide authorized, unbilled water for more uses than the Company. This was the extent of the evidence presented regarding whether the 1.25%

adjustment was the result of a reasonable estimation procedure. Accordingly, it was not clearly erroneous for the Commission to decide that the use of the M36 Manual constituted a reasonable estimation procedure for arriving at the 1.25% adjustment. We reiterate that it is up to the Commission to decide the credibility of the expert witness and the weight to be given his testimony. *Hartigan*, 214 Ill. App. 3d at 226-27. The Commission is given substantial deference and its decision will only be deemed clearly erroneous if we are left with the definite and firm conviction that a mistake has been made. *Cinkus*, 228 Ill. 2d at 211. Here, we are not left with the firm conviction that a mistake has been made. However, we believe petitioner has raised an interesting issue of the ability to track the unbilled, authorized usage in question, and thus we believe the Commission's order directing the Company to work with the staff to develop appropriate methods of tracking unbilled, authorized water consumption for one year was appropriate.

¶ 44 Part 655.30(d)

¶ 45 Petitioner's final argument is that the 1.25% adjustment violates part 655.30(d) of the Code. Petitioner contends that a portion of the 1.25% adjustment includes water used in company facilities, which cannot be counted under part 655.30(d) of the Code. Part 655.30(d) states that the "determination of costs recoverable from customers through the purchased water/sewage treatment surcharge shall not include water used in, and/or sewage treated for, facilities either owned or leased by the utility." 83 Ill. Adm. Code § 655.30(d), adopted at 35 Ill. Reg. 16277 (eff. Dec. 19, 2001). Specifically, petitioner argues that the Company's water mains, hydrants, and sewer pipes all constitute part of its water distribution "facilities" and thus are excluded from the determination of the purchased water/sewage treatment surcharge. The Company and Staff maintain that the term "facilities" in part 655.30(d) of the Code is limited to

company buildings and non-infrastructure uses. The Commission chose not to adopt the petitioner's interpretation of this part of the Code, which was a reasonable finding based on the evidence.

¶ 46 Petitioner, in support of its contention, points to section 8-502 of the Act, which is not a general definitions section and is entitled "Joint use of facilities." It states in part that whenever the Commission shall find that public convenience and necessity require the use by one public utility of the "conduits, subways, wires, poles, pipes, or other property or equipment, or any part thereof, on, over or under any street or highway, belonging to another public utility," the Commission may order that such use be permitted and prescribe reasonable compensation and reasonable terms and conditions for such joint use. 220 ILCS 5/8-502 (West 2008). Because of this section's title, petitioner seems to be arguing that "facilities" mean "conduits, subways, wires, poles, pipes, or other property or equipment, or any party thereof." Additionally, petitioner points to section 9-220.2(b) of the Act which states: "For purposes of this Section, 'costs associated with an investment in qualifying infrastructure plan' include a return on the investment in and depreciation expense related to plant items or facilities (including, but not limited to, replacement mains, meters, services, and hydrants)." 220 ILCS 5/220.2(b) (West 2008). Accordingly, petitioner contends that the word "facilities" in part 665.30(d) of the Code encompasses these two definitions. We find no support for petitioner's broad interpretation.

¶ 47 As the Company notes, there is no general definition of the word "facilities" in ether the Act or the Code. The Company contends that it is clear from part 665.30(d) of the Code that "facilities" means Company buildings or other structures. The Commission agreed with the Company and found that the language as used in the context of part 655.30(d) was intended to

apply to such places as Company buildings or other structures whether water is used or sewage is generated.

¶ 48 We reiterate that a court will not substitute its own construction of a statutory provision for a reasonable interpretation adopted by the agency charged with the statute's administration. *Church v. State*, 164 Ill. 2d 153, 162 (1995). See also *Milkowski*, 82 Ill. App. 3d at 222 (the interpretation of a statute by the agency charged with the administration of the statute is entitled to substantial deference and such construction should be and normally is persuasive). Moreover, we note that even if we were to find that the term "facilities" in this section was ambiguous, it would not be enough to overturn the Commission's reasonable interpretation of the term. *Illinois Consolidated Telephone.*, 95 Ill. 2d at 152 (it is generally recognized that courts give substantial weight and deference to an interpretation of an ambiguous statute by the agency charged with the administration and enforcement of the statute); *Sartwell*, 403 Ill. App. 3d at 728 (same). Accordingly, we find that the Commission's finding that the term "facilities" in part 655.30(d) of the Code encompassed Company buildings and other structures was reasonable, and we will not overturn it on appeal.

¶ 49 CONCLUSION

¶ 50 For the foregoing reasons, we affirm the Order of the Illinois Commerce Commission.

¶ 51 Affirmed.