

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF COMMUNITY UTILITIES OF)
INDIANA, INC. FOR: AUTHORITY TO)
INCREASE ITS RATES AND CHARGES FOR)
WATER AND WASTEWATER UTILITY)
SERVICE; APPROVAL OF NEW SCHEDULES)
OF RATES AND CHARGES APPLICABLE)
THERETO; AUTHORITY TO RECOVER)
CERTAIN COSTS INCURRED IN)
CONNECTION WITH CAUSE NOS. 44724,)
45342 AND 45389; AUTHORITY TO RECOVER)
COSTS INCURRED AND DEFERRED IN)
CONNECTION WITH THE COVID-19)
PANDEMIC; APPROVAL OF A NEW)
RESIDENTIAL LOW-INCOME RATE FOR)
WATER AND WASTEWATER SERVICE; AND)
OTHER APPROPRIATE RELIEF)

CAUSE NO. 45651

PETITIONER'S RESPONSE TO MOTION TO STRIKE

Community Utilities of Indiana, Inc. ("Petitioner" or "CUII") respectfully requests that the Indiana Utility Regulatory Commission (the "Commission") deny the Motion to Strike filed by the Office of Utility Consumer Counselor ("OUCC") and intervenor Lakes of the Four Seasons ("LOFS") (collectively the "Movants"). In support, CUII states:

1. Petitioner Does Not Intend to Seek Administrative Notice.

Movant's motion practice on the administrative notice issue was unnecessary. As the Movants note, they did bring to the attention of CUII's counsel that its Motion for Administrative Notice was arguably deficient under the Commission's current rules because Petitioner did not identify the specific facts it intended for the Commission to administratively notice. Perhaps counsel for CUII was not sufficiently clear, but at that time, counsel for CUII informed counsel for Movants that, in light of this issue, CUII did not intend to seek administrative notice of the

documents attached to its Motion for Administrative Notice filed on December 7, 2021. This issue is thus moot.

2. CUII Filed Proper Rebuttal Testimony.

Movants claim that certain documents (attachments to the rebuttal testimony of Mr. Lubertozzi and Mr. Fischer) should be stricken because they do not constitute proper rebuttal, and instead should have been included with CUII's case-in-chief evidence. Similarly, Movants assert that certain rebuttal testimony of Mr. Dickson on the need for a declining consumption adjustment should be stricken because it is not proper rebuttal and should have been included in CUII's case-in-chief.

Movants are wrong. As they note, proper rebuttal testimony is evidence that "tends to disprove, explain, contradict or otherwise address the evidence by the adverse party." Motion to Strike at 6 (citing *Petition of Indiana Bell*, Cause No. 38059 (IURC Dec. 3, 1986)) (other citations omitted). And that is precisely what the rebuttal attachments and testimony at issue do – they "disprove, explain, contradict or otherwise address" the evidence prefiled by the OUCC and/or LOFS, and the Commission holds the discretion to permit the evidence.

For example, the OUCC and LOFS both argue against the recovery in rates of engineering costs incurred by CUII in connection with its Cause No. 45389 wastewater project plans, on the bases that there is no precedent for such and that the Commission did not direct the incurrence of the costs. Stull Testimony, pp. 53, 57-58; Cleveland Testimony, p. 4. In response, Mr. Lubertozzi's rebuttal testimony includes a number of documents submitted by CUII and/or issued by the Commission under Cause No. 44724 (CUII's most recent rate case), which demonstrate that engineering costs in question were incurred as a result of unique circumstances, including Commission direction to CUII to develop a wastewater system improvement plan and present such

plan to the Commission. The documents at issue also demonstrate that CUII kept the parties and the Commission updated and apprised of its work on the wastewater system improvement plan, and only learned of one party's "grave concerns" about the plans after engineering was almost complete. These documents, along with Mr. Lubertoizzi's rebuttal testimony, directly contradict and address the Movants' arguments that the engineering costs should be disallowed. Specifically, they tend to disprove the Movants' argument that the Commission did not direct CUII to engage in these engineering activities; and they further contradict the Movants' position on this issue by showing the Movants' themselves were aware of CUII's engineering activities and the incurrence of the engineering costs and did not object until the engineering was almost complete.

This is a classic example of how rate cases progress. A petitioning utility includes a number of different cost items in its case-in-chief filing, knowing that a utility's expenses are presumed reasonable, unless and until another party objects. *In re Indiana Michigan Power Co.*, Cause No. 44075 (IURC Feb. 13, 2013). Then, the utility can present rebuttal testimony with additional evidence showing that the costs at issue are indeed reasonable.

Similarly, Mr. Dickson's rebuttal testimony about weather data directly disproves, explains, contradicts and otherwise addresses Mr. VerDouw's testimony that a declining consumption adjustment is not needed, by showing that even with weather conditions ripe for increasing consumption, consumption is nevertheless declining. This is altogether proper rebuttal.

Likewise, Mr. Fischer's testimony and the attachments thereto directly contradict the testimony of OUCC witness Parks at page 11, line 8 that the 14.0 MGD peak flow design of the headworks is too large. Mr. Fischer offers his opinion that he believes the headworks is correctly sized to handle a peak flow of 14.0 MGD and relies on his own experience as well as the flow projections of three engineering firms made before CUII retained Baxter & Woodman – all of

whom disagree with Mr. Parks. As discussed in detail below, as an expert witness, it was appropriate for Mr. Fischer to rely on the opinion of other engineering experts to support his independent conclusions. *See City of Tell City v. Ind. Utility Regulatory Comm’n*, 558 N.E.2d 857, 863-64 (Ind. Ct. App. 1990). It also is appropriate for Mr. Fischer to attach the reports he reviewed to support the analysis in his testimony – all of which were available to Mr. Parks before he offered his opinion. Through their Motion, Movants essentially ask that Mr. Parks’ opinion, which has been refuted by four engineering firms, go un rebutted. Such a result would be error. Petitioner is entitled to show that Mr. Parks’ conclusion is wrong.

While not mentioned in their Motion, Movants also request in Exhibit A that the Commission strike Quarterly Reports that were attached to Mr. Grosvenor’s testimony. These reports were offered to refute the testimony of LOFS witness Cleveland regarding customer complaints. Testimony of Cleveland, p. 7.¹ Mr. Grosvenor testifies that “Mr. Cleveland’s testimony overstates the number of complaints that the Company has received since January 1, 2020.” The Quarterly Reports support Mr. Grosvenor’s testimony and “disprove, explain, contradict or otherwise address” Mr. Cleveland’s testimony regarding customer complaints. Among other things, the Quarterly Reports show that CUII received no complaints during some quarters. Here again, CUII is entitled to contradict Mr. Cleveland’s erroneous testimony.

Finally, it should be noted that Movants request in their Motion that the Commission strike “all of the documents for which CUII improperly requested administrative notice as set forth in Exhibit A hereto and portions specified herein of the pre-filed rebuttal testimony of Loren Grosvenor that are inadmissible hearsay.” Motion to Strike at 1. However, in addition to those documents, Movants vaguely complain about other evidence Petitioner offered in rebuttal without

¹ “Over the past year or so, community members have continued to report problems with discolored and unusually hard water.”

moving to strike that evidence, such as the schematics attached to Ms. Streicher’s testimony. Because Movants did not move to strike any portion of Ms. Streicher’s testimony or attachments (all of which were proper rebuttal), CUII has not addressed those comments in this response.

3. Mr. Lubertozi’s Corrections to Legal Costs Should Be Allowed.

Movants also complain about the corrections made to Mr. Lubertozi’s case-in-chief testimony about the dollar amounts of legal/regulatory expenses incurred by CUII in Cause Nos. 45342 and 45389. After CUII discovered these mistakes, CUII promptly notified the OUCC and LOFS on April 25, 2022, through discovery responses and via a cover email – precisely to avoid a surprise. See Attachment A.² CUII then followed up with “official” corrections filed with the Commission on April 27, 2022.³

Movants’ unfair attempt to limit the definition of a correction to a typo is unreasonable and unsupported by statute, rule, or caselaw. Additionally, Movants’ attempt to characterize these corrections as a new request for relief is likewise unreasonable; these corrections did not raise the overall level of revenue increases requested in its case-in-chief. Nor did the corrections raise a new issue; they simply corrected the level of legal expenses requested to be recovered. The cases cited by Movants themselves show the weakness of their argument: *Highland Utilities* involved a request for a return to be added to its revenue requirement (as opposed to the utility’s initially-proposed “breakeven” rates), made for the first time in a post-rebuttal “correction” – easily distinguishable from corrections to the dollar amounts of certain expenses submitted *prior to* its rebuttal filing. Cause No. 38890, p. 3 (IURC Sept. 19, 1990).⁴ And in *Indiana Bell*, the

² Attachment A includes only the portions of the email’s attachments relevant to this response.

³ While claiming surprise, the discovery response in which the mistake was disclosed was served days earlier. LOFS witness Cleveland actually attached the relevant discovery response to his prefiled testimony. See Attachment RC-5 to his testimony.

⁴ The Motion improperly inserted the bracketed “[CUII’s]” into a purported quotation from *Highland Utilities*, as if it was CUII’s proposal that the Commission rejected. To be clear, CUII was not involved in that case.

Commission found that the testimony at issue contained modifications to the utility's proposed plan, the modifications were made in response to other parties' testimony, and the testimony was proper rebuttal. *Order DENYING Motion to Dismiss*, Cause No. 38059 (IURC Dec. 3, 1986).

4. The Block Quote in Mr. Grosvenor's Testimony is Admissible.

Movants' request to strike a block quote from Mr. Grosvenor's testimony is misplaced for at least three reasons: (a) the quote on its face is not hearsay under even Movants' incomplete restatement of the rule; (b) expert witnesses in Commission proceedings may rely on out-of-court statements made by other experts; and (c) Mr. Carbonaro is referred to, quoted, or cited by OUCC witness Parks multiple times, portions of Mr. Carbonaro's testimony are included as part of OUCC Attachment JTP-18, and CUII is entitled to respond accordingly.

A. The block quote is neither hearsay nor inadmissible.

Movants define hearsay as "an out-of-court statement offered to prove the truth of the matter asserted by a declarant who is unavailable for cross examination." Motion to Strike at 7 (citing *Kimbrough v. Anderson*, 55 N.E.3d 325, 335 (Ind. Ct. App. 2016); I.R.E. 801(c), 802).⁵ However, the quoted portion of Mr. Carbonaro's testimony is not "*offered to prove the truth of the matter asserted by a declarant.*" Mr. Grosvenor offers the quote from Mr. Carbonaro as support for Mr. Grosvenor's contention that "[a] new headworks has been consistently identified as a crucial need going back at least two cases and was discussed at length in both of those cases." After making this statement, Mr. Grosvenor quotes the testimony of Petitioner's former Vice President of Operations for the Midwest and Mid-Atlantic Regions in Cause No. 44724, which Movants did not move to strike. Then, as support for the claim that headworks also was identified

⁵ The *Kimbrough* case involves a negligence action. It is unclear why Movants chose to cite this case and ignore precedent regarding expert witnesses testifying in Commission proceedings. As further discussed below, Movants also ignore that the Court in *Kimbrough* concluded the testimony was admissible for reasons that apply here.

as a crucial need in Cause No. 45389, Mr. Grosvenor quotes the excerpt from Mr. Carbonaro's testimony that Movants inconsistently moved to strike. Neither statement is hearsay because neither was offered to "prove the truth of the matter asserted by a declarant."

Even if it did constitute hearsay, Mr. Carbonaro's testimony should still not be excluded under Indiana Rule of Evidence 804(b)(1):

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

(1) *Former Testimony*. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had or, in a civil case, whose predecessor in interest had an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(Emphasis in original). Mr. Carbonaro's testimony was admitted into evidence in Cause No. 45389, a proceeding in which both Movants were parties. And not only did Movants have an opportunity to cross examine Mr. Carbonaro in that proceeding, counsel for LOFS and OUCC actually did cross-examine him *for an entire hearing day* on November 20, 2020. Therefore, even if it was offered for the truth of the matter asserted, the block quote would be admissible.

B. The Court of Appeals has long held that expert testimony in Commission proceedings relying on hearsay is admissible.

Even assuming *arguendo* that Mr. Carbonaro's testimony were offered to prove the truth of matters asserted therein – *which it clearly is not* – the block quote still would be admissible. Like nearly all witnesses in Commission proceedings, Mr. Grosvenor and Mr. Carbonaro were offered by Petitioner as experts to provide opinions with respect to CUII's capital needs – neither was offered as a pure "fact witness." Accordingly, Mr. Grosvenor is entitled to rely on Mr. Carbonaro's prior opinion, so long as he had the ability to independently evaluate the information

provided by Mr. Carbonaro through his own personal observation. In *City of Tell City v. Ind. Utility Regulatory Comm’n* the Indiana Court of Appeals explained:

The opinion of an expert is not necessarily rendered inadmissible or incompetent because it may be based on knowledge of facts gained from hearsay sources. Any expert worthy of the name must of necessity assimilate prior learning derived from the experiences of others. As an expert witness he draws upon various sources of information whose credibility or trustworthiness he must determine in light of his expertness. It would completely frustrate the use of expert witnesses if they were obliged to substantiate each single factor upon which their ultimate opinion must depend upon first hand personal knowledge or personal experience. If some of the expert’s factual information is derived from sources fairly trustworthy though hearsay and he has as such the ability to coordinate and evaluate that information with all the other facts in his possession secured through personal observation, the trial court may in the exercise of a sound discretion permit the expert’s ultimate opinion to be considered by the jury.

558 N.E.2d 857, 863-64 (Ind. Ct. App. 1990) (quoting *Phillips v. State*, 386 N.E.2d 704, 708 (Ind. Ct. App. 1979)). See also, *Capital Improvement Bd. v. Public Serv. Comm’n*, 375 N.E.2d 616 (Ind. Ct. App. 1978) (finding an IPALCO witness’s testimony admissible because he “was giving his own expert opinion and not merely acting as a conduit for the opinions of others”).⁶

Mr. Grosvenor does not rely on Mr. Carbonaro’s testimony as the basis of his conclusion that replacing the headworks continues to be a crucial need of CUII’s system. Rather, Mr. Grosvenor relies on his own personal observations for that conclusion, including:

- The “current headworks hydraulic capacity continues to be inadequate and leads to surcharging of the collection system and basement back-ups and SSOs.” Pet. Exh. 2-R at 11.
- The headworks “continues to plague the treatment process with rags and debris causing blockages and unnecessary wear on pumps and other mechanical components.” *Id.*
- “The existing facility is deteriorating” *Id.* at 12.

⁶ Movants fail to disclose that in even the single case they cite, *Kimbrough v. Anderson*, the Court of Appeals found the out-of-court statement was hearsay, but it “*was admissible*” because the statement was offered by an expert witness as opposed to a fact witness. 55 N.E.3d at 336.

- The current facility has “odor issues.” *Id.*
- “Manually cleaning the headworks, particularly during severe storms is dangerous and puts our employees at risk.” *Id.* at 15.
- “Over the last ten to fifteen years there have been significant increases in the typical solid loading from disposable wipes in the waste stream,” which make manual screens less feasible for systems of CUII’s size. *Id.* at 16.
- “If there is a large rain event, the manual screens can become blinded during off hours, leading to surcharges and backups. These incidents inevitably have been the cause of SSOs and likely basement backups. . . .” *Id.* at 18.
- “Without a proper headworks, there will continue to be a bottleneck at the treatment plant. The result will be that no matter how much I&I is reduced, there will continue to be blinding of manual screens, blockages, pump wear, and loss of capacity in the tanks with the build-up of rags that should have been removed through proper screening.” *Id.* at 19.
- “Without an upgrade to the headworks, I am concerned that we will be taking an unnecessary risk that could lead to an injury of one of the operators.” *Id.* at 2.

C. Mr. Carbonaro’s testimony in Cause No. 45389 is referred to, quoted, or cited by OUCC witness Parks (in testimony and exhibits) repeatedly.

OUCC witness Parks repeatedly quotes Mr. Carbonaro’s testimony in Cause No. 45389, which further underscores the inappropriateness of Movants’ request to strike the single quote in Mr. Grosvenor’s testimony. In all, Mr. Parks cites Mr. Carbonaro’s testimony in ten separate footnotes to his testimony. Mr. Parks also included a nine-page excerpt from Mr. Carbonaro’s testimony in Cause No. 45389 as part of his Attachment JTP-18 and highlighted certain facts Mr. Parks apparently wanted to emphasize. OUCC witness Parks’ testimony also includes block quotes from Mr. Carbonaro’s testimony. For instance, on page 16 of his testimony Mr. Parks includes the following block quote from Mr. Carbonaro’s testimony in Cause No. 45389:

Q. Did CUII’s 2020 permitted design include grit removal?

A: No and yes. In his Case-in-Chief Testimony, Mr. Sean Carbonaro testified:

Grit collection is typical for a facility of this capacity, but is only designed at this phase and will not be constructed as part of the initial construction. The Company sampled throughout the facility and identified that grit is likely not enough of an operational concern to justify the costs.

On pages 10 through 11 of his testimony, Mr. Parks paraphrases portions of page 49 of Mr. Carbonaro's testimony in Cause No. 45389, which is the same page that the block quote in Mr. Grosvenor's testimony is taken from.

It would be error for the Commission to allow Mr. Parks to repeatedly quote, cite, and otherwise refer to the testimony of Mr. Carbonaro in Cause No. 45389, but strike one quote from that same testimony in Mr. Grosvenor's testimony.

Conclusion

For the foregoing reasons, Petitioner CUII respectfully requests that the Commission deny the Movants' Motion to Strike.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served on June 22, 2022, by electronic transmission to the following counsel:

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From: Beyrer, Kelly
Sent: Monday, April 25, 2022 6:16 PM
To: Shoultz, Nikki; lee@glblegal.com; Hitz, Lorraine; Le Vay, Daniel; UCC Info Mgt
Cc: Pashos, Kay; Alson, Mark; Krohne, Steven; Parks, James
Subject: 45651 - CUll's Responses to LOFS DR 01
Attachments: 45651_Community Utilities of Indiana_Objections to LOFS DR 01_04252022-c.pdf; 45651_Community Utilities of Indiana_Responses to LOFS DR 01_04252022-c.pdf

Categories: Filed to ND
FilingIndicator: -1

Good afternoon,

Please see attached, Petitioner's responses and objections to LOFS DR 01. These documents and accompanying attachments are being served via the "Community Utilities of Indiana, Inc. 2021-2022 Rate Case" sharefile. If you have any issues accessing the files, please let me know.

Please note that DR 01.16 discusses a correction to be made to Petitioner's direct testimony. Updated testimony reflecting the corrections will be filed this week.

Thanks,
Kelly



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**COMMUNITY UTILITIES OF INDIANA, INC.,
RESPONSE TO THE OUCC
DATA REQUEST LOFS 01.16**

Witness Responsible:	Andrew Dickson
Title:	FP&A Manager
Date Received:	April 14, 2021
Docket No.:	45651

LOFS 01.16

Referencing Mr. Lubertozi's direct testimony at p. 14, lines 18-20, please produce:

- a. The invoices supporting CUII's request for recovery of \$115,000 in legal fees to litigate Cause No. 45342;
- b. Citation to a statute, administrative rule or case law that authorizes utility recovery of attorney fees where pre-approval was denied.

OBJECTION:

Petitioner objects to subpart (b) of the foregoing Data request on the grounds that it seeks legal research and/or privileged information. Petitioner further objects to this request on the basis that it is vague and ambiguous. Petitioner further objects to this request on the grounds and to the extent it seeks information that is confidential, privileged, and/or proprietary. Subject to and without waiving the foregoing objections, Petitioner provides the following response.

RESPONSE:

- a. In this case, CUII is seeking recovery of regulatory costs (legal fees) incurred in connection with Cause Nos. 45342 and 45389 – a total of \$434,463. While preparing its response to LOFS 01.16, the Company noticed two inadvertent errors in Mr. Lubertozi's direct testimony. The first is on Page 14, Line 18 and the second is on Page 15, Line 7. The Company will file corrected direct testimony of Mr. Lubertozi on or before April 27, 2022 (but the corrections to the testimony that will be made are shown below). These changes will also impact the Company's revenue requirement, which the Company will reflect in its rebuttal position. The Company incurred the following amounts related to Cause No. 45342 and Cause No. 45389:

Cause No.	Project Description	Project No.	Reasonable Legal		Included in Direct Case	Change Since Direct Case
			Fees Incurred	Comments		
45342	Iron Filter	2020014	\$ 176,144	This project was approved by the Commission November, 04, 2020.	FALSE	\$ 176,144
45389	Collection System Improvements	2020017	125,924	This project was denied by the Commission May 5, 2021	TRUE	11,976
45389	WWTP Expansion	2020016	132,395	This project was denied by the Commission May 5, 2021	TRUE	17,011
Total			\$ 434,463			\$ 205,131

Mr. Lubertozzi Direct Testimony (Page 14, Lines 18 – 20)

Additionally, the Company has included the costs incurred, ~~\$144,000~~\$176,144 (see workpaper k) to litigate Cause No. 45342 as a deferred Operational and Maintenance (“O&M”) expense amortized over three years.

Mr. Lubertozzi Direct Testimony (Page 15, Lines 7 – 9)

Additionally, the Company has included the costs incurred, ~~\$145,000~~\$258,319 (see workpaper k) to litigate Cause No. 45389 as a deferred O&M expense amortized over three years.

Notes:

Strikethrough represents deletions.

Underlined represents correction.

CUII has updated the costs associated with its preapproval projects, as identified in the table above. Primarily, CUII did not include legal fees from Cause No. 45342 in its direct filing, and has corrected that (\$176,144 in legal fees, proposed to be recovered as a deferred O&M expense amortized over three years). Further, since the date of its direct filing, additional invoices have been booked against these preapproval projects – these updates do not reflect new costs related to these filings, but rather invoices that had not yet been received and attributed to the appropriate matter(s). An additional \$11,976 has been identified as related to the Collection System preapproval efforts, and \$17,011 for the wastewater treatment plant preapproval efforts. CUII has included legal fee invoices for all three preapproval efforts – please refer to the attached: “LOFS 01.16 IFR Preapproval Legal Fees (2020014)_CONFIDENTIAL.pdf”; “LOFS 01.16 WWTP Preapproval Legal Fees (2020016)_CONFIDENTIAL.pdf”; and “LOFS 01.16 CSEP Preapproval Legal Fees (2020017)_CONFIDENTIAL.pdf”.

- b. In LOFS request 01.16b, the LOFS seek a statute, administrative rule, or case law that authorizes utility recovery of attorney fees where pre-approval was denied. However, in 01.16a, the LOFS refers to Cause No. 45342, which was the Cause related to the Iron Filter project, approved by the Commission on November 4, 2020.

Notwithstanding its previously stated objections, CUII responds that the Commission’s Orders in Cause Nos. 45342 and 45389 authorize CUII to seek recovery of these expenses in this case. See also Ind. Code 8-1-2-48; Ind. Code 8-1-2-0.5; *Capital Improvement Bd. v. Public Serv. Comm’n*, 375

N.E.2d 616 (Ind.App.1978); *City of Evansville v. SIGECO*, 339 N.E.2d 562 (Ind.App. 1975); *L.S. Ayres v. IPALCO*, 351 N.E.2d 814 (Ind.App.1976).

Attachments:

LOFS 01.16 IFR Preapproval Legal Fees (2020014)_CONFIDENTIAL.pdf
LOFS 01.16 WWTP Preapproval Legal Fees (2020016)_CONFIDENTIAL.pdf
LOFS 01.16 CSEP Preapproval Legal Fees (2020017)_CONFIDENTIAL.pdf

Date Response Provided: April 25, 2022