STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

APPLICATION OF AMERICAN SUBURBAN UTILITIES, INC., FOR AUTHORITY TO INCREASE RATES AND CHARGES THROUGH THE SMALL UTILITY PROCEDURE PURSUANT TO IND. CODE § 8-1-2-61.5 AND 170 IAC 14-1-1 ET SEQ.	**)**	**CAUSE NO. 45649-U**

APPLICANT'S RESPONSE TO OUCC'S OBJECTION AND MOTION TO STRIKE

Applicant, American Suburban Utilities, Inc. ("ASU"), by counsel, responds to the Indiana Office of Utility Consumer Counselor's ("OUCC") Objection and Motion to Strike ("Motion"). The OUCC's Motion ignores: (1) that ASU could not have anticipated rate case expenses because the OUCC made this small utility ("small-U") filing contentious; (2) prior Commission orders establish that replying to the position of an adverse party is proper rebuttal; and (3) prior Commission Orders and the rules of evidence establish an expert witness may rely on hearsay. Accordingly, the Motion should be denied.

I. The Commission encourages eligible utilities to utilize the small utility process and the OUCC has instead made the case contentious resulting in unforeseen rate case expenses.

As explained in Ms. Shafer's rebuttal testimony, ASU had anticipated minimal expenses based on the nature of a small utility filing.[1] It is clear the OUCC is not treating this proceeding as a small utility application. Starting with discovery, the OUCC has changed the nature of this case, the OUCC has issued hundreds of data requests. The OUCC cannot claim ignorance regarding the highly contentions nature of this filing. When ASU sought an unopposed modification to the procedural schedule, ASU cited discovery as a reason: "Between March 15, 2022 and March 18,

[1] Applicant's rebuttal testimony of Katelyn R. Shafer p. 10, line 20 – p. 11, line 3.

2022 (three days) Applicant received from the OUCC four sets of discovery questions totaling 74 questions not including subparts. While Applicant could have responded under the typical ten calendar day response time, Applicant has not been able to respond in the required five business days."[2] Continuing, the OUCC has prefiled testimony and attachments of four witnesses. The OUCC, in its May 25, 2022, email request to the administrative law judge assigned to this proceeding, asked for a two day hearing, citing "extensive testimony." ASU could not have reasonably foreseen what this case would become when it filed this case as a small-U proceeding. ASU did so because this Commission has specifically cautioned both utilities and the OUCC that small utilities must be mindful of the effect on rates from rate cases. *Switzerland County Nat. Gas Co.,* Cause No. 45117 (IURC 4/17/2019), p. 21. "[R]ate case expense is a cost of doing business." *Id.,* p. 18. ASU is not seeking recovery of its unforeseen rate case expense in this docket or even assurance of future recovery; ASU merely seeks deferral authority so that such recovery may be sought in a future case. ASU's request is reasonable, and it is proper rebuttal to the voluminous and unexpected filing made by the OUCC. To deny ASU's request for deferral through the OUCC's Motion to Strike would deter any other small utility from filing a small-U rate case application.

II. Responding to adjustments made by the OUCC, an adverse party, is proper rebuttal.

Without citing authority to support its position, the OUCC moves to strike portions of Ms. Shafer's and Mr. Mix's testimony as "untimely" and "prejudicial to the OUCC if admitted into evidence without the opportunity for the OUCC to review or respond."[3] Importantly, the OUCC

[2] Applicant's Unopposed Motion to Modify Procedural Schedule, para 2 (filed March 25, 2022).

[3] OUCC motion pp. 1, 2.

ignores that it is proper for ASU to provide rebuttal in response to an adverse party's position. Indiana courts have uniformly held that rebuttal evidence is "evidence presented which tends to disprove, explain, contradict or otherwise address the evidence by the adverse party." *In re Petition of Indiana Bell Tel. Co*., Cause No. 38055, dated December 3, 1986, 1986 Ind. PUC LEXIS 49, *5 (citing *Layton v. State*, 301 N.E.2d 633 (Ind. 1973); *see also Reed v. Bethel*, 2 N.E.3d 98 (Ind. Ct. App. 2014) (allowing new rebuttal evidence that explains the witnesses' testimony).

An intervenor in *In re Petition of Indiana Bell Tel. Co*. objected to the admission of rebuttal evidence offered by petitioner, Indiana Bell Telephone Company, after the petitioner had presented its case-in-chief. The intervenor claimed that the evidence "was not proper rebuttal testimony and its admission would result in the denial of [the intervenor's] 'right to due process' ... [because the petitioner] had presented substantially 'new' direct evidence setting forth a 'new' plan requesting different relief." Indiana Bell Telephone, Cause No. 38055, 1986 Ind. PUC LEXIS at *2-3. The Administrative Law Judge overruled the objection, and the Commission affirmed the ruling on appeal. The Commission found that the testimony met the definition of rebuttal evidence because each of the modifications to the plan "were responsive to matters testified to by various witnesses for the [intervenor]"; that is, the modifications explained and addressed evidence introduced by the adverse party. *Id*. at *5.

ASU provided its rebuttal testimony *only* to respond to matters testified to by OUCC witnesses. The OUCC, through the testimony of Ms. Sullivan, reduced building rental fees and property taxes.[4] Ms. Sullivan's testimony states: "Q: Do you recommend an adjustment to Rental

[4] Public's Exhibit No. 2 the Testimony of Carla Sullivan pp 27-28 (rental fees) and 30-31 (property taxes).

of Building/Real Property expense? A: Yes."[5] Ms. Sullivan then goes on to discuss the square footage ASU reasonably uses and the price per each square foot.[6] Ms. Shafer's testimony rebuts these positions. Ms. Shafer shows that after further investigation (which occurred because of the position the OUCC took) the OUCC's position is wrong because what was actually included in ASU's initial application is understated.[7]

Mr. Mix's testimony is also *only* offered for the purposes of responding to Ms. Stull's testimony regarding whether or not it is more cost effective to own or rent equipment. Ms. Stull states in testimony:

> ASU has not demonstrated it uses the specialized equipment it has purchased to perform sewer utility related work on any consistent or regular basis that would justify the purchase of this equipment. If a piece of specialized equipment is needed, it would be more cost effective for ASU to rent the equipment rather than purchase it. For these reasons, the OUCC does not consider it reasonable to include this equipment in rate base.[8]

Ms. Stull performed no analysis to support her statements that it would be more cost effective to rent vs. own. Importantly, Ms. Stull misstates the nature of the burden of proof. These are actual assets owned by ASU, and the amounts are properly reflected on ASU's books and records. ASU had no burden to "demonstrate [that] it uses the specialized equipment" sufficiently to "justify the purchase." To the contrary, "at least a rebuttable presumption exists that such expenditures are legitimate." *Indiana Michigan Power Co.,* Cause No. 39314 (IURC 11/12/93), p. 5 (citing *West Ohio Gas Co. v. Pub. Utils. Comm'n of Ohio No. 1,* 294 U.S. 63, 72 (1934).

[5] *Id*. at p. 27, lines 5-7.

[6] *Id*. at pp. 27-28.

[7] ASU Rebuttal Testimony of Katelyn, Shafer, p. 12, lines 4-8.

[8] Public's Exhibit No. 3, Testimony of Margaret A Stull, p. 15, lines 4-9.

Despite that Ms. Stull's testimony and analysis have done nothing to overcome that rebuttable presumption, Mr. Mix's rebuttal testimony responds with an analysis showing Ms. Stull's conclusory statements to be incorrect. The analysis in Mr. Mix's testimony allows for easy comparison between the breakeven point between owning the equipment vs. renting and shows that ASU is beyond this breakeven point, producing a benefit to ratepayers. *See*, Mix, p. 41, Table 3: Yearly Rental Cost, Column "Days Needed to Rent". His analysis is not presented to show specifically and in detail how often this equipment is actually used; rather, his analysis demonstrates how little this equipment must be used before it is better to own than rent as Ms. Stull surmises.

The OUCC misstates the nature of the data requests, ASU responses thereto, and what ASU has provided in rebuttal. The OUCC asked a very detailed question regarding ASU's Tailored Protection Insurance Policy and about the amount of time each item was used for 2018-2021.[9] In response to subpart c, ASU stated it does not keep track of "[t]he amount of time the item was used during each of the calendar years 2018 through 2021."[10] In response to subparts (a) and (b), however, ASU provided information regarding how each item is used and the circumstances of its use.[11] Mr. Mix's rebuttal testimony is not providing the level of detail sought in subpart (c) of this data request, as ASU does not keep track of this information. Rather, Mr. Mix's testimony provides basic estimated level of use detail to be able to conclude that ASU uses the equipment more frequently than the breakeven point on the own vs. rent calculus. The OUCC was given information on this conclusion within the discovery response when ASU identified in that

[9] Id. Attachment MAS-13, OUCC DR 9-2.

[10] *Id*. at p. 1.

[11] *Id*. at pp. 4-5.

discovery response a benefit ASU has received from owning the equipment. ASU stated: "By owning this equipment, it allowed ASU to negotiate the *$300,000 price change* in the bid from Atlas for the Cumberland project." (Emphasis added).[12]

III. Experts may rely on hearsay.

The OUCC takes issue with Mr. Mix relying on what it argues is "hearsay"; however, expert witness testimony may rely on hearsay so long as: 1) the expert has sufficient expertise to evaluate the reliability and accuracy of the hearsay; 2) the hearsay is of a type normally found reliable; 3) the hearsay is of a type customarily relied upon by the expert in the practice of his profession or expertise. *Public Service Indiana, Inc. v. Nichols*, 494 N.E.2d 349, 358 (Ind. App. 4 Dist., 1986) (citing *Duncan v. George Moser Leather Co.* (1980), Ind. App., 408 N.E.2d 1332, 1343. *See also Clouse v. Fielder* (1982), Ind. App., 431 N.E.2d 148, 155. Consultations with other individuals is included within the ambit of this rule. Reliance on hearsay information does not destroy the witness's expert status but goes only to the weight of the testimony when considered by the trier of fact. *Bixler v. State* (1984), Ind., 471 N.E.2d 1093, 1099–1100.) The Commission followed this long-established precedent when it accepted testimony from the OUCC that was "almost wholly derived from his [the OUCC's witness's] one meeting with Petitioner's representatives, and his reliance on their representations and 'unsophisticated' financials."[13]. In *Re Switzerland County Natural Gas* the Commission cited *City of Tell, Indiana v. Indiana Utility Regulatory Comm.*, 558 N.E.2d 857, 863-64 (Ind. App. 1990) which states:

> The testimony of an expert may be based upon hearsay, and need not: substantiate each single factor upon which their ultimate opinion must depend upon first hand personal knowledge or personal experience. If

[12] *Id*. at p. 5, line 11, "John Deere 2010G".

[13] *Re Switzerland County Natural Gas Co., Inc.*, Cause No. 37791-GCA 51, 2005 WL 351220, (IURC 1/12/2005).

> some of the expert's factual information is derived from sources fairly trustworthy through 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[.]

Further, Indiana Rules of Evidence allow an expert to rely on a variety of information: "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field." Ind. Evidence Rule 703.

Mr. Mix relied on other employees from ASU to estimate the amount of hours certain equipment was used. This is a reasonable method for acquiring such information. Mr. Mix, through his experience as an engineer and a fellow employee of ASU, has an understanding of all the equipment in question and the nature of its use and can also estimate the amount of its usage. Further as explained above, Mr. Mix used these estimates to compare back to the own vs. rental breakeven point.

IV. Conclusion

As explained above, ASU's request for deferral of rate case expense is the most reasonable response to the OUCC turning a Commission-encouraged small utility filing into a contentious proceeding. Further, ASU's rebuttal testimony is proper response to position raised by the OUCC, an adverse party, and its expert has allowably relied on hearsay. Accordingly, the OUCC's Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been served upon the following counsel of record by electronic mail this 31st day of May, 2022:

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