

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF COMMUNITY UTILITIES OF)
INDIANA, INC. FOR APPROVAL OF (1))
EXPENDITURES FOR CONSTRUCTION OF)
ADDITIONS AND IMPROVEMENTS TO)
PETITIONER'S WATER UTILITY PROPERTIES) CAUSE NO. 45342
AND (2) THE INCLUSION OF SUCH NEW)
FACILITIES IN PETITIONER'S RATE BASE IN)
FUTURE CASES.)

**COMMUNITY UTILITIES OF INDIANA, INC.'S RESPONSE TO THE OFFICE
OF UTILITY CONSUMER COUNSELOR'S MOTION TO STRIKE**

Community Utilities of Indiana, Inc. ("Petitioner" or "CUII"), by counsel, hereby responds to the Motion to Strike ("Motion") filed by the Office of Utility Consumer Counselor ("OUCC"). The Motion seeks to exclude from the record portions of the rebuttal testimony and attachments of CUII witnesses Sean Carbonaro and Loren Grosvenor that provide relevant facts and context regarding the condition of the South Filter, which is a key aspect of CUII's request for preapproval in this Cause. Specifically, the OUCC seeks to strike: (i) Mr. Carbonaro's rebuttal testimony and Attachment SC-R4 regarding Symbiont's internal inspection of the South Filter, (ii) Mr. Carbonaro's rebuttal testimony regarding the LAN letter report and the letter included as Attachment SC-R3, and (iii) Mr. Grosvenor's rebuttal testimony about the metal condition of the South Filter and Attachment LG-R2 providing photographs of the South Filter exterior. In the alternative, the OUCC requests the opportunity to respond to CUII's rebuttal with sur-rebuttal testimony of its own. CUII has no objection to the alternative, provided CUII is afforded the opportunity to supplement its rebuttal as necessary.

The OUCC does not argue that this evidence is irrelevant; nor does it deny that this

evidence directly responds to Mr. Parks's testimony. Instead, the entire crux of the OUCC's argument is that it learned of the new facts too late – that CUII should have supplemented an earlier discovery response sooner than it did. The relief the OUCC seeks is extraordinary: they seek to avoid the merits on a central issue by denying access to facts that are key to an issue in dispute. They want the Commission to decide this case on the basis of something not happening when, in fact, it did. Justice may be blind, but it should never be blind to the truth. Not surprisingly, the OUCC cites no authority where this Commission or any Court has so ruled.

As explained below, there is a much less draconian response to CUII's correction of an earlier incorrect discovery request: the OUCC and Lakes of the Four Seasons Property Owners' Association ("LOFS") could file supplemental testimony to address the corrected discovery request.¹ Again, CUII does not object to this alternative provided it has an opportunity to supplement its rebuttal testimony in response. Especially in a proceeding where the parties stipulated that discovery would be conducted on an informal basis, this is the best course of action as it would permit the OUCC and LOFS an opportunity to address the supplemental discovery response in its testimony and still allow the Commission to decide the case on the truth rather than based upon an earlier incorrect discovery response.

1. The proper relief is to permit the OUCC and LOFS to file supplemental testimony to address the information included in the challenged portions of testimony.

The crux of the OUCC's position is that CUII included "new" evidence in its rebuttal testimony that was not previously provided to the parties in its case-in-chief or discovery, and inclusion of this "new" evidence "affects a substantial right of the OUCC" and "is violative of the

¹ Indeed, it is uncertain how Mr. Parks could even adopt his prefiled testimony as his sworn testimony at the hearing without correction, now that he has the updated discovery response.

OUCC's right to due process."² The OUCC goes on to state "the new information provided was neither harmless nor substantially justified ... [t]he OUCC therefore respectfully requests that the Commission strike the testimony and documents identified [in the Motion]."³ In the alternative, the OUCC requests the opportunity to respond to CUII's rebuttal with sur-rebuttal.⁴

The appropriate relief to address the concerns raised in the OUCC's Motion is an opportunity to file supplemental testimony, not to strike the challenged portions of CUII's rebuttal testimony. Motions to strike cross-answering and rebuttal testimony are disfavored, and such testimony should not be stricken "unless the matters sought to be omitted from the record has no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party."⁵ The challenged portions of CUII's rebuttal testimony clearly have a relationship to the controversy at issue. The OUCC explicitly states in its Motion that its "case-in-chief testimony rested in large part on CUII's statement that Symbiont *had not inspected the South Filter*."⁶ (Emphasis original). Thus, to strike the portions of Mr. Carbonaro's rebuttal testimony showing Symbiont did inspect the South Filter would mean that a significant portion of the record relies on inaccurate or incomplete information. Further, the crux of the issue in this preapproval case is whether the condition of the South Filter warrants replacement. Thus the information the OUCC seeks to strike in Mr. Carbonaro's testimony regarding the LAN letter report and in Mr. Grosvenor's rebuttal testimony regarding the condition of the South Filter is critical to the controversy at issue.

² Mot. at 2, 4.

³ *Id.* at 6.

⁴ *Id.*

⁵ *Power Mining, Inc.*, 45 FERC ¶61,311 at p. 61, 972 n.1 (1988). *See also Central Hudson Gas & Electric Corp.*, 92 FERC ¶ 63,004 at p. 65,008 (2000).

⁶ Mot. at 4.

Further, the challenged testimony and attachments will not confuse the issues. Rather, inclusion of the testimony will help clarify the record on the issue of whether or not Symbiont inspected the South Filter and on the South Filter's condition. As stated, the primary issue in this case is whether the condition of the South Filter warrants CUII to expend some amount of money to repair or rehabilitate the asset. By including this information on rebuttal, CUII sought to clarify the record to show Symbiont did perform an internal inspection of the South Filter and to provide the Commission and the parties with a more complete picture of the South Filter's condition, so as to allow the Commission access to all relevant information on which to base its decision.

By seeking to strike this evidence, the OUCC is attempting to avoid the merits of the case—namely whether the condition of the South Filter warrants replacement—in favor of denying the Commission access to probative evidence that is crucial to the issues in this Cause. This course of action is not the best course for either CUII's customers or the Commission, as the Commission will be left without important evidence needed to make its determination on the WTP #1 Improvements Project. The OUCC argues that inclusion of the evidence violates the OUCC's right to due process. If the OUCC believes the evidence prejudices them in any way, the proper relief is not to strike probative evidence that is central to the issues in this case. Rather, the proper relief is to grant the OUCC and LOFS an opportunity to file supplemental testimony to address the evidence at issue. CUII would not oppose such request, but would request an opportunity to file supplemental rebuttal.

2. The evidence at issue regarding the internal inspection of the South Filter is not “new” evidence and the OUCC’s sandbagging argument has no merit.

The OUCC lodges a number of complaints against CUII, including that all three portions of the testimony it seeks to strike constitutes “new” evidence that should have been provided with

CUII's case-in-chief, and, further, specifically with respect to Mr. Carbonaro's testimony and attachment discussing the Symbiont internal inspection, this evidence is directly contradictory to information CUII provided in discovery and which CUII used to "sandbag" the OUCC.⁷

The evidence CUII included on rebuttal regarding the Symbiont internal inspection is not provided as new evidence to bolster its argument regarding the South Filter's condition. Instead, CUII included the information to clarify the record regarding whether Symbiont inspected the interior of the South Filter. Page 5 of the Symbiont Report included as Attachment SC-1 to Mr. Carbonaro's Direct Testimony clearly states that Symbiont performed a limited internal inspection of the South Filter.⁸ However, CUII mistakenly stated in discovery that Symbiont had not inspected the interior of the South Filter. Mr. Parks then proceeded to base a large portion of his testimony on this statement. CUII supplemented its response to OUCC DR 5-10 promptly upon learning its original response to OUCC DR 5-10 stating that Symbiont had not inspected the South Filter interior was incorrect. CUII also included interior photographs of the South Filter, as the OUCC requested this information in its original discovery request. It was incumbent on CUII to supplement the discovery response to include the corrected information and to include this information on rebuttal so it is clear in the record Symbiont did perform an interior inspection of the South Filter.

Further, CUII did not intentionally withhold information until after the OUCC filed its testimony or provide inconsistent discovery responses as the OUCC suggests.⁹ As evidenced in CUII's response to OUCC DR 8-02, attached to this Response as Attachment 1, CUII was not

⁷ See discussion of sandbagging on pp. 2-4 of the Motion.

⁸ Attachment SC-1 at 5 states "Symbiont performed a limited inspection of the older iron filter internals" and "[w]hen tank media and internals were inspected from the horizontal access hatch, internal components exhibited wear and conditions of equipment nearing the end of its useful life."

⁹ *Id.* at 2.

aware until after the OUCC filed its testimony that Symbiont inspected the interior and, in fact, it was the OUCC's testimony on this point which prompted CUII to seek clarification from Symbiont. Upon reviewing Mr. Parks's direct testimony and his statements regarding the internal inspection of the South Filter, Mr. Carbonaro contacted Symbiont on May 20, 2020 to inquire whether the interior of the South Filter was inspected. Symbiont confirmed via e-mail on May 21, 2020 that the South Filter was inspected and provided internal photographs, and CUII immediately supplemented its response to OUCC DR 5-10 with this information on the same day. The standards for informal discovery did not require CUII to undertake this investigation of third parties to respond to the OUCC's discovery request, and CUII only did so when it realized how Mr. Parks was relying on the earlier discovery response.

The OUCC further suggests that by supplementing its response to OUCC DR 5-10 after the OUCC filed its case-in-chief, CUII is "sandbagging" the OUCC by offering new arguments or new evidence to support its initial opinions.¹⁰ In support of this contention, the OUCC argues CUII's reponse is "a 180 degree reversal from the information originally provided to the OUCC [and] if the Commission allows this obvious substitution to stand, it will be perverting the good faith obligations of discovery."¹¹ The OUCC cites *Constructora Mi Casita S de RL de CV v. NIBCO, Inc.*, 2019 WL 8112486 at *2 (N.D. Ind. 2019), a case involving the opinions of two expert witnesses, as support for its contention CUII is sandbagging. The OUCC's effort to gloss over the critical distinction of this case falls short of the mark. The OUCC does not seek to exclude a new expert witness opinion; rather the OUCC seeks to exclude a fact – that Symbiont had indeed

¹⁰ *Id.*

¹¹ Mot. at 3.

inspected the interior of the tank.¹² *Constructora* does not support the extraordinary relief the OUCC seeks. Moreover, this is not a case where one party's expert waited until seeing the other party's expert opinions to then raise new opinions. Instead, this is the case where CUII clarified a crucial fact on the record upon learning of the existence of that fact. It is a fact that Symbiont inspected the interior of the South Filter and the OUCC cannot now ignore this fact as if the internal inspection of the South Filter never happened. To do so would be unreasonable, as it would allow a large portion of the OUCC's case to stand based on evidence that is not true.

3. The evidence at issue regarding the LAN letter report and metal condition of the South Filter also is not “new” evidence and is proper rebuttal testimony.

The LAN Letter report included as Attachment SC-R3 to Mr. Carbonaro's testimony and the evidence regarding the South Filter's metal condition included in Mr. Grosvenor's testimony is also not “new” evidence. CUII included the evidence on rebuttal to “explain, contradict, or disprove [the OUCC's] evidence”¹³ and thus it is proper rebuttal evidence based on the standard cited in the OUCC's Motion. Mr. Carbonaro testified on direct that in addition to the South Filter's condition, operational concerns warrant replacement of the South Filter.¹⁴ Mr. Carbonaro discussed these operational concerns at length in his direct testimony.¹⁵ Mr. Carbonaro also discussed the engineering design process with LAN in his testimony and testified that “CUII and LAN were in frequent communication during the engineering design process.”¹⁶ He explained that

¹² Again, the OUCC does not explain how Mr. Parks can adopt under oath his current testimony without modification.

¹³ *See id.* at 1 (where the OUCC quotes *Hatter v. Pierce Mfg., Inc.*, 934 N.E.2d 1160, 1174-75 (Ind. Ct. App. 2010)(citing *White v. White*, 655 N.E.2d 523, 529 (Ind. Ct. App. 1995) for the proposition that “rebuttal evidence is that which tends to explain, contradict, or disprove an adversary's evidence).

¹⁴ *See* discussion of operational concerns at pp. 5-6 of the Direct Testimony of Sean Carbonaro.

¹⁵ *Id.*

¹⁶ Carbonaro Direct at 7.

LAN and CUII held bi-weekly progress meetings and two design meetings, and CUII and LAN were in communication between these meetings as needed to resolve design issues, clarify existing conditions, and other design questions.¹⁷ Attachment SC-R3 is simply a letter formalizing these discussions with LAN during design. The letter is offered to explain that the Symbiont technical memorandum is not the “sole support” for Mr. Carbonaro’s testimony and the issues at WTP #1 as Mr. Parks asserts.¹⁸ These issues were identified by CUII’s design engineer and discussed at length during the design process, and Attachment SC-R3 provides formal documentation of these discussions.

Further, with respect to the information regarding the South Filter condition included in Mr. Grosvenor’s testimony, CUII discussed the 2016 and 2017 rehabilitations in its case-in-chief and Mr. Carbonaro testified “CUII and the contractor for the rehabilitation noted significant issues with the metal structure” and “the South Filter is approaching the end of its useful life, primarily due to poor metal condition that is no longer feasible to repair.”¹⁹ Mr. Parks testified CUII did not provide support for its statement that due to poor metal condition the South Filter is no longer feasible and “the absence of documented inspections concerns [him].”²⁰ The information provided in Mr. Grosvenor’s rebuttal is provided to contradict Mr. Parks’s claims regarding the metal condition of the South Filter and to provide documentation of an inspection. Further, with respect to the exterior photographs of the South Filter included with Mr. Grosvenor’s rebuttal testimony as Attachment LG-R2, the parties toured the facility two weeks prior to those photos of the filter being taken and the parties had an opportunity to take photos at the site visit. Mr. Parks could have

¹⁷ *Id.*

¹⁸ Parks at 5.

¹⁹ Carbonaro Direct at 4.

²⁰ Parks at 26.

included his own photos and any opinions he gleaned from those photos in his testimony but chose not to do so. The photographs are included with Mr. Grosvenor's rebuttal testimony to dispute portions of Mr. Parks's testimony on the condition of the South Filter, a critical issue in this case. As stated, CUII is amenable to the OUCC and LOFS filing supplemental testimony to respond to these photos if either party feels the need to do so.

Again, the information the OUCC seeks to strike is critical to issues in this proceeding and it is in the best interests of CUII's customers and the Commission for the Commission to have this information in order to make a fully informed decision on CUII's WTP #1 project. The OUCC and LOFS will have an opportunity to vet this information at trial through cross-examination, and normally no additional relief would be needed. However, as stated, CUII will agree to allow the OUCC and LOFS an opportunity to respond to this information with supplemental testimony and CUII will not oppose this relief, provided CUII is also provided an opportunity to file supplemental rebuttal in response.

CUII would propose the following schedule to allow the parties an opportunity to file supplemental testimony:

Action	Date
OUCC/LOFS File Supplemental Testimony	Friday, June 26, 2020
CUII Files Supplemental Rebuttal Testimony	Thursday, July 2, 2020

4. Conclusion.

The challenged portions of testimony are central to the issues at hand in this case and should be admitted into the record. The challenged portions of the rebuttal testimony of Mr. Carbonaro and Mr. Grosvenor may be relevant and useful to the Commission and form part of an independently sufficient record on the disputed issues in this proceeding. Further, there are no due process concern here because CUII is agreeable to the OUCC and LOFS filing supplemental

testimony to address the information, and Mr. Carbonaro and Mr. Grosvenor are available for cross-examination. Accordingly, the OUCC's request to strike the testimony should be denied. The OUCC and LOFS should be permitted to file supplemental testimony to address the challenged portions of the testimony, and CUII should be permitted to file supplemental rebuttal to respond.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served by electronic transmission
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Data Request OUCC DR 8 - 02

Reference Q14 in the Carbonaro Rebuttal Testimony which reads in part:

Further, as stated in the Company's Supplemental Response to OUCC DR 5-10, provided as Attachment SC-R4, the Company followed up with Symbiont during discovery to inquire whether it performed an interior inspection of the filter, and Symbiont indicated it did inspect the South Filter interior and provided photographs from the inspection.

Please answer or provide the following:

- a. Admit or deny that CUII responded to OUCC DR 5-10 on April 17, 2020 and stated:

The Company understands the 'detailed inspection' to refer to Peerless-Midwest's proposal/report which was provided as Attachment to OUCC DR 1-4. The Company does not have any photographs from Peerless-Midwest's inspection. Symbiont did not inspect the filter interior. No interior photographs were taken.

Emphasis added

If your response is anything other than an unqualified admission, please explain.

- b. Admit or deny that CUII's supplemental response to OUCC DR 5-10 was sent to the OUCC on May 21, 2020, two days after the OUCC filed its testimony. If your response is anything other than an unqualified admission, please explain.
- c. Please provide the date when Sean Carbonaro initially contacted Symbiont to inquire whether an interior inspection of the filter was performed and whether any photographs taken by Symbiont existed.
- d. Copies of all communications with Symbiont regarding its site visit not previously provided to the OUCC.
- e. Copies of all communications with Symbiont about CUII's inquiry, made after April 1, 2020, regarding the inspection and follow up with Symbiont during discovery to inquire whether it performed an interior inspection of the filter.
- f. Copies of all photographs taken by Symbiont or CUII during the July 24, 2018 site visit in the original format taken as a jpg file with photograph attributes intact. For purposes of this data request, photograph attributes include but may not be limited to file name, date and time taken, file size, dimensions, shot, ISO, and device.
- g. Identify the person who provided CUII's original response to OUCC DR 5-10, dated April 17, 2020.
- h. Did the person who provided CUII's original response to OUCC DR 5-10 ask Loren

Grosvenor and Mike Whelan, employees of Utilities, Inc., if Symbiont inspected the South Filter and took photographs? If not, why not?

- i. For the eight photographs CUII provided in its Supplemental response to OUCC DR 5-10, please identify, by photograph, all filter deficiencies shown. For example, Photograph 1 shows the following deficiencies, Photograph 2 shows the following deficiencies, etc.

Objection:

CUII objects to the request on the grounds and to the extent it is overly broad and unduly burdensome in that it seeks copies of “all communications” and “all photographs” and exceeds the scope of permissible discovery. CUII further objects to the request on the grounds and to the extent it seeks a compilation or analysis CUII has not performed and which it objects to performing. CUII further objects to the request to the extent it requests identification of witnesses who will be prepared to testify concerning the matters contained in each response on the grounds that CUII has no obligation to call witnesses to respond to questions about information provided in discovery. Subject to and without waiver of the foregoing objection, CUII responds as follow.

Response:

- a. Admit. As explained in the Company’s Supplemental Response to OUCC DR 5-10, the employee who attended the entire Symbiont inspection is no longer with the Company and it was the belief of CUII’s current employees that Symbiont did not perform an inspection of the filter interior. Upon reviewing Mr. Parks’ testimony and his statements regarding the internal inspection of the South Filter, CUII contacted Symbiont to inquire whether Symbiont performed an interior inspection of the South Filter. Upon learning that Symbiont did perform an interior inspection and receiving the photographs, the Company promptly supplemented its prior discovery response in order to provide the most complete and correct information to the parties.
- b. Admit. As explained in the Company’s Supplemental Response to OUCC DR 5-10, the employee who attended the entire Symbiont inspection is no longer with the Company and it was the belief of CUII’s current employees that Symbiont did not perform an inspection of the filter interior. Upon reviewing Mr. Parks’ testimony and his statements regarding the internal inspection of the South Filter, CUII contacted Symbiont to inquire whether Symbiont performed an interior inspection of the South Filter. Upon learning that Symbiont did perform an interior inspection and receiving the photographs, the Company promptly supplemented its prior discovery response in order to provide the most complete and correct information to the parties.
- c. Sean Carbonaro contacted Symbiont on May 20, 2020 regarding inspection and photographs of the South Filter.

- d. The May 2020 emails are included as Attachment to OUCC DR 8-2d(1). The email string also includes emails from October 2018 and prior. Those emails were previously provided in Attachment to OUCC DR 4-10.

See objection. In response to previous data requests, the Company attempted to locate all communications with Symbiont regarding the site visit within the time constraint provided for discovery responses. However, individuals at the Company have tens of thousands of e-mails stored and even when using specific search terms it is possible that some communications will not be located. In searching in historical emails, the Company identified additional emails with Symbiont from July 2018. These are provided as Attachment to OUCC DR 8-2d(2).

- e. The Company first contacted Symbiont on May 20, 2020 regarding the interior inspection of the filter. Those e-mails are provided in response to subpart b. These are the only communications CUII has had with Symbiont after April 1, 2020 regarding the inspection.
- f. The original photographs are provided in Attachment to OUCC DR 8-2f. Symbiont provided the interior photographs to the Company over a file-sharing website. The Company does not believe the time and date in the file properties for the photograph are correct. The properties indicate the photos were taken on 9/20/2013 between 8:21 PM and 8:24 PM. The photographs were taken with a digital camera (Panasonic DMC-LS6) that may require manual time and date setting. These photographs are all original photographs from Symbiont's inspection we located in our files.
- g. See objection. Sean Carbonaro provided the original response.
- h. Yes, Sean Carbonaro asked Loren Grosvenor if Symbiont inspected the South Filter interior and took photographs. As explained in Response to OUCC DR 8-2a, it was the belief of current employees (including Loren Grosvenor) that Symbiont did not perform an inspection of the filter interior.
- i. See objections. The photographs speak for themselves.