

II. ARGUMENT

A. Notwithstanding AG's Assertions, Mr. Uffelman's Surrebuttal Testimony Directly Responded to Arguments Made by Mr. Rothstein in Rebuttal.

According to the AG, the referenced portions of Mr. Uffelman's surrebuttal testimony do not respond to Mr. Rothstein's rebuttal testimony and provide a reply solely to his direct testimony. The AG's argument is incorrect. While Mr. Uffelman refers in part to Mr. Rothstein's direct testimony, Mr. Uffelman does so in order to fully respond to claims made by Mr. Rothstein in rebuttal testimony.

1. A witness on surrebuttal may discuss the direct testimony of the opposing party's witness in order to respond to the rebuttal testimony of that witness.

The rule giving a trial court discretion to prohibit a party from presenting testimony in rebuttal (or surrebuttal) that could have been introduced as part of the party's case-in-chief (or on rebuttal) does *not* mean that witnesses in rebuttal or surrebuttal cannot refer to the earlier testimony. AG has provided no authority establishing such a requirement. Instead, "evidence that would otherwise constitute proper rebuttal evidence [or surrebuttal evidence] is not rendered improper . . . merely because it conceivably could have been offered during [a party's] case-in-chief [or on rebuttal]." *Hoem v. Zia*, 239 Ill. App. 3d 601, 619–20 (Ill. App. Ct. 1993), *aff'd*. 159 Ill. 2d 193 (1994). As *Hoem* indicates, at times it is necessary (and wholly appropriate) to discuss matters raised in a witness's direct testimony to respond to that witness's rebuttal testimony. Here, all portions of testimony that AG has sought to strike respond to Mr. Rothstein's rebuttal, and all of Mr. Uffelman's references to direct testimony were made in the course of that response.

2. The first portion of testimony that AG seeks to strike responds to Mr. Rothstein’s assertion, made repeatedly in rebuttal, that differences identified in IAWC’s Exhibit 10.20 should not affect O&M costs.

AG seeks to strike pages 8–11, lines 159–241 of Mr. Uffelman’s surrebuttal, asserting that this testimony “unfairly discusses Mr. Rothstein’s Direct Testimony and the exhibits attached to his Direct Testimony in Surrebuttal.” (AG Mot. at 3.) Mr. Uffelman’s testimony is proper, however, because it responds to a principal theme in Mr. Rothstein’s rebuttal testimony.

Mr. Rothstein in his direct testimony attempts to compare IAWC’s operating expenses with: (1) expenses of predominantly municipally-owned utilities (“MOUs”) in a benchmarking survey and (2) expenses of certain other MOUs. (AG Ex. 2 at 14–23.) Mr. Rothstein submits these comparisons (and offers them as support for a ratemaking adjustment) without demonstrating the comparability of either group of entities to IAWC. In rebuttal, Mr. Uffelman explained that Mr. Rothstein’s comparisons are meaningless because “the accounting, reporting and cost structures on which the rates of IOUs such as IAWC are based, differ in many respects from those of the MOU systems.” (IAWC Ex. 10.30 at 12.) A central theme of Mr. Rothstein’s subsequent rebuttal is a repeated suggestion that “the overall impact” of the differences identified by Mr. Uffelman is “limited” with respect to operation and maintenance (“O&M”) expenses allegedly because, according to Mr. Rothstein, O&M “expenses [in alleged contrast to other operating expenses] largely reflect the annual costs of performance of the fundamental utility operating functions.” (AG Ex. 2.1 at 8, *see also id.* at 4–5, 6–7.) AG seeks to strike the portion of Mr. Uffelman’s surrebuttal testimony that directly counters Mr. Rothstein’s erroneous suggestion in rebuttal that, due to the nature of O&M functions, differences between the cost characteristics of IAWC and MOUs would not affect O&M expenses.

Contrary to Mr. Rothstein’s assertion in rebuttal, Mr. Uffelman explains that the “differences between MOUs and IOUs . . . affect O&M expense.” (IAWC Ex. 10.60 at 7.)

Pages 8–11, lines 159–241 of Mr. Uffelman’s surrebuttal testimony—the portions that AG seeks to strike—identify five areas of difference that affect O&M expenses, and thus demonstrate Mr. Rothstein’s rebuttal testimony is mistaken. (*See, e.g.*, IAWC Ex. 10.60, pp. 8-11, lines 159-228 (describing significant accounting differences affecting O&M expense and discussing a calculation to demonstrate “that, contrary to the assertion in Mr. Rothstein’s Rebuttal Testimony, the accounting and cost structure differences discussed in IAWC Exhibit 10.20 have a direct bearing on O&M expense”).) This testimony shows that—despite Mr. Rothstein’s attempt in rebuttal to salvage the comparisons he made on direct—those comparisons do not support Mr. Rothstein’s proposed ratemaking adjustment. Since Mr. Uffelman’s surrebuttal testimony directly responds to an argument raised on rebuttal, it is proper.

3. The second portion of testimony AG seeks to strike responds directly to Mr. Rothstein’s rebuttal testimony.

AG suggests that IAWC created a “straw man” for the purpose of slipping additional rebuttal testimony into the record as surrebuttal. On this sole basis, AG seeks to strike page 12, lines 248–63, and pages 13–17, lines 271–352 of Mr. Uffelman’s surrebuttal. This argument fails because the referenced arguments (whether a “straw man” or not) is raised in by Mr. Rothstein in his rebuttal testimony. AG states that, “Mr. Uffelman attributes to Mr. Rothstein the suggestion that ‘IAWC undertake to quantify all of the reasons for the differences in O&M costs.’” (AG Mot. at 4.) Mr. Uffelman’s attribution of this argument to Mr. Rothstein’s rebuttal testimony is completely accurate. Mr. Rothstein asserts expressly that “it is IAWC’s task to . . . delineate why its non-purchased water O&M expenses are relatively higher than the municipal utilities that the company itself selected for its own cost comparisons or those benchmarked nationally.” (AG Exh. 2.1 at 7.) In fact, Mr. Rothstein *repeatedly* asserts in his rebuttal testimony that IAWC should come forward with additional specific reasons why its operating

expenses may be higher than those of certain MOUs. (*See, e.g., id.* at 6, 7, 8, 10, 11, 17, 18.)

Because this argument was made by Mr. Rothstein in rebuttal, AG has provided no justification for striking the identified portions of Mr. Uffelman's surrebuttal testimony.

In response to Mr. Rothstein's proposal that IAWC perform an additional delineation analysis (offered in rebuttal at the pages referenced above), Mr. Uffelman explained in surrebuttal evidence (IAWC Ex. 10.60 at 12) that IAWC has already submitted as IAWC Exhibit 10.20 an analysis of the cost structure differences between investor-owned utilities ("IOUs"), such as IAWC, and MOUs. Mr. Uffelman also points out that, where reasonably possible, IAWC quantified the cost structure differences. (*Id.*) As Mr. Uffelman also explains, with additional effort and at a significant cost, some further quantification could be possible. (*Id.* at 13-17.) As Mr. Uffelman indicates on surrebuttal, however, such a further quantification effort would be costly and unproductive. (*Id.* at 13, 16.) As Mr. Uffelman explains in testimony that AG seeks to strike, IAWC has already provided a thorough and well-supported study (IAWC Ex. 10.20) demonstrating that, for rate purposes, MOU/IAWC cost and rate comparisons do not provide meaningful information. (*Id.* at 16-17.)

At lines 271-352, which the AG seeks to strike, Mr. Uffelman describes the process that would be required to attempt additional quantifications. As Mr. Uffelman indicates (in evidence supported by Ms. Kane's surrebuttal testimony, IAWC Exhibit 10.70, pages 4-5), MOUs would not be expected to cooperate in providing the extensive information that would be required for such a further review. (IAWC Ex. 10.60 at 16.) As a result, Mr. Uffelman explains that, if additional information needed from MOUs can be obtained at all, the information gathering process would be expected to include formal procedures and involve significant cost. (*Id.*) Mr. Uffelman also explains other costly procedures which would be required to attempt further

quantifications. (*Id.* at 13-16.) As Mr. Uffelman also indicates, even if the costly process he describes were undertaken, the expected result would be further confirmation of the conclusions supported by the extensive analysis already performed and set out in IAWC Exhibit 10.20. (*Id.* at 13.) Accordingly, for all the reasons discussed in the portion of Mr. Uffelman's surrebuttal evidence that AG seeks to strike, Mr. Rothstein's proposal in his rebuttal evidence to require an effort to develop additional quantification of differences should be rejected.

As Mr. Uffelman (and Ms. Teasley) indicate in surrebuttal testimony, it is appropriate for a utility to review its own cost structure for reasonableness. (IAWC Ex. 10.60 at 4.) Mr. Rothstein's proposed additional study to further delineate differences between IAWC's cost structure and that of MOUs not comparable to IAWC (beyond that already completed), should be rejected. As Mr. Uffelman concluded in his surrebuttal testimony, it would not be reasonable to require IAWC, or any water utility, to expend resources or incur costs of such a large magnitude for the additional delineation effort, when the effort is expected to be nonproductive, with the costs greater than the regulatory value of the information obtained. (*Id.* at 16.)

Mr. Rothstein repeatedly returned to this point on rebuttal, and Mr. Uffelman properly responded on surrebuttal. AG thus has no basis to strike Mr. Uffelman's testimony.

III. CONCLUSION

For the reasons set forth above, IAWC respectfully requests that the Commission deny AG's Motion to Strike.

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Respectfully submitted,

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