

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of Evergy Metro, Inc. )  
d/b/a Evergy Missouri Metro’s Request )  
for Authority to Implement A General )  
Rate Increase for Electric Service )  
Case No. ER-2022-0129

In the Matter of Evergy Missouri West, )  
Inc. d/b/a Evergy Missouri West’s )  
Request for Authority to Implement A )  
General Rate Increase for Electric )  
Service )  
Case No. ER-2022-0130

**RESPONSE TO STAFF’S MOTION TO STRIKE**

**COMES NOW** the Office of the Public Counsel (“OPC”) and for its *Response to Staff’s Motion to Strike*, states as follows:

1. On August 24, 2022, Staff filed a motion to strike portions of three different sets of testimony offered by two different witnesses for the OPC.
2. Staff argues that the disputed sections of testimony should be struck because they are improper rebuttal or surrebuttal, in that, Staff claims the testimony excerpts address matters that should have been included in the OPC’s direct filing.
3. Staff’s motion to strike fails to engage in the proper legal analysis, misidentifies true-up direct testimony as surrebuttal testimony, and presents an illogical interpretation of a position statement that can be demonstrated as false given Staff’s own filing.
4. The motion to strike should therefore be denied

## Proper Legal Analysis

5. The rule in question in this dispute is 20 CSR 4240-2.130(7) which states:

(7) For the purpose of filing prepared testimony, direct, rebuttal, and surrebuttal testimony are defined as follows:

(A) Direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief;

(B) Where all parties file direct testimony, rebuttal testimony shall include all testimony which is responsive to the testimony and exhibits contained in any other party's direct case. A party need not file direct testimony to be able to file rebuttal testimony;

(C) Where only the moving party files direct testimony, rebuttal testimony shall include all testimony which explains why a party rejects, disagrees or proposes an alternative to the moving party's direct case; and

(D) Surrebuttal testimony shall be limited to material which is responsive to matters raised in another party's rebuttal testimony.

6. Because more than just the moving party filed direct testimony, it is subsection (B), not subsection (C), that applies.

7. The portions of the testimony that Staff seeks to strike are taken from rebuttal, surrebuttal, and true-up direct testimony.

8. As will be addressed more thoroughly later, the sections taken from true-up direct are not being offered as either rebuttal or surrebuttal and hence cannot be stricken as improper rebuttal or surrebuttal.

9. As for the sections that genuinely are rebuttal and surrebuttal, the proper legal analysis is simply whether the portions that Staff seeks to strike are "responsive to the testimony and exhibits contained in any other party's direct case"

or “responsive to matters raised in another party’s rebuttal testimony” for the rebuttal and surrebuttal excerpts, respectively.

10. With this proper legal analysis in mind, it is now necessary to turn to the testimony portions in question and determine whether these conditions are met.

Surrebuttal Testimony of Angela Schaben

11. The rebuttal testimony of Every witness Mr. Darin Ives was filed on July 13, 2022. (Rebuttal Testimony of Darrin R. Ives, ER-2022-0129, EFIS Item No. 156; Rebuttal Testimony of Darrin R. Ives, ER-2022-0130, EFIS Item No. 166).

12. Mr. Ives testimony states as follows:

As discussed in the rebuttal testimony of Company witness Melissa Hardesty, Missouri recently passed legislation, signed by the governor on June 29, 2022, which allows utilities to establish a property tax tracker. The legislation will be effective August 28, 2022.

*Id.* at pg. 19 lns. 19 – 21.

13. Ms Schaben filed her surrebuttal testimony on behalf of the OPC on August, 16, 2022. (Surrebuttal Testimony of Angela Schaben, ER-2022-0129, EFIS Item No. 216; Surrebuttal Testimony of Angela Schaben, ER-2022-0130, EFIS Item No. 226).

14. In responding to the issue raised by Mr. Ives’s rebuttal testimony, Ms. Schaben stated as follows:

**Q. In light of the fact that utility companies can now utilize a property tax tracker as a result of state legislation, what do you recommend?**

A. Since utilization of a property tax tracker could reduce Company risk relating to prudent or efficient property management, I recommend this be considered in the Company's approved ROE.

*Id.* at pg. 30 lns. 9 – 13.

15. Because Ms. Schaben's testimony responds to the passage of Mo. Senate Bill 745 that was signed into law by Governor Parsons on June 29, 2022, as discussed in the rebuttal testimony of Mr. Ives, it is "responsive to matters raised in another party's rebuttal testimony."

16. Because Ms. Schaben's testimony is "responsive to matters raised in another party's rebuttal testimony[.]" it is within the proper scope of surrebuttal as defined by 20 CSR 4240-2.130(7)(D).

17. To summarize, Ms. Schaben was simply requesting that the Commission consider the full ramifications of the passage of Mo. Senate Bill 745 that was discussed by Evergy's witness Mr. Ives when setting Evergy's rates. Ms. Schaben's testimony is therefore not "direct" as Staff claims, but rather, properly filed surrebuttal testimony.

#### Rebuttal Testimony of David Murray

18. Evergy's rate increase necessarily includes an analysis of its existing rate base. Both Evergy and Staff filed direct testimony that supported rate base determinations. (Direct Testimony of Ron A. Klote, pg. 4 lns. 1 – 2, Schedule RAK-2, ER-2022-0129, EFIS Item No. 15; Direct Testimony of Ron A. Klote, pg. 4 lns. 1 – 2, Schedule RAK-2, ER-2022-0130, EFIS Item No. 15; Staff Accounting Schedules,

Accounting Schedule: 02 pg. 1, ER-2022-0129, EFIS Item No. 95; Staff Accounting Schedules, Accounting Schedule: 02 pg. 1, ER-2022-0130, EFIS Item No. 112).

19. One component of rate base is the cost of construction property included in the Company's plant accounts. *Id.*

20. One component of the cost of construction property included in the Company's plant accounts are certain direct and overhead costs including an "allowance for funds used during construction" or AFUDC. 18 CFR 101 Electric Plant Instructions 3(17).

21. This amount represents "the net cost for the period of construction of borrowed funds used for construction purposes and a reasonable rate on other funds when so used." *Id.*

22. The Federal Energy Regulatory Commission's approved Uniform System of Accounts ("USOA") includes a formula to designate the percentage of funds that may be capitalized and included in rate base as AFUDC. *Id.*

23. This formula is based largely on cost of capital components including both the amount of (and average return on) short-term debt, long-term debt, and common equity. *Id.*

24. Both Evergy and Staff provided witnesses who testified as to the proper capital structure and return on equity for Evergy. (*See, e.g.,* Direct Testimony of Ann E. Bulkley, ER-2022-0129, EFIS Item No. 11; Direct Testimony of Ann E. Bulkley, ER-2022-0130, EFIS Item No. 10; Direct Testimony of Kirkland B. Andrews, ER-2022-0129, EFIS Item No. 9; Direct Testimony of Kirkland B. Andrews, ER-2022-

0130, EFIS Item No. 8; Direct Testimony of Seoung Joun Won, Ph.D., ER-2022-0129, EFIS Item No. 92; Direct Testimony of Seoung Joun Won, Ph.D., ER-2022-0130, EFIS Item No. 109).

25. OPC witness Mr. Murray filed rebuttal testimony on July 13, 2022. (Rebuttal Testimony of David Murray, ER-2022-0129, EFIS Item No. 150; Rebuttal Testimony of David Murray, ER-2022-0130, EFIS Item No. 160).

26. In his Rebuttal, Mr. Murray responded to the capital structure arguments presented by both Staff and Evergy. (Rebuttal Testimony of David Murray, pgs. 1 – 4, ER-2022-0129, EFIS Item No. 150; Rebuttal Testimony of David Murray, pgs. 1 – 4, ER-2022-0130, EFIS Item No. 160).

27. As part of that discussion, Mr. Murray explained how Evergy is using short-term debt at the holding company level (*i.e.* Evergy Inc.) to pay dividends instead of making those dividend payments with funds received from the Evergy Metro and Evergy West subsidiaries. *Id.* at pg. 4 lns. 5 – 14.

28. Mr. Murray further discussed how:

[D]ue to Evergy issuing significant amounts of short-term debt at the holding company to both fund dividends to Evergy’s shareholders and to make equity infusions into its subsidiaries, such as the \$200 million infusion into MO West to increase its common equity balance, it is rather easy for Evergy to achieve certain ratemaking targets.

*Id.* at pg. 3 lns. 3 – 7.

29. This practice “distorts the original expectation for stand-alone electric utility companies to balance its capital allocation based on its own anticipated capital needs[,]” and “is unnecessarily inflating Metro’s rate base.” *Id.* at pg. 4 lns. 5 – 14.

30. Mr. Murray then went on to explain exactly how Evergy’s management of its capital structure is “inflating” its rate base and describes how that could be corrected:

**Q. Does Evergy’s management of liquidity at the holding company disrupt the determination of a fair and reasonable Allowance for Funds Used During Construction (“AFUDC”) rate for its subsidiaries?**

A. Yes. This has particularly been an issue for Metro. Despite having CWIP balances of \$300 to \$500 million since June 2020, because Metro is retaining its earnings rather than supporting the dividend paid to Evergy’s shareholders, it has only had a miniscule percentage of short-term debt (usually less than 2% of CWIP) contributing to its AFUDC capitalization rate. This inflates Metro’s rate base. Based on Metro’s monthly CWIP balances for the period July 1, 2020 through March 1, 2022, I estimated that Metro’s accrued capitalization for financing charges related to CWIP was \$44.585 million. During most of these months, Metro’s AFUDC rate was in excess of 6%. If Metro’s AFUDC rate had been determined based on a cost of commercial paper consistent with Metro’s commercial paper rating, the accrued capitalization for financing over this period would have been approximately \$1.6 million.

**Q. What is your recommendation to resolve the unfair use of long-term capital costs to capitalize CWIP?**

A. Reduce Metro’s rate base by \$43 million and order Metro and MO West to use a short-term debt rate to capitalize all CWIP, rather than follow the FERC AFUDC formula.

*Id.* at pg 29 lns. 3 – 20.

31. It is this last part that Staff is seeking to strike.

32. An examination of the testimony in its entirety, as the OPC has done here, shows that the AFUDC discussion is an attempt by Mr. Murray to draw the Commission's attention to the extended negative impacts of the holding company engaging in financing activities, which can have additional significant impacts on the utilities' requested cost of service not just related to the requested ROR, but also on ratemaking formulas which rely on ROR inputs, such as the amount and cost of short-term debt normally held at a stand-alone utility company (*i.e.* without a holding company corporate structure). It is part of Mr. Murray's larger overall argument that the Commission should consider the capital structure of Evergy's parent company when determining the proper capital structure on which to set rates because "it appears that Metro is continuing to target [its] capital structure for ratemaking purposes." *Id.* at pg. 2 lns. 9 – 10.

33. In doing so, Mr. Murray is responding to the proposed capital structure offered by Evergy and explaining: (1) how that capital structure has artificially inflated equity amounts, and (2) how those artificially inflated equity amounts are causing a higher-than-necessary AFUDC capitalization rates.

34. This is an immediate response to Evergy (and to a lesser extent Staff's) direct testimony regarding capital structure as well as a response to the testimony of both Evergy and Staff regarding rate base (due to the influence of capital structure on rate base *via* the AFUDC instructions and formula in the USOA).

35. As such, this testimony is “responsive to the testimony and exhibits contained in any other party’s direct case” and therefore proper rebuttal. 20 CSR 4240-2.130(7)(B).

True-up Direct testimony of David Murray

36. OPC witness Mr. David Murray filed joint true-up direct and surrebuttal testimony in this case on August 16, 2022. (Surrebuttal and True-Up Direct Testimony of David Murray, ER-2022-0129, EFIS Item No. 213; Surrebuttal and True-Up Direct Testimony of David Murray, ER-2022-0130, EFIS Item No. 223).

37. Mr. Murray’s testimony stated as follows:

**Q. What is the purposes of your true-up direct testimony?**

A. To update the cost of long-term debt through the true-up date for both Evergy Metro, Inc. (“Metro”) and Evergy Missouri West, Inc. (“MO West”). I also provide an updated cost of short-term debt for the scenario in which I recommend MO West’s ratemaking capital structure include short-term debt. Additionally, I analyzed the most recent financial statement information available for Evergy, Metro and MO West to determine if I should change my initial capital structure recommendation. Although I decided not to change my initial capital structure recommendation, my updated capital structure analysis supports the reasonableness of my recommended ratemaking capital structure for Metro and MO West. My discussion of this updated information is included throughout the entirety of this testimony.

*Id.* at pg. 1 lns. 7 – 17.

38. True to his word, Mr. Murray provided a true-up to his capital structure analysis by considering the most recent financial information that had been made available during the true-up period. *Id.* at pgs. 4 – 8.

39. In particular Mr. Murray concluded his true-up direct of capital structure with the following two statements:

**Q. If you had changed any of your recommended ratemaking capital structures due to your consideration of additional and more recent financial information, which recommendation would you change?**

A. My recommendation for MO West, but only for the second scenario, which is premised on the assumption that short-term debt rates are not used for purposes of calculating carrying costs in MO West's current securitization case, Case No. EF-2022-0155. As can be seen in Schedules DM-S-3, pages 4-7, MO West's use of short-term debt in excess of CWIP has been increasing since June 30, 2020. Although not shown on the schedules, at June 30, 2022, MO West outstanding short-term debt balance was at its highest level of \$690.5 million. Of course for the period since February 2021, most of the short-term debt in excess of CWIP is explained by MO West's financing Storm Uri costs.

**Q. Considering the difficulties of predicting short-term debt rates and the likelihood that MO West will reduce its short-term debt outstanding after it issues securitized debt, what do you consider a reasonable and fair alternative to including short-term debt in MO West's ratemaking capital structure?**

A. Considering the nuances created by the financing of Storm Uri, as well as the distortion on Metro's books caused by Evergy's increased use of holding company commercial paper, a reasonable solution to these issues is to require all of MO West's and Metro's CWIP to be capitalized by a short-term debt rate. This will allow ratepayers to receive credit for each company's use or expected use of short-term financing and allow a more reasonable allowance for funds used during construction ("AFUDC") rate as well as the ability to capture the actual changes to the cost of short-term debt in between rate cases.

*Id.* at pg. 7 ln. 20 – pg. 8 ln. 18.

40. All of the fore-going, which includes the sections Staff now moves to strike, were included as part of true-up direct testimony and is therefore proper direct testimony.

41. Staff's argument that these sections should be struck because they are not proper surrebuttal is irrelevant because the sections are not being offered as surrebuttal, but rather, as direct testimony being filed during the true-up phase of the case.

Response to claims of prejudice and Due Process of Law violations

42. Staff makes an assertion that the sections of Mr. Murray and Ms. Schaben's testimony that it seeks to strike "necessarily prejudice Staff and every other party who will have no opportunity to reply to or rebut their assertions in contravention of those parties' right of Due Process of Law, leaving the Commission's rate case decision subject to reversal on appeal." This is an absurd claim.

43. The pre-filed testimony in question has not been offered or accepted by the Commission.

44. At the time the testimony is offered, the witnesses sponsoring that testimony will be tendered for cross-examination by all parties including Staff.

45. This cross-examination is the means by which Staff and other parties may rebut the assertions made by the witness and to develop new or old facts in a view favorable to the Commission. *State ex rel. Util. Consumers Council v. Pub. Serv. Com.*, 562 S.W.2d 688, 694 (Mo. App. E.D. 1978) ("The purpose of cross-examination is to sift, modify or explain what has been said, to develop new or old facts in a view favorable to the examiner, and to test the correctness of the information from the witness with an eye to discrediting the accuracy or truthfulness of the witness." (internal citations omitted)).

46. Moreover, both the rebuttal testimony and the true-up direct testimony of Mr. Murray afforded all parties, including Staff, an opportunity to directly respond to the assertions Mr. Murray made through surrebuttal or true-up rebuttal, respectively.

47. Because Staff, and all other parties, have had the opportunity to directly respond to two of the three testimonies in question and because Staff, and all other parties, will have the opportunity to cross-examine Ms. Schaben and Mr. Murray once those testimonies are offered, neither Staff nor any other party can justifiably claim to have been prejudiced.

48. For the same reason, neither Staff nor any other party can claim to have had their respective right to due process of law violated.<sup>1</sup>

49. The Missouri Supreme Court, citing the US Supreme Court, has held that "due process is flexible and calls for such procedural protections as the particular situation demands." *Jamison v. Dep't of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 405 (Mo. banc 2007) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). However, "[t]he fundamental requisite of due process of the law is the opportunity to be heard,' which includes 'an effective opportunity to defend by confronting any adverse witnesses.'" *Doughty v. Dir. of Revenue*, 387 S.W.3d 383, 387 (Mo. 2013)

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<sup>1</sup> It should be noted that in order to raise a claim of a due process violation, it is necessary to first establish that a party has been deprived of a constitutionally protected liberty or property interest. *Jamison v. Dep't of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 405 (Mo. banc. 2007). Staff has not identified what constitutionally protected liberty or property interest it claims to have been violated, which makes a full examination of their motion somewhat difficult.

(quoting *Goldberg v. Kelly*, 397 U.S. 254, 266-67 (1970)). The Missouri Supreme Court has therefore concluded:

in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. Therefore, the protections of confrontation and cross-examination apply in cases where administrative actions that seriously injure an individual are under scrutiny.

*Id.* quoting (quoting *Goldberg*, 397 U.S. 269-70) (internal citations omitted). This has been directly applied to the Missouri Public Service Commission. *State ex rel. Util. Consumers Council*, 562 S.W.2d at 694.

50. As previously stated, Ms. Schaben and Mr. Murray will be made available for cross-examination by Staff and all other parties at the time their testimony is offered onto the record.

51. Because Staff, and all other parties, will be afforded an opportunity for cross-examination, said parties will be given all the process they are due.

52. Thus, no party, Staff included, will be able to raise a claim of due process violation in response to the testimony offered by the OPC.

#### Misapplication of the OPC's position statement

53. Staff's motion states:

As is obvious from the citations to Mr. Murray's rebuttal and surrebuttal testimony included in its position statement set out above, and the citations to Ms. Schaben's surrebuttal testimony, each of these four issues is part of OPC's direct case and yet were raised only for the first

time in rebuttal and/or surrebuttal testimony, in violation of Commission Rule 20 CSR 4240-2.130(7)

(Staff's Motion to Strike, pg. 3 ¶ 4, ER-2022-0129, EFIS Item No. 269; Staff's Motion to Strike, pg. 3 ¶ 4, ER-2022-0130, EFIS Item No. 285).

54. Staff evidently appears to be arguing that any citation to any testimony other than direct in a position statement indicates that the issue in question is part of a party's direct case but was only raised for the first time outside of direct. This is not remotely true.

55. Different issues may be raised by different parties through the course of a general rate increase case.

56. These issues may arise both out of direct testimony or out of rebuttal testimony that seeks to challenge the position taken by another party's direct testimony.<sup>2</sup>

57. The Commission's rules even envision that some parties may not file direct and instead only file rebuttal testimony. 20 CSR 4240-2.130(7)(B) ("A party need not file direct testimony to be able to file rebuttal testimony;").

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<sup>2</sup> To give a basic example, consider a utility that files direct testimony stating that certain costs it normally incurs have increased and another party files in rebuttal that the utility has failed to consider a certain offset to those costs. If the issue is described as "should the offset be included in calculating the cost" then the issue was necessarily and properly first raised in rebuttal.

58. Further, the individual **position** of any party on a given issue, other than the party who first raised the issue, is likely to be developed in testimony that is responding to the party that raised the issue.

59. Because an issue can be raised in either direct or rebuttal testimony, it therefore stands to reason that a party's position can be developed in either direct, rebuttal, or surrebuttal testimony.<sup>3</sup>

60. Staff should be well aware of this given that its own position statement makes numerous citations to both rebuttal and surrebuttal testimony.

61. Specifically, Staff cites to either rebuttal or surrebuttal testimony in regards to Issues: I.C, II. A, II.A.1, II.B, II.C, II.D, II.E, II.H, III.B, V.B, V.D, V.E.1(a), VI.D, VI.F.1, VII.B, XI.A, XI.B, XIV.A.2, XIV.A.3, XVII.B, XVII.C, XVIII.C, XVIII.F, XX.A.1, XX.B, XX.B.1, XXIII.C, XXIII.D, XXVI. C, XXVI.D, XXX.A, XXXII.C.1, XXXII.C.2, XXXIV.B, XXXIV.C, XXXVI.B, XLIV.B, XLIV.C, XLIV.D, and XLV.A. (Statement of Positions, ER-2022.0129,EFIS Item No. 262; Statement of Positions, ER-2022.0129,EFIS Item No. 277).

62. If Staff is to be believed, it is "obvious" from the fact that Staff cited to rebuttal and surrebuttal testimony in its position statement that each and every one of these issues represents a part of Staff's direct case that was raised for the first time in rebuttal and surrebuttal testimony.

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<sup>3</sup> To follow on from the previous example, the Utility's position on the issue of whether the offset should be included in calculating costs will almost certainly be developed in the utility's surrebuttal response to the rebuttal that developed the issue.

63. Of course, Staff should not be believed and this idea is nonsense. The Commission should not be basing its decision on whether testimony is or is not proper by only considering whether it was cited to in a position statement. That decision should instead be made based on an examination of the testimony in question, which is what the OPC has prepared in this response.

Considered application of Staff's cited Commission decision

64. Staff cites to the Commission's decision in case ER-2016-0156 to support its motion to strike. (Staff's Motion to Strike, pg. 3 ¶ 7, ER-2022-0129, EFIS Item No. 269; Staff's Motion to Strike, pg. 3 ¶ 7, ER-2022-0130, EFIS Item No. 285).

65. Staff offers no evaluation of this decision and makes no attempt to apply it to the present motion.

66. There is a good reason for this.

67. The Order Staff is citing concerns a motion to strike filed by KCP&L Greater Missouri Operations Company ("GMO") (the former predecessor of Evergy West) against the OPC. (Order Granting Motion To Strike, ER-2016-0156, EFIS Item No. 159).

68. In that filing, GMO claimed that certain **direct** testimony filed by the OPC was "prematurely filed rebuttal testimony." *Id.* at pg. 2.

69. The testimony in question addressed portions of the direct testimony of GMO witnesses. *Id.*

70. The OPC argued that it was entitled "to prepare its 'entire' case-in-chief on direct by including testimony that responds to GMO's direct case." *Id.*

71. The Commission disagreed and concluded that the disputed testimony was, in fact, rebuttal. *Id.*

72. As a result, the Commission ordered the testimony struck but allowed it to be re-filed as rebuttal. *Id.* at pg. 4.

73. Hopefully, the Commission can see how this decision would place the OPC in a double bind when compared to the current request by Staff.

74. If the OPC files testimony that **is** responsive to another party, then the ER-2016-0156 decision states that it is **not** direct.

75. Staff now argues, however, that if the OPC makes a recommendation in response to the testimony filed by another party, that recommendation must necessarily be filed in direct.

76. As a result, any recommendation the OPC could make on an issue that was raised in another party's testimony – but not in the OPC's direct – would therefore simultaneously be both proper direct and improper direct testimony.

77. The end result would be that the OPC, and all other parties for that matter, would be prohibited from making any recommendation in response to another party's testimony, which is obviously not how 20 CSR 4240-2.130(7) was intended to function.

78. When considering the full application of the Commission's ER-2016-0156 decision that Staff cites, it thus becomes clear why Staff's motion must be denied.

### Conclusion

79. The sections of testimony that Staff seeks to strike are properly developed surrebuttal, rebuttal, and true-up direct, respectively.

80. Staff both had – and continues to have – a plethora of opportunities to address these arguments and consequently cannot truly claim to be prejudiced.

81. The Commission should therefore deny Staff's motion to strike the requested excerpts.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission deny Staff's *Motion to Strike*.

Respectfully submitted,

By:           /s/ John Clizer            
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CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this Thirtieth day of August.

          /s/ John Clizer