

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

In the Matter of Liberty Utilities)
(Midstates Natural Gas) Corp. d/b/a)
Liberty Utilities' Tariff Revisions Designed)
To Implement a General Rate Increase for) Case No. GR-2014-0152
Natural Gas Service in the Missouri)
Service Areas of the Company)

**PUBLIC COUNSEL’S SURREPLY IN
OPPOSITION TO PROPOSED RATE CASE EXPENSE**

COMES NOW the Office of the Public Counsel (“Public Counsel”) and for its surreply in opposition to the proposed rate case expense claimed by Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty Utilities (“Liberty”), states:

1. On November 19, 2014, Liberty and the Commission’s Staff filed a proposed rate case expense amount of \$609,679 to be included in Liberty’s revenue requirement. The filing did not provide any detail supporting the request.
2. On November 24, 2014, Public Counsel filed a reply opposing the request.

Public Counsel’s reply stated in part:

Public Counsel recommends that the Commission issue an order finding that the Memorandum does not provide sufficient evidence to enable the Commission to determine the rate case expense issue. ...Liberty and Staff must file the supporting detail necessary to enable the Commission to understand what rate case expenses were incurred. Among the issues the Commission should ensure are addressed are: why the amount sought by Liberty is now over 50% higher than the estimate offered in direct testimony; detailed substantiation of the hours worked and rates charged by consultants and attorneys; substantiation of all other rate case expenses; comparative review of industry rates in order to demonstrate that the rates charged to Liberty and proposed to be passed on to customers are reasonable; and an analysis demonstrating that the use of outside consultants and attorneys was the least-cost option available.

3. On December 1, 2014, Liberty and the Commission's Staff filed separate replies to Public Counsel's Response in Opposition to Proposed Rate Case Expense. Upon review of the responses provided, Public Counsel concurs with Liberty and the Staff that the \$37,768 amount agreed to in the Partial Stipulation and Agreement ("Stipulation") was to be included annually in the three-year normalization period, which equals a total of \$113,304 over three years. To the extent Public Counsel suggested otherwise, that was in error. In addition, Public Counsel concurs that a normalized amount of \$51,210 was included in the revenue requirement agreed upon in the Stipulation, which equals a total of \$153,630 over three years. Combined, Public Counsel offers that these amounts equal a total agreed upon rate case expense of \$266,934. Accordingly, Public Counsel's opposition to Liberty's proposed rate case expense is in regard to the additional \$342,745 still unsupported and unsettled rate case expense requested by Liberty above and beyond \$266,934.

4. Liberty's response to Public Counsel's opposition fails to provide to the Commission the details of its rate case expense, including hourly rates charged and number of hours claimed by its experts and attorneys. Without producing such information, the Commission is deprived of an evidentiary basis upon which to determine whether Liberty is entitled to the entire additional \$342,745 requested, and if not, to what extent the record supports some reduced amount, if any. Instead of providing an adequate record, Liberty's reply offers only argument.

5. Liberty's response asserts in Footnote 2 that it provided detailed invoices to the Staff and Public Counsel. Yet, for unexplained reasons, Liberty fails to provide invoice and billing information to the Commission. If Liberty has the documents to

substantiate its request, Liberty must get those documents in the record before the Commission. Providing discovery to Public Counsel and the Staff is no substitute for entering evidence in the record. This begs the question: Why did Liberty not provide the Commission with any details of its rate case expense? Liberty's response is more noteworthy for what it failed to provide than for what it did provide. Without additional evidence upon which the Commission may base a decision on rate case expense, the Commission has no record upon which it may conclude that Liberty's proposed rate case expense is just and reasonable.

6. Another factual issue before the Commission is whether Liberty's decision to hire outside experts and attorneys to conduct its rate case rather than using in-house experts and attorneys was just and reasonable. Part of that inquiry requires examination of whether the work outsourced reasonably could have been performed at less cost to ratepayers. Instead of addressing this Commission-recognized component of rate case expense reasonableness, Liberty states that its predecessor also used outside attorneys and that Liberty "has pursued hiring in-house counsel for its Jackson, Missouri headquarters location" (EFIS No. 181). This response provides absolutely nothing for the Commission to consider that would allow it to determine whether the costs associated with hiring outside experts and attorneys was just and reasonable. Therefore, without an evidentiary basis upon which to find that hiring outside experts and attorneys was just and reasonable, the Commission should disallow the costs.

7. While Liberty chose not to provide any evidentiary support for its rate case expense, the Commission's Staff attempted to provide some missing evidence with the Staff's Highly Confidential spreadsheet. Therein, the Staff provides a summary

document identifying invoice dates, vendor names, a brief description of services rendered, invoice numbers, and the amount of each invoice. Just as Liberty's response is notable for what it does not provide, the Staff's response is equally notable. Staff also chose not to include the detail necessary for the Commission to have any understanding of the hourly rates charged and hours worked that Liberty now seeks to include in rates. Nor does Liberty or Staff attempt to compare the hours worked with the amount of time taken by others in the field to perform similar work, or compare the rates charged to the market rate for those services. Public Counsel is not suggesting that the Commission must independently examine every invoice, but at a bare minimum the hourly rates and hours charged must be reviewed for reasonableness.

8. In an analogous context, the Eighth Circuit has adopted a twelve-factor analysis that courts are to consider when determining the reasonableness of an attorneys fees request. *Hardman v. Board of Educ.*, 714 F.2d 823, 825 (8th Cir. 1983). "The starting point in determining attorney's fees is the lodestar, which is calculated by multiplying the number of hours reasonably expended by the reasonable hourly rates." *Quigley v. Winter*, 598 F.3d 938, 957 (8th Cir. 2010)(emphasis added). Missouri courts have also employed the lodestar method for calculating the reasonableness of attorney's fees. *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 250 (Mo. 2013). Clearly, in other contexts a significant scrutiny is applied to such expenses, with a particular attention applied to the rate charged and the hours expended.

9. Chapter 536 of the Revised Statues of Missouri provides guidance to the Commission as it considers expert and attorney fees because "One purpose of Chapter 536 is to fill in gaps in administrative procedure" where the public utility law statutes do

not provide guidance. *State ex rel. Noranda Aluminum, Inc. v. P.S.C.*, 24 S.W.3d 243, 245 (Mo. App. 2000). Parties seeking an award of attorney’s fees and expenses must submit “an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed” (§ 536.087.3, RSMo. Supp. 2013, emphasis added). In this context, “The amount of fees awarded as reasonable fees and expenses shall be based upon prevailing market rates for the kind and quality of the services furnished, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the state in the type of civil action or agency proceeding, and attorney fees shall not be awarded in excess of seventy-five dollars per hour unless the court determines that a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee” (§ 536.085(4), RSMo. Supp. 2013). These analogous contexts are offered as examples of the type of evidence that can support a decision on expert and attorney fees.

10. The responses of Liberty and the Commission’s Staff make it impossible for the Commission to determine whether there is a reasonable basis for Liberty’s request for such a large increase in rate case expense above and beyond that which was agreed to in the Stipulation, and above and beyond Liberty’s own estimate in testimony. Only Liberty has the burden of proving whether its rate case expense is just and reasonable, and Liberty has failed to satisfy that burden with *any* support (§ 393.150.2, RSMo. Supp. 2013). Despite Liberty’s claim that the rate case expense amount approved by the Commission is not a blank check, that is exactly what Liberty is proposing by not providing the Commission with the evidence it needs to resolve this issue.

11. “Where an agency’s findings are not based on competent and substantial evidence, the agency has acted unreasonably and arbitrarily.” *State ex rel. Public Counsel v. P.S.C.*, 289 S.W.3d 240, 251 (Mo. App. 2009). Accordingly, all rate increases ordered by the Commission must be based on competent and substantial evidence. *Id.* This is not an optional legal requirement to be selectively applied to some rate increases and not applied to other rate increases. Substantial evidence must be the basis for all rate increase decisions. *Id.*

WHEREFORE, the Office of the Public Counsel urges the Commission to reject Liberty’s proposed additional rate case expense of \$342,745 as being completely unsubstantiated and affording the Commission no record upon which to make a lawful order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 2nd day of December 2014:

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