

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

In the Matter of Liberty Utilities)	
Verified Application For Approval of)	
PVC Pipe Replacement Program and)	
Recovery of Associated Costs Through)	Case No. GO-2019-0091
ISRS Mechanism)	

**THE OFFICE OF PUBLIC COUNSEL’S RESPONSE TO LIBERTY UTILITIES’
RESPONSE TO STAFF RECOMMENDATION AND MOTION TO DISMISS**

COMES NOW the Office of the Public Counsel (“OPC”) and for its *Response to Liberty Utilities Response to Staff Recommendation and Motion to Dismiss*, states as follows:

1. Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty Utilities (“Liberty”) initiated this case with the filing of its September 28, 2018, application.
2. In its application, Liberty sought Commission approval for a ten-year PVC pipe replacement program as well as a predetermination by the Commission that replacements made under that program would be eligible for recovery through the Infrastructure System Replacement Surcharge (“ISRS”) mechanism.
3. The Staff of the Public Service Commission (“Staff”) filed its *Recommendation* and attached *Memorandum* on January 9, 2019.
4. The Staff’s *Recommendation* and attached *Memorandum* concluded: (1) that Liberty need not obtain an Order from the Commission in order to replace the PVC pipe described in its application, and (2) that Staff could not recommend

predetermination of the eligibility of cost recovery for Liberty's proposed replacements through the ISRS mechanism.

5. Liberty filed its *Response to Staff Recommendation and Request for Procedural Conference* on February 28, 2019.

6. As part of this *Response*, Liberty withdrew its request for predetermination of the eligibility of PVC replacement related cost recovery through the ISRS mechanism. However, Liberty continued to ask the Commission to "approve" its ten-year PVC replacement program (though Liberty made clear that it was *not* seeking a Commission order requiring Liberty to follow this program).

7. Specifically, Liberty's *Response* closed with a request that:

the Commission accept its Response and, at the conclusion of these proceedings, issue an Order approving a ten-year replacement program for the remaining PVC pipe in the Company distribution system and finding that such approval is necessary to protect public safety by removing facilities that, for the reasons discussed herein, are in a worn-out or deteriorated condition.

8. Liberty further claimed that this request represented the utility's attempt "to partner with both the Commission and its Staff in taking a proactive approach towards improving public safety."

9. While Liberty's efforts to ensure the safety of its customers might otherwise be applauded, its request in this case is ultimately unnecessary, counterproductive, wastes administrative resources, and constitutes a request for an unlawful advisory opinion. As such, Liberty's request should be dismissed pursuant to 4 CSR 240-2.116.

I. Liberty's Request is Unnecessary

10. As explained at length in Staff's well written *Recommendation* and attached *Memorandum*, there is no legal basis requiring Liberty to obtain Commission approval before implementing its replacement program.

11. In other words, Liberty requires no Commission involvement and is completely free to implement its proffered ten-year PVC replacement program whenever it so chooses, regardless of whether or not the Commission acts on its request.

12. Thus, Liberty's request for Commission approval of its ten-year PVC replacement program is entirely unnecessary.

13. Liberty attempts to address this point in its *Response* by pointing to a number of cases where the Commission has nevertheless approved gas utility replacement programs for cast iron and bare steel mains and services. This is an obviously faulty analogy, however, because the replacements made in those cases are mandated by a Commission rule that ***requires*** the replacement program to be submitted for review and approval by the Commission. *See, e.g.*, 4 CSR 240-40.30(15)(D)(1) ("Operators who have cast iron transmission lines, feeder lines, or mains shall develop a replacement program to be submitted with an explanation to the commission by May 1, 1990, ***for commission review and approval.***" (emphasis added)).

14. There is no comparable rule mandating commission review and approval for a PVC replacement program.¹

15. In the absence of any such rule or statute requiring Commission approval, Liberty's request is essentially just an invitation for the Commission to make management decisions on Liberty's behalf.

16. The Commission has previously noted its lack of authority to make such decisions. *See Office of the Public Counsel, Complainant, v. Southern Missouri Gas Company, L.P., Respondent*, 2005 Mo. PSC LEXIS 1729, *10 n 6 ("It is well-established that the Commission lacks authority to take over the management of regulated entities." (citing *St. ex rel. Southwestern Bell Telephone Co. v. Missouri Public Service Commission*, 262 U.S. 276, (1923); *St. ex rel. City of St. Joseph v. Public Service Commission*, 30 S.W.2d 8 (Mo. banc 1930); *St. ex rel. Laclede Gas Co. v. Public Service Com.*, 600 S.W.2d 222, 227-228 (Mo. App., W.D. 1980); and *St. ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo. App. 1960))).

17. If Liberty truly and honestly believes that the PVC replacement program it has put forward is necessary to provide safe and adequate service to its customers, then Liberty should promptly implement the program itself, instead of asking the Commission to weigh-in and make important management decisions on Liberty's behalf.

¹ The OPC is not arguing that such a PVC program may not be implemented; merely that there is no Commission rule requiring the program be approved.

II. Liberty's Request is Counterproductive.

18. Liberty's *Response* goes to great lengths to assert Liberty's belief that the PVC replacements it envisions are ISRS eligible.

19. Without commenting on the veracity of this belief, the OPC notes that, under the ISRS statute, replacements are only eligible if they are "installed ***to comply with state or federal safety requirements*** as replacements for existing facilities that have worn out or are in deteriorated condition." RSMo. § 393.1009(5)(a) (emphasis added).

20. Therefore, based on Liberty's own assertion that these proposed PVC replacements are ISRS eligible, Liberty is necessarily claiming that it believes it is ***required*** to undertake the contemplated replacements.

21. And yet, instead of engaging in the PVC replacements that Liberty itself claims it is mandated to perform, Liberty has chosen to delay those replacements in order to have the Commission verify that there are safety related reasons for making them.

22. The irony of this, of course, is that Liberty has thus forestalled making what it claims to be important safety related changes while it awaits Commission approval, which is further exacerbated by the fact that Commission approval is altogether unnecessary as established in the preceding section.²

² This argument naturally assumes that Liberty is not already engaged in PVC replacements. If Liberty has already begun replacing its PVC lines, then that only further underlines the sheer pointlessness of its request because it is already engaged in the very thing for which it seeks Commission approval.

23. Moreover, Liberty is also asking the Commission to make a factual finding that the PVC being removed is “in a worn-out or deteriorated condition,” thus necessitating the need for an evidentiary hearing. This ensures that even more time will be lost before Liberty undertakes its proposed PVC replacement program.

24. As such, Liberty’s request is entirely counterproductive to its goal of ensuring customer safety.

III. Liberty’s Request will Result in a Waste of Administrative Resources

25. The OPC has already explained how Commission approval of Liberty’s PVC replacement program is neither required by any rule or statute nor even necessary for Liberty to undertake its proffered program.

26. This means that Liberty could implement its ten-year PVC replacement program regardless of whether the Commission approves it.

27. As such, any amount of time spent on answering the question of whether the Commission should approve the PVC replacement program is ultimately pointless and thus wastes administrative resources.

28. Of course, this fact is ultimately irrelevant to Liberty given the **true** purpose behind its filing, which is really only meant to set the stage for its future ISRS case.

29. This can easily be seen in paragraph eleven of Liberty’s *Response* where, despite having previously withdrawn its request for ISRS preapproval, Liberty states: “[t]he Company also believes that a Commission-approved PVC replacement

plan will further serve to clarify the eligibility of the associated costs for eventual cost recovery in a future ISRS mechanism tariff filing.”

30. In particular, Liberty seems to be focused on the Commission making a factual predetermination in this case that PVC pipes that have not yet been identified, replaced, examined, tested, or even proven significantly susceptible to degradation are “worn out or [] in [a] deteriorated condition.”

31. This is clearly an unabashed attempt to verify the eligibility of recovery under an ISRS for costs associated with the replacement of such pipes based on the definition of “[g]as utility plant projects” found in RSMo. § 393.1009(5)(a) prior to Liberty actually filing its ISRS case.

32. The problem with Liberty requesting such a finding in this case, however, is the well-established body of law dictating that the Commission is not bound by the doctrine of *stare decisis*. See *State ex rel. AG Processing, Inc. v. PSC*, 120 S.W.3d 732, 736 (Mo. banc 2003) (“[A]n administrative agency is not bound by *stare decisis*, nor are PSC decisions binding precedent on this Court.”); *State ex rel. GTE N., Inc. v. Mo. Pub. Serv. Com.*, 835 S.W.2d 356, 371 (Mo. App. W.D. 1992) (“An administrative agency is not bound by *stare decisis*. Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable. It is the impact of the rate order which counts; the methodology is not significant.” (citing *State ex rel. Churchill Truck Lines, Inc. v. Public Serv. Comm’n*, 734 S.W.2d 586 (Mo. App. 1987); *Columbia v. Missouri State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo.

App. 1980); and *State ex rel. Arkansas Power & Light Co. v. Public Serv. Comm'n*, 736 S.W.2d 457 (Mo. App. 1987)); *State ex rel. Laclede Gas Co. v. PSC*, 392 S.W.3d 24, 36 (Mo. App. W.D. 2012) (“The Commission ‘is not bound by *stare decisis* based on prior administrative decisions.’” (quoting *State ex rel. Aquila, Inc. v. Pub. Serv. Comm'n of Mo.*, 326 S.W.3d 20, 32 (Mo. App. W.D. 2010))).

33. This means that even if the Commission were to grant Liberty the factual predetermination it has requested, that finding would not be binding on any future Commission decision and would not prevent this issue from being re-litigated in any future ISRS proceeding.

34. Again, this makes any attempt to reach a resolution *in this case* on the question of whether the PVC pipes Liberty seeks to replace are worn out or deteriorated ultimately pointless and thus constitutes a waste of administrative resources.

35. In addition, Liberty’s fixation with getting a factual predetermination related to ISRS eligibility raises serious concerns regarding fundamental aspects of Commission practice and due process.

36. Assuming *arguendo* that the PVC replacements Liberty is contemplating were ISRS eligible, Liberty would still be incapable of recovering any revenue related to those replacements until after it had requested and received an ISRS, which itself can only occur after Liberty actually made the replacements.

37. Therefore, Liberty cannot possibly benefit (financially or otherwise) if the Commission provides Liberty’s requested factual finding regarding the condition

of the PVC pipes now as opposed to during a later ISRS case, *if one assumes that the replacements will be made regardless.*

38. Instead, the only logical reason for why Liberty would want the Commission to make a factual predetermination regarding the condition of the PVC pipes prior to requesting an ISRS is if Liberty was making its decision as to whether to undertake the replacements at all *based* on that finding, *i.e.* if Liberty would only make the replacements if it was *guaranteed* ISRS recovery.

39. However, this presents its own problem, as it means Liberty is making its decisions about how to rectify what it has sworn under oath to be a potentially dangerous condition on its distribution lines based, not on the threat that issue possess to its consumers, but rather on its own ability to recoup costs through the ISRS rate mechanism.

40. This is obviously a wholly unacceptable position for any gas utility to take.

41. Again, if Liberty truly and honestly believes that the PVC replacement program it has put forward is necessary to provide safe and adequate service, then Liberty should promptly implement that program instead of wasting administrative resources trying to ensure that the replacements will be ISRS eligible.³

³ Conversely, If Liberty does *not* truly and honestly believe that the PVC replacements are necessary to provide safe and adequate service to its customers, then it most certainly should not be claiming that such replacements are ISRS eligible in the first place.

**IV. Liberty's Request Would Require the Commission to Issue an
Unlawful Advisory Opinion**

42. As explained in the preceding sections, there is no need for the Commission to make a factual predetermination regarding the condition of Liberty's PVC pipes in order for Liberty to perform its ten-year PVC replacement program.

43. Therefore, Liberty is asking the Commission to issue an advisory opinion. *See State ex rel. Heart of Am. Council v. McKenzie*, 484 S.W.3d 320, 324 n.3 (Mo. banc 2016) ("An opinion is advisory if there is no justiciable controversy, such as if the question affects the rights of persons who are not parties in the case, ***the issue is not essential to the determination of the case***, or the decision is based on hypothetical facts." (emphasis added)).

44. "Like other administrative agencies, the Commission is not authorized to issue advisory opinions." *State ex rel. Laclede Gas Co. v. PSC*, 392 S.W.3d 24, 38 (Mo. App. W.D. 2012).

45. "The Commission [is] restricted to determining the complaint before it, and it should not be issuing decisions with 'no practical effect and that are only advisory as to future, hypothetical situations.'" *Id.* (quoting *State ex rel. Mo. Parks Assoc. v. Mo. Dept. of Natural Res.*, 316 S.W.3d 375, 384 (Mo. App. W.D. 2010)).

46. Liberty's request for an unlawful advisory opinion should consequently be denied.

V. Conclusion

47. Liberty's request for the Commission to approve its ten-year PVC replacement program should be denied and this case dismissed pursuant to 4 CSR 240-2.116.

48. This is not because such a replacement program is inappropriate, but rather, because Liberty's request is unnecessary, counterproductive, wastes administrative resources, and constitutes a request for an unlawful advisory opinion.

49. The OPC notes that the Commission has already issued an order setting a procedural conference for this case on April 3, 2019. The OPC believes that this procedural conference would provide an excellent opportunity to hear oral arguments regarding this motion to dismiss. Therefore, the OPC further requests that the Commission schedule oral arguments regarding the motion to dismiss Liberty's case made herein on April 3, 2019.

WHEREFORE, the Office of the Public Counsel respectfully submits the forgoing *Response to Liberty's Response to Staff Recommendation*, requests that the Commission dismiss this case pursuant to 4 CSR 240-2.116, and asks the Commission to schedule oral arguments regarding this motion to dismiss for April 3, 2019.

Respectfully submitted,
OFFICE OF THE PUBLIC COUNSEL

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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 eleventh day of March, 2019.

/s/ John Clizer