BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Liberty Utilities (Missouri Water) LLC's Application for a Rate Increase.	))	File No. WR-2018-0170 SR-2018-0171

MOTION TO STRIKE THE REBUTTAL TESTIMONY OF STAFF WITNESS DAVID MURRAY

COME NOW, Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. (herein "Silverleaf"), by and through undersigned counsel, files this Motion to Strike portions of the Rebuttal Testimony of Staff Witness David Murray. For its cause, Silverleaf states the following:

I. BACKGROUND

On July 20, 2018 Staff filed 3 pages of rebuttal testimony from David Murray. Witness Murray explains on page 2 of his rebuttal testimony, "Because my direct testimony from the Liberty Midstate's gas rate case has yet to be filed in this case, I am attaching it to this rebuttal testimony as Confidential Schedule DM-rl, which included the executive summary from the Cost of Service Report and the Detailed Direct Testimony Appendix 2." Murray, Rebuttal Testimony, Pg. 2, ll 2-5. On page 1 of Witness Murray's rebuttal testimony he suggests that this appropriate because "I am responding to information attached to the direct testimony of Liberty Water's witness, Jill Schwarz." Murray, Rebuttal Testimony, Pg. 1, ll 16-17. Mrs. Schwarz filed, as an attachment to her direct testimony, *in this case*, the direct testimony offered by Keith Magee on behalf of Liberty Utilities (Midstates Natural Gas) Corp.'s in Case No. GR-2018-0013. Notably, Mr. Magee has not been offered as a witness in this docket.

In addition to Witness Murray's 3-pages of rebuttal testimony in this case, he attaches: 1) Mr. Murray's sponsored portion of Staff's Cost of Service Report in GR-2018-0013 and 2) the 108-page "Detailed ***Direct Testimony*** of David Murray and Support for Staff Cost of Capital Recommendations", which was filed as Appendix 2 to Staff's Cost of Service Report in GR-2018-0013. (Emphasis added.) Nowhere in Witness Murray's rebuttal testimony does he actually identify what specific issue he is responding to in Witness Jill Schwarz's direct testimony.

II. THE MURRAY TESTIMONY IS IMPERMISSIBLE SUPPLEMENTAL DIRECT TESTIMONY

Staff produced its first analysis regarding Liberty Utilities (Missouri Water)'s proper return on equity and rate of return this spring with its 120 Day Report. Staff filed its direct testimony (case-in-chief) on June 22, 2018 in this case. As part of Staff's case-in-chief, Staff Witness Paul Harrison filed direct testimony, which included the Auditing Department's "Review and Audit of Liberty Utilities (Missouri Water), LLC (Water) D/B/A Liberty Utilities." That Review and Audit included the section entitled "Rate of Return and Capital Structure" sponsored by Staff Witness David Murray. Mr. Murray's July 20, 2018 rebuttal testimony seeks to supplement or replace the June 22, 2018 Staff direct testimony on rate of return and return on equity with his sponsored portion of Staff's cost of service report and his direct testimony in the recently closed Liberty Utilities (Midstates Natural Gas) Corp. gas utility rate case.

Commission Rules bar the addition of supplemental direct testimony. Commission Rule 4 CSR 240-2.130 (7) provides:

> 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.

Commission Rule 4 CSR 240-2.130 (8) provides:

> No party shall be permitted to supplement prefiled prepared direct, rebuttal or surrebuttal testimony unless ordered by the presiding officer or the commission. A party shall not be precluded from having a reasonable opportunity to address matters not previously disclosed which arise at the hearing. This provision does not forbid the filing of supplemental direct testimony for the purpose of replacing projected financial information with actual results. (Emphasis added).

The attachment of Witness Murray's direct testimony and Staff's Cost of Service Report in GR-2018-0013 to Witness Murray's rebuttal testimony in this case is clearly supplemental direct testimony in violation of 4 CSR 240-2.130. Staff itself recently acknowledged this principle arguing against the Office of Public Counsel in Docket Number ER-2018-0146, "Staff's Response to Commission's Order Directing Filing", attached hereto as Schedule A. In particular, at pages 6-7 of this attached Staff filing, Staff notes that the Commission has previously admonished Staff for relying on a cost of service study from another docket and failing to explain how that cost of service study was developed, which is exactly what has occurred here. Staff's offer to provide work papers in rebuttal testimony was found insufficient because the **direct testimony** failed to explain Staff's case-in-chief.[1] The Commission found that Staff's

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[1] Citing *In the Matter of Missouri Gas Energy's Tariffs to Implement a General Rate Increase for Natural Gas Service*, Case No. GR-2004-0209, Order Regarding Midwest Gas Users' Association's Motion To Strike A Portion Of The Testimony Of Daniel I. Beck. "It essentially just says to go look at what Staff said in an earlier case and that Staff may answer your questions if you have any. It is not enough to say, as Staff does, that if MGUA or other parties had wanted to learn more about Beck's position they could have taken his deposition. The Commission's rule requires a party to assert and explain its position through its direct testimony." *Id.* at 3.

tactic of excluding material pieces of its position on cost of service caused other parties in the proceeding to be prejudiced. Just as the Commission noted in Case No. GR-2004-0209, Staff should have included its cost of service analysis with its direct testimony/case-in-chief in this docket. In order to avoid prejudicial effect on Silverleaf and other parties, the supplemental direct testimony of Mr. Murray that was filed on July 20 should be struck.

III. SILVERLEAF'S DUE PROCESS RIGHTS ARE MATERIALLY HINDERED BY THE ADOPTION OF TESTIMONY FROM A GAS RATE CASE

Silverleaf's due process rights would be impaired if Mr. Murray's testimony from an unrelated docket is admitted as evidence in this docket. Silverleaf is not a party to the Liberty Midstate's gas rate case. Consequently, it has not had the opportunity to participate in that proceeding and certainly has not had the opportunity to review or issue discovery in that case.

Mr. Murray's gas testimony relies on confidential discovery responses that were provided in the gas utility's rate case consistent with the requirements set forth in 4 CSR 240-2.135 (Confidential Information) by Liberty Utilities (Midstates Natural Gas) Corp. Liberty Utilities (Midstates Natural Gas) Corp. is a separate corporate entity from Liberty Utilities (Missouri Water), LLC, even though they share a multi-national corporate parent. As such, the designation of confidential information in the gas rate case does not apply to the applicant or the intervenors in this case, and the gas utility's confidential information has been improperly disclosed in the confidential version of Mr. Murray's rebuttal testimony in the water rate case.[2] Obviously, Liberty Utilities (Midstates Natural Gas) Corp. is not a party to the water rate case and therefore has no way to authorize the release or disclosure of confidential information in this case.

[2] *See* 4 CSR 240-2.135(6) ("Confidential information may be disclosed only to the attorneys of record for a party and to employees of a party who are working as subject-matter experts for those attorneys or who intend to file testimony in that case, or to persons designated by a party as an outside expert <u>in that case</u>.") (emphasis added).

Likewise, Silverleaf was not a party to the gas rate case and has not executed non-disclosure agreements related to the gas rate case.[3] The gas utility's confidential information is outside of the scope of the nondisclosure agreements executed in this docket and should be removed in order to mitigate the risk of its public release, consistent with the intent of 4 CSR 240-2.135 as it was applied in the gas rate case.[4]

Staff's rebuttal testimony relies upon information that is not supposed to be available to parties in this water case. Given that this gas-related confidential information is not supposed to be released to parties outside of the gas rate case, parties in this water rate case have no proper way of inquiring about it. For example, there is no method by which Silverleaf can ask the gas utility about the confidential data responses that it provided Staff as the gas utility is not even a party in this water case. Additionally, the gas rate case was recently completed. Consequently, even assuming *arguendo* that standing to participate in the gas case were not an issue, parties like Silverleaf have no opportunity to propound discovery regarding the testimony that was filed and heard in that gas case. Therefore, the gas-case related testimony and associated reports should be struck both to protect the sensitive information of the gas utility and because its inclusion in this water case would unfairly prejudice parties like Silverleaf who were not participants in the gas case.

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[3] *See, e.g*, Appendices 2 and 3, Staff Report Cost of Service, Liberty Utilities (Midstates Natural Gas) Corp., d/b/a Liberty Utilities Case No. GR-2018-0013.

[4] *See* 4 CSR 240-2.135(13) ("All persons who have access to information under this rule shall keep the information secure and may neither use nor disclose such information for any purpose other than preparation for and conduct of the proceeding for which the information was provided. This rule shall not prevent the commission's staff or the Office of the Public Counsel from using confidential information obtained under this rule as the basis for additional investigations or complaints against any public utility.

Further, it is simply impossible for Silverleaf to effectively respond in surrebuttal to a 108-page analysis offered for the first time in rebuttal. As such, the testimony and related Staff Report Cost of Service should be struck from Mr. Murray's testimony in this water proceeding.

WHEREFORE, Silverleaf Resorts Inc. and Orange Lake County Club, Inc. respectfully ask the Commission to strike the attachments to Staff Witness David Murray's Rebuttal Testimony from case number GR-2018-0013.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been e-mailed to all counsel of record this 1st day of August 2018.

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/s/ Joshua Harden

SCHEDULE A

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Kansas City Power & Light Company's Request for Authority to Implement A General Rate Increase for Electric Service	)))	**Case No. ER-2018-0145**
In the Matter of KCP&L Greater Missouri Operations Company's Request for Authority to) Implement A General Rate Increase for Electric Service	))))	**Case No. ER-2018-0146**

STAFF'S RESPONSE TO COMMISSION'S ORDER DIRECTING FILING

COMES NOW the Staff of the Missouri Public Service Commission ("Commission"), by and through the undersigned counsel, and for its response to the *Order Directing Filing* issued by the Commission on June 28, 2018, states the following:

1. On June 27, 2018, Kansas City Power & Light Company ("KCPL") and Kansas City Power and Light Company's Greater Missouri Operations ("GMO") (collectively, "the Companies") filed its *Notice of Public Counsel's Stated Intent to Violate PSC Rules and Procedural Order, and Motion to Enforce Rules and Order* ("Motion to Enforce Rules"). In its Motion to Enforce Rules, the Companies quoted Commission Rule 4 CSR 240-2.130 (7), which provides:

> 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;

Commission Rule 4 CSR 240-2.130 (8) also provides:

> No party shall be permitted to supplement prefiled prepared direct, rebuttal or surrebuttal testimony unless ordered by the presiding officer or the commission. A party shall not be precluded from having a reasonable opportunity to address matters not previously disclosed which arise at the hearing. This provision does not forbid the filing of supplemental direct testimony for the purpose of replacing projected financial information with actual results.

The Companies then provide portions of the Office of Public Counsel's ("OPC") case-in-chief that the Companies allege violate the above quoted rules. The Companies conclude by requesting the Commission enforce its rule, and not allow OPC to supplement its case-in-chief, direct testimony with new affirmative positions or additional revenue requirement adjustments in rebuttal or surrebuttal testimony.

2. On June 27, 2018, OPC filed *The Office of the Public Counsel's Response to KCPL and GMO's Motion to Enforce Rules and Order*, in which it stated, in summary, OPC was not limited to what it filed in direct, as OPC does not have the burden of proof and chose to file direct testimony it was not required to file.

3. Commission Rule 4 CSR 240-2.130 (7) governs the filing of direct, rebuttal, and surrebuttal for practice before the Commission. The rule outlines two procedural pathways for a case, which result in different rebuttal testimony limitations. For a case in which all parties file direct testimony,

> (A) Direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief;[1]
> (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;

[1] Commission Rule 4 CSR 240-2.130 (7).

In contrast, when only the moving party files direct,

> (A) Direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief;
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> * * *
>
> (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;[2]

4. It is a canon of construction that every word must be given a meaning, and that a statute (or regulation) should be read without a presumption of redundant language. Thusly, since the regulation draws a meaningful distinction between cases where all parties may file direct and cases in which only the moving party files direct, that to give meaning to this distinction rebuttal filed in one instance cannot be treated the same as rebuttal filed in the other instance. The distinction between the two rebuttals in 4 CSR 240-2.130 (7) (B) and (C) is the use of "proposes an alternative". As "proposes an alternative" is specifically delineated in (C), the only interpretation of this regulation that does not render language redundant is that parties cannot propose alternatives in rebuttal testimony for cases in which all parties file direct testimony. Any other interpretation renders 4 CSR 240-2.130 (7) (B) obsolete. Therefore, direct testimony, in cases where all parties file direct, must present a party's case-in-chief, that is affirmative positions, adjustments to the test year, and alternative proposals. A party that does not file a case-in-chief is not barred from filing rebuttal; however, that rebuttal is limited to responsive testimony to what has been filed in direct, asserting why a party agrees or disagrees with the direct testimony presented. There may be times where a delay in receiving information or additional information received

[2] *Id.*

would require an update to a party's direct testimony, or the presentation of a position or adjustment in rebuttal; however, these instances should be limited and an entire case should not be presented in such a manner. Furthermore, although parties are given the opportunity to true up data as well as file supplemental direct to replace projected financial information with actual results,[3] this gives leeway to update information, not to improperly present new positions.

5. This interpretation makes sense from a practical and equitable point of view. If parties could file affirmative positions, adjustments, and alternative proposals in rebuttal, a distinction between cases in which all parties file direct testimony and cases in which only the moving party files direct testimony is meaningless. All cases would essentially be treated as cases in which only the moving party files direct testimony. Currently, generally speaking, when utilities apply for something, such as financing, a certificate of convenience and necessity, or a Missouri Energy Efficiency Investment Act Cycle, those cases proceed under the 4 CSR 240-2.130 (7) (C) approach where only the moving party files direct. Rate cases follow the 4 CSR 240-2.130(7)(B) approach, where all parties file direct, if they wish to present a case-in-chief. If parties were not required to present their case-in-chief in direct for rate cases, there would be no need for eleven month timeline under which most rate cases proceed. In this current case, the Companies filed their direct testimony on January 30, 2018. Intervenors were to file their case-in-chief on June 19, 2018. The almost six month intervening period is designed to give parties an opportunity to examine the Companies' books and records, conduct discover, and formulate their case-in-chief. This extended schedule makes little sense if parties are not required to present their case-in-chief in direct. Allowing some

[3] 4 CSR 240-2.130 (8).

parties to present alternative proposals, adjustments, and affirmative positions in rebuttal while others present in direct raises concerns about due process. A party that raises its alternative proposals, adjustments, and affirmative positions in rebuttal only allows parties one opportunity to respond (surrebuttal), and shortens the discovery period. Yet that same party will be able to respond to direct testimony in rebuttal and surrebuttal, and conduct discovery throughout that time.

6. The Commission has explained its view on rebuttal when ordering procedural schedules. When Union Electric Company d/b/a Ameren Missouri ("Ameren") requests the Staff be required to present the results of its construction audit in its direct, and to make it clear that each party must fully support its proposed rate base in direct testimony, the Commission declined, supporting Staff and OPC's contention that 4 CSR 240-2.130 (7) already required this approach.[4] The Commission's belief that each party must support its proposed rate base in direct testimony is aligned with the discussion of 4 CSR 240-2.130 (7) Staff presents above.

7. This view is supported by relevant Commission case law. For example, the Commission has previously found that a request in briefing for a tracker for property taxes or a refundable surcharge for taxes, as an alternative proposal to the property tax figure the utility requested in its direct revenue requirement testimony violated 4 CSR 2402-.130 (7)(A).[5] The Commission denied this alternative proposal because it violated the rule that "direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief." The Commission also found

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[4] *In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase Its Annual Revenues for Electric Service*, File No. ER-2011-0028, **Order Adopting Procedural Schedule and Establishing Test Year** issued November 10, 2010.

[5] *In the Matter of the Water Rate Request of Hillcrest Utility*¸ Case No. WR-2016-0064, **Report and Order** issued July 12, 2016, p. 9.

that alternative proposals must be presented as part of a case-in-chief in direct in a prior KCPL rate case.[6]

8. The definition of case-in-chief and requirements for direct the Commission outlines in the prior two cases do not only apply to the utility. The Commission has held Staff to the same standard in cases in which all parties file direct. In a challenge to Staff's testimony, the Commission described the challenged testimony as follows:

> In introducing Staff's class cost of service study in his direct testimony, Beck merely states that he updated the class cost of service study that Staff filed in Case No. GR-2001-292, MGE's last rate case. Beck testifies to some details about how the old study was updated, but he provides no testimony that would explain the method by which the original class cost of service study was developed. Beck testifies that he has included his updated calculations in his work papers and indicates that he will discuss any areas of disagreement that the other parties may raise in his rebuttal testimony.[7]

The Commission found this testimony to not be sufficient for direct testimony.

> Beck's direct testimony does not assert and explain Staff's entire case-in-chief. In fact, it does not inform the Commission or the other parties of much of anything. It essentially just says to go look at what Staff said in an earlier case and that Staff may answer your questions if you have any. It is not enough to say, as Staff does, that if MGUA or other parties had wanted to learn more about Beck's position they could have taken his deposition. The Commission's rule requires a party to assert and explain its position through its direct testimony.[8]

The Commission concluded by striking Staff's testimony.

> Staff is not required to explain the details of each and every calculation that supports it testimony. But it must present its case in a clear and coherent manner. It has not done so and MGUA and the other parties

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[6] *In the Matter of Kansas City Power & Light Company's Request for Authority to Implement a General Rate Increase for Electric Service*, Case No. ER-2014-0370, **Report and Order** issued September 2, 2015, p.28.

[7] *In the Matter of Missouri Gas Energy's Tariffs to Implement a General Rate Increase for Natural Gas Service,* Case No. GR-2004-0209, **Order Regarding Midwest Gas Users' Association's Motion To Strike A Portion Of The Testimony Of Daniel I. Beck**, p.3

[8] *Id.*

> have been prejudiced as a result. The testimony of Daniel I. Beck regarding the Staff's class cost of service study will be struck.[9]

9. Outside of the Commission, this view of rebuttal has been accepted by Missouri courts. For instance, the Supreme Court of Missouri has stated

> Rebuttal evidence is evidence tending to disprove 'new points first opened by' the opposite party. Christal v. Craig, 80 Mo. 367. A party cannot, as a matter of right, offer in rebuttal evidence which would have been admissible had it been offered in the case in chief, even though it tends to rebut or contradict the opposite party's evidence. 88 C.J.S. Trial § 102, p. 215.[10]

The Court held that a court "generally should, decline to permit either party to introduce evidence in support of his case in chief on rebuttal, especially on a subject fully covered in his case in chief, unless sufficient reason is offered for not introducing it at the proper time.' 88 C.J.S. Trial § 102, pp. 215–216."[11]

10. If the Commission finds that a party's testimony does not present its case-in-chief, the Commission can strike the direct testimony, can find the direct testimony to not be competent and substantial evidence,[12] and can strike any rebuttal testimony that presents alternative proposals, adjustments or affirmative positions that should have been raised in direct.

WHEREFORE, Staff prays the Commission will accept its *Staff Response to Order Directing Filing*, and grant such other and further relief as the Commission considers just in the circumstances.

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[9] *Id.*
[10] Peters v. Dodd, 328 S.W.2d 603, 610 (Mo. 1959).
[11] *Id.*
[12] "As the Commission noted in its Report and Order, "[s]tatements in violation of evidentiary rules do not qualify as competent and substantial evidence" in administrative proceedings. *Concord Publ'g House, Inc. v. Dir. of Revenue,* 916 S.W.2d 186, 195 (Mo. banc 1996)." State ex rel. GS Techs. Operating Co. v. Pub. Serv. Comm'n of State of Mo., 116 S.W.3d 680, 690 (Mo. Ct. App. 2003), as modified on denial of reh'g (Oct. 28, 2003).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic mail, or First Class United States Postal Mail, postage prepaid, on this 6th day of July, 2018, to all counsel of record.

/s/ Nicole Mers