

**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

APPLICATION FOR REHEARING

Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. (herein "Silverleaf") respectfully submits this Application for Rehearing pursuant to Section 386.510, RSMo and Commission regulation. Silverleaf asks the Commission to rehear this case for the following issues.

I. The Commission abused its discretion by admitting the written surrebuttal testimony and hearing testimony of Keith Magee (herein "Magee") into the legal record and relying on that testimony in determining Liberty Utilities' (Missouri Water) (herein "Liberty Utilities") allowed return on equity.

It is undisputed that Liberty Utilities did not disclose Magee as an expert witness in this case until the last day of discovery thereby entirely thwarting Silverleaf's ability to conduct meaningful discovery on Magee. The Commission's admission of Magee's surrebuttal testimony and hearing testimony is an abuse of discretion in that it violated Silverleaf's substantive right to defend and protect its interests on the contested issue of cost-of-capital in this contested case.

On June 22, 2018 Jill Schwartz, Senior Manager of Rates and Regulatory Affairs for Liberty Utilities Central Region filed written direct testimony in this case. In her direct testimony Schwartz attached the direct testimony of Keith Magee, a retained expert witness for Liberty Utilities in another unrelated case, for a subsidiary natural gas rate company, Liberty Utilities Midstates, Docket Number GR-2018-0013.

Silverleaf, in this case, propounded a data request No. 4(b) on March 30, 2018 which asks Liberty Utilities to provide the name of the individuals that would testify regarding return on equity and capital structure on behalf of Liberty Utilities. See attached **Schedule A**. Liberty Utilities responded that "Until the Company understands what specific issues would be tried, it is unable to identify the individuals that would testify on behalf of Liberty Utilities." Liberty Utilities was on notice – since at least May 24, 2018 filing of the Partial Disposition Agreement – that return on equity and capital structure were contested issues in this case. The direct testimony of Jill Schwartz filed June 22, 2018 is itself evidence that Liberty Utilities understood that the issue of return on equity and capital structure were contested issues and that any expert witness on that issue would need to be disclosed. Yet, Liberty Utilities did not disclose Magee as an expert witness in this case until August 3, 2018 – the last day of discovery under the procedural schedule – during the deposition of Schwartz. At the very least, Liberty Utilities had over *two months* to disclose Magee as an expert witness. On August 7, 2018 Liberty Utilities filed the surrebuttal testimony of Magee.

Magee's surrebuttal testimony purports to "update" his direct testimony from Liberty Utilities' natural gas case, Liberty Utilities' Midstates, Docket No. GR-2018-0013. Magee's "update" includes, for the first time, an "expected earnings analysis" of "the water utility industry." *See*, Exhibit 4, Surrebuttal Testimony, Magee 18:4-10. It is disingenuous and false to suggest that Magee's water-industry "updates" are merely responsive to prior testimony in this case. The "updated" analysis, to include the water industry, is clearly the case-in-chief of Liberty Utilities' return on equity and capital structure request in this case.

On August 8, 2018 Silverleaf filed its "Motion to Strike the Surrebuttal Testimony of Keith Magee and Motion for Expedited Treatment" attached, referenced and incorporated herein

as **Schedule B**. On August 9, 2018 the Commission issued its "Order Denying Motion for Expedited Treatment", but withheld ruling on Silverleaf's motion to strike, providing, "the Commission will consider this motion in its report and order." Order Denying Motion for Expedited Treatment.

On October 24, 2018 the Commission issued its Report and Order in this case and denied Silverleaf's motion to strike. The Commission justified the admission of Magee's decision with the following statement, "Silverleaf had notice of Keith Magee as a potential witness, and also the content of his testimony, from Jill Schwartz's direct testimony and the accompanying Keith Magee direct testimony from GR-2018-0013." Report and Order, P. 9. It would be difficult to pack more misapprehension into a single sentence.

Silverleaf fully believed that Liberty Utilities (Missouri Water) would retain and call a cost-of-capital expert in this case. It was this belief that caused Silverleaf to propound a data request to Liberty Utilities (Missouri Water) seeking this very information. It was a data request that Liberty Utilities was legally obligated to respond to in a timely manner so that Silverleaf could conduct sufficient discovery.

The Commission's position is profoundly flawed. Under this ruling, Silverleaf apparently should have conducted discovery by taking an "educated guess" as to who Liberty Utilities might ultimately call as an expert witness, despite the fact that there was an outstanding data request that asked *that very question*. Liberty Utilities did not respond to Silverleaf's data request regarding an expert witness until Schwartz's deposition on the last day of discovery. The Commission's rationale directs Silverleaf to assume either Liberty Utilities' bad-faith or incompetence in failing to supplement its data request. Silverleaf was, according to the

Commission's decision, to proceed with discovery on Magee because his direct testimony from another case was simply attached to Schwartz's direct testimony in this case.

The notion that Silverleaf was on "notice" of "the content of [Magee's] testimony, from Schwartz's direct testimony" is not only wrong as to Silverleaf, but professionally insulting to Magee. The fact that Schwartz attached Magee's direct testimony from a natural gas case to her direct testimony in this case is only indicative of Jill Swartz's belief – *not Keith Magee's* – that such analysis is applicable in any way to this case. Silverleaf had no idea what Magee's position in the Liberty Utilities' (Missouri Water) case was until he filed his surrebuttal testimony. The Commission's suggestion that Silverleaf should have somehow inferred "the content of his testimony" in this case because Schwartz attached his direct testimony from a different case does not say much for Commission's view of Magee's impartiality, credibility or analytical due diligence. It is only in Magee's surrebuttal testimony in this case that he renders any opinion whatsoever about Liberty Utilities (Missouri Water) or the water utility industry at all.

The admission of Magee's testimony is an abuse of discretion that violated Silverleaf's right to conduct meaningful discovery and resulted in fundamental unfairness and prejudice to the substantive rights of Silverleaf. See, *State vs. Lorenz*, 620 S.W.2d 407, 409 (Ct. of App. E. D., 1981). The decision is also inconsistent with the Commission's own regulation, 4 CSR 240-2.090(1), which adopts the Missouri Rules of Civil Procedure. Implicitly, Rule 56.01(B)(5)(6) of the Missouri Rules of Civil Procedure imposes an obligation to disclose expert witnesses within a timeframe that meaningful discovery can be conducted. Obviously no discovery can be accomplished if the expert is not disclosed until the final day of discovery.

The Commission's admission of Magee's testimony is also contrary to the controlling statute regarding administrative depositions, Section 536.073 RSMo¹ Section 536.073 RSMo grants any party in a contested case a statutory right to "take and use depositions" in the case. This statutory right cannot be exercised without timely disclosure of the expert witness.

There are procedural issues which arise during the course of regulatory litigation in which reasonable minds can disagree. This is not one. The parties to a contested case must be afforded the right to conduct discovery on expert witnesses. The Commission's ruling denying Silverleaf's motion to strike, the admission of Keith Magee's surrebuttal and evidentiary hearing testimony, and the Commission's reliance on that testimony in forming its return on equity decision puts the Commission well outside any regulatory discovery norm and is a clear violation of Silverleaf's substantive rights in this case.

II. The Commission erred in categorizing Liberty Utilities as a small water and sewer company under the Small Utility Rate Procedure (SURP) because Liberty Utilities' has more than 8,000 customers. The time-share owners of Silverleaf properties are customers of Liberty Utilities as the word "customer" is defined under 4 CSR 240-3.010(7) and Liberty Utilities' tariff.

Commission Rule 4 CSR 240-3.010(7) defines customer as "any person, firm, partnership, corporation, municipality, cooperative, organization, governmental agency, etc., that accepts financial and other responsibilities in exchange for services provided by one (1) or more public utilities."

¹ Missouri Administrative Procedure Act "operates to fill gaps not addressed within the PSC statutes." *State ex rel. A & G Commercial Trucking v. Public Serv. Comm'n*, 168 S.W.3d 680, 682-83 (Mo.App.2005).

Liberty Utilities' tariff defines a customer as: "Any person, firm, corporation or governmental body which has contracted with the company for water service or is receiving service from company, or whose facilities are connected for utilizing such service."

On February 8, 2018 Silverleaf filed a motion to dismiss this case based on the definition of "customer" under 4 CSR 240-3.010(7), as well as Liberty Utilities' tariff language. Silverleaf's Motion to Dismiss attached, referenced and incorporated herein as **Schedule C**. In short, the time-share owners of Silverleaf properties are customers of Liberty Utilities as the word "customer" is defined under PSC regulations and Liberty Utilities' own tariff.

In denying Silverleaf's motion to dismiss, the Commission extrapolates from the definition of "customer" an additional requirement of being "directly financially responsible to the utility." Order Denying Motion to Dismiss, Pg. 6. The Commission's extrapolation to require a contractual link with the utility disregards the actual definition of "customer." The language of the statute and Liberty Utilities' own tariff requires only financial responsible in exchange for utility service, and does not mention "direct financial responsibility to the utility."

As explained in Silverleaf's motion to dismiss, the Commission's definition of "customer" mocks the purpose of the SURP, which is to assist actual small utilities, and invites large utilities (like Liberty Utilities) to manipulate their corporate structure to skirt the procedural requirements of Missouri statute (See Section IV below). So in addition to being inconsistent with the definition of "customer" provided by PSC regulation and Liberty Utilities' own tariff, the Commission's definition is also inconsistent with the policy purpose of SURP.

Silverleaf provided evidentiary support that the time-share owners of Silverleaf bear financial responsibility in exchange for utility service. Evidentiary hearing exhibits 304 through 308 are affidavits, deeds, and the declaration of rights of the Silverleaf management and owners

of Silverleaf properties. These exhibits undisputedly show the time-share owners of Silverleaf bear financial responsibility in exchange for utility services. Silverleaf agrees with the Commission that the time-share owners do not have direct financial responsibility to Liberty Utilities (Missouri Water), but Silverleaf disagrees that the definition provided by PSC regulation or Liberty Utilities tariff require such a direct financial agreement with the public utility.²

III. The Commission erred in finding that all of Staff's work-papers, reports and analysis regarding Liberty Utilities *prior* to the filing of direct testimony constitute "confidential settlement communication" and in striking the portions of William Stannard's rebuttal testimony which used information derived from Staff's 120-Report.

On June 30, 2018 Staff filed a motion to strike certain portions of William Stannard's rebuttal testimony claiming that all analysis, work-papers, reports – every aspect of Staff's work constituted a "confidential settlement communication." On June 31, 2018 Silverleaf filed its "Response to Staff's Motion to Strike" attached, referenced and incorporated herein as **Schedule D**. On August 2, 2018 the Commission granted Staff's motion to strike.

Silverleaf agrees with the Commission that the information contained in the Disposition Agreement, a settlement communication which offers specific contractual terms and conditions to Liberty Utilities, constitute a confidential settlement communication. However, Silverleaf disagrees with the Commission's positions that all of Staff's regulatory work commencing from the moment Liberty Utilities requested a revenue increase is protected by the confidential settlement communication privilege.

² It should be noted that the Commission treated the time-share owners of Silverleaf as "customers" for the purposes of justifying its rate-design in this case. The Commission observed the water usage of two "account holders" that directly reflected the seasonal "utility service" of time-share owners. *See* Report and Order, P. 37.

This exceedingly broad definition of the settlement communication privilege expands the privilege far beyond the public policy rationale for the privilege, which is to encourage settlement discussions. The Commission's decision turns the "settlement communication privilege" into a tool against government transparency and has no connection to Staff's ability or incentive to make settlement offers.

IV. The Commission erred in not requiring Liberty Utilities to file a tariff in its request for a rate increase because Missouri statute only authorizes a single method by which a utility may seek a rate change and that is by filing a tariff (or "rate schedule") with the Missouri Public Service Commission.

The SURP³ fundamentally alters the detailed process set forth by Section 393.140(11) and 393.150(1)(2) for a utility to change its rates by filing a new tariff. Specifically, the SURP inverts the statutory process and allows the utility to not only request a rate change, but for the Commission to adjudicate and authorize the request without the utility filing a tariff. Under the SURP a tariff is not required until after the Commission renders a decision on the merits of the utility's request.

Under the "file and suspend" method enshrined in Sections 393.140(11) and 393.150 the tariff itself becomes a contested issue itself when the Commission suspends the tariff and sets a procedural schedule. Missouri statute does not envision or authorize the utility (regardless of size) to simply "request" via a letter additional revenues to be authorized by the PSC. Instead, the statute articulates a process by which a utility files a tariff which will ultimately have the full force and effect of state law after the Commission acts on it.

³ The Small Utility Rate Procedure was amended during the course of this case and is located at 4 CSR 10-240-10.075. Now referred to as the Staff Assisted Rate Case.

But the inversion of the normal process, regardless of its policy merits or lack thereof, is not authorized by Missouri statute, and is in fact contravened, by existing Missouri statute. This issue was brought to the Commission's attention on June 11, 2018 with Silverleaf filing "Silverleaf's Response to Staff's Proposed Procedural Schedule" attached, referenced and fully incorporated herein as **Schedule E**. Silverleaf objects to the Commission's failure to require Liberty Utilities to file a tariff prior to the evidentiary hearing. Silverleaf does not contend that the Commission is limited to a file-and-suspend rate case in order to change rates, but that the utility is limited to filing tariffs in order to initiate a rate case.

Additionally, by failing to require Liberty Utilities to file a tariff the Commission violated Silverleaf's procedural rights under Section 536.063, RSMo. Section 536.063 provides that a "reasonable opportunity shall be given for the preparation and presentation of evidence bearing on any issue raised or decided or relief sought or granted." Here again, the *Liberty Utilities (Missouri Water)'s tariff is the contested issue*. While underlying issues such as cost-of-service or rate-design will impact the substance of the tariff, it is the tariff itself that has the full force and effect of state law. It is the tariff itself that legally binds Liberty Utilities (Missouri Water) and its customers. By failing to require Liberty Utilities to file a tariff, the Commission denied Silverleaf the opportunity to present evidence on the key legal document that, as of the date of this Application for Rehearing, does not exist, but will be impacted by the Commission's Report and Order in this case.

For all of the reasons set forth above, Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. respectfully ask the Commission to grant this Application for Rehearing, find that Liberty Utilities (Missouri Water) is not eligible under the Staff Assisted Rate Case Procedure, rescind the Staff Assisted Rate Case Procedure in its entirety for lack of statutory authority and

direct Liberty Utilities (Missouri Water), LLC to file a tariff pursuant to Section 393.140(11) and 393.150.

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 2nd day of November 2018.

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