SCHEDULE C

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 DISMISS, OR IN THE ALTERNATIVE, TO ORDER LIBERTY UTILITIES (MISSOURI WATER), LLC TO FILE A TARIFF PURSUANT TO SECTION 393.140(11)

COME NOW, Orange Lake Country Club, Inc. and Silverleaf Resorts, Inc. ("Movants"), pursuant to 4 CSR-2.080 and files this Motion to Dismiss, or in the Alternative, to Order Liberty Utilities (Missouri Water), LLC to File a Tariff. For its cause, the Movants state the following:

I. Procedural Background

On December 15, 2017 Liberty Utilities (Missouri Water) filed a letter with the Secretary of the Missouri Public Service Commission pursuant to 4 CSR 240-3.050, Small Utility Rate Case Procedure ("SURP"), requesting a $995,844 increase in water revenues and a $196,617 increase in its annual sewer system revenues. On December 19 Staff filed its "Small Utility Rate Case Timeline". On January 13, 2018 Liberty Utilities (Missouri Water) filed a "Request for Consideration and Notice of Proposals" which asks Staff and the Office of Public Counsel to "consider the consolidation of customer rates, service charges, and rules and regulations in their investigations." On January 17, the Movants filed their joint application to intervene in the case, which was granted on January 29. On January 30, Ozark Mountain Condominium Association filed its application to intervene, which has not yet been granted as of the time of this filing.

II. Introduction

Algonquin Power & Utilities, the corporate parent of Liberty Utilities (Missouri Water) is a multinational company based in Oakville, Ontario with annual revenues of more than $2,000,000,000, total assets of more than $10,000,000,000 and more than 2,200 employees. Suffice it to say that Liberty Utilities (Missouri Water) has access to enormous capital and technical resources, and may in fact seek recovery from Missouri water consumers for allocated investment in plant used to serve other companies across the Algonquin Power & Utilities corporate chart.

Although Liberty Utilities (Missouri Water) in this case chose to file under the SURP, it does not fit the profile of a small utility that this procedure was designed to benefit. Movants are asking the Commission to dismiss these consolidated cases, or in the alternative to order Liberty Utilities (Missouri Water) pursue its proposed rate increases by filing tariffs under the traditional, statutory "file and suspend" procedures. Intervenors desire a meaningful opportunity to prepare and present evidence in these cases and will be denied that opportunity if the SURP is utilized. The SURP is also not necessary to advance Liberty Utilities (Missouri Water) interests because it is not the type of small, unsophisticated utility for which the SURP was designed.

While Movants are aware that the Commission may be sensitive to the impact of rate case expenses generated by a rate case for a smaller system, that concern is not relevant in this particular case. The facilities owned and operated by Liberty Utilities (Missouri Water) were originally constructed and operated by Silverleaf Resorts, Inc. to serve its resort properties in Missouri. Accordingly, the majority of all revenues received by Liberty Utilities (Missouri

Water) are actually paid by Silverleaf Resorts,[1] indicating that Silverleaf Resorts would also absorb the majority of all rate case expenses generated in this case.

III. Traditional File and Suspend Ratemaking versus the SURP

In a "file and suspend" rate case, the utility institutes a rate case by filing tariffs involving a general rate increase, filing general information concerning the rate increase request that will be of interest to the public, and filing supporting direct testimony. See generally, Section 393.140(11) RSMo (2016)[2], 4 CSR 240-3.030, 4 CSR 240-2.065(1). Unless the Commission otherwise orders, increases in the utility's rates may not take effect except after 30 days' notice to the Commission and publication for thirty days. §393.140(11). The Commission has the authority, upon reasonable notice, to conduct a full hearing into the propriety of the tariffs and, pending the hearing and its decision, it may suspend the operation of the tariffs for a total of 300 days beyond their effective date if their effective date does not allow sufficient time for the Commission to determine if they are just and reasonable. §393.150(1)(2).

If the Commission suspends the tariffs,[3] the filing becomes a contested case and a full hearing is required. *Id.* and 536.010(4). When the Commission exercises its discretion to hold a hearing, its decisions must be supported by competent and substantial evidence. *State ex rel. Transp. Delivery Co. v Publ Serv. Comm'n of Mo.*, 414 S.W.2d 322, 327 (Mo. App. W.D. 1967). In any such hearing, the burden of proof to show that the rate increase is just and reasonable is upon the utility proposing the increase. §393.150(2). In a contested case, parties are entitled to due process, including among other protections notice of hearing and a reasonable opportunity to

[1] Based on Liberty's 2016 Annual Report, Liberty reported revenues of $1,060,638. Of this amount, Silverleaf Resorts, Inc. paid $612,776, or 57.7%.
[2] All statutory chapter and section references hereinafter are to RSMo (2016), unless otherwise noted.
[3] Movants acknowledge that by non-action alone, the Commission can let a requested rate go into effect. *State ex rel. Laclede Gas Co. v. P.S.C.*, 535 S.W.2d 561, 566.

prepare and present evidence bearing on any issue raised or decided, or relief sought or granted. §§536.063 and .067. All parties have the right to be heard and to introduce evidence, there must be a full and complete record of the proceedings, and the Commission must make a report and order. §386.420(1)(2)(4). These due process requirements are not met unless the parties are afforded a full and fair hearing at a meaningful time and in a meaningful manner. *State ex rel. Fischer v. Public Service Commission*, 645 S.W.2d 39, 43 (Mo. *en banc* 1983). In a typical rate case, witness testimony is pre-filed, discovery is conducted, and public hearings are held, all within deadlines established by the Commission to provide the parties' sufficient opportunity to fully develop their positions.

SURP, in contrast, is a procedure borne entirely of Commission regulation, 4 CSR 240-3.050, *et seq.* The procedure, as described by the Commission, was "designed to reduce the barriers between a small company and a Commission decision."[4] As Jacob Westen, Staff Deputy Counsel for the Water and Sewer Division of the PSC, noted in the recent SURP rulemaking hearing, through SURP: "Staff is able to provide assistance to the unsophisticated companies that might have trouble being able to put together a rate case."[5] Utilities to which SURP is available include water and sewer companies with 8,000 or fewer customers. 4 CSR 240-3.050(1). About this limit, Mr. Westen testified: "I think the 8,000 number is sourced from the statutes that Mr. Smith identified [Sections 393.146, 393.320, 393.145, RSMo.] and because those are identified as small utilities that may have operational issues or need receivership or need to be acquired."[6] This reasoning comports with the small utility companies that have recently taken advantage of

[4] In the Matter of a Requested Rate Increase for Annual Sewer Operating Revenues by Hickory Hills Water & Sewer, WR-2014-0167, SR-2014-0166, Order Directing Filing, p. 2 (August 13, 2014).
[5] AX-2018-0050, In the Matter of a Proposed Rule Regarding Staff Assisted Small Utility Rate Cases, Tr. Rulemaking Hearing, Vol. 1, p. 6, ll. 22-25 (Dec. 21, 2017).
[6] *Id. at* p. 16, ll. 3-7.

SURP: Terra Du Lac Utilities, Rogue Creek Utilities, Osage Water, S.K.&M Water and Sewer Co., Oakbrier Water Co., Racoon Creek Utility Operating Company, Ridge Creek Water Company.

In a “file and suspend” rate case, there is at least the theoretical possibility that the Commission will take no action to suspend the tariff and it will automatically go into effect without any other process. In contrast, once a SURP is filed, the process outlined in the regulation must be followed or the tariff will never be filed at all. This is because a SURP is initiated not by filing tariffs, but by a small utility company filing a letter with the Commission’s Secretary specifying the amount of overall revenue increase it is requesting. 4 CSR 240-3.050(2).

Thereafter, there is significant amount of process in the SURP, but an intervening party is not guaranteed any meaningful participation in that process. SURP does not require (or even contemplate) the disclosure of a party’s case-in-chief to the other parties through prepared direct testimony, or the development of issues or evidence through prepared rebuttal or surrebuttal testimony. Nor is there a procedural schedule developed after a procedural conference with the presiding officer and all the parties. Instead, Staff, “files a timeline under which the case will proceed, specifying due dates[.]” Nor, if the timeline filed by Staff in this case is any indication, does it contemplate any party other than Staff propounding discovery. Rather, Staff simply investigates the rate request, and Office of Public Council ("OPC") may investigate the rate request if it wants to. 4 CSR 240-3.050(6). Investigation may include review of the utility’s cost of service, operating revenues, rate design, charges, tariffs, and operational or customer service issues. *Id*. Staff, within 90 days of the letter filing, must provide its preliminary investigative/auditing report of the utility to the utility and public counsel. 4 CSR 240-3.050(9). Within 120 days of the filing of the letter Staff is to provide its "settlement proposal" to both the

utility and public counsel. 4 CSR 240-3.050(10). Within 150 days of the letter filing, Staff and the utility are to file a full or partial "disposition agreement." 4 CSR 240-3.050(11). SURP does not contemplate an intervenor participating in the investigation, contributing to a settlement proposal or entering into a full or partial disposition agreement. It is process without participation for an intervening party, which is only logical for those truly small utilities where there are no intervening parties.

Only *after* a disposition agreement is filed are the small utility's proposed tariffs filed. 4 CSR 240-3.050(14)(16). This would appear to be an intervenor's first opportunity, possibly as late as 150 days into the process, to learn exactly how the small utility is proposing to increase its rates. At that point, the tariffs state an effective date of 30 days after filing if the disposition agreement is executed by the utility, Staff and OPC, or an effective date of 45 days after filing, if the disposition agreement is executed only by the utility and Staff. *Id.* The utility must send notice to its customers of the proposed tariff provisions and must invite customers to submit comments within 20 days thereafter. *Id.* Within 5 days after the end of the public comment period, OPC must file a pleading indicating its position or requesting a local public hearing or evidentiary hearing. 4 CSR 240-3.050(15)(17). OPC may also request an evidentiary hearing after a local public hearing. 4 CSR 240-3.050(19). In the request for an evidentiary hearing, OPC must specify the list of issues for the requested evidentiary hearing. 4 CSR 240-3.050(20). *Only* if OPC requests an evidentiary hearing are the pending tariff provisions suspended and the case resolved through contested case procedure process. *Id.*

There is no provision in the SURP under which an intervening party can request an evidentiary hearing. The intervenor party is not provided with the small utility's evidence supporting its rate increase or an opportunity to "investigate" and is not considered a party (or

hold-out) to the disposition agreement. In the event an evidentiary hearing *is* ordered, the Commission's decision and order must be issued and effective no later than 11 months after the SURP was opened, through contested case procedures consistent with the requirements of due process and with fairness to the participants and the utility's ratepayers. 4 CSR 240-3.050(20)(24).

In short, although Movants have been granted intervention, during the SURP, Movants will have no meaningful opportunity to participate, and even if the SURP eventually resulted in an evidentiary hearing, Movants' opportunity to participate will be materially limited by the short amount of time (relative to a regular rate case) left on the clock. Because Movants desire to participate in any proceeding in which a rate increase for Liberty Utilities (Missouri Water) is considered, Movants ask that the Commission dismiss this SURP and require Liberty Utilities (Missouri Water) to proceed under the statutory file and suspend procedures, where Movants will be assured due process. Movants believe such an order would be entirely consistent with the spirit of 4 CSR 240-3.050(21), which permits a party (Staff or the utility) to move the Commission to resolve the utility's rate increase request through contested case procedures, considering the requirements of due process and fairness to the participants in the SURP and the utility's ratepayers.

IV. SURP Small Water and Sewer Utilities Versus Liberty Utilities (Missouri Water)

As noted above, SURP is "designed to reduce the barriers between a small company and a Commission decision"[7] and "to provide assistance to the unsophisticated companies that might

[7] In the Matter of a Requested Rate Increase for Annual Sewer Operating Revenues by Hickory Hills Water & Sewer, WR-2014-0167, SR-2014-0166, Order Directing Filing, p. 2 (August 13, 2014).

have trouble being able to put together a rate case."[8]

4 CSR 240-3.050(1) limits the SURP to water and sewer companies serving 8,000 or fewer customers. 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." The definition of "customer" does not require a contractual relationship between the customer and the public utility. Rather, the regulation defines customer as the person that accepts financial responsibility for *utility services*, it does not ask who has financial responsibility to the *public utility*.

Where there is an intermediary entity which simply passes through the utility bills, it is the number of end-user customers which should count for the purposes of determining SURP eligibility, not the number of intermediary entities, which do not own, control or manage any of the assets which provide service to the end-user customer.

The end-user definition of customer comports with the spirit of the SURP regulation and prevents the perverse scenario of a large and legally sophisticated public utility company taking advantage of the SURP regulation to skirt the traditional rate case process. The end-user definition of customer, for purposes of SURP eligibility, also works in concert, rather than against, the policy interest for small, financially fragile and distressed water and sewer utilities being acquired by larger utilities.

[8] AX-2018-0050, In the Matter of a Proposed Rule Regarding Staff Assisted Small Utility Rate Cases, Tr. Rulemaking Hearing, Vol. 1, p. 6, ll. 22-25 (Dec. 21, 2017).

In 2013 Algonquin Water Resources of Missouri, LLC changed its name to Liberty Utilities (Missouri Water). Liberty Utilities (Missouri Water) is a subsidiary of Algonquin Power & Utilities, Corp. As opposed to the small utilities mentioned above, Liberty Utilities (Missouri Water) has many affiliate water and sewer companies spanning across the United States of America. According to its website, "Liberty Utilities delivers safe, reliable drinking water to over 150,000 customer connections. We pump, treat, and deliver potable water to homes, schools, hospitals, and businesses."[9] The states in which Liberty Utilities provide service include Arizona, California, Texas, Illinois, Arkansas and Missouri. In Missouri, Liberty Utilities serves the following communities: Noel, Branson, Kimberling City, Cedar Hills, Catawissa, House Springs, Pacific, Scotsdale, Cape Girardeau, Branson, and De Soto.[10]

According to its 2016 Annual Report, Liberty Utilities (Missouri Water) claims 1,698 residential customers and 269 commercial customers, equaling a total of 1,975 customers. One of those customers is Silverleaf Resorts, which operates three resort properties in Missouri served by Liberty Utilities (Missouri Water). Silverleaf Resorts is an intermediary entity between Liberty Utilities (Missouri Water) and the 36,686 time-share vacation homeowners of these resort properties which pay Liberty Utilities (Missouri Water) for water and sewer services. Interpreted consistently with the purpose of the SURP, Liberty Utilities (Missouri Water's) actual number of end-user customers greatly exceeds the 8,000 customer threshold for filing under SURP. The classification of Liberty Utilities (Missouri Water) as a small utility, for the purposes of SURP eligibility, ignores both reality and the purpose of the SURP.

V. Rate Case Expense

[9] https://libertyutilities.com/commercial/about/what-we-do/water-and-wastewater.html
[10] *Id.*

Movants have considered whether Liberty Utilities (Missouri Water's) decision to file under the SURP may have been motivated by a concurring opinion filed by former Commissioner Jefferson Davis in WR-2006-0458.[11] In that case, Mr. Davis opined that Algonquin Water Resources of Missouri, LLC (the predecessor entity) should have filed under the SURP, rather than filing a tariff, precipitating a general rate case. Mr. Davis' argument was based on his desire to reduce rate case expense.

The current situation renders this policy justification inapplicable and illogical. The Movants represent nearly 60% of Liberty Utilities (Missouri Water) revenues in Missouri, based on Liberty Utilities (Missouri Water's) 2016 annual report. The Movants will bear roughly the same percentage in rate case expense. In this case the customers that will bear rate case expense will be the 36,686 end-user customers, which is beyond the customer limits of the SURP. Further, the Movants would rather shoulder their share of rate case expense for the due process afforded by the general rate case, than take the minimal reduction in rate case expense and go without a meaningful opportunity to participate.

Mr. Davis also opined, "This case is one of first impression for this Commission in that a small water company opted not to make use of the small company rate case procedures. The practice should be the exception rather than the norm exercised by parties seeking a rate increase because of the impact it has on the ratepaying customers."[12] While the Movants understand the concern underlying these comments, Movants respectfully disagree with the characterization of Liberty Utilities (Missouri Water) as a "small water company." The process authorized by the

[11] In the Matter of the Tariff Filing of Algonquin Water Resources of Missouri, LLC, to Implement a General Rate Increase for Water and Sewer Service Proved to Customers in its Missouri Service Areas, WR-2006-0425, Concurring Opinion of Chairman Jeff Davis (March 13, 2007).
[12] *Id.*

Missouri legislature under Section 393.140(11), RSMo. ("file and suspend method") should be the procedural rule to changing utility rates for a utility the size and sophistication of Liberty Utilities (Missouri Water). See generally, *State ex rel. Jackson County,* 532 S.W.2d 20 (Mo. *en banc* 1975). The SURP represents a process created by the Missouri Public Service Commission, not the state legislature, to deal with a particular population of small utilities which are financially sensitive and unequipped to handle the traditional regulatory process. The Commission should be cautious in substituting its process over the process established by state statute, particularly with regards to a utility which clearly does not fit the intended purpose of the SURP regulation.

VI. Conclusion

The Commission is granted deference in the interpretation of its own rules. See generally, *Matter of Verified Application and Petition of Laclede Gas Company,* 504 S.W.3d 852, 859 (Mo. Ct. App. W. D., 2016). The Commission should define "customers" to limit SURP's applicability to 8,000 or fewer end-user customers. This interpretation respects and effectuates the purpose of SURP without allowing it to be abused by large and sophisticated utilities which clearly it was not designed. This interpretation recognizes that what is a regulatory "barrier" to one party may be "due process" to another party.

The SURP reduces the procedural timeline, and the filing and evidentiary requirements of a monopoly public-utility to increase their rates. SURP provides a needed regulatory alternative for small utilities with less than 8,000 end-user customers, where no other interested party seeks intervention. The Commission does these truly needy small water and sewer utilities no good by

adhering to a definition of customer which allows for large, sophisticated utilities to bypass the traditional ratemaking process.

WHEREFORE, Orange Lake Country Club, Inc. and Silverleaf Resorts, Inc. respectfully asks the PSC to dismiss the small utility rate case proceeding filed by Liberty Utilities (Missouri Water), or, in the alternative, order Liberty Utilities (Missouri Water) to file tariff pursuant Section 393.140(11).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all counsel of record this 8th day of February, 2018.

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