

SCHEDULE D

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

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

**SILVERLEAF RESORTS, INC. AND ORANGE LAKE COUNTRY CLUB, INC.'S
RESPONSE TO STAFF'S MOTION TO STRIKE**

COME NOW, Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. (herein "Silverleaf"), by and through undersigned counsel, in response to the Motion to Strike and Motion for Expedited Treatment (herein "Motion") filed on July 30, 2018 by the Staff of the Missouri Public Service Commission in response to the Rebuttal Testimony filed by William Stannard on behalf of Silverleaf. For its cause, Silverleaf states the following:

On April 24, 2018 the parties to this case received via e-mail from Staff, "Company/Staff Agreement Regarding Disposition of Small Water and Sewer Company Revenue Increase Request Liberty Utilities (Missouri Water), LLC D/B/A Liberty Utilities." Staff's proposed Disposition Agreement set forth specific terms and conditions offered by Staff to resolve all of the issues in this case. Silverleaf agrees that Staff's proposed Disposition Agreement, which sets forth, for settlement negotiation purposes, specific terms and conditions for purpose of settling this case, was and is a confidential settlement communication.

However, Silverleaf disagrees with Staff that all of its regulatory work commencing from the moment Liberty Utilities filed for a rate increase constitutes a "confidential settlement communication." Staff seeks to have a wide variety of documents and analyses from outside of the Disposition Agreement deemed a "confidential settlement offer," not just the proposed Disposition Agreement itself. The list of documents include draft revised tariff sheets; Staff audit

workpapers; Staff rate design workpapers; and any other documents supporting (or unrelated to) Staff's recommendation made in the Disposition Agreement. The documents Staff seeks to shield from the Commission and the legal record include Staff's Audit Report, the Consumer Experience Final Report, Report of Water and Sewer Department Field Operations and Tariff Review, Depreciation Schedules, Rate Base Worksheet, draft water and sewer tariffs, and the individual EMS runs for all Liberty Utility water and sewer systems. Neither Missouri case law, the regulations of the Missouri PSC nor common sense support this incredibly expansive view of settlement offer confidentiality.

The case law that Staff cites in its Motion supports the position that a Settlement Offer or Agreement is a "confidential settlement communication" and should not be admitted as evidence of guilt or liability with the trier of fact. Silverleaf agrees that the draft disposition agreement offered by Staff on April 24, 2018 (which ultimately led to the non-unanimous partial disposition agreement filed May 25, 2018) was covered by settlement offer confidentiality. Silverleaf would also agree that the verbal communications specifically regarding the draft disposition agreement would also be covered under settlement agreement confidentiality. The quantitative analyses conducted by Staff prior to the settlement offer do not directly relate to the amounts offered in the settlement and should be viewed as independent documents from the Day 120 settlement offer itself. The scope of the confidential settlement communication is the settlement offer itself. To interpret the Rule otherwise would lead to the absurd conclusion that the Staff's audit work papers, Staff rate design workpapers, and any other documents supporting Staff's recommendations regarding settlement cannot be relied upon as evidence by the Commission as the Commission is asked to determine whether to approve the settlement proposal. In effect, Staff's interpretation would render Staff's reports meaningless and unavailable to the

Commission for any purpose since the Commissioners obviously would not participate in negotiating a settlement on which it must rule.

The case law cited by Staff does not support the proposition that all work product produced by Staff preceding the draft disposition agreement is also covered by settlement offer confidentiality. In fact, reports and audits regarding water utilities have not been historically excluded from the record on the basis that they constitute a settlement offer. Commission Rules explicitly state:

Reports, work papers, or other documentation related to work produced by internal or external auditors, consultants, or attorneys, except that total amounts billed by each external auditor, consultant, or attorney for services *related to general rate proceedings shall always be public*... . 4 CSR 240-2.135(2)(5) (emphasis added).

An interpretation that bundles these workpapers and documents under the umbrella of a “settlement offer” not only would deprive the Commission of evidence on which to rely in making a decision, it plainly contradicts the Commission’s Rule. The Commission Rules clearly exclude these documents from the scope of settlement confidentiality.

Fundamentally, and consistent with the purpose of 4 CSR 240-2.135(2)(5), removing the records would strip vital evidence from the docket and would infringe on the due process rights of parties. The Staff prepared reports at issue cannot be questioned in this docket if the Staff’s overly restrictive position were to apply. Parties would have no opportunity for cross-examination or to rebut these positions in evidence and argument simply because it could not reference the disposition agreement that forms the evidentiary backbone of the Staff position. In fact, in the case of a non-unanimous settlement, a party would be prevented from questioning the assumptions underlying the Staff analyses or the role of the analyses in developing the non-

unanimous settlement. This creates the risk of serious due process concerns and potentially leaves the Commission with no evidentiary record on which to rely in approving such a settlement. Staff points to 4 CSR 240-2.090(7), to wit: "Facts disclosed *in the course* of a prehearing conference and settlement offers are privileged and, except by agreement, shall not be used against participating parties unless fully substantiated by other evidence." (Emphasis added.) Under Staff's interpretation, "in the course" extends from the moment Liberty Utilities filed its rate request. Also, Staff refers to 4 CSR 240-3.050(10) regarding Staff's filing of a 120-day settlement proposal. But the language of the regulation clearly differentiates between the Disposition Agreement and other components which are to be provided. Those components include the documents at issue in the Motion.

It further stretches credulity to consider all of Staff's voluminous work product and analysis to be a "settlement offer." These documents (in many cases formulaic analyses) cannot logically be deemed "negotiable" in any way. The Missouri Court of Appeals, Eastern District dealt with the boundaries of settlement offer confidentiality in *Holtmeier v. Dayani*, "A valid compromise requires mutual concessions or a yielding of opposing claims. *Maugh v. Chrysler Corp.*, 818 S.W.2d 658, 660 (Mo.App.1991). An offer of compromise is made with the idea of mutual concessions. *Id.*" 862 S.W.2d 391, 403-04 (Mo. App. E.D. 1993). Staff's desire to pack literally all of its work product and analysis under the "settlement offer" umbrella runs counter to this definition of a legitimate settlement agreement.

In *Holtmeier* the Court also notes that "[o]ne exception to the rule that settlement negotiations be excluded is that if an offer of settlement also constitutes an admission of an independent fact pertinent to an issue between the parties, then the offer of settlement is admissible on the trial of such issues. *Owen*, 642 S.W.2d at 414." *Id.* In fact, all of Silverleaf's

references to Staff's 120-day Proposal (and the voluminous material conveyed with it) are to establish independent facts pertinent to the issues between the parties; specifically various discrepancy between Liberty Utilities revenue requirement numbers and Staff's analysis. At no point does Silverleaf use the 120-Day proposal as an admission of guilt or a statement against interest by Staff. None of the policy rationales supporting settlement offer confidentiality are applicable to the rebuttal testimony filed by Mr. Stannard on behalf of Silverleaf.

Quite the opposite of Staff's assertion, a dramatic extension of the confidentiality of settlement offers to include all proceeding analysis, work product and reports will certainly hinder settlement negotiations and offers. Just as a new extension of confidentiality would remove any value from the workpapers for the Commission, it would similarly reduce the meaningfulness of these analyses for parties to a proceeding. For example, if Silverleaf understood that Staff's position was that all of its analysis, work product and reports preceding its Disposition Agreement were considered by Staff to be confidential settlement communications and could not be subject to scrutiny or questioning, Silverleaf likely would have approached settlement discussions far differently. For instance, Silverleaf may not have participated and simply sought the information via discovery.

Also, the policy rationales supporting the confidentiality of settlement offers do not fit the situation at hand. As the case law cited by Staff in its Motion provides, the policy rationale for settlement offer confidentiality is based on: 1) encouraging parties to settle and 2) the fear that a jury may view a settlement offer as an indication of the merits of the underlying case. Commission Rule compels the parties to seek to settle; so, no additional encouragement is needed. And given that every case under SURP must include settlement discussions pursuant to Commission Rule, the existence of discussions says nothing about the merits of one party's case

relative to another. Consequently, the policy rationale for open discourse about regulated ratemaking should take the highest priority. *See, e.g.*, 4 CSR 240-2.135(5); 4 CSR 240-2.135(1) (establishing a presumption that items at the Commission should be open to the public).

Silverleaf also notes that a settlement offer is not the same as an executed settlement. An executed non-unanimous settlement must still be supported by an evidentiary record before it can be approved by the Commission. To the extent that Staff's work papers preceding the execution of a non-unanimous settlement are used as evidentiary support for the partial Disposition Agreement, then an intervenor, such as Silverleaf is entitled to inquire and opine on the evidence. Liberty filed direct testimony that plainly discusses the terms of the partial Disposition Agreement and, without complaint from Staff, has publicly disclosed information that Staff now calls confidential in the context of testimony from a Silverleaf witness.¹ Any claim of confidentiality as to the settlement offer ended on June 22, 2018, when Liberty publicly filed key terms of the settlement offer and underlying Staff documents. Any confidentiality has been waived by Liberty's public disclosure.

Staff wrongly claims that the portions of Silverleaf's rebuttal testimony related to the partial Disposition do not correspond to another party's direct case. As evidenced by the pages of discussion of the Partial Disposition and the Staff reports in Ms. Schwartz's Direct Testimony

¹ *See* Direct Testimony of Jill Schwartz at 4 ("I will address the Partial Disposition Agreement filed on May 24, 2018. I will address the unresolved revenue requirement and rate design issues of concern to the Company"); *id.* at 5 ("On April 24, 2018, Staff circulated a proposed disposition agreement that, among other things, suggested a water revenue requirement increase of \$818,800 (a 92.4% increase) added to existing revenues of \$871,317 for an overall annual level of water operating revenues of \$1,690,117. In addition, Staff suggested a sewer revenue requirement increase of \$196,792 (a 75.8% increase) added to existing revenues of \$258,381 for an overall annual level of sewer operating revenues of \$455,163."); *id.* at 6 ("It is my understanding that Staff's financial analysis department recommended, and Staff used, a capital structure including 42.83% equity capital and a return on that equity ("ROE") of 9.75%.")

(see footnote 1), Silverleaf's rebuttal testimony absolutely relates to previously filed direct testimony. Staff's claim is factually inaccurate and should be rejected.

For these reasons, Silverleaf asks the Commission to deny Staff's Motion in its entirety and to grant any further relief deemed just and necessary.

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 31st day of July 2018.

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