

**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 Rate Increase. ) SR-2018-0171

**Brief of Orange Lake Country Club, Inc. and Silverleaf Resorts, Inc. on Timeshare  
Owners as Customers of Liberty Utilities**

The issue before the Commission is whether time-share owners financially responsible for utility services provided by Liberty Utilities (Missouri Water) ("Liberty Utilities") are "customers" under the Small Rate Case Procedure ("SURP") rule, 4 CSR 240-3.050. The plain language of the 4 CSR 240-3.010(7) and Liberty Utilities' own tariff provides a conclusive answer: The time-share owners are "customers" of Liberty Utilities. The Commission should find that Liberty Utilities is not eligible to utilize the SURP by virtue of the number of customers it serves. As such, this case should be dismissed and Liberty Utilities should be ordered to file tariffs and supporting testimony pursuant to Section 393.140(11), RSMo.

Attached to this Brief are five exhibits supporting the position that the time-share owners of property developed by Orange Lake Country Club, Inc. ("Orange Lake") and Silverleaf Resorts, Inc. ("Silverleaf") are "customers" as defined under both 4 CSR 240-3.010(7) and Liberty Utilities' tariff. **Exhibit No. 1** is the Affidavit of Hugh Rosenblum ("Rosenblum Affidavit"), Vice President of Financial Services for Orange Lake outlining the ownership interest and the financial responsibility of the time-share owners for services provided by Liberty Utilities. **Exhibit No. 2** is the Affidavit of Lori Howell ("Howell Affidavit"), the Home Owners' Association Board President at Holiday Hills Resort, Timber Creek Resort, and Ozark Mountain Resort. **Exhibit No. 3** is the Affidavit of Michael Hall ("Hall Affidavit"), Vice President of Resort Operations for the Gulf Region and Vice President of the Silverleaf Club. These affidavits provide a short description of the properties, the number of owners involved, and a

statement as to the financial responsibility of time-share owners for the benefit and use of utilities services provided by Liberty Utilities. **Exhibit No. 4** is sample deeds of the properties involved in this case and **Exhibit No. 5** are the corresponding Declaration of Rights, Covenants and Conditions ("Declaration of Rights"), referenced in the Deed, which vests financial responsibility for utility services with the time-share owner.

I. The Timeshare Owners Take Financial Responsibility for the Use and Benefit of Utility Services Provided by Liberty Utilities Fitting the Definition of "Customers" Under 4 CSR 240-3.010(7) and Liberty Utilities' Tariff

A timeshare is a fractional ownership of property in which the use and enjoyment of that property is divided by agreement among the various fractional owners. Fractional owners hold a cognizable legal interest in real property under Missouri law. See generally, *City of Excelsior Springs v. Elms Redevelopment Corp.*, 18 S.W.3d 53 (Ct. App. W. D. 2000). The fractional owners at issue in this case hold title to the real property on a fee simple basis. See Exhibit 2, Howell Affidavit. These properties and owners receive water and sewer services from Liberty Utilities.

As explained in the Rosenblum Affidavit, the fractional owners take title to property encumbered by a Declaration of Rights. The Declaration of Rights require the owner take financial responsible for utility services provided by Liberty Utilities. See Exhibit 5. The Declaration of Rights is as legally binding and enforceable as any similar Declaration for non-fractional property interests. The Declaration of Rights is managed and enforced by a non-profit association composed of the owners, similar to a homeowners association. The deeds and Declaration of Rights clearly evidence the fractional owners' financial responsibility for the use and benefit of utility services for utility.

4 CSR 240-3.010(7) defines "customer" as:

- 1) Any person;
- 2) That accepts financial responsibility;
- 3) In exchange for services; and
- 4) Provided by a public utility.

Similarly, Liberty Utilities' own tariff defines "customer" as:

- 1) Any person;
- 2) Contracted with the company for water service; or
- 3) Is receiving service from company; or
- 4) Whose facilities are connected for utilizing such service.

The fractional owners at issue in this case fit the definition of "customers" under both 4 CSR 240-3.010(7) and Liberty Utilities' tariff by virtue of taking financial responsibility in exchange for utility services. Liberty Utilities' tariff provides a particularly expansive and inclusive definition of "customer." There are three *independent* ways to fit the definition of customer under Liberty Utilities' tariff. The owners satisfy two of the requirements. The owners receive service from Liberty Utilities and their facilities are connected for utilizing such service. Liberty Utilities should not be allowed to use a more narrow definition of "customer" than that provided by their own tariff in order to meet the SURP customer limitation.

## II. Silverleaf Sold Its Water and Sewer Assets to Liberty Utilities and Silverleaf's Former Utility Customers are now Liberty Utilities' Customers

Silverleaf was itself a certificated water and sewer company. In 2005 Silverleaf sold its water and sewer assets to what was then Algonquin Water Resources of Missouri, LLC -- now Liberty Utilities. See, *In the Matter of the Joint Application of Silverleaf Resorts, Inc., and*

*Algonquin Water Resources of Missouri, LLC, for Authority for Silverleaf Resorts, Inc., to Sell Certain Assets to Algonquin Water Resources of Missouri, LLC, and, in Connection Therewith, Certain Other Related Transactions*, WO-2005-0206, Order Approving Sale of Assets (Issued August 4, 2005). In the Order Approving Sale of Assets, the Commission explicitly recognized the fractional owners of Silverleaf as utility customers that would transfer to Liberty Utilities for utility services. "These customers will still need service when Algonquin buys Silverleaf's assets. There is clearly a need for sewer and water service." Order at 5. The Commission, as did Staff's Memorandum in that case, recognized that the fractional owners of Silverleaf were utility service "customers" of Silverleaf. The Silverleaf utility customers did not magically disappear with the transfer of assets to Liberty Utilities. Silverleaf customers were transferred from one utility service provider (Silverleaf) to another utility service provider (Liberty Utilities). Silverleaf and Orange Lake no longer own any water or sewer assets, nor do they provide utility service. Liberty Utilities provides all water and sewer services to the fractional owners.

It would be entirely inconsistent for the Commission to recognize the Silverleaf owners as "customers", as it did in the transfer of assets case, but not recognize those same owners as customers for the purposes of determining Liberty Utilities eligibility under the SURP. If the fractional owners were Silverleaf customers then, they are Liberty Utilities' customers now.

III. Privity of Contract with the Utility Company is not Required, Rather "Customer" is Defined by Taking Financial Responsibility for the Use and Benefit of Utility Services

There is no relevant definition of "customer" which requires privity of contract between the public utility and the person utilizing the utility service. Neither 3 CSR 240-3.010(7), nor Liberty Utilities' tariff contemplate a particular billing arrangement between the customer, the public utility or an intermediary entity. Rather the definition of "customer" centers on the

financial responsibility for utility services used by a person. Undoubtedly the utility company finds this "benefit and use" definition of "customer" useful and necessary for purposes of collections and disconnection/reconnection of utility services. *See eg.*, 4 CSR 240-13.010(G), 4 CSR 240-13.050(2)(D); *See also, Marlyn Young v. Laclede Gas Company*, GC-2017-0211, Report and Order (Issued March 13, 2008)(The Commission found that Laclede Gas Company had not violated a rule or statute by disconnecting a customer that had received the use and benefit of the gas service, but was not the named account holder.)

Likewise, Missouri courts have sided with a broad definition of "customer." In *Laclede Gas Comp. v. Hampton Speedway Co.*, 520 S.W.2d 625 (St. L Ct. App. 1975), the utility sought recovery for gas and gas services provided to defendants. The Court of Appeals recognized that a utility had stated a claim for relief against defendants (sufficient to survive a motion to dismiss) where it alleged that it furnished gas service and each defendant had the benefit and use of the service. The Court of Appeals held that the allegations were sufficient to state a claim of implied contract and that it was reasonably inferred that by receiving the use and benefit of the service, a promise to pay the lawful and reasonable charges for the service was implied. The same logic should hold true for those fractional owners that receive the benefit and use of Liberty Utilities' services. They should not be considered legal customers for one purpose, but non-customers for the purposes of the SURP.

Other provisions of the Commission's rules support the conclusion that a person who receives the substantial benefit and use of the utility service is a customer. 4 CSR 240-13.050(2)(D) prohibits disconnection of service for failure to pay the bill of another customer, "*unless the customer whose service is sought to be discontinued received substantial benefit and use of the service billed to the other customer.*" (Emphasis added.) Here again, a customer is not

defined in terms of meters or privity of contract with the utility company, but financial responsibility for utility services provided.

IV. A Narrow Definition of "Customer" Based on the Number of Meters or Account Holders is Inconsistent with the Plain Language of 4 CSR 240-3.010(7), Liberty Utilities' Tariff and the Purpose of the SURP

Liberty Utilities suggested in its Response to the Motion to Dismiss that Orange Lake and Silverleaf desire a sweeping policy change better suited for a general rulemaking. Staff asserted that there was no cited violation of the applicable regulations. Both of these assertions are patently wrong. To the extent that a previous Commission or commissioner's opinion advocated for a narrow definition of "customer," Orange Lake and Silverleaf ask this Commission to correct that legal error. Correcting this error will ensure that large and sophisticated utility company could unlawfully utilize the SURP. It is well-established that the Commission is not bound by stare decisis and that a past Commission cannot bind the existing Commission. See generally, *State ex rel. AG Processing, Inc. v. Public Service Com'n of State*, 120 S.W.3d 732 (Mo. en banc 2003). There is absolutely no need for a rule-making because the plain language of 4 CSR 240-3.010(7) includes the fractional owners at issue in this case, as does Liberty Utilities' own tariff.

Liberty Utilities has at least 36,686 customers as defined by their own and 4 CSR 240-3.010(7). This Commission's recognition of these customers, far from a wholesale policy change, would be consistent with other rules and orders of the Commission defining "customer" according to financial responsibility for the benefits and uses of utility service. In applying this consistent and lawful definition of "customer" the Commission would also support the purpose

and spirit of the SURP rather than allowing it to be opportunistically manipulated by a utility for which it clearly was not designed.

Finally, by applying this consistent and inclusive definition of "customer" the Commission will prevent serious violations of the due process rights of these 36,686 property-owners and customers. Because the SURP both expedites and eliminates many of the due process safeguards provided by a general rate case, the 36,686 property owners and utility customers affected are in substantial jeopardy, as Liberty Utilities attempts to negotiate a rate increase with Staff outside of the transparent process and lawful burdens of proof provided by a general rate case.

For all of these reasons, Orange Lake and Silverleaf ask this Commission to find that the 36,686 time-share owners are "customers" of Liberty Utilities for the purpose of determining Liberty Utilities' eligibility under the SURP. As such, Orange Lake and Silverleaf ask the Commission to dismiss the existing case initiated by Liberty Utilities under the SURP and order Liberty Utilities to file tariffs and supporting evidence pursuant to Section 393.140(11), RSMo.

Respectfully Submitted,

STINSON LEONARD STREET LLP

/s/Joshua Harden

Joshua Harden, Mo. 57941  
1201 Walnut St. Suite # 2900  
Kansas City, MO 64106  
Office phone: 816-691-3249  
[Joshua.Harden@stinson.com](mailto:Joshua.Harden@stinson.com)

Attorneys for Orange Lake Country Club,  
Inc. and Silverleaf Resorts, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been emailed to all counsel of record this 7<sup>th</sup> day of March, 2018.

Jacob Westen at [Jacob.westen@psc.mo.gov](mailto:Jacob.westen@psc.mo.gov)

Hampton Williams (OPC) at [Hampton.Williams@ded.mo.gov](mailto:Hampton.Williams@ded.mo.gov)

Dean Cooper (atty for Liberty Utilities) at [dcooper@brydonlaw.com](mailto:dcooper@brydonlaw.com)

/s/Joshua Harden \_\_\_\_\_