

**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

**MOTION TO STRIKE THE SURREBUTTAL TESTIMONY OF KEITH MAGEE AND
MOTION FOR EXPEDITED TREATMENT**

COME NOW, Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. (herein "Silverleaf"), by and through undersigned counsel, files this Motion to Strike the Surrebutal Testimony of Liberty Utilities (Missouri Water's) witness Keith Magee. For its cause, Silverleaf states the following:

I. Background

On June 22, 2018 Jill Schwartz, Senior Manager of Rates and Regulation for Liberty Utilities Central Region filed direct testimony in this case. The direct testimony of Witness Schwartz, in this case, included Schedule JSM-1, which was the direct testimony of Keith Magee in docket number GR-2018-0013, *In the Matter of Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty Utilities' Tariff Revisions Designed to Implement a General Rate Increase for Natural Gas Service in the Missouri Service Areas of the Company.*

Keith Magee did not file direct or rebuttal testimony in this case. Magee has filed surrebuttal testimony in this case. According to his surrebuttal testimony, Mr. Magee is a Director at ScottMadden, Inc. and filed surrebuttal testimony in this case on behalf of Liberty Utilities (Missouri Water). Magee Surrebuttal, p. 1, ll. 3-9. Mr. Magee provides that the purpose of his surrebuttal testimony is to respond to the rebuttal testimony of Staff Witness David Murry

and Silverleaf Witness William Stannard on the issues of return on equity and capital structure. Magee Surrebuttal, p. 2, ll. 16-21. Mr. Magee did not file a certification pursuant 4 CSR 240-2.135(7) certifying that an outside expert will abide by the confidentiality rules of 4 CSR 240-2.135. Silverleaf did not learn of Liberty Utility's intent to proffer Mr. Magee as an expert witness in this case until the deposition of Witness Jill Schwartz on August 3, 2018 – the last day of discovery.

II. Liberty Utilities Failure to Disclose Keith Magee as an Expert Witness is a Violation of Discovery Rules and Prejudicial to Silverleaf

4 CSR 240-2.090(1) provides that "[d]iscovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court." Missouri Supreme Court Rule 56.01(b)(4) requires disclosure of expert witnesses who are expected to be called and testify at trial in anticipation of litigation.

(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of Rule 56.01(b)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial by providing such expert's name, address, occupation, place of employment and qualifications to give an opinion, or if such information is available on the expert's curriculum vitae, such curriculum vitae may be attached to the interrogatory answers as a full response to such interrogatory, and to state the general nature of the subject matter on which the expert is expected to testify, and the expert's hourly deposition fee.

(b) A party may discover by deposition the facts and opinions to which the expert is expected to testify. Unless manifest injustice would result, the court shall require that the party seeking

discovery from an expert pay the expert a reasonable hourly fee for the time such expert is deposed.

On March 30, 2018 Silverleaf propounded its First Set of Data Requests to Liberty Utilities (Missouri Water), LLC. Of that First Set of Data Requests, Data Request No. 4(b) specifically asked the following:

b. Provide the name of the individual(s) that would testify regarding return on equity and capital structure on behalf of Liberty Utilities.

i. Provide all work papers or other analysis the Company has conducted regarding return on equity and capital structure.

Liberty Utilities provided the following response to this data request, "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 has been on notice since at least the filing of the Partial Disposition Agreement on May 24, 2018, in which Staff specifically identified return on equity and capital structure as remaining issues. It is important to note that Liberty Utilities pursuant to the data request, as well as Missouri Supreme Court Rule 56.01(e) has an affirmative obligation to update and supplement its data requests in a "seasonable" manner. Liberty Utilities failed to supplement its response and disclose its intent to call Magee as an expert witness.

Rule 56.01(b)(4)(a) *requires the disclosure of experts* expected to be called to testify at trial. An expert witness is a person retained by a party in relation to litigation and who by reason of education or specialized experience possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion or of deducing correct conclusions. *Krug v. United Disposal, Inc.*, 567 S.W.2d 133 (Mo.App.1978) [3]. *See also Owen v. City of Springfield*, 741

S.W.2d 16 (Mo. banc 1987)(expert witness is one engaged by a party in anticipation of litigation to testify to scientific or technical matters). While a trial court has broad discretion in its choice of action in response to non-disclosure of evidence or witnesses, that discretion is not unfettered. *Manahan v. Watson*, 655 S.W.2d 807 (Mo.App.1983) [2]. (Emphasis added.)

St. Louis County v. Pennington, 827 S.W.2d 265, 266 (Ct. App. E.D. 1992).

Liberty Liberty Utilities' failure to disclose Keith Magee as an expert witness in this case until August 3, 2018 – the last day of discovery -- is a clear violation of discovery rules. The failure to disclose Magee as an expert in this case stopped Silverleaf and other parties from conducting any discovery on Magee.

The prejudice to Silverleaf from Liberty Utilites' failure to disclose can and should be inferred: "Particularly with regard to expert witnesses, untimely disclosure or non-disclosure is so offensive to the underlying purpose and intent of discovery rules that prejudice may be inferred unless, under the circumstances of a particular case, such an inference is dissipated." *Ellis v. Union Elec. Co.*, 729 S.W.2d 71, 74 (Ct. of App. E.D. 1987).

In *Wilkerson v. Pretlutsky*, the Missouri Supreme Court affirmed the trial court's decision on this exact issue. 943 S.W.2d 643 (Mo. en banc 1997). In *Wilkerson*, the Plaintiff in a medical malpractice lawsuit failed to disclose in its interrogatory responses the name of an expert witness. *Id.at* 648. The Missouri Supreme Court offered the following analysis for the exact situation at issue in the case:

[D]efendants were entitled to rely on plaintiff's answers to interrogatories in determining who they should depose and who to select as their experts. Plaintiff's failure to identify Dr. Davidson in her interrogatory responses could very well have led defendants to believe that plaintiff did not consider Dr. Davidson to be a potential witness in the case. By March 1993, when plaintiff for the first time indicated that Dr. Davidson would be called as an

expert on causation, trial was scheduled just a few weeks away and defendants were subject to an order prohibiting them from obtaining new experts to respond to what Dr. Davidson might say. Had the trial court permitted such late disclosure by allowing Dr. Davidson to give expert testimony, defendants would have been burdened with delay and unnecessary expense. Untimely disclosure or nondisclosure of expert witnesses is so offensive to the underlying purposes of the discovery rules that prejudice may be inferred. *Ellis v. Union Elec. Co.*, 729 S.W.2d 71, 75 (Mo.App.1987). The purpose of discovery is not merely to prevent surprise at trial. An equally important purpose is to narrow the issues and thereby facilitate a speedy and less expensive disposition of the case. Moreover, to hold that the trial court has no discretion to impose sanctions for the unexplained late disclosure of witnesses only serves to promote noncompliance with the discovery rules.

Id. at 649. In *Wilkerson* there was some question that the expert witness was also a fact witness, but even as a fact witness the Supreme Court affirmed the disallowance of his testimony. *Id.* at 648. In this case there is no suggestion that Magee is a fact witness. Magee is clearly being proffered as an expert witness in such a manner which rendered any discovery on him impossible.

III. Any Rate Case Expense Incurred as a Result of Keith Magee Filing Surrebuttal Testimony or Being Proffered as an Expert Witness Should be Disallowed

As the Missouri Supreme Court recognized in *Wilkerson*, "[t]he purpose of discovery is not merely to prevent surprise at trial. An equally important purpose is to narrow the issues and thereby facilitate a speedy and less expensive disposition of the case." *Id.* Here, Liberty Utilities waits almost 10 years to file a rate case, and then on the last day of discovery, discloses its only expert witness in this case. The prejudicial effect on Silverleaf and other parties to this case can and should be inferred. The Commission should also recognize that Liberty Utilities' conduct with respect to Mr. Magee has also increased the expense of this rate case. The Commission

should disallow the recovery of any rate case expense incurred by Liberty Utilities resulting from Magee's retention as an expert witness in this case.

IV. Motion for Expedited Treatment

Pursuant to 4 CSR 240-2.080(14), Silverleaf respectfully requests the Commission, at its discretion, hold a telephone conference or issue a decision on the motion on August 10, 2018, if such conference is not deemed necessary by the Commission to rule on the motion. Silverleaf respectfully asks for expedited treatment because of the potential harm of potential prejudice, not only to Silverleaf, but to *other* parties as well. Silverleaf filed this pleading as soon as it could, informing Liberty Utilities on August 3, 2018 of its intention to file this motion to strike if Liberty Utilities did have Keith Magee surrebuttal testimony in this case.

WHEREFORE, Silverleaf Resorts Inc. and Orange Lake County Club, Inc. respectfully ask the Commission to:

A. Strike the Surrebuttal Testimony of Liberty Utilities' (Missouri Water)'s Witness Keith Magee in its entirety and order its removal from EFIS;

B. Disallow any rate case expense incurred by the retention of Keith Magee as an expert witness for failure to disclose the witness in a timely manner to the Intervenors in this case.

C. Schedule a telephone conference on August 10, 2018 for the parties to argue this Motion.

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 8st day of August 2018.

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