

**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

**RESPONSE OF LIBERTY UTILITIES
TO MOTION TO STRIKE THE SURREBUTTAL TESTIMONY
OF KEITH MAGEE**

COMES NOW Liberty Utilities (Missouri Water) LLC (“Liberty Utilities” or “Company”), by and through counsel, and, for its Response to the motion to strike the surrebuttal testimony of Company witness Keith Magee filed by Silverleaf Resorts, Inc., and Orange Lake Country Club, Inc. (hereinafter the “Motion”), states as follows to the Missouri Public Service Commission (“Commission”):

1. The Motion contends that Liberty Utilities failed to timely disclose the involvement of Mr. Magee as an expert on the topic of cost of capital in this case. As will be shown below, Mr. Magee’s involvement in this case was timely disclosed in the circumstances and in accordance with standard discovery practice in cases before the Commission. Consequently, there is no good cause to strike his testimony.

2. As an initial observation, Mr. Magee’s surrebuttal testimony is proper under the Commission’s evidence rule. In accordance with 4 CSR 240-2-130(7)(D), Mr. Magee is responding to specific matters first raised in the rebuttal testimony of Staff witness David Murray and Silverleaf Resorts, Inc., and Orange Lake Country Club Inc., witness William Stannard filed on August 3, 2018. There is no Commission rule prohibiting the filing of surrebuttal testimony by a person who has not filed either direct or rebuttal testimony. Indeed, at least one Staff witness (Dana Parish) has in this case appeared for the first time as a surrebuttal witness.

3. Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. filed no direct testimony in this case. They instead waited to file until the rebuttal testimony round. It was only when Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. filed their rebuttal testimony could Liberty Utilities be certain that the cost of engaging an expert witness on that subject would become necessary.¹ This is entirely consistent with the Company's answer to Data Request ("DR") 4(b) quoted on page 3 of the Motion.²

4. Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. asserts that the Company did not timely update its response to DR 4(b), but that simply is not so. During the course of her deposition on August 3, the same day that Mr. Stannard's substitute rebuttal testimony was filed, Liberty Utilities witness Jill Schwartz advised Mr. Harden that the Company would be sponsoring surrebuttal testimony by Mr. Magee on the issue of cost of capital. Depositions are an allowed method of discovery under the Commission's rules of practice³ and, consequently, matters addressed during the course of a deposition are a perfectly valid and effective means of advising the requesting party of any changes to a previous DR response.⁴ Notably, Mr. Harden did not ask any follow-up questions at the deposition regarding

¹ The Company's overarching concern from the time this case was initiated has been to not incur any unnecessary rate case expense until circumstances compel doing so, particularly in light of the small customer base served by its water and sewer operations over which to spread such costs.

² Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. contend that the Company was "on notice" since May 24 that cost of capital would be an issue in this case, but until testimony is actually filed addressing an issue there is no way to be certain that the involvement of an expert is necessary or advisable.

³ See, Commission rule 4 CSR 240-2.090(1).

⁴ Movants' legal analysis is couched in the case law principles surrounding the propounding of discovery under the rules of civil procedure, none of which is applicable because Liberty Utilities was not served with interrogatories. Rather, the question was put to the Company in the form of a data request which is a discovery tool made available exclusively to parties in cases before the Commission. Nevertheless, the facts clearly show that Liberty Utilities "promptly notified" Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc., that

the substance of Mr. Magee's testimony once it had been established that he would be a surrebuttal witness.

5. Any suggestion of sandbagging on the part of Liberty Utilities in terms of disclosing Mr. Magee's involvement is unjustified. To the contrary, it was Movants' decision to hold back and challenge the Company's cost of capital recommendation in rebuttal filed on the threshold of the scheduled hearing in this case that has caused the situation of which it now complains.

6. Additionally, Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. cannot claim surprise or material prejudice. Ms. Schwartz attached a copy of Mr. Magee's direct testimony in the Midstates case as a schedule to her direct testimony filed on June 22, so the fundamental rationale for the Company's cost of capital recommendation has been known and available for examination and critique for some time now. Certainly, Silverleaf Resorts, Inc., and Orange Lake Country Club Inc. could have requested that the Commission issue a subpoena to take Mr. Magee's deposition at that time. Additionally, Mr. Magee states in his prepared testimony that he is restating and adopting that testimony in this case such that he will be available to stand cross-examination with regard to its content when he takes the stand August 16. Silverleaf Resorts, Inc., and Orange Lake Country Club can challenge Mr. Magee's analysis and conclusions when he takes the stand.

7. Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc.'s complaint that Mr. Magee has not filed a non-disclosure agreement ("NDA") in this case is not a meaningful objection. The only party that may have a claim to confidentiality of information concerning cost of capital is Liberty Utilities, the party who has retained his services. It can be safely

Mr. Magee would be filing surrebuttal testimony as a cost of capital expert. *See*, 4 CSR 240-2.090(2)(F).

assumed that the Company has no objection to Mr. Magee possessing and examining such information. Should the Commission direct the Company to nevertheless file an NDA for him, it will promptly do so.

8. Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc.'s request that the Commission disallow any rate case expense associated with his involvement in this case is premature in that rate case expense is a revenue requirement issue the Commission will be called upon to decide in this case. Also, the request is ironic in that a great deal of the rate case expense being incurred by Liberty Utilities in this case is caused by Silverlake Resort Inc., and Orange Lake Country Club Inc.'s own actions.

WHEREFORE, Liberty Utilities requests that the Commission deny the Motion for the reasons aforesaid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via electronic mail on this 9th day of August, 2018, to:

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