

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

In the Matter of the Application of Liberty)
Utilities (Missouri Water) LLC d/b/a Liberty)
Utilities for Certificates of Convenience and)
Necessity Authorizing it to Install, Own,) **File No. WA-2020-0397**
Acquire, Construct, Operate, Control, Manage)
And Maintain a Water System and Sewer)
System in Bolivar, Polk County, Missouri)

**STAFF RESPONSE TO LIBERTY’S MOTION FOR SUMMARY DETERMINATION,
REQUEST FOR RULING AND MOTION FOR WAIVER**

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), by and through the undersigned counsel, and for its *Staff Response to Liberty’s Motion for Summary Determination, Request for Ruling and Motion for Waiver*, states as follows:

LEGAL ISSUE

Pursuant to Commission Rule 22 CSR 4240-2.117(1), summary determination shall be granted by the Commission “if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case.” Based on the uncontroverted facts previously filed with the Commission, and agreed to by Staff therein and below, Staff requests an initial ruling on the question of whether Liberty meets the definition of a “large water public utility” under RSMo. §393.320.1(1). With regard to this threshold issue, there are no material facts in dispute.

STAFF RESPONSE TO LIBERTY’S STATEMENT OF UNDISPUTED FACTS

1. On October 15, 2020, Liberty Utilities (Missouri Water) LLC, d/b/a Liberty Utilities (“Liberty”) filed two applications for certificates of convenience and necessity authorizing it to install, own, acquire, construct, operate, control, manage and maintain a water and sewer system in Bolivar, Polk County, Missouri. The application for the water system was designated

File No. WA-2020-0397, and the application for the sewer system was designated File No. SA-2020-0398.

2. The Commission consolidated both applications under File No. WA-2020-0397 on October 16, 2020.

3. On June 16, 2021, Liberty filed its *Motion for Summary Determination and Request for Ruling* (“Motion”).

4. In its Motion, Liberty included a *Statement of Uncontested Facts*, and noted that both Staff and the Office of the Public Counsel both stipulated and agreed to the facts contained therein.¹

5. Staff admits that the facts as stated by Liberty in paragraphs 1 through 23 of its Motion are true and not in dispute. This includes the fact that Liberty regularly provides water and/or sewer service to approximately 8,274 customer connections (approximately 7,636 water and approximately 638 sewer), with approximately 8,079 unique water/sewer customers.²

MEMORANDUM IN SUPPORT OF STAFF’S REQUEST FOR PARTIAL SUMMARY DETERMINATION

Liberty, for the first time, filed its applications to install, own, acquire, construct, operate, control, manage and maintain a water system and sewer system in Bolivar, Polk County, Missouri as a “large water public utility” per Section 393.320, RSMo, in order to purchase both systems by utilizing the appraisal method, also outlined under Section 393.320, RSMo. However, though Liberty’s separate applications for both systems have been consolidated for administrative efficiency, they remain separate applications for the purpose of ratemaking: one from a public

¹ *Motion for Summary Determination and Request for Ruling*, pg. 2-5 (June 16, 2021).

² *Id.*, pg. 2, para. 5. See also *Legal Issue and Statement of Uncontested Facts*, pg. 2, para. 5 (June 14, 2021). The 8,079 unique water/sewer customer connections is calculated by subtracting the 195 customer connections to which Liberty provides both water and sewer service from its approximately 8,274 total customer connections.

utility serving only 7,636 water customers, and one from a public utility serving only 638 sewer customers.

As further explained within, Staff concludes that Liberty does not meet the statutory definition of a “large water public utility.”

Section 393.320, RSMo, states that, in order to utilize the appraisal method for determining rate base in acquisitions like the one proposed by Liberty in its applications, a utility must meet the definition of a “large water public utility.”

Section 393.320 defines a “large water public utility” as “a public utility that regularly provides water service **OR** sewer service to more than eight thousand customer connections (emphasis added)...”³ This statute cannot be construed in a manner to render the disjunctive “or” meaningless.⁴ Moreover, “water corporation” is defined under Section 386.020(59), RSMo, and “sewer corporation” is defined under Section 386.020(49), RSMo, but there is no definition for “water or sewer corporation” under Section 386.020, RSMo.

The Commission consolidated Liberty’s separate applications for both the water and sewer systems around Bolivar, Polk County, Missouri for administrative efficiency, but they remain separate applications for the purpose of ratemaking. The Commission has pending before it one application from a water corporation with only 7,636 water customer connections, and another separate pending application from a public utility serving only 638 sewer customer connections. As agreed to by the parties, Liberty regularly provides water and/or sewer service to approximately 8,274 customer connections (approximately 7,636 water and approximately 638 sewer), with approximately 8,079 unique water/sewer customers.⁵

³ Section 393.320.1, RSMo.

⁴ *Grain Belt Express Clean Line, LLC v. Pub. Serv. Comm’n*, 555 S.W.3d 469, 473 (Mo. banc 2018).

⁵ *Motion for Summary Determination and Request for Ruling*, pg. 2, para. 5. See also *Legal Issue and Statement of Uncontested Facts*, pg. 2, para. 5.

The wording of the statute makes it clear that the legislative intent was to require a public utility that regularly provides water or sewer service to have more than 8,000 water service customer connections or more than 8,000 sewer service customer connections.

The rules of statutory interpretation require the Commission to look at the intent of the legislature. The Commission is bound by the wording of the statute if the meaning is clear and unambiguous based on the plain and ordinary meaning of the wording of the statute.⁶ The plain and ordinary use of the word “or” is to create an alternative, which is generally the same as using the word “either.”⁷ When employing the plain meaning of a word to interpret a statute, the law requires the use of a dictionary.⁸ Merriam-Webster Dictionary defines “or” as a function word to indicate an alternative.⁹ The Commission must determine the use of the word “or” in the statute to have a plain and ordinary meaning if the meaning would be “plain and clear to a person of ordinary intelligence.”¹⁰ The Commission should rule that the plain meaning of the language and use of “or” in the statute is plain and clear to a person of ordinary intelligence.

Utilizing the plain meaning of the word “or,” it is reasonable to conclude that the requirement established in Section 393.320, RSMo defining a “large public water utility” requires that the public utility provide water service to 8,000 or more water connections. The public utility could also provide sewer service to 8,000 or more sewer connections. However, Liberty asserts in its applications that it meets the statutory requirement by combining its water and sewer customers, which would equal 8,274 water **AND** sewer customers.

⁶ *State ex. Rel. Union Elec. Co. v. Pub. Serv. Comm’n*, 399 S.W.3d 467, 480-81 (Mo. App. W.D. 2013).

⁷ *Council Plaza Redevelopment Corp. v. Duffey*, 439 S.W.2d 526, 531-32 (Mo. 1969).

⁸ *State ex rel. Humane Society of Missouri v. Beetem*, 317 S.W.3d 669, 673 (Mo. App. W.D. 2010).

⁹ Merriam-Webster Dictionary, [Or | Definition of Or by Merriam-Webster \(merriam-webster.com\)](https://www.merriam-webster.com/dictionary/or).

¹⁰ *State ex. Rel. Union Elec. Co. v. Pub. Serv. Comm’n* at 480 (quoting *State v. Daniel*, 103 S.W.3d 822, 826 (Mo. App. W.D. 2003)).

The conjunction “and” is most often the opposite of “or” and indicates a connection, or signifies “as well as.”¹¹

Despite Liberty’s attempts, the statute is clear: a public utility must provide water service **OR** sewer to more than 8,000 customers. Seeing as how “or” and “and” do not have the same meaning, it is clear that Liberty does not meet the statutory definition of a “large public water utility,” and its applications should be denied for utilizing an appraisal method that Liberty does not have the authority to employ per Section 393.320, RSMo.

If the Commission decides that the statutory language is ambiguous, the Commission should still find the definition of “or” to have the exclusive meaning of either water service or sewer service, but not both. Commentators on legal drafting suggest that every “or” has the potential to be either inclusive or exclusive, but generally conveys the exclusive.¹² An exclusive meaning of “or” is one that can mean one or the other but not both.¹³ Section 393.320, RSMo, suggests an exclusive meaning because, if it was inclusive, “and” would have been used instead of “or.”¹⁴ Using the word “and” would have been a clear and unambiguous way for the legislature to get across the meaning that Liberty is trying to claim. The exclusive meaning of “or” must have been the intent of the legislature because in legal writing, “or” is often used when a choice is presented, but it does not matter which alternative is chosen.¹⁵ In this matter, the legislature did not provide an option to combine water and sewer customer connections to determine whether the utility is considered a “large public water utility,” as Liberty has proposed in this matter.

¹¹ *Id.* [And | Definition of And by Merriam-Webster \(merriam-webster.com\)](#).

¹² Kenneth A. Adams & Alan S. Kaye, *Revisiting the Ambiguity of “and” and “or” in legal drafting*, 80 St. John’s L. R. 1167, 1181 (2006).

¹³ *Id.* at 1180.

¹⁴ *See generally, Id.* at 1180-81.

¹⁵ *Id.* at 1181.

Liberty’s interpretation of the statute would require “or” to be interchangeable with “and.” While Missouri law has rarely embraced Liberty’s interpretation,¹⁶ the Supreme Court of Missouri has ruled that an interchangeable construction of “and” and “or” should only be used when it is done in order to create the intended effect of the legislature, and when not doing so would render the meaning ambiguous or would result in an absurd result.¹⁷ In this instance, the statute does not require the interchangeability of “and” and “or” because it is not necessary to get across the intent of the legislature, and the use of “or” is not ambiguous and does not create an absurd result. It would not be an absurd result to require a public water utility have 8,000 water connections **OR** 8,000 sewer connections to qualify as a “large public water utility.” In addition, courts are often reluctant to interpret “and” and “or” to be interchangeable in statutes because it can achieve an absurd result that is contrary to legislative intent.¹⁸

Liberty argues that it is a “large public water utility” because it regularly provides water and/or sewer service to more than 8,000 customers.¹⁹ Section 393.320 does not use the term “and/or,”²⁰ and “and/or” is frowned upon in legal writing because it creates ambiguity.²¹ It is reasonable to infer that the legislature intended to use “or” to avoid ambiguity in the statute and show the exclusive intent of the meaning of “or” in the statute. When “and/or” is properly used, then neither “and” nor “or” can be used in its place to give the desired meaning.²² When Liberty uses “and/or” in place of “or” in its *Application*²³, Response to Staff Recommendation and

¹⁶ *Hawkins v. Hawkins*, 511 S.W.2d 811, 812-13 (Mo. 1974).

¹⁷ *Id.*

¹⁸ *Council Plaza Redevelopment Corp.*, 439 S.W.2d at 532

¹⁹ *Motion for Summary Determination and Request for Ruling*, pg. 6. See also *Response to Staff Recommendation and Request for Ruling*, pg. 3 at para. 3 (April 26, 2021).

²⁰ See Section 393.320.1, RSMo.

²¹ Maurice B. Kirk, *Legal Drafting: The Ambiguity of “and” and “or”*, 2 Tex. Tech L. Rev. 235, (1971).

²² *Id.* at 252.

²³ *Application*, pg. 1, para. 2 (October 15, 2020).

Request for Ruling,²⁴ and Motion,²⁵ Liberty is proving the point that the statute was not intended to convey both “and” and “or” because it is not being properly used if it can be replaced with either “and” or “or.”

Liberty is trying to apply the rules of statutory interpretation to achieve its intended result and not to determine what the legislature intended, which is not the purpose of the traditional principles of statutory interpretation.²⁶ Staff is looking at the plain meaning of the statute and interpreting how the legislature wrote it. If the legislature had intended for the statute to classify a large public utility as any water utility with combined water and sewer with over 8,000 customer connections, the statute would have likely read, “a large public utility is a public utility that regularly provides water service or sewer service, *or both* to more than 8,000 customer connections.” This would be the same meaning as “and/or” but avoid ambiguity.²⁷ If the legislature had intended the inclusive meaning of the word “or” or “and/or,” as used by Liberty in its Motion, the legislature would have used “or both” to signal this. The legislature made a conscious decision to use “or” in the statute to avoid ambiguity and to convey the exclusive meaning of “or,” and not to allow a water utility to be classified as a “large water public utility” if its combined water and sewer service customer connections are greater than 8,000.

Further, the legislature has shown that if it intended the meaning of “or” to mean either or both, it would have stated so. In Section 250.140.1, RSMo, the legislature states;

“Sewerage services, water services, **or water and sewerage services combined** shall be deemed to be furnished to the occupant and the owner of the premises (emphasis added)...”²⁸

²⁴ *Response to Staff Recommendation and Request for Ruling*, pg. 2. See also pg. 3, para. 3.

²⁵ *Motion for Summary Determination and Request for Ruling*, pg. 2, para. 5.

²⁶ *State ex. Rel. Union Elec. Co.*, 399 S.W.3d at 479-80.

²⁷ *Adams & Kaye supra* note 2 at 1190.

²⁸ Section 250.140.1, RSMo.

This adds further support to Staff's conclusion that if the legislature intended for "or" in Section 393.320, RSMo, to be defined as "either" or "both," then the legislature would have stated it unambiguously, as in Section 250.140.1.

It is clear from the plain language of Section 393.320, RSMo, and the rules of statutory interpretation that Liberty does not meet the legal definition of a "large public water utility." Staff respectfully requests that the Commission issue an order resolving this threshold issue prior to the evidentiary hearing in this matter. This will not only ensure a clean record at the evidentiary hearing, but also facilitate potential settlement in this matter, once all parties are aware of the Commission interpretation of Section 393.320, RSMo.

MOTION FOR WAIVER OF COMMISSION RULE 20 CSR 4240-2.117(1)(A)

Commission Rule 20 CSR 4240-2.117(1)(A) states that "a motion for summary determination shall not be filed less than sixty (60) days prior to the hearing except by leave of the commission."

The evidentiary hearing in this matter is scheduled for August 12-13, 2021. Liberty filed its Motion for Summary Determination, per the procedural schedule ordered by the Commission, on June 16, 2021, fifty-six (56) days prior to hearing.

Due to the importance of the Commission ruling on this issue prior to any evidentiary hearing, and per the Commission's order setting the procedural schedule, Staff requests that the Commission waive the sixty (60) day requirement of Commission Rule 20 CSR 4240-2.117(1)(A).

WHEREFORE, Staff prays that the Commission rule that Liberty does not meet the legal definition of a "large public water utility" as contemplated under Section 393.320, RSMo, grant a waiver of the sixty (60) day requirement of Commission Rule 20 CSR 4240-2.117(1)(A), and grant such other and further relief as is just in the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile, or electronically mailed to all parties and/or counsel of record on this 25th day of June 2021.

/s/ Travis J. Pringle