

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

In the Matter of the Application of Rate Increase)
Request for Liberty Utilities (Missouri Water) LLC) Case No. WR-2018-0170
d/b/a Liberty Utilities)

**OFFICE OF THE PUBLIC COUNSEL'S
POST HEARING REPLY BRIEF**

Respectfully submitted,

Caleb Hall, Mo. Bar No. 68112
Senior Counsel

September 11, 2018

Table of Contents

Introduction.....	1
Cost of Service – Return on Equity	2
Cost of Service – Capital Structure.....	3
Cost of Service – Rate Case Expense	8
Customer Service Issues	8
Rate Design.....	10
Silverleaf/Orange Lake Exemption.....	10

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

In the Matter of the Application of Rate Increase)
Request for Liberty Utilities (Missouri Water) LLC) Case No. WR-2018-0170
d/b/a Liberty Utilities)

**OFFICE OF THE PUBLIC COUNSEL'S
POST HEARING REPLY BRIEF**

COMES NOW the Office of the Public Counsel (OPC or Public Counsel), by and through counsel, and for its Post Hearing Reply Brief states as follows:

INTRODUCTION

Liberty Utilities (Missouri Water), LLC (Liberty) initiated this proceeding by filing for a rate increase for under the Public Service Commission's (Commission) Small Utility Rate Case Procedure rule.¹ Liberty requested an increase of \$995,844 and \$196,617 in its annual water and sewer system operating revenues, respectively in its application.² The Staff of the Public Service Commission (Staff) and Liberty have since entered into a Non-Unanimous Stipulation and Agreement (Stipulation) providing for an increase of \$818,800 and \$196,782 in annual water and sewer system operating revenues, respectively.³ The OPC did not approve of the Stipulation, but also chose to not object to the agreement; electing instead to provide comments as to how the Commission might modify the Stipulation. To the chagrin of Liberty, the OPC noted that the Stipulation fails to clearly provide the utility's capital structure used for ratemaking.⁴ All parties to the case filed their initial post-evidentiary hearing briefs on August 31, 2018, and the OPC responds in kind.

¹ 4 CSR 240-3.050.

² *Small Company Rate Increase Request*, Case. No. WR-2018-0170 (Dec. 15, 2017).

³ *Non-Unanimous Stipulation and Agreement*, Case No. WR-2018-0170 (Aug. 3, 2018).

⁴ *See Motion to Strike the Office of the Public Counsel's Response to Non-Unanimous Stipulation and Agreement*, Case No. WR-2018-0170 (Aug. 14, 2018) (moving to strike OPC's comments on the basis that the filing is an untimely made objection).

COST OF SERVICE – RETURN ON EQUITY

The OPC concurs with Staff's recommended return on equity (ROE) of 9.75% in its Initial Brief. Staff has most recently advocated for an ROE of 9.75% based on the same value that was agreed to in its Stipulation with Liberty.⁵ The OPC is satisfied with this ROE because 9.75% is within Staff's initial range from their Day 90 Fiscal Analysis review of Liberty's finances with a capital structure of 40.94% common stock equity and 59.06% long-term debt.⁶ The OPC acknowledges that Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. (Silverleaf) are not supportive of a 9.75% ROE, desiring an ROE between 8 and 9% instead, but has no direct response to Silverleaf.⁷

Understanding that Liberty's secondary ROE recommendation is made in the alternative to the position it has adopted in the Stipulation, the OPC still rejects Liberty's requested substitute ROE of 10.25%. Liberty's requested ROE is premised on a purported consistency with Liberty's position in Utilities Midstates Natural Gas Corp.'s (Midstates) rate case,⁸ and a relative reasonableness when compared to the 12% ROE ordered in Indian Hills Utility Operating Company's (Indian Hills) recent rate case.⁹ Firstly, whatever Liberty's position in Midstates' rate case may have been, the ultimately resulting ROE from that case was 9.8%, far less than what

⁵ *Staff's Initial Brief*, Case No. WR-2018-0170 p. 10-11 (Aug. 31, 2018).

⁶ *Office of the Public Counsel's Response to Non-Unanimous Stipulation and Agreement*, Case No. WR-2018-0170 KNR-1 (Aug. 13, 2018).

⁷ Exhibit 302, *Refiled Rebuttal Testimony of William G. Stannard*, Case No. WR-2018-0170 (Aug. 3, 2018).

⁸ Exhibit 1, *Direct Testimony of Jill Schwartz*, Case No. WR-2018-0170 (Jun. 22, 2018) (citing Case No. GR-2018-0013); Exhibit 4, *Surrebuttal Testimony of Keith Magee*, Case No. WR-2018-0170 (Aug. 7, 2018).

⁹ *Initial Brief of Liberty Utilities (Missouri Water) LLC*, Case No. WR-2018-0170 p. 4, (Aug. 31, 2018).

Liberty is asking for today.¹⁰ Although 9.8% and 10.25% may appear substantially similar with only a 0.45% in difference, such divergent ROE are so statistically significant as to implicate thousands to hundreds of thousands of revenue dollars.

Secondly, the inordinately high ROE for Indian Hills can be justified on Indian Hills' history of purchasing derelict water systems requiring intensive environmental compliance upgrades and vastly smaller corporate structure.¹¹ Liberty is a part of a multinational conglomerate with greater access to capital, whereas Indian Hills is a domestic entity with fewer customers. The risks assumed by Indian Hills in making required upgrades then substantiate such a large ROE of 12%, and make any comparison between Indians Hills and Liberty inappropriate. Indian Hills is an outlier; not a benchmark. Accordingly, Liberty's requested 10.25% is not justified by Midstates or Indian Hills' experiences, and the ROE of 9.75% contemplated by the Stipulation should be approved.

COST OF SERVICE – CAPITAL STRUCTURE

Staff and Liberty entered into a Stipulation resolving nearly all issues in this case, and providing the necessary components of Liberty's rates with the exception of capital structure.¹² The OPC did not object to the Stipulation, but responded that a capital structure should be clearly stated.¹³ The OPC maintains its position and responds to other parties as follows.

¹⁰ *Order Approving Stipulation and Agreement*, Case No. GR-2018-0013 (June 6, 2018) (“The stipulation and agreement indicates the agreed upon revenue requirement is based on a 9.8 percent return on equity and incorporates the effects of Liberty's reduced federal tax burden”).

¹¹ *Report and Order*, Case No. WR-2017-0259 (Feb. 7, 2018); Exhibit 1, *Direct Testimony of Josiah Cox*, Case No. WR-2017-0259 p. 9-21 (Oct. 13, 2017).

¹² *Non-Unanimous Stipulation and Agreement*, Case No. WR-2018-0170 (Aug. 3, 2018).

¹³ *Office of the Public Counsel's Response to Non-Unanimous Stipulation and Agreement*, Case No. WR-2018-0170 (Aug. 13, 2018); *Office of the Public Counsel's Clarification of its Response to Non-Unanimous Stipulation*, Case No. WR-2018-0170 (Aug. 13, 2018).

Staff's Mischaracterizes the OPC's Response and Repeats its Contradictory Positions from the Evidentiary Hearing

The OPC's response to the Stipulation was premised solely on its absence of a capital structure and timely filed. Staff's response incorrectly labels the OPC's product as "late filed" and claims that the Stipulation, although admittedly silent thereto, nonetheless incorporates Staff's suggested capital structure based on the final revenue requirement.¹⁴ Staff's description of the OPC's belatedness is based on the seven day timeline to object to the filing of a stipulation under Commission Rule 4 CSR 240-2.115.¹⁵ However Commission Rule 4 CSR 240-2.080 provides that all parties "shall be allowed ten (10) days from the date of filing in which to respond to any pleading unless otherwise ordered by the commission." The Commission incorporated this ten day response deadline in its approved procedural schedule.¹⁶ The OPC filed its response and accompanying clarification on August 13, 2018, ten days after the Stipulation was filed on August 3, 2018. Therefore the OPC's response was not untimely filed despite Staff's portrayal.

The OPC is relieved to again hear that Staff considers its capital structure to be integrated into the Stipulation, just as Staff counsel presented at the evidentiary hearing,¹⁷ but confused as to why Staff also claims that Liberty may still disagree with that capital structure.¹⁸ Staff's contradictory position between its counsel, witnesses, and Stipulation were already addressed in OPC's Initial Post Hearing Brief, and therefore no more attention is needed other than to spotlight

¹⁴ *Staff's Initial Brief*, Case No. WR-2018-0170 p. 5, 31 (Aug. 31, 2018).

¹⁵ *Id.* at 8.

¹⁶ *Order Setting Procedural Schedule and Other Procedural Requirements*, Case No. WR-2018-0170 (Jun. 13, 2018). ("All pleadings, briefs, and amendments shall be filed in accordance with Commission Rule 4 CSR 240-2.080").

¹⁷ *Transcript of Proceedings Evidentiary Hearing*, Case No. WR-2018-0170 p. 52 (Aug. 16, 2018).

¹⁸ *Id.* at 53.

that Staff has not defended the absence of a capital structure directly.¹⁹ Instead Staff has only collaterally undercut the OPC's comments on procedural or supposedly precedential grounds. Staff's strategy leads the OPC to the inference that Staff actually recognizes the value in a stated capital structure. As Staff has also informed the Commission of its "statutory duty" to consider "all relevant factors" when setting rates, the OPC merely asks that the Commission not ignore capital structure.²⁰

Liberty's Desire to Not Have a Specified Capital Structure is Unpersuasive

Liberty has reiterated its opposition to the OPC's response to the Stipulation on the grounds that the OPC's filing was untimely, constitutes "surrebuttal testimony out-of-time without showing a good cause," that the OPC should seemingly be expected to accept a Stipulation just because it is similar to a previously agreed to settlement from the Midstates rate case, and that there are supposedly good reasons for a capital structure to not be stated.²¹ The issue of timeliness has already been addressed in the OPC's reply to Staff's brief. As for the notion that the OPC could have responded to Liberty and Staff's Stipulation in surrebuttal, Commission rules dictate that surrebuttal is to be limited to "material which is responsive to matters raised in another party's rebuttal testimony."²² A phantom capital structure did not haunt either Staff or Liberty's rebuttal testimony, nor was such a specter summoned in prior direct testimony. Thus Liberty's contention that the OPC should have responded to the Stipulation in surrebuttal is premised on a contention that the OPC should have violated Commission rule on the scope of surrebuttal.

¹⁹ *Office of the Public Counsel's Initial Post Hearing Brief*, Case No. WR-2018-0170 p. 6-9 (Aug. 31, 2018).

²⁰ *Staff's Initial Brief*, Case No. WR-2018-0170 p. 6 (Aug. 31, 2018) (citing *State ex rel. Utility Consumers Coun. of Mo. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. 1979)).

²¹ *Initial Brief of Liberty Utilities (Missouri Water) LLC*, Case No. WR-2018-0170 p. 13-14 (Aug. 31, 2018).

²² Commission Rule 4 CSR 240-2.130(7)(D).

As for Liberty’s suggestion that the prior Midstates agreement bounds the OPC today, one cannot demand respect for a previous agreement while ignoring its very words. The stipulation from the Midstates rate case clearly states that “none of the signatories shall be prejudiced or bound in any manner by the terms of this Stipulation and Agreement in this or any other Commission or judicial review or other proceeding.”²³ Liberty’s use of the Midstates case in an attempt to silence the OPC then paradoxically disregards the very agreement they invoke. Furthermore, stipulations and settlements are efficient ratemaking tools precisely because they need not bound parties in future cases, but instead efficiently resolve disputes so that utility service may proceed. Unfortunately, the OPC is left questioning what incentive the OPC has to enter into future stipulations if other signatories are going to inappropriately use them as baselines for future behavior. If anything, Liberty’s position regarding the Midstates case justifies the OPC’s decision to not sign the pending Stipulation.

Finally, Liberty argues that an unstated capital structure may be warranted because “[t]here are good reasons the signatories may not want capital structure to be specified in a settlement.”²⁴ Liberty cites to the Staff witness David Murray, but does not otherwise articulate why a capital structure should not be publically provided. Ironically, when Murray was asked by Silverleaf’s counsel why a utility company would not want a capital structure stated, Liberty objected on the grounds that such a question calls for legal conclusions.²⁵ Liberty’s objection was not sustained, and Murray answered as follows:

And I’ll just use the example of all the attention that the Regulatory Research Association information gets. They look at average allowed ROEs and they look at average equity

²³ *Unanimous Stipulation and Agreement*, Case No. GR-2018-0013 (May 24, 2018).

²⁴ *Initial Brief of Liberty Utilities (Missouri Water) LLC*, Case No. WR-2018-0170 p. 14 (Aug. 31, 2018).

²⁵ *Transcript of Proceedings Evidentiary Hearing*, Case No. WR-2018-0170 p. 113 (Aug. 16, 2018).

ratios. And to the extent you have – whether it’s a higher ROE, lower ROE, higher equity ratio, lower equity ratio, gets cited in every – I mean to the extent the rate of return witnesses start to discuss that, if it’s – you know, if it’s a lower equity ratio, that would bring, you know, the average equity ratio allowed through the country down. And so it’s just – there’s just concern about the circularity.²⁶

From Murray’s answer the OPC gathers that a public utility may wish for a capital structure to be concealed so that industry wide equity ratios and the subject utility’s share prices are protected. Those are certainly reasons why Liberty might have a vested interest in this Stipulation sans capital structure, but Liberty has thus far provided no evidence that Liberty would be harmed from a stated capital structure, or that explicitly denoting Liberty’s capital structure would have national repercussions.

Liberty’s logic that capital structure should not be stated for fear of nationally dropping national equity ratios is also fallacious because it ultimately leads to absurd results. If simply providing capital structures to the public can lead to a downward spiral for the entire public utility industry, then, following Liberty’s reasoning, ROE and every other ratemaking factor should be concealed. If transparency leads to chaos, then ignorance should presumably guide all Commission ratemaking. Of course such a conclusion is foolish, just as its foundational syllogism.

Furthermore, it is not apparent why the Staff should have the prerogative of protecting national equity ratios or a single company’s reputation since neither are the basis for safe and adequate utility service. Liberty’s basis for why the Commission should be satisfied without a capital structure is thus unpersuasive.

²⁶ *Id.*

Silverleaf's Complaints Regarding the Lack of a Capital Structure are Valid but Likewise Mischaracterize the OPC's Response

The OPC agrees with Silverleaf's position that the Stipulation should plainly state a capital structure.²⁷ However, the OPC does not agree with Silverleaf's presentation of the OPC's capital structure comments as an "objection."²⁸ The OPC has made it perfectly clear in its original Response,²⁹ Clarification,³⁰ and Initial Post-Hearing Brief, that it has not objected to the Stipulation.³¹ Silverleaf's portrayal of the OPC's filing is most likely not intentionally inaccurate, but rather the result of zealous advocacy and an attempt to emphasize that multiple parties responded to the Stipulation. Nevertheless the OPC feels obligated to correct Silverleaf's error.

COST OF SERVICE – RATE CASE EXPENSE

The OPC takes no position as to rate case expense, and therefore does not reply to Staff or Liberty.

CUSTOMER SERVICE ISSUES

The OPC does not take a position as to whether customer service issues have been adequately addressed by Liberty, but expects that the utility will attend to the matters raised by Ozark Mountain Condominium Association (OMCA). Intervenor OMCA has alleged repeated instances where Liberty has failed to provide safe and adequate service to its customers.³² Such

²⁷ See *Initial Brief of Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc.*, Case No. WR-2018-0170 p. 10 (Aug. 31, 2018) (arguing that an "ROE without a capital structure is inherently, mathematically incomplete information").

²⁸ *Id.* at 17.

²⁹ *Office of the Public Counsel's Response to Non-Unanimous Stipulation and Agreement*, Case No. WR-2018-0170 (Aug. 13, 2018)

³⁰ *Office of the Public Counsel's Clarification of its Response to Non-Unanimous Stipulation*, Case No. WR-2018-0170 (Aug. 13, 2018).

³¹ *Office of the Public Counsel's Initial Post Hearing Brief*, Case No. WR-2018-0170 p. 2-3 (Aug. 31, 2018).

³² *Ozark Mountain Condominium Association, Inc.'s Post-Hearing Brief*, Case No. WR-2018-0170 p. 3-4 (Aug. 31, 2018).

instances include water meter housing boxes rotting for several years, broken mains with associated property damage, loss of water pressure, and the complete absence of fire protection for several days following a main repair.³³ The last complaint is particularly alarming to OPC because of the uniquely rural nature of OMCA and Liberty's other customers. The initial time it takes for first responders to react to a fire is the most crucial for saving life and property, and those efforts can be naturally impeded in rural areas by circuitous roads and lack of access to water. Liberty, as a rural water provider, is then particularly situated to secure the safety of its customers. The idea that Liberty's customers are not secure is beyond alarming, but Liberty has provided assurances that OMCA's complaints have been, or in the process of, being remedied.³⁴ Staff also echoes the conclusion that Liberty has taken steps to alleviate customer complaints,³⁵ albeit that decision does not appear to be based on any input from OMCA.³⁶

The OPC is therefore willing to accept Liberty and Staff's consolations as to customer service issues, provided that the OPC expects Liberty to promptly respond to unaddressed customer service disputes, and to proactively prevent future complications. Customers in Branson complained about a lackluster water pressure,³⁷ while residents attending the Branson and Pineville public hearings protested customer service unavailability.³⁸ The OPC and other parties learned at

³³ *Id.*

³⁴ *Initial Brief of Liberty Utilities (Missouri Water) LLC*, Case No. WR-2018-0170 p. 7-9 (Aug. 31, 2018).

³⁵ *Staff's Initial Brief* 15-19, Case No. WR-2018-0170 (Aug. 31, 2018).

³⁶ *Transcript of Proceedings Evidentiary Hearing*, Case No. WR-2018-0170 p. 178 (Aug. 16, 2018) (After being asked by OMCA's counsel whether Don Allsbury, OMCA's property manager, had been contacted by Staff following the filing of his testimony regarding customer service issues, he responded "No one - - no one has contacted me").

³⁷ *Transcript of Proceedings Public Hearing*, Case No. WR-2018-0170 p. 8-12 (July 23, 2018).

³⁸ *Id.* (Denice Bart testifying to her experience being unable to directly call customer service but instead "get routed to an extension that doesn't have voicemail set up or [getting] to an operator and they tell [her] that they don't handle the Missouri company"); *Transcript of Proceedings Public Hearing*, Case No. WR-2018-0170 p. 11 (July 23, 2018) (Billy Howard recounting an experience where he was routed from Jill Schwartz to an Empire District representative only to then be sent back to Schwartz).

the Pacific, MO public hearing that some customers were no longer drinking their water “because it smells like a swimming pool” due to recent chlorination.³⁹ Regardless, absent future evidence to the contrary, the OPC expects Liberty will resolve these issues for the benefit of their customers.

RATE DESIGN

The OPC takes no position as to phase-in rates, customer charges, or commodity charges, and therefore does not reply to Staff, Liberty, or Silverleaf.

SILVERLEAF/ORANGE LAKE EXEMPTION

The OPC takes no position at this time as to Silverleaf’s request to be exempted from Liberty’s subsequent rate case, and therefore does not reply to Staff, Liberty, or Silverleaf. However the OPC reserves the right to object in future proceedings should an exclusion request from one inordinately large utility customer lead to undue rate increases for other customer classes.

WHEREFORE, the OPC presents its Reply Brief reiterating that its Response to the filed Stipulation is not an objection, but that Liberty’s capital structure should be addressed by the Commission.

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

/s/ Caleb Hall
Caleb Hall, #68112
Senior Counsel
Caleb.hall@ded.mo.gov
200 Madison Street, Suite 650
Jefferson City, MO 65102
P: (573) 751-4857
F: (573) 751-5562

**Attorney for the Office of the Public
Counsel**

³⁹ *Transcript of Proceedings Local Public Hearing*, Case No. WR-2018-0170 p. 11, 13 (July 25, 2018).

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 11th day of September, 2018, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall