

**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
INITIAL POST HEARING BRIEF**

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

INTRODUCTION

Liberty Utilities (Missouri Water), LLC (Liberty) provides regulated water and sewer services throughout the State of Missouri as a public utility. Its services are provided disproportionately for rural residents. Liberty initiated this case by filing for a rate increase as a small water utility. Prior to hearing, Liberty and the Staff of the Public Service Commission (Staff) entered into a Non-Unanimous Stipulation and Agreement detailing a negotiated revenue requirement, rate design, accounting principles, tariff revisions, and other settled terms. The OPC does not object to this Stipulation, but instead requests that the Public Service Commission (Commission) accept the Stipulation with a plainly stated capital structure for Liberty.

PROCEDURAL HISTORY

On December 15, 2017, Liberty filed for a rate increase for its water and sewer services operating revenues under the Commission's Small Utility Rate Case Procedure rule.¹ In Liberty's Request Letter, the Company set forth its requested increase of \$995,844 and \$196,617 in its annual water and sewer system operating revenues, respectively.² On January 29, 2018, the Public Service Commission (Commission) approved Silverleaf Resorts, Inc. and Orange Lake Country

¹ 4 CSR 240-3.050.

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

Club, Inc.’s (Silverleaf) intervener applications.³ Ozark Mountain Condominium Association became another intervener in the case after Commission approval was provided on February 14, 2018.

On August 3, 2018, after a lengthy litigation dialogue and exchange of various motions, the Staff of the Public Service Commission (Staff) and Liberty entered into a Non-Unanimous Stipulation and Agreement agreeing to an increase of \$818,800 and \$196,782 in annual water and sewer system operating revenues, respectively.⁴ The OPC responded that the Stipulation fails to include an explicit capital structure,⁵ whereupon Liberty moved to strike the OPC’s comments.⁶ At the Evidentiary Hearing on August 16, 2018, Presiding Officer John Clark directed the parties to respond to Liberty’s motion to strike should they so choose.

**THE COMPANY’S OBJECTION TO PUBLIC COUNSEL’S RESPONSE TO THE
STIPULATION AND AGREEMENT IS UNWARRANTED**

The OPC’s response to the Stipulation is mere commentary with suggestions for improvement, not an objection to the ultimate rate design included therein. Liberty’s objection is premised on Commission Rule 4 CSR 240-2.115(2)(B) providing that “[e]ach party shall have seven (7) days from the filing of a nonunanimous [*sic*] stipulation and agreement to file an objection to the nonunanimous [*sic*] stipulation and agreement.” Liberty puts additional emphasis on this rule by literally highlighting that “[f]ailure to file a timely objection shall constitute a full waiver of that party’s right to a hearing.”⁷

³ *Order Granting Applications to Intervene*, Case No. WR-2018-0170 (Jan. 29, 2018).

⁴ *Non-Unanimous Stipulation and Agreement*, Case No. WR-2018-0170 (Aug. 3, 2018).

⁵ *Office of the Public Counsel’s Response to Non-Unanimous Stipulation and Agreement*, Case No. WR-2018-0170 (Aug. 13, 2018).

⁶ *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).

⁷ *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).

The OPC responded to the Stipulation on August 13, 2018, ten days after it was filed. Liberty is therefore correct that the OPC acted beyond the seven day period for raising an objection, but Liberty is incorrect in identifying the nature of an “objection.” Black’s Law primarily defines an objection as the “act of objecting; that which is, or may be, presented in opposition.”⁸ In common parlance an objection refers to “1. The act of objecting. 2. A statement presented in opposition. 3. A ground, reason, or cause for expressing opposition.”⁹ Rather than objecting, opposing, or providing grounds for the Commission to reject the Stipulation, the OPC quite clearly stated in its initial response to the Stipulation that “The OPC does not object to the revenue requirements as finalized...”¹⁰ The OPC also concurrently filed a clarification alongside its response stating that “Public counsel neither opposes but also cannot support the non- Unanimous Stipulation and Agreement...”¹¹ If the OPC had objected, then it would have raised a fatal issue or deficiency such as the Stipulation filing’s failure to include a certificate of service contrary to 4 CSR 240-2.080(17).¹² Instead Liberty has seemingly ignored both the OPC’s response and clarification, along with a dictionary understanding of “objection,” and concluded that any statement other than affirmation is objectionable.

On the contrary, displaying the lack of an endorsement is perfectly permissible under Commission procedures. Commission rule plainly provides the OPC with the opportunity to “indicate that it does not oppose all or part of a nonunanimous stipulation and agreement.”¹³ Of

⁸ BLACK’S LAW DICTIONARY 1073 (6th ed. 1990).

⁹ THE AMERICAN HERITAGE COLLEGE DICTIONARY 958 (4th ed. 2004).

¹⁰ *Office of the Public Counsel’s Response to Non-Unanimous Stipulation and Agreement*, Case No. WR-2018-0170 (Aug. 13, 2018).

¹¹ *Office of the Public Counsel’s Clarification of its Response to Non-Unanimous Stipulation*, Case No. WR-2018-0170 (Aug. 13, 2018).

¹² Commission rule clearly states that “Every pleading or brief shall include a certificate of service.” 4 CSR 240-2.080(17). The Non-Unanimous Stipulation and Agreement filed on August 3, 2018, noticeably lacked such a certificate.

¹³ 4 CSR 240-2.115(2)(E).

course the lack of opposition does not necessarily equate to endorsement, and conversely the OPC's decision to withhold its endorsement, and provide the justification for its decision, does not automatically assert opposition. The OPC's lack of both approval and objection is why the response was instead filed under the standard ten day period following any filing as opposed to the objection timeline.¹⁴

Liberty's contention that the OPC has objected out-of-time is belied by Liberty's own emphasis that the OPC be denied a hearing on the concerns raised in the OPC's response.¹⁵ The OPC again agrees with Liberty that Commission rule provides that a party who fails to timely object may be denied a hearing.¹⁶ However, neither the OPC's response to the Stipulation nor its clarification of its response ask for a hearing or other tribunal. In this notable absence one finds that Liberty is requesting sanctions for offenses that were neither given nor intended. As the OPC has not formally objected to the Non-unanimous Stipulation and Agreement, Liberty's motion to strike the OPC's comments on the matter are unwarranted.

PROPER RATEAKING CLEARLY ACCOUNTS FOR CAPITAL STRUCTURE

The OPC requests that the Commission accept the Stipulation filed by Staff and Liberty provided that the associated capital structure for rates be plainly stated. The Stipulation settles on a return on equity (ROE) of 9.75%, which is then applied to Liberty's assets to calculate the utility's revenue requirements for both water and sewer services. As the OPC analogized previously in its initial response to the Stipulation, an ROE is like an interest rate in that it is only

¹⁴ See 4 CSR 240-2.080(13) ("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").

¹⁵ 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).

¹⁶ 4 CSR 240-2.115(2)(B).

one factor used in determining what consumers ultimately pay.¹⁷ Therefore, only providing the ROE and ultimate rates, but not the capital structure used to calculate those rates, provides customers with an incomplete picture of how their billing is calculated.

Wishing for the capital structure to be fully disclosed, when the other rate design elements are otherwise provided, may appear like a superficial issue. However, in actuality the Stipulation's failure to plainly admit its capital structure is a legitimate transparency concern that demands attention. Ordering consumer rates based on an ROE, but not informing them of what that ROE is applied to, is comparable to burdening someone with a motor vehicle loan, giving her the car, but not telling her how much of a debt principal she has to pay off and for how long. No reasonable consumer would accept such black box lending, and likewise utility customers should expect clear accounting when deciding their rates.

Clear accounting is especially justified when neither Staff nor Liberty's initial positions on ROE support what was agreed to in the Stipulation. Staff witness Paul Harrison argued for an ROE of 10% with a capital structure of 42.83% common equity with 57.17% long term debt.¹⁸ On behalf of Liberty, Jill Schwartz recommended a 10.25% ROE with an associated 53% equity capital structure.¹⁹ However, the Stipulation agreed to by these parties accepts an ROE of 9.75%, which is wholly outside the range of either's prior position.²⁰ The associated capital structure was then presumably modified from Staff or Liberty's earlier positions, but to what extent remains

¹⁷ *Office of the Public Counsel's Response to Non-Unanimous Stipulation and Agreement*, Case No. WR-2018-0170 (Aug. 13, 2018) (“Similarly to how an interest rate on an asset tells you nothing about the final profit without considering equity, an ROE alone does not determine rates or customer bills. Rather, an ROE is applied to a specific capital structure to calculate revenue requirements and charges”).

¹⁸ Exhibit 105, *Direct Testimony of Paul R. Harrison*, Case No. WR-2018-0170 (Jun. 22, 2018).

¹⁹ Exhibit 1, *Direct Testimony of Keith McGee*, Case No. WR-2018-0170 (Jun. 22, 2018).

²⁰ *Non-Unanimous Stipulation and Agreement*, Case No. WR-2018-0170 (Aug. 3, 2018).

uncertain. The public should not be burdened with that uncertainty, and therefore the OPC again affirms that any agreed ROE must be accompanied by a capital structure.

Staff and Liberty's objections to the OPC's request for a stated capital structure are superficial or are self-contradicted. Counsel for Liberty addressed OPC's concerns in its opening during this case's evidentiary hearing by comparing the Stipulation to a prior one agreed to in "the Mid-States Gas rate case that was just recently resolved by this Commission."²¹ Staff Counsel echoed Liberty's point that the OPC's approval of a stipulation in the Mid-States Gas case presumably bounds the OPC today.²² An appeal to past actions may be persuasive in some instances, but in others may amount to nothing more than fiddling on the roof in praise of tradition for tradition's sake. The latter is the case here.

The Commission need not be bound by past actions, and is free to make rulings that correct past oversights. To bind the Commission's considerations to prior approved stipulations ironically violates the provisions of the Mid-States Gas stipulation providing 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" and that nothing in the Stipulation shall "limit Staff's access to information in other proceedings," including capital structure.²³ Furthermore, Liberty and Staff's citation to the Mid-States Gas rate case forgets that the aforementioned Unanimous Stipulation actually *does* contain a capital structure for the company's infrastructure system replacement surcharge.²⁴

²¹ *Transcript of Proceedings Evidentiary Hearing*, Case No. WR-2018-0170 p. 44-45 (Aug. 16, 2018).

²² *Transcript of Proceedings Evidentiary Hearing*, Case No. WR-2018-0170 p. 52 (Aug. 16, 2018).

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

²⁴ *Id.* ("The Parties agree that for any ISRS established for changed between the effective date of new rates in this proceeding and the effective date of new rates in the Company's next general rate case proceeding, a return on equity of 9.8%, a long term debt cost of 4.7%, and a capital structure of 53% equity and 47% debt, shall be used to calculate the revenue requirement sought in the ISRS filing").

Despite the oversight of actually and explicitly agreeing to capital structures in the past, Staff “views that its capital structure is the appropriate one and is what’s in [the Non-unanimous Stipulation].”²⁵ The OPC is pleased to hear that Staff views that the Stipulation contemplates their capital structure, but is simultaneously troubled by Staff Counsel’s admission that “Liberty may disagree.”²⁶ If there is a disagreement not addressed by the Stipulation then it should have been perfectly disclosed within the Stipulation’s “Remaining Issues for Determination” section.²⁷ However, Staff witness David Murray confirmed that the Stipulation “remains silent” as to capital structure.²⁸

The OPC is thus left wondering what the truth about the capital structure is because Staff is being inconsistent. Staff counsel claims the Stipulation encompasses a capital structure, but Staff witnesses then contradict counsel. The Stipulation purports that only rate case expense is in dispute, but Staff counsel admits that Liberty may still disagree about the capital structure, despite supposedly being in agreement with Staff enough to sign onto a stipulation. It was in an effort to avoid this confusion that the OPC first offered the suggestion that a capital structure should be added to the Stipulation.

The idea that the capital structure is otherwise covered by the Stipulation because the other elements of rate design are disclosed is also inadequate. Chairman Daniel Hall pointedly addressed capital structure during the evidentiary hearing and asked “isn’t it relatively easy to determine what the capital structure would be if you have the revenue requirement, the cost of debt and the return on equity?”²⁹ The Chairman is literally correct that if one is given a formula of $x(y) = z$, along

²⁵ *Transcript of Proceedings Evidentiary Hearing*, Case No. WR-2018-0170 p. 52 (Aug. 16, 2018).

²⁶ *Id.* at 53.

²⁷ *See Non-Unanimous Stipulation and Agreement*, Case No. WR-2018-0170 (Aug. 3, 2018) (Noting that only “rate case expense, as part of the revenue requirement, is not resolved between the Signatories”).

²⁸ *Transcript of Proceedings Evidentiary Hearing*, Case No. WR-2018-0170 p. 110 (Aug. 16, 2018).

²⁹ *Id.* at 79.

with the numbers for y and z, then the calculation of x is matter of simple algebra. However, public utility rate setting is not a matter of basic arithmetic, and the OPC offers that the average customer cannot be expected to undergo advanced rate setting calculations. Public utility investors may have more sophistication, but they nonetheless probably lack the engineering and accounting training employed by parties in this case. Furthermore, if capital structure calculation is indeed relatively easy, then there should be no issue or complaint with overtly addressing capital structure in the Stipulation, and there would be no grounds for Liberty to disagree on capital structure contrary to Staff counsel.

Furthermore, Staff's expert witness disagrees with the idea the capital structure may be easily calculated. When Silverleaf's counsel asked Murray if the capital structure could be calculated using the ROE and revenue requirement, Murray replied that it could only be done with Staff's revenue requirement.³⁰ When pressed again by Silverleaf's counsel if capital structure could be obtained with a known ROE and revenue requirement, Murray responded, "I disagree."³¹

The idea that capital structure need not be addressed so long as it can be deduced with other known rate design variables would also be unacceptable when applied to other public utility practices such as customer billing. Silverleaf's witness William Stannard, speaking on behalf of Liberty's largest water customer, stated quite positively that Silverleaf would not accept a bill for water commodities that simply stated what it owed Liberty with no description of how much water was supposedly used.³² Using one's bill statement and a utility tariff, it is technically true that anyone could then calculate their utility usage with the simple $x(y) = z$ formula, and Silverleaf is certainly sophisticated enough to do so. However, the Commission does not allow such billing

³⁰ *Id.* at 111.

³¹ *Id.*

³² *Id.* at 267-69.

practices because it lacks transparency, leaving customers to employ advanced calculations simply to audit their own bills. The Commission should apply the same consideration to capital structure.

WHEREFORE, the OPC does not object to the Stipulation and Agreement agreed to by Staff and Liberty, but offers that the capital structure be explicitly provided therein for the sake of transparency.

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**

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 31st day of August, 2018, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall