



CIVIL PROCEDURE FORM NO. 8-A(2)

IN THE \_\_\_\_\_ JUDICIAL CIRCUIT, \_\_\_\_\_ COUNTY, MISSOURI

FILED

FEB 07 2019

Missouri Public Service Commission 12:33pm MA

Judge or Division:	Mo. P.S.C. Case Number: WR-2018-0170 and SR-2018-0171		
Plaintiff/Petitioner: Orange Lake Country Club, Inc. and Silverleaf Resorts, Inc.	Appellate Number:	<input type="checkbox"/> Filing as an Indigent	Court Reporter:
	Date of Judgment/Decree/Order: (ATTACH A COPY) 1/9/2019	Date Post Trial Motion Filed: 11/2/2018	
vs.	Date Ruled Upon: 1/9/2019	<input type="checkbox"/> Sound Recording Equipment	The Record on Appeal will consist of: ___ Legal File only or <input checked="" type="checkbox"/> Legal File and Transcript
Defendant/Respondent: Missouri Public Service Commission			

(Date File Stamp)

Notice of Appeal to Missouri Court of Appeals - Civil

District:  Western  Eastern  Southern

Notice is given that Orange Lake Country Club, Inc. and Silverleaf Resorts, Inc. appeals from the judgment/decree/order entered in this action on January 9, 2019 (date).

Appellant's Name (If multiple, list all or attach additional pages) Orange Lake Country Club, Inc.	Respondent's Name (If multiple, list all or attach additional pages) Missouri Public Service Commission
Address 8505 W. Irlo Bronson Memorial Hwy Kissimmee, FL 34747	Address 200 Madison Street P.O. Box 360 Jefferson City, MO 65102
Appellant's Attorney/Bar Number (If multiple, list all or attach additional pages) Joshua Harden MO # 57941	Respondent's Attorney/Bar Number (If multiple, list all or attach additional pages) Mark Johnson Staff Counsel
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Telephone 816-691-3249	Telephone 573-751-2690
Brief Description of Case (May be completed on a separate page) In the Matter of Application for a Rate Increase Request for Liberty Utilities (Missouri Water), LLC d/b/a Liberty Utilities pursuant to 4 CSR 240-3.050.	
Issues Expected To Be Raised On Appeal (May be completed on a separate page. Appellant is not bound by this list.) See attached.	
Signature of Attorney or Appellant 	Date 2/7/2019

**Certificate of Service on Persons other than Registered Users of the Missouri eFiling System**

I certify that on 2/7/2019 (date), a copy of the foregoing was sent to the following by facsimile, hand-delivery, electronic mail or U.S. mail postage prepaid to their last known addresses.

Mark Johnson at mark.johnson@psc.mo.gov; Staff Counsel at staffcounsel@psc.mo.gov; Marc Poston at opcservice@ded.mo.gov; Paul A. Boudreau at PaulB@brydonlaw.com; Dean L. Cooper at dcooper@brydonlaw.com; Sarah E. Giboney at giboney@smithlewis.com



Appellant or Attorney for Appellant

**Directions to Clerk**

Transmit a copy of the notice of appeal and all attached documents to the clerk of the Court of Appeals and to any person other than registered users of the eFiling system in a manner prescribed by Rule 43.01. Clerk shall then fill in the memorandum below. See Rule 81.08(i). Forward the docket fee to the Department of Revenue as required by statute.

**Memorandum of the Clerk**

I have this day served a copy of this notice by  regular mail  registered mail  certified mail  facsimile transmission to each of the following persons at the address stated below. If served by facsimile, include the time and date of transmission and the telephone number to which the document was transmitted.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I have transmitted a copy of the notice of appeal to the clerk of the Court of Appeals, Western District.

Docket fee in the amount of \$70.00 was received by this clerk on 2/7/19 (date) which will be disbursed as required by statute.

No docket fee was received because:

a docket fee is not required by law under \_\_\_\_\_ (cite specific statute or other authority).

a motion to prosecute the appeal in forma pauperis was received on \_\_\_\_\_ (date) and was granted on \_\_\_\_\_ (date).

2/7/19  
Date

Melina Anderson  
Clerk

### Additional Parties and Attorneys

List every party involved in the case not listed on page 1, indicate the position of the party in the circuit court (e.g. plaintiff, defendant, intervenor) and in the Court of Appeals (e.g. appellant or respondent) and the name of the attorney of record, if any, for each party. Attach additional pages to identify all parties and attorneys if necessary.

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*Issues Expected To Be Raised On Appeal:*

- 1) The Appellants challenge the statutory authority of the Public Service Commission (PSC) to authorize a regulated public utility to initiate a rate case without the filing of a tariff or rate schedule;
- 2) The Appellants challenge the PSC's decision finding Liberty Utilities (Missouri Water) to be an eligible small water and sewer company under the PSC's Small Utility Rate Case Procedure;
- 3) The Appellants challenge the PSC's order striking portions of Appellants' expert rebuttal testimony and finding that all of Staff's work-product and analysis constituted privileged settlement communications; and
- 4) The Appellants challenge the PSC's order allowing the testimony of Liberty Utilities (Missouri Water's) expert testimony despite Liberty Utilities' failure to disclose the expert witness which violated the PSC's own discovery rules and prejudiced the Appellants.

## **RSMo. §386.510 STATEMENT OF THE ISSUES**

Liberty Utilities (Missouri Water), LLC sent a letter to the Public Service Commission (PSC) asking to increase its water and sewer rates under 4 CSR 240-3.050, the Small Utility Rate Case Procedure (SURP). This rate request "letter" initiated a rate case. The PSC granted intervention to the Appellants, Orange Lake Country Club, Inc. and Silverleaf Resorts, Inc. who asked the PSC to either dismiss or order Liberty Utilities to file a Tariff Pursuant to Section 393.140(11)". The Appellants argued, inter alia, that under Missouri law a regulated public utility could only request a rate increase by filing a tariff (or "rate schedule" under the statutory language). The Appellants also argued that even under the unlawful process established by 4 CSR 240-3.050, Liberty Utilities was not eligible to use the SURP in that it had more than 8,000 "customers" as the word "customer" is defined in Liberty Utilities tariff and in PSC regulation, 4 CSR 240-3.010(7). The PSC denied the Appellants' motion to dismiss and did not order Liberty Utilities to file a tariff. Liberty Utilities did not file a tariff through the course of the rate case, even though the tariff itself was a contested issue, until it was ordered to file "compliance tariffs" in conformity with the PSC's final Report and Order.

Another issue is that the PSC granted Staff's motion to strike portions of Appellants' expert's rebuttal testimony while refusing to strike Liberty Utilities' expert's testimony. The decision to strike portions of the Appellate expert's testimony was based on an overly broad application of the settlement communication privilege. The failure to strike Liberty Utilities' expert testimony violated the PSC's own discovery rules and prejudiced the Appellants who were unable to conduct discovery on the expert witness because of Liberty Utilities failure to disclose the expert witness until the last day of discovery.



**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 d/b/a Liberty Utilities )

File No. WR-2018-0170

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**REPORT AND ORDER**

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**Issue Date:** October 24, 2018

**Effective Date:** November 3, 2018

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

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

**REPORT AND ORDER**

**APPEARANCES**

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**OZARK MOUNTAIN CONDOMINIUM ASSOCIATION:**

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**REGULATORY LAW JUDGE:**     John T. Clark



## I. Procedural History

### A. Case Filing and Consolidation

Liberty Utilities (Missouri Water), LLC d/b/a Liberty Utilities (“Liberty Utilities” or “Liberty”) provides water service to approximately 1,954 connections in Cape Girardeau, Franklin, Jefferson, McDonald, Stone and Taney Counties in Missouri.<sup>1</sup> Liberty Utilities provides sewer service to approximately 416 connections in Cape Girardeau, Franklin, Jefferson, Stone and Taney Counties in Missouri.<sup>2</sup> Liberty Utilities is a public utility,<sup>3</sup> and water corporation,<sup>4</sup> and a sewer corporation,<sup>5</sup> and a regulated utility under the Missouri Public Service Commission’s jurisdiction

On December 15, 2017, Liberty Utilities filed a letter with the Missouri Public Service Commission (“Commission”) requesting that the Commission approve increases in its annual water and sewer operating revenues, which resulted in the Commission opening two cases, File Nos. WR-2018-0170 and SR-2018-0171. Liberty Utilities requested an increase of \$995,844 in its annual water system operating revenues and an increase of \$196,617 in its annual sewer system operating revenues.<sup>6</sup> The case was initiated under Commission Rule 4 CSR 240-3.050, Small Utility Rate Case Procedure, which describes the procedures by which small utilities, such as Liberty Utilities, may request increases in their overall annual operating revenues. This rule, while now rescinded and replaced with Commission Rule 4 CSR 240-10.75

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<sup>1</sup> Exhibit No. 1, Schwartz Direct, Page 3.

<sup>2</sup> Exhibit No. 105, Harrison Direct, Schedule PRH-d2, Page 1.

<sup>3</sup> Section 386.020(43).

<sup>4</sup> Section 386.020(59).

<sup>5</sup> Section 386.020(49).

<sup>6</sup> EFIS No. 1, Request for Increase

(effective starting May 30, 2018), was effective when Liberty Utilities requested an increase and was used in this case. Under the Small Utility Rate Case Procedure a water or sewer company serving 8,000 or fewer customers may initiate a rate case by filing a letter requesting an increase with the secretary of the Commission.

On January 13, 2018, Liberty Utilities filed a *Motion to Consolidate*, which requested that the Commission consolidate the two cases because they involved related questions of law and fact under Commission Rule 4 CSR 240-2.110(3). The Commission granted the motion, consolidating both cases under File No. WR-2018-0170.<sup>7</sup>

#### **B. Intervention**

Orange Lake Country Club, Inc. and Silverleaf Resorts, Inc. (collectively “Silverleaf”) and Ozark Mountain Condominium Association (“OMCA”) filed motions to intervene pursuant to Commission Rule 4 CSR 240-2.075. Both Silverleaf and OMCA were granted intervention.<sup>8</sup>

#### **C. The Partial Disposition Agreement**

On May 24, 2018, the Staff of the Missouri Public Service Commission (“Staff”), filed a *Partial Disposition Agreement and Request for Evidentiary Hearing* (“Partial Disposition Agreement”). Staff, Liberty, and the Office of the Public Counsel (“OPC”) reached agreement on some of the issues related to Liberty Utilities’ rate increase request. The Partial Disposition Agreement was a partial resolution of Liberty Utilities water and sewer rate requests but left unresolved certain other issues for determination

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<sup>7</sup> EFIS No. 7, Order Consolidating Cases.

<sup>8</sup> EFIS Nos. 8 and 12, Order Granting Applications to Intervene.

after an evidentiary hearing. The Partial Disposition Agreement states that the unresolved issues include: “(a) revenue requirement, (b) return on equity, (c) capital structure, (d) rate base, (e) rate case expense, (f) rate design and rate consolidation, and (g) compliance with § 393.140(4) RSMo, 4 CSR 240-50.030(1) and 4 CSR 204-61.020(1), the use of The Uniform System of Accounts.” Among the issues resolved in the Partial Disposition Agreement were some customer service issues, and depreciation issues. No objections to the Partial Disposition Agreement were received and the Commission finds reasonable and adopts the resolution of the issues contained therein.

#### **D. Local Public Hearings**

The Commission conducted local public hearings in Pineville and Branson Missouri on July 23, 2018, and in Pacific Missouri on July 25, 2018. At the conclusion of the local public hearings, the Commission had received the sworn testimony of nine witnesses, and admitted two exhibits onto the record. All of the parties were given the opportunity to cross-examine the witnesses.

#### **E. The Non-Unanimous Stipulation and Agreement**

On August 3, 2018, Liberty Utilities and Staff filed a *Non-Unanimous Stipulation and Agreement*.<sup>9</sup> The agreement resolved most of the remaining issues between Liberty and Staff including revenue requirement, return on equity, and rate design. It left unresolved rate case expense and certain customer service issues.

Commission Rule 4 CSR 240-2.115(2) allows a party seven days from the filing of a non-unanimous stipulation and agreement to file an objection to it. Any party failing to file a timely objection waives its right to a hearing. Additionally if no party timely

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<sup>9</sup> EFIS No. 72, Non-Unanimous Stipulation and Agreement.

objects, the Commission may treat the non-unanimous stipulation and agreement as unanimous. Objections to the *Non-Unanimous Stipulation and Agreement* were due by August 10, 2018.

On August 13, 2018, Staff filed a *Notice of no Objections to Non-unanimous Stipulation and Agreement, Request to Modify Hearing Schedule, and Motion for Expedited Treatment*.<sup>10</sup> Staff asked to modify the evidentiary hearing schedule to include only three issues: rate case expense, customer service issues, and adoption of the stipulation and agreement.

On August 13, 2018, OPC filed a response to Staff's notice of no objections, and later a clarification, stating that it did not oppose but does not support the *Non-Unanimous Stipulation and Agreement*. OPC did not oppose the overall revenue requirement, but was concerned that the information in the stipulation was incomplete, in that it contained a stated return on equity without an associated capital structure.

Also on August 13, 2018, Silverleaf filed a response to Staff's notice of no objections, stating that it did not support the return on equity or the lack of a capital structure, and therefore did not support the stipulation and agreement. It did not, however, specifically object to the *Non-Unanimous Stipulation and Agreement*.

Also on August 13, 2018, OMCA filed its *Objection to Non-Unanimous Stipulation and Agreement and Request for Leave to Late file Same*, stating that the public interest would be better served by deciding the case after a hearing on the merits.

Liberty Utilities filed objections to OMCA's request and a motion to strike OPC's response. The motion to strike OPC's response is denied.

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<sup>10</sup> EFIS No. 90, Notice of No Objections to Non-Unanimous Stipulation and Agreement, Request to Modify Procedural Schedule, and Motion for Expedited Treatment.

No party objected within seven days; therefore, no party timely objected to the Non-Unanimous Stipulation and Agreement. Nevertheless, the Commission agrees that given the late objections to the *Non-Unanimous Stipulation and Agreement* by multiple interveners and the concerns of OPC, the public interest would be best served by issuing a decision on the merits. The Commission is treating the *Non-Unanimous Stipulation and Agreement* as non-unanimous.

At the evidentiary hearing on August 16, 2018, objections and arguments regarding the *Non-Unanimous Stipulation and Agreement* were taken under advisement. Counsel for Liberty Utilities indicated that he was operating under the assumption that the *Non-Unanimous Stipulation and Agreement* was a joint recommendation of the signatories,<sup>11</sup> and counsel for Staff indicated that Staff viewed it a joint position statement of Staff and the company.<sup>12</sup> Accordingly, the Commission is treating the *Non-Unanimous Stipulation and Agreement* as the position statement of both Staff and Liberty Utilities

#### **F. Test Year**

The test year is a central component in the ratemaking process. Rates are usually established based upon a historical test year, which focuses on four factors: (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses.<sup>13</sup> From these four factors is calculated the “revenue requirement,” which is the amount of revenue ratepayers must generate to pay the

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<sup>11</sup> Transcript, Page 44.

<sup>12</sup> Transcript, Page 51.

<sup>13</sup> *State ex rel. Union Electric Company v. Public Service Comm'n*, 765 S.W.2d 618, 622 (Mo. App. 1988).

costs of producing the utility service they receive while yielding a reasonable rate of return to the investors.<sup>14</sup> A historical test year is used because the past expenses of a utility can be used as a basis for determining what rate is reasonable to be charged in the future.<sup>15</sup> Staff used a test year of the twelve months ending June 30 2017, with an update period through November 30, 2017, to annualize the available revenue and expense information and develop its revenue requirement recommendation.<sup>16</sup>

**G. Motion to Strike Testimony of Keith Magee**

On August 8, 2018, Counsel for Silverleaf filed a *Motion to Strike the Surrebutal Testimony of Keith Magee and Motion for Expedited Treatment*.<sup>17</sup>

On August 9, 2018, Liberty Utilities filed its *Response of Liberty Utilities to Motion to Strike the Surrebutal Testimony of Keith Magee*.<sup>18</sup> Liberty observes that Keith Magee's testimony is responsive to other witnesses, and no rule prohibits the filing of surrebutal testimony by a witness that has not filed either direct or rebuttal testimony. Liberty states that Silverleaf filed no direct testimony, and only after Silverleaf filed rebuttal testimony was Liberty aware that a witness regarding the particular subject matter would be necessary. Additionally, Keith Magee's testimony from a Liberty Utilities gas rate case, GR-2018-0013, was attached to the filed direct testimony of Jill Schwartz.

On August 9, 2018, the Commission issued its *Order Denying Motion for*

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<sup>14</sup> *State ex rel. Capital City Water Co. v. Public Service Comm'n*, 850 S.W.2d 903, 916 n. 1 (Mo. App. 1993).

<sup>15</sup> See, *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Comm'n*, 585 S.W.2d 41, 59 (Mo. Banc 1979).

<sup>16</sup> Exhibit No. 105, Harrison Direct, Page 4.

<sup>17</sup> EFIS No. 82, Motion to Strike the Surrebutal Testimony of Keith Magee and Motion for Expedited Treatment

<sup>18</sup> EFIS No. 83, Response of Liberty Utilities to Motion to Strike the Surrebutal Testimony of Keith Magee

*Expedited Treatment*, indicating the Commission would consider Silverleaf's motion in its report and order.<sup>19</sup>

Liberty Utilities complied with the Commission's discovery deadline. Silverleaf had notice of Keith Magee as a potential witness, and also the content of his testimony, from Jill Schwartz's direct testimony and the accompanying Keith Magee direct testimony from GR-2018-0013. Silverleaf's motion to strike Keith Magee's surrebuttal testimony is denied.

#### **H. Evidentiary Hearing**

The evidentiary hearing was held at the Commission's offices in Jefferson City, Missouri on August 16, 2018.<sup>20</sup> All parties (Liberty Utilities, Staff, OPC, Silverleaf, and OMCA) participated.<sup>21</sup> During the hearing, the parties presented evidence relating to the unresolved issues previously identified by the parties. Those issues are: the revenue requirement including return on equity, capital structure, and rate case expense; Rate design including phase-in rates, customer charge, and commodity charge; the Silverleaf exemption; and customer service issues.<sup>22</sup> The Commission admitted the testimony of twelve witnesses and received twenty-seven exhibits into evidence.

#### **I. Case Submission**

Post-hearing briefs were filed according to the post-hearing procedural schedule. The final post-hearing briefs were filed on September 11, 2018. Several of the parties offered testimony at the evidentiary hearing regarding the *Non-Unanimous Stipulation*

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<sup>19</sup> EFIS No. 84, Order Denying Motion for Expedited Treatment

<sup>20</sup> Transcript Volume 5.

<sup>21</sup> Transcript, Page 26.

<sup>22</sup> EFIS No. 86, List of Issues, Order of Witnesses, Order of Cross-Examination and Order of Opening Statements.



*and Agreement*. To better assist the Commission in making its decision, the Commission admitted the *Non-Unanimous Stipulation and Agreement* and its attachments onto the record as Commission Exhibit No. 1. The case was deemed submitted for the Commission's decision on September 25, 2018.<sup>23</sup>

## II. General Matters

### A. General Findings of Fact

1. Liberty Utilities which holds the water and sewer utility assets, is a subsidiary of Liberty Utilities Company ("LUCo"), an intermediate holding company, which is an indirect wholly owned subsidiary of Algonquin Power & Utilities Corp.<sup>24</sup> Liberty Utilities provides water service in Cape Girardeau, Franklin, Jefferson, McDonald, Stone and Taney Counties in Missouri. Liberty Utilities provides sewer service in Cape Girardeau, Franklin, Jefferson, Stone and Taney Counties in Missouri.<sup>25</sup>

2. Liberty Utilities currently provides service to approximately 1,954 water customers and approximately 416 sewer customers in 14 certificated service areas with 11 different sets of tariffed rates.<sup>26</sup>

3. The Office of the Public Counsel is a party to this case pursuant to Section 386.710(2), RSMo<sup>27</sup> and Commission Rule 4 CSR 240-2.010(10).

4. Staff is a party to this case pursuant to Section 386.071, RSMo, and Commission Rule 4 CSR 240-2.010(10).

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<sup>23</sup> "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

<sup>24</sup> Exhibit No. 4, Magee Surrebuttal, Pages 1, 7-8.

<sup>25</sup> Exhibit No. 1, Schwartz Direct, Page 3

<sup>26</sup> Exhibit No. 105 – Direct Testimony of Paul Harrison, Schedule PRH-d2, Page 1.

<sup>27</sup> Unless otherwise stated, all statutory citations are to the Revised Statutes of Missouri, as codified in the year 2016 and subsequently revised or supplemented.

5. Liberty Utilities' KMB water systems include seven systems: Cedar Hills, Crestview, High Ridge Manor, Hillshine Community, Lakeview Hills, Town of Scotsdale, and Warren Woods. Each of these systems has its own tariffed rates for water service. Liberty Utilities' KMB sewer system includes Cape Rock Village, which has its own sewer tariffed rates.<sup>28</sup>

6. Liberty Utilities' Silverleaf water systems include Holiday Hills, Ozark Mountain, and TimberCreek. All three Silverleaf water systems have the same water tariffed rate. Liberty Utilities' Silverleaf sewer systems include Ozark Mountain and Timber Creek. Both of these sewer systems are under one sewer tariffed rate.<sup>29</sup>

7. Liberty Utilities' Noel water system has its own tariffed rates for the water services it provides to its customers.<sup>30</sup>

8. The Commission last approved a rate increase for Liberty Utilities' KMB properties in File Nos. WR-2010-0345 and SR-2010-0346, effective February 1, 2011. The Commission last approved a rate increase for Liberty Utilities' Silverleaf properties in File Nos. WR-2006-0425 and SR-2006-0426, effective April 2, 2007. The Commission last approved a rate increase for Liberty Utilities' Noel properties in File No. WR-2009-0395, effective November 12, 2009.<sup>31</sup>

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<sup>28</sup> Exhibit No. 105, Harrison Direct, Schedule PRH-d2, Page 1.

<sup>29</sup> Exhibit No. 105, Harrison Direct, Schedule PRH-d2, Page 1.

<sup>30</sup> Exhibit No. 105, Harrison Direct, Schedule PRH-d2, Page 1.

<sup>31</sup> Exhibit No. 105, Harrison Direct, Schedule PRH-d2, Page 1.

9. In its original rate request letter, Liberty Utilities requested an increase of \$995,844 in its annual water system operating revenues and an increase of \$196,617 in its annual sewer system operating revenues.<sup>32</sup>

10. Staff used a test year of the twelve months ending June 30 2017, with an update period through November 30, 2017, to annualize the available revenue and expense information and develop its revenue requirement recommendation.<sup>33</sup>

11. On May 24, 2018, Staff filed a *Partial Disposition Agreement and Request for Evidentiary Hearing* on behalf of itself, Liberty Utilities, and OPC. The agreement was a partial resolution of Liberty Utilities' water and sewer rate requests but left unresolved certain other issues for which the signatories requested an evidentiary hearing. The agreement is attached hereto as Attachment A and incorporated herein by reference as if fully set forth.

12. The Commission finds that any given witness' qualifications and overall credibility are not dispositive as to each and every portion of that witness' testimony. The Commission gives each item or portion of a witness' testimony individual weight based upon the detail, depth, knowledge, expertise, and credibility demonstrated with regard to that specific testimony. Consequently, the Commission will make additional specific weight and credibility decisions throughout this order as to specific items of testimony as is necessary.<sup>34</sup>

13. Any finding of fact reflecting that the Commission has made a

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<sup>32</sup> EFIS No. 1, Request for Increase.

<sup>33</sup> Exhibit No. 105, Harrison Direct, Page 4.

<sup>34</sup> Witness credibility is solely a matter for the fact-finder, "which is free to believe none, part, or all of the testimony". *State ex rel. Public Counsel v. Missouri Public Service Comm'n*, 289 S.W.3d 240, 247 (Mo. App. 2009).

determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.<sup>35</sup>

## **B. General Conclusions of Law**

1. Liberty Utilities is a “water corporation”, a “sewer corporation”, and a “public utility” as defined in Sections 386.020(59), 386.020(49), and 386.020(43), RSMo, respectively, and as such is subject to the supervision, control and regulation of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes. The Commission’s statutory authority over Liberty Utilities’ rate increase request is established under Section 393.150, RSMo.

2. The Commission has exclusive authority to establish public utility rates,<sup>36</sup> and the tariffs it approves have the force and effect of law when they become effective.<sup>37</sup> A public utility has no right to fix its own rates and cannot charge or collect rates that have not been approved by the Commission;<sup>38</sup> neither can a public utility change its rates without first seeking authority from the Commission.<sup>39</sup> A public utility may submit rate schedules or “tariffs,” and thereby suggest to the Commission rates and classifications which it believes are just and reasonable, but the final decision is the Commission’s.<sup>40</sup>

3. Sections 393.130 and 393.140, RSMo, mandate that the Commission

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<sup>35</sup> An administrative agency, as fact finder, also receives deference when choosing between conflicting evidence. *State ex rel. Missouri Office of Public Counsel v. Public Service Comm’n of State*, 293 S.W.3d 63, 80 (Mo. App. 2009).

<sup>36</sup> *May Dept Stores Co. v. Union E.L.P. Co.*, *supra*, 107 S.W.2d 41 57 (Mo. 1937)

<sup>37</sup> *State Ex Rel. Utility Consumers Council v. Pub. Serv. Comm’n*, *supra*, 585 S.W.2d 41 49 (Mo. 1979).

<sup>38</sup> *State Ex Rel. Utility Consumers Council v. Pub. Serv. Comm’n*, *supra*, 585 S.W.2d 41 49 (Mo. 1979).

<sup>39</sup> *Deaconess Manor Ass’n v. Pub. Serv. Comm’n*, 994 S.W.2d 602, 610 (Mo. App., W.D. 1999).

<sup>40</sup> *May Dept Stores Co. v. Union E.L.P. Co.*, *supra*, 107 S.W.2d 41 50 (Mo. 1937)

ensure that all utilities are providing safe and adequate service and that all rates set by the Commission are just and reasonable. Section 393.150.2, RSMo, makes clear that at any hearing involving a requested rate increase, the burden of proof to show the proposed increase is just and reasonable rests on the corporation seeking the rate increase. As the party requesting the rate increase, Liberty Utilities bears the burden of proving that its proposed rate increase is just and reasonable.<sup>41</sup> In order to carry its burden of proof, Liberty Utilities must meet the preponderance of the evidence standard.<sup>42</sup>

4. In determining whether the rates proposed by Liberty are just and reasonable, the Commission must balance the interests of the investor and the consumer.<sup>43</sup> In discussing the need for a regulatory body to institute just and reasonable rates, the United States Supreme Court has held as follows:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.<sup>44</sup>

In the same case, the Supreme Court provided the following guidance on what is a just and reasonable rate:

What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the

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<sup>41</sup> 393.150.2, RSMo

<sup>42</sup> *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996), citing to, *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979).

<sup>43</sup> *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603, (1944).

<sup>44</sup> *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 690 (1923).

property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.<sup>45</sup>

The Supreme Court has further indicated:

‘[R]egulation does not insure that the business shall produce net revenues.’ But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.<sup>46</sup>

In undertaking the balancing required by the Constitution, the Commission is not bound to apply any particular formula or combination of formulas. Instead, the Supreme Court has said:

Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.<sup>47</sup>

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<sup>45</sup> *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 692-93 (1923).

<sup>46</sup> *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (citations omitted).

<sup>47</sup> *Federal Power Commission v. Natural Gas Pipeline Co.* 315 U.S. 575, 586 (1942).

Furthermore, in quoting the United States Supreme Court in *Federal Power Commission v. Hope Natural Gas Co.*, the Missouri Court of Appeals said:

[T]he Commission [is] not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' ... Under the statutory standard of 'just and reasonable' it is the result reached, not the method employed which is controlling. It is not theory but the impact of the rate order which counts.<sup>48</sup>

### III. The Issues

#### A. Revenue Requirement

- ***What is the revenue requirement for Liberty Utilities water and sewer services?***

The Commission is tasked with determining the revenue requirement for Liberty Utilities. The revenue requirement is how much it costs Liberty Utilities, in operating expenses ("expenses") and for a return on its capital assets ("rate base"), to provide safe and adequate service, and includes a return sufficient to service debt and equity and continue attracting capital.<sup>49</sup> Liberty Utilities has requested an increase in rates to compensate it for necessary investments made in its systems and to address increases in operation and maintenance expenses that have increased since the company's last rate case.

#### **Findings of Fact:**

1. On December 15, 2017, Liberty Utilities filed a request for an increase of \$995,844 in annual water system operating revenues, and \$196,617 in annual sewer

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<sup>48</sup> *State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 706 S.W. 2d 870, 873 (Mo. App. W.D. 1985).

<sup>49</sup> *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944).



system operating revenues.<sup>50</sup> These requests totaled a combined increase of \$1,192,461. Liberty Utilities presented no evidence in its case in chief that substantiated those particular increase amounts.

2. Staff changed its recommended revenue requirement for the company several times during the course of the case. Staff's initial recommended revenue requirement was \$810,886 for water operations and \$179,323 for sewer operations.<sup>51</sup> These totaled a combined increase of \$990,209. Staff filed accounting schedules in support of this specific increase.<sup>52</sup>

3. On July 20, 2018, Staff updated its revenue increase recommendation from \$990,209 to \$978,569, to reconcile a difference in the amount of contribution in aid of construction rate base that the company was including in its cost of service.<sup>53</sup>

4. Staff again updated the revenue requirement recommendation on August 7, 2018, to reflect rate case expense incurred as of April 2018 from \$978,569 to \$984,581.<sup>54</sup>

5. Liberty Utilities did not keep the KMB operating books separate for the seven KMB systems. In order to determine the cost of service revenue requirement for the seven KMB systems Staff had to develop an allocation process to separate the seven systems.<sup>55</sup>

6. Liberty Utilities has made significant improvements in the system since the last Liberty Utilities water and sewer rate cases. Liberty has invested approximately

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<sup>50</sup> Exhibit No. 1, Schwartz Direct, Page 4.

<sup>51</sup> Exhibit No. 105, Harrison Direct, Page 5.

<sup>52</sup> Exhibit No. 105, Harrison Direct, Schedule PRH-d3.

<sup>53</sup> Exhibit No. 106, Harrison Rebuttal, Page 2.

<sup>54</sup> Exhibit No. 107, Harrison Surrebuttal, Page 2.

<sup>55</sup> Exhibit No. 105, Harrison Direct, Schedule PRH-d2, Pages 3-4.

\$1,952,614 for water improvements and \$621,830 for sewer improvements.<sup>56</sup> No party challenged the necessity of those improvements.

7. Liberty Utilities' operation and maintenance expenses have increased since its last rate case.<sup>57</sup>

8. James Busch is the Staff witness supporting the *Non-Unanimous Stipulation and Agreement*.<sup>58</sup>

9. The *Non-Unanimous Stipulation and Agreement* specifies, exclusive of rate case expense, that the annual revenue requirement increase for Liberty Utilities should be \$818,800 for water operations and \$196,792 for sewer operations.<sup>59</sup> These represent a total overall annual revenue requirement for Liberty Utilities' water system operations of \$1,690,117 and a total overall annual revenue requirement for Liberty Utilities' sewer system operations of \$455,163.

10. Silverleaf's witness, William Stannard, challenged the revenue requirements proposed by Staff due to an error he states would cause over-recovery. He also challenged Liberty Utilities' proposed revenue requirement for over-recovery based on commodity charges and meter size.<sup>60</sup>

11. Staff witness Matthew Barnes filed testimony indicating that the error Stannard discovered in Staff's rate design recommendation involved application of the

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<sup>56</sup> Exhibit No. 105, Harrison Direct, Pages 5-6, and Schedule PRH-d4.

<sup>57</sup> Exhibit No. 1, Schwartz Direct, Page 10.

<sup>58</sup> Exhibit No. 103, Busch Surrebuttal, Page 15.

<sup>59</sup> Commission Exhibit No. 1, Page 1.

<sup>60</sup> Exhibit No. 302, Stannard Refined Rebuttal, Pages 10-14.

wrong charge for the ¾ inch meter, which caused the commodity charges to be higher than appropriate. Barnes noted that the error has since been corrected.<sup>61</sup>

12. William Stannard noted that the *Non-unanimous Stipulation and Agreement* included a return on equity, but not a capital structure. Stannard is concerned because capital structure impacts the revenue requirement. Stannard states that if the Commission were to approve the 9.75 percent return on equity, it should be accompanied by a stated capital structure of 42.83 percent equity and 57.17 percent debt.<sup>62</sup>

13. The revenue requirement amounts contained in the *Non-Unanimous Stipulation and Agreement* are numerically supported by the billing determinates attached to it, including the Rate Making Income Statements that establish a cost of service for each tariffed area.<sup>63</sup>

14. No party other than Staff and Liberty Utilities has proposed a revenue requirement other than the one agreed to in Liberty Utilities' and Staff's position statement.

#### **Conclusions of Law and Decision:**

Sections 393.130 and 393.140, RSMo, mandate that utilities provide safe and adequate service and at rates set by the Commission that are just and reasonable. The United States Supreme Court advises that "the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests."<sup>64</sup> Furthermore, "Rates

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<sup>61</sup> Exhibit No. 101, Barnes Rebuttal, Page 2.

<sup>62</sup> Exhibit No. 302, Stannard Surrebuttal, Page 7.

<sup>63</sup> Commission Exhibit No. 1, Attachment A.

<sup>64</sup> *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603, 64 S.Ct. 281, 88 L.Ed. 333 (1944) (*Hope*).

which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory.”<sup>65</sup>

Liberty Utilities did not put forth sufficient evidence to sustain its burden that its originally requested increase of \$995,844 in annual water system operating revenues and \$196,617 in annual sewer revenues are just and reasonable. However, Liberty Utilities produced sufficient evidence to support that its requested rate increase of \$818,800 for water operations and \$196,782 for sewer operations in its joint position statement is just and reasonable. The standard of proof, as stated above in general conclusions of law, is preponderance of the evidence. The question before the commission is: balancing the interests of investors and ratepayers, is it more likely than not that the proposed increase of \$818,800 for water operations and \$196,782 for sewer operations will result in just and reasonable rates?

The Commission concludes that it is more likely than not that the increase will result in just and reasonable rates. Liberty Utilities has not come to the Commission for a rate increase for any of its water or sewer systems in more than seven years, and during that time, the ratepayers have enjoyed low rates that have not changed in more than half a decade. Silverleaf's rates have not changed in more than a decade. Meanwhile, Liberty Utilities has made necessary improvements to the system in excess of 2.5 million dollars. Additionally it has experienced higher costs of service with increasing operation and management expenses.

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<sup>65</sup> *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 690 (1923).

For the reasons discussed above, the Commission is ordering an annual revenue requirement for Liberty Utilities' water system operations of \$1,690,117 and an annual revenue requirement for Liberty Utilities' sewer system operations of \$455,163.

**1. Return on Equity**

- ***What is the appropriate return on equity for Liberty Utilities?***

The Commission must determine an appropriate return on equity for Liberty Utilities. Staff filed testimony with the Commission supporting a return on equity of 10 percent.<sup>66</sup> Liberty Utilities filed testimony with the Commission supporting a return on equity of 10.25 percent.<sup>67</sup> Silverleaf filed testimony supporting a return on equity within a range of 8 percent to 9 percent.<sup>68</sup>

Staff and Liberty Utilities later filed with the Commission the *Non-Unanimous Stipulation and Agreement* of which they were both signatories. As part of that agreement, which the Commission is treating as a joint position statement of the signatories, Staff and Liberty both support a return on equity of 9.75 percent.

**Findings of Fact:**

1. James Busch is the Staff witness supporting the *Non-Unanimous Stipulation and Agreement*.<sup>69</sup>
2. Liberty Utilities believes that the *Non-Unanimous Stipulation and Agreement* represents a reasonable compromise of all revenue requirement issues but

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<sup>66</sup> Exhibit No. 109, Murray Substitute Rebuttal, Page 3.

<sup>67</sup> Exhibit No. 4, Magee Surrebuttal, Page 3.

<sup>68</sup> Exhibit No. 302, Stannard Refiled Rebuttal, Page 10.

<sup>69</sup> Exhibit No. 103, Busch Surrebuttal, Page 15.

one.<sup>70</sup> A return on equity of 9.75 percent is one of the resolved revenue requirement issues in the *Non-Unanimous Stipulation and Agreement*.<sup>71</sup>

3. The Commission accepts that the proposed return on equity of 9.75 percent is just and reasonable. This return on equity is close to the return on equity proposals separately made by Staff and Liberty Utilities in their direct testimony.<sup>72</sup>

4. Staff witness David Murray filed testimony in support of a 10 percent return on equity which was derived by adding 20 basis points to Spire Missouri's most recent Commission approved return on equity of 9.8 percent. The reason for this adjustment was because Liberty Utilities capital structure is more leveraged than Spire Missouri's.<sup>73</sup> Staff quantified the recommended 20 basis point increase by evaluating spreads between 'BBB' rated bonds and 'A' rates bonds.<sup>74</sup> Staff does not explain why either the reason or quantification substantiates the addition of 20 basis points.

5. Silverleaf witness William Stannard filed testimony in support of a return on equity range of 8 percent to 9 percent. Stannard added the Duff & Phelps equity risk premium of 5 percent to the 2.97 percent 30-year treasury rate for a return on equity of 7.97 percent, which supports his proposed return on equity range.<sup>75</sup>

6. Staff finds Duff & Phelps to be an authoritative source for estimating cost of capital and relies on it for purposes of testing the reasonableness of Staff's cost of equity estimates.<sup>76</sup>

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<sup>70</sup> Exhibit No. 3, Schwartz Surrebuttal, Page 7.

<sup>71</sup> Commission Exhibit No. 1, Page 2, Cost of Service/Revenue Requirement, C. Return on Equity.

<sup>72</sup> Exhibit No. 105, Harrison Direct, Page 5, and Exhibit No. 1, Schwartz Direct, Page 6.

<sup>73</sup> Exhibit No. 110, Murray Surrebuttal, Page 3.

<sup>74</sup> Exhibit No. 110, Murray Surrebuttal, Page 3.

<sup>75</sup> Exhibit No. 302, Stannard Refiled Rebuttal, Pages 9-10.

<sup>76</sup> Exhibit No. 110, Murray Surrebuttal, Page 2.

7. David Murray credibly testified that William Stannard did not apply Duff & Phelps' risk premium as Duff & Phelps intended by not adjusting the equity risk premium to reflect that utility stocks are less volatile than the broader markets. Applying Duff & Phelps' risk premium correctly yields a return on equity of 7 percent.<sup>77</sup>

8. Staff does not use a 7 percent return on equity because David Murray used previous Commission decisions as guidance for a just and reasonable return on equity, giving the 9.8 percent return on equity in Spire Missouri's gas rate cases, GR-2017-0216 and GR-2017-0217, the most weight.<sup>78</sup>

9. Keith Magee credibly testified for Liberty that Duff & Phelps understates the risk premium authorized for gas utilities and that the risk factors between natural gas companies are similar.<sup>79</sup> Magee testified that the method used by William Stannard to calculate return on equity has consistently produced return on equity estimates more than 100 basis points below average authorized returns since 2012.<sup>80</sup>

10. Liberty Utilities proposes a 10.25 percent return on equity, within a range of 9.9 percent to 10.35 percent<sup>81</sup> Keith Magee used a proxy group of comparable companies to arrive at an appropriate return on equity range.<sup>82</sup>

11. In May 2018, the Commission approved a stipulation and agreement specifying a return on equity range of 9.5 percent to 10 percent for Missouri American Water Company.<sup>83</sup>

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<sup>77</sup> Exhibit No. 110, Murray Surrebuttal, Page 3.

<sup>78</sup> Exhibit No. 110, Murray Surrebuttal, Page 3.

<sup>79</sup> Transcript, Page 95.

<sup>80</sup> Exhibit No. 4, Magee Surrebuttal, Page 5.

<sup>81</sup> Exhibit No. 4, Magee Surrebuttal, Page 3.

<sup>82</sup> Exhibit No. 4, Magee Surrebuttal, Schedule KM-S13, Page 4.

<sup>83</sup> Exhibit No. 4, Magee Surrebuttal, Page 17.



12. Average authorized return on equity from January 2018 to June 2018 for Illinois, California, New Jersey, Missouri, and North Carolina encompass a return on equity range of 9.05 percent to 10.5 percent with an average return on equity of 9.69 percent.<sup>84</sup>

**Conclusions of Law and Decision:**

A disputed issue in this case is the estimated cost of common equity, or the return on equity. Estimating the cost of common equity capital is a difficult task, as academic commentators have recognized.<sup>85</sup> Determining a rate of return on equity is imprecise and involves balancing a utility's need to compensate investors against its need to keep prices low for consumers.<sup>86</sup> Accordingly, the Commission cannot simply find a rate of return on equity that is unquestionably scientifically, mathematically, or legally correct. Such a "correct" rate does not exist. Missouri court decisions recognize that the Commission has flexibility in fixing the rate of return, subject to existing economic conditions.<sup>87</sup>

Liberty Utilities has proposed the Commission authorize a return on equity of 10.25 percent, which is on the upper end of its proposed range of 9.9 percent to 10.35 percent. 10.25 percent is outside of the range of 9.5 percent to 10 percent recently approved by the Commission for a water utility. Liberty Utilities notes that the Commission authorized a return on equity of 12 percent for Indian Hills in February

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<sup>84</sup> Exhibit No. 4, Magee Surrebutal, Table 7: Average Authorized Water Utility Returns by State, Page 17.

<sup>85</sup> See Phillips, *The Regulation of Public Utilities*, Public Utilities Reports, Inc., p. 394 (1993).

<sup>86</sup> *State ex rel. Public Counsel v. Public Service Commission*, 274 S.W.3d 569, 574 (Mo. Ct. App. 2009).

<sup>87</sup> *State ex rel. Laclede Gas Co. v. Public Service Commission*, 535 S.W.2d 561, 570-571 (Mo. App. 1976).

2018.<sup>88</sup> However, Indian Hills was an extremely distressed water system with an extremely high cost of debt.

Silverleaf's proposed range of 8 percent to 9 percent starts outside the Commission's recently approved range of 9.5 percent to 10 percent. William Stannard calculated the return on equity using Duff & Phelps equity risk premium at 7.97 percent. David Murray credibly testified that Stannard miscalculated and that the correct return on equity using Duff & Phelps would be 7 percent. Keith Magee testified at the evidentiary hearing that Duff & Phelps underestimates the risk premium authorized for gas utilities.<sup>89</sup> Keith Magee also points out that Silverleaf's return on equity recommendation is based on a single model.

Staff's 10 percent return on equity, based upon the Commission's recently approved return on equity for Spire Missouri of 9.8 percent, seeks to add 20 basis points due to Liberty Utilities more leveraged capital structure. Staff states that the 20 basis point adjustment is quantified by evaluating the spreads between 'BBB' rated bonds, and 'A' rated bonds, but offers no explanation as to how that difference produces an additional 20 basis points. The Commission finds the addition of 20 basis points to the return on equity of 9.8 percent authorized for Spire Missouri to be unwarranted absent an explanation. The 9.8 percent return on equity recently authorized for Spire Missouri is not unreasonable and is within the range of 9.5 percent to 10 percent the Commission recently authorized for a water utility.

The evidence shows that both Liberty Utilities and Staff agree that an appropriate return on equity is 9.75 percent. 9.75 percent is within a range of 9.5

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<sup>88</sup> Exhibit No. 4, Magee Surrebuttal, Page 18.

<sup>89</sup> Transcript, Page 95.

percent to 10 percent that would be a reasonable and accurate estimate of the current market cost of capital for Liberty Utilities. Based on the competent and substantial evidence in the record and on its balancing of the interests of the company's ratepayers and shareholders, the Commission concludes that 9.75 percent is a fair and reasonable return on equity for Liberty Utilities.

## 2. Capital Structure

- *What is the appropriate capital structure to apply to Liberty Utilities?*

The Commission is tasked with determining the appropriate capital structure to apply to Liberty Utilities. Capital structure is expressed as a debt-to-equity ratio that indicates how a company finances its operations and provides an overview of a company's risk. Only two capital structures were presented by the parties: Liberty Utilities position is that the capital structure should consist of 53 percent common equity and 47 percent long term debt.<sup>90</sup> Staff's position is that Liberty Utilities' capital structure should consist of 42.83 percent common equity and 57.17 percent long term debt.<sup>91</sup> No alternative capital structures were proposed by any party.

### Findings of Fact:

1. Liberty Utilities proposes applying the same capital structure Liberty Utilities' witness Keith Magee recommended for Liberty Midstates in GR-2018-0013.<sup>92</sup>
2. A 53 percent equity and 47 percent debt capital structure was approved by the Commission as part of the settlement agreement in Liberty Midstates gas rate case

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<sup>90</sup> Exhibit No. 4, Magee Surrebuttal, Page 3,4.

<sup>91</sup> Exhibit No. 109, Murray Substitute Rebuttal, Page 3

<sup>92</sup> Exhibit No. 4, Magee Surrebuttal, Page 3, Liberty Midstates is an affiliated natural gas utility.

(GR-2018-0013) for the limited purpose of calculating an infrastructure investment surcharge.<sup>93</sup>

3. Liberty Utilities' witness Keith Magee's recommendation for capital structure is based on the mean equity ratio of several proxy gas companies with similar risk characteristics to Liberty Utilities, which he updated for this rate case to the eight quarters ending Q1 2018.<sup>94</sup>

4. Staff witness David Murray disagrees with Liberty Utilities' capital structure because it assumes that Liberty Utilities is capitalized with more equity than what Algonquin Power and Utilities Corp. considers appropriate for its low-risk regulated utility assets.<sup>95</sup>

5. David Murray also disagrees with Liberty Utilities capital structure recommendation because it is not consistent with its parent company, LUCo's corporate strategy of using a higher proportion of debt to finance its regulated utility assets.<sup>96</sup>

6. David Murray's recommendation for capital structure is based on the actual capital structure of LUCo as of December 31, 2017.<sup>97</sup>

7. LUCo is the intermediate holding company which supplies the debt financing for Algonquin's United States regulated utility assets, including Liberty Midstates and Liberty Utilities, through Liberty Utilities Finance GP1.<sup>98</sup>

8. Liberty Utilities issues no independent debt.<sup>99</sup>

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<sup>93</sup> Transcript, Page 100.

<sup>94</sup> Exhibit No. 4, Magee Surrebuttal, Pages 9-10.

<sup>95</sup> Exhibit No. 109, Murray Substitute Rebuttal, Page 3.

<sup>96</sup> Exhibit No. 109, Murray Substitute Rebuttal, Page 4.

<sup>97</sup> Exhibit No. 109, Murray Substitute Rebuttal, Page 2.

<sup>98</sup> Exhibit No. 109, Murray Substitute Rebuttal, Page 2.

<sup>99</sup> Exhibit No. 109, Murray Subditute Rebuttal, Page 3.

9. LUCo's capital structure is used to finance LUCo's United States' regulated utility assets, including Liberty Midstates and Liberty Utilities. LUCo's capital structure contains 42.83 percent common equity.<sup>100</sup>

10. The Commission has previously adopted Staff's recommended capital structure by using LUCo's capital structure in GR-2014-0152 for Liberty Midstates.<sup>101</sup>

11. LUCo is composed of over 30 water, gas, and electric utilities and Liberty Utilities' customers are less than 1 percent of the 762,000 customers served by LUCo.<sup>102</sup>

12. Silverleaf witness William Stannard supports Staff's proposed capital structure as reasonable.<sup>103</sup> Stannard, states that if the Commission approves a 9.75 percent return on equity it should be accompanied by a stated capital structure of 42.83 percent equity and 57.17 percent debt.<sup>104</sup>

13. OPC agrees with Staff's proposed capital structure.<sup>105</sup>

**Conclusions of Law and Decision:**

The issue for determination is whether to apply a capital structure based upon the mean ratio of a set of proxy gas companies that Liberty Utilities' witness Keith Magee believes closely resembles the risk characteristics of Liberty Utilities, a hypothetical capital structure, or whether to apply a capital structure based upon Liberty Utilities' parent holding company, LUCo. Staff notes that its method of determining

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<sup>100</sup> Exhibit No. 109, Murray Subdstitute Rebuttal, Page 3.

<sup>101</sup> Exhibit No. 109, Murray Substitute Rebuttal, Page 3.

<sup>102</sup> Exhibit No. 4, Magee Surrebuttal, Pages 11-12.

<sup>103</sup> Exhibit No. 302, Stannard Refined Rebuttal, Page 9.

<sup>104</sup> Exhibit No. 303, Stannard Surrebuttal, Page 7.

<sup>105</sup> Transcript, Page 78.

capital structure using LUCo has been used by the Commission before for Liberty Utilities' affiliate company, Liberty Midstates, in GR-2014-0152.

Liberty Utilities argues that it is inappropriate to base its capital structure on a parent company that has grown significantly since 2014. Liberty argues that a sizable portion of the debt in LUCo's capital structure is not related to Liberty Utilities and should not be used to set Liberty Utilities capital structure.<sup>106</sup> Liberty also argues that LUCo's characteristics and circumstances are not the same as they were at the time of the company's last rate case as the company has been growing. However, Staff's recommendation is based on the more recent capital structure of LUCo on December 31, 2017, which takes into account the time elapsed since 2014.

Staff's witness, David Murray, testified that it is the intention of the company to do all its financing with third-party investors at the LUCo level.<sup>107</sup> Applying LUCo's capital structure is appropriate because LUCo's capital structure is used to finance LUCo's United States' regulated utility assets. Staff's approach to base Liberty Utilities' authorized capital structure on its parent intermediate holding company is more reasonable for the reason that LUCo is the company which provides all corporate debt financing both Liberty Utilities and Liberty Midstates.<sup>108</sup> It is logical to apply the actual capital structure of the company providing the financing for Liberty Utilities because Liberty Utilities issues none of its own debt.

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<sup>106</sup> Exhibit No. 4, Magee Surrebuttal, Page 9.

<sup>107</sup> Transcript, Page 121-122

<sup>108</sup> Exhibit No. 109, Murray Substitute Rebuttal, Page 2.

The Commission concludes that the appropriate capital structure to apply to Liberty Utilities consists of 42.83 percent common equity and 57.17 percent long term debt.

### 3. Rate Case Expense

- *What is the appropriate amount of rate case expense to allow Liberty Utilities to recover in its rates for expenses incurred presenting its case to the Commission?*
- *What is the appropriate recovery period for rate case expense?*

The Commission will determine what amount of rate case expense, if any, that Liberty Utilities is allowed to recover in rates for expenses incurred in the preparation and presentation of its case to the Commission. Staff and Liberty Utilities agree that the company should be allowed to recover reasonable expenses through the end of the case. The parties disagree on the time period for recovery of rate case expense.

#### **Findings of Fact:**

1. Utility companies incur various expenses in the preparation and presentation of a rate case before the Commission. Included in these costs are expenses for outside counsel, expert witnesses, and miscellaneous expenses for items such as travel expenses and copying costs.<sup>109</sup>

2. Jill Schwartz credibly testified that Liberty has incurred attorney and expert witness fees associated with processing this case.<sup>110</sup> Jill Schwartz additionally testified that, "The Company is mindful of the costs of rate cases and has worked hard to keep rate case expenses low given the small customer base in this case."<sup>111</sup>

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<sup>109</sup> Exhibit No. 105, Harrison Direct, Page 6.

<sup>110</sup> Exhibit No. 1, Schwartz Direct, Page 7.

<sup>111</sup> Exhibit No. 2, Schwartz Rebuttal, Page 2.



3. Liberty proposes that rate case expense be normalized over two years.<sup>112</sup>

Liberty asks for the shorter period of time because it expects that another rate case will be filed in several years due to the acquisition of additional water systems.<sup>113</sup>

4. Staff originally recommended normalizing rate case expense over five years. Staff based its initial recommendation on how often Liberty Utilities has filed for a rate increase in the past. It has been seven to eleven years since any Liberty Utilities water or sewer system has had a rate increase.<sup>114</sup> Staff, using the Non-Unanimous Stipulation and Agreement as its current position statement, recommends amortizing rate case expense over three years.<sup>115</sup> Normalizing takes an ongoing expense and builds it into cost of service, whereas amortizing takes a lump sum amount and spreads it over a select number of years to allow full recovery.<sup>116</sup>

5. Silverleaf supports a five year recovery period for rate case expense and notes that any amounts included in base rates will continue to be recovered until new rates are implemented in a future rate case.<sup>117</sup>

#### **Conclusions of Law and Decision:**

Liberty Utilities, in its brief, has requested to recover rate case expenses through at least September 11, 2018, when reply briefs are due. Staff witness Paul Harrison also affirmed September 11, 2018, as a period of time in which rate case expenses could continue to accrue.<sup>118</sup> Counsel for Liberty noted that the revenue requirement to

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<sup>112</sup> Exhibit No. 1, Schwartz Direct, Page 7.

<sup>113</sup> Exhibit No. 1, Schwartz Direct, Page 8.

<sup>114</sup> Exhibit No. 106, Harrison Rebuttal, Page 3.

<sup>115</sup> Transcript, Pages 142-143.

<sup>116</sup> Transcript, Pages 145-146

<sup>117</sup> Exhibit No. 303, Stannard Surrebuttal, Pages 2-3.

<sup>118</sup> Transcript, Page 149.

cover rate case expense is unknown at the time because rate case expense was still accruing.<sup>119</sup> The Commission understands that Commission allowed rate case expenses will be an addition to the revenue requirement determined in this report and order. There are incentives for Liberty Utilities to file another rate case in the next few years due to potential acquisitions. However, the company has not filed a rate case for any of its water or sewer systems within the last five years, and the Commission is not in this order setting a time in which Liberty Utilities must file another rate case.

The Commission concludes that the company should be allowed to recover in rates prudently incurred rate case expense through September 11, 2018. Rate case expenses are to be amortized over a five year period with any over or under recovery to be placed in a regulatory asset or regulatory liability account to be considered in Liberty Utilities' next rate case.

## **B. Rate Design.**

### **1. Customer Charge**

- *What is the appropriate customer charge for Liberty Utilities service areas?*
- *What is the appropriate commodity charge for Liberty Utilities service areas?*
- *Should any of Liberty Utilities' water systems be consolidated?*

The Commission will determine the appropriate rates to charge Liberty Utilities customers by service area. The Commission will determine whether any of Liberty Utilities' systems should be consolidated. Because rate case expense has not been calculated yet, any rate calculated is subject to change based upon the final allowable rate case expense.

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<sup>119</sup> Transcript, Page 41.

**Findings of Fact:**

1. The rate structure consists of a fixed monthly customer charge and a commodity (usage) charge. The customer charge is developed by comparing certain costs that are generally considered fixed. Commodity charges are generally developed by comparing the remaining costs and the usage characteristics of each system.<sup>120</sup>

2. Most of the Liberty Utilities' water and sewer tariffs specify a monthly minimum base rate and a usage charge per 1,000 gallons of usage for each additional 1,000 gallons of usage thereafter. In addition, some of Liberty Utilities' customers' water and sewer rates are unmetered and are charged a flat monthly rate.<sup>121</sup>

3. Liberty is made up of 11 water and three sewer systems that compose nine water tariff districts and two sewer tariff districts. Liberty acquired these systems by purchasing KMB's water and sewer operations, Silverleaf's water and sewer operations, and Noel's water operations.<sup>122</sup>

4. Silverleaf proposes applying the overall percentage increase in rate revenues needed for each system to each charge equally for water and sewer.<sup>123</sup>

5. Silverleaf is opposed to Staff's rate design placing much of the increase in rates within the fixed customer charge. Silverleaf's witness testified that this method shifts much of the cost of the increase onto low volume users, impeding their ability to control their monthly bill.<sup>124</sup>

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<sup>120</sup> Exhibit No. 100, Barnes Direct, Page 3.

<sup>121</sup> Exhibit No. 105, Harrison Direct, Schedule PRH-d2, Page 1.

<sup>122</sup> Exhibit No. 100, Barnes Direct, Page 2.

<sup>123</sup> Exhibit No. 302, Stannard Refiled Rebuttal, Pages 22-23.

<sup>124</sup> Exhibit No. 302, Stannard Refiled Rebuttal, Pages 24-25.

6. Staff witness Matthew Barnes found that Silverleaf analyzed data from roughly 7,000 monthly bills. Two accountholders account for over 3,000 of those monthly bills. Of those two accountholders, 1,300 monthly bills have zero usage, but those same two accountholders also have the highest number (2,100) of monthly bills. Those accountholders put a tremendous strain on the system. The system has to be built to meet peak demand, and the users who are causing the highest stress on the system should be the ones paying for that system. Even if a substantial amount of the accountholders' monthly bills are for zero usage, the system has to be built to support the one or two months when usage is maxed. This means that the fixed costs for having a properly sized system should be collected from those customers every month through the customer charge.<sup>125</sup>

7. Staff calculated the following customer charge amounts: \$23.88 for a 5/8" meter at the Noel water system, \$30.04 for a 5/8" meter at the consolidated KMB water system, and \$26.65 for the smallest meters (both 5/8" and 3/4") at the Silverleaf water systems.<sup>126</sup>

8. The appropriate amounts for the sewer system customer charges are \$45.67 for the Cape Rock Village sewer system and \$37.07 for the Timber Creek and Ozark Mountain sewer system.<sup>127</sup>

9. The appropriate amount for commodity charge, per thousand gallons, is \$3.04 for the Noel water service system, \$6.65 for the KMB water service system, and \$6.73 for the Silverleaf water service system. The appropriate amount for the

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<sup>125</sup> Exhibit No. 102, Barnes Surrebuttal, Pages 2-3.

<sup>126</sup> Commission Exhibit No. 1, Attachment A.

<sup>127</sup> Commission Exhibit No. 1, Attachment A.

commodity charge is \$26.97 for the Timber Creek and Ozark Mountain sewer system.<sup>128</sup>

10. Staff notes that because rate case expense has not been calculated yet, the proposed rates will change. Staff asks the Commission to approve the methodology used to reach the rates.<sup>129</sup>

11. On January 13, 2018, Liberty Utilities formally requested that Staff and OPC consider the consolidation of customer rates, charges and fees, and rules and regulations.<sup>130</sup>

12. Liberty Utilities agreed to consolidate rules and regulations for all of its water systems in the Partial Disposition Agreement. Liberty is requesting that the Commission approve consolidation of customer rates for its KMB and Noel water customers and KMB sewer customers.<sup>131</sup>

13. Liberty Utilities acquired the KMB water systems in 2010 and did not keep books and records separate for each of the seven different KMB properties. Liberty consolidated all the rate base and expenses for the KMB properties but kept the rates charged for each property separate according to the appropriate tariffs.<sup>132</sup>

14. Liberty cites a joint publication by the United States Environmental Protection Agency and National Association of Regulatory Utility Commissioners titled Consolidated Water Rates: Issues and Practices in Single-Tariff Pricing in support of its

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<sup>128</sup> Commission Exhibit No. 1, Attachment A.

<sup>129</sup> EFIS No. 133, Staff's Initial Brief, Page 25.

<sup>130</sup> Exhibit No. 105, Harrison Direct, Schedule PRH-d2, Page 4.

<sup>131</sup> Exhibit No. 1, Schwartz Direct, Page 8.

<sup>132</sup> Exhibit No. 105, Harrison Direct, Schedule PRH-d2, Page 3.

position for consolidation and lists the following reasons from that publication for consolidating its system rates:<sup>133</sup>

- a. Mitigation of the impact of large rate increases
- b. Lower administrative costs to utilities and regulatory commissions
- c. Addresses small-system viability issues
- d. Improves service affordability for customers
- e. Facilitates compliance with drinking water standards
- f. Encourages investment in water supply infrastructure
- g. Promotes regional economic development

15. Staff proposed two rate design plans for Liberty Utilities. One plan involved district specific pricing where each currently tariffed service area would maintain its own rate structure based on its particular cost of service.<sup>134</sup> The Commission's Staff also proposed an alternative plan to consolidate the KMB service areas into one tariffed area.<sup>135</sup>

16. Liberty is agreeable to the alternative rate design proposal that consolidates seven sets of rates for the KMB water system.<sup>136</sup>

#### **Conclusions of Law and Decision:**

Rate design is how Liberty Utilities collects its revenue requirement. The Commission is keeping the current rate design in regard to each service area having a fixed customer charge regardless of usage and a commodity charge based upon usage.

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<sup>133</sup> Exhibit No. 1, Schwartz Direct, Page 9, citing Consolidated Water Rates: Issues and Practices in Single-Tariff Pricing, by Jancie A. Beecher Ph.D., September 1999.

<sup>134</sup> Exhibit No. 100, Barnes Direct, Page 5.

<sup>135</sup> Exhibit No. 100, Barnes Direct, Page 7.

<sup>136</sup> Exhibit No. 2, Schwartz Rebuttal, Page 6.

The Commission finds that this creates just and reasonable rates by charging customers not only for the amount of water actually used, but also for use of the system, to assist in maintaining system integrity and readiness. The Commission rejects the notion that merely distributing any increase equally across all systems will result in just rates in this case. As Staff witness Barnes notes, when a low number of account holders have the highest and lowest usage, the stress on the system is severe. Placing a portion of the increase in the fixed charge helps balance seasonal and non-seasonal usage. The Commission is therefore adopting Staff's proposed rate methodology, with adjustments in the final amount to accommodate approved rate case expenses.

Liberty has proposed consolidating its rates for the KMB and Noel systems into one single-tariff rate. The Commission's Staff has proposed maintaining district specific pricing, or, in the alternative, just consolidating KMB properties. There are advantages to each. With district specific pricing, those who cause an expense bear the cost of that expense, while single-tariff pricing can mitigate large capital expenditures made in a particular district.<sup>137</sup> No party proposed consolidating the Silverleaf service at this time, and no party opposed consolidating the KMB properties.

The Commission concludes that the KMB system should be consolidated, but not the Noel system, which is a much larger system with 665 customers, most of which are permanent residents.<sup>138</sup>

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<sup>137</sup> Exhibit No. 100, Barnes Direct, Page 4.

<sup>138</sup> Exhibit No. 101, Barnes Rebuttal, Page 4.

## 2. Phase-in Rates

- *Should rates for Holiday Hills, Ozark Mountain, and Timber Creek be phased-in over a period of five years?*
- *Should carrying costs be allowed to be recovered if rates are phased-in?*

Silverleaf is requesting that the Commission order phase-in rates to mitigate the size of any increase on the Silverleaf system customers. The Commission will determine whether to order phase-in rates for Silverleaf or any other Liberty Utilities system.

### Findings of Fact:

1. A phase-in rate design is an approach to rate design that allows for rates to be increased on an incremental basis to reach the ultimate Commission approved revenue requirement.<sup>139</sup>

2. Staff does not generally oppose the use of phased-in rates when the magnitude of the rate increase when compared to existing rates makes a slower approach to increasing rates a better option for the customers.<sup>140</sup> Staff is opposed to phase-in rates in this case.<sup>141</sup>

3. Silverleaf proposes using phase-in rates for customers in the Silverleaf water and sewer systems as a way of mitigating rate shock.<sup>142</sup> The phase-in approach would “stair step” any increase in rates such that only 1/4 of the increase is felt in year 1 and customers have time to adjust their budgets to take into account this new, unavoidable expense.”<sup>143</sup>

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<sup>139</sup> Exhibit No. 103, Busch Surrebuttal, Page 3.

<sup>140</sup> Exhibit No. 103, Busch Surrebuttal, Pages 3-4.

<sup>141</sup> Transcript, Page 56.

<sup>142</sup> Exhibit No. 302 – Stannard Refiled Rebuttal, Pages 25-27.

<sup>143</sup> Exhibit No. 302, Stannard Refiled Rebuttal, Page 28.



4. Rate shock is the financial harm caused to customers from a sudden, significant increase in customer utility bills caused by an increase in utility rates.<sup>144</sup>

5. Silverleaf considers Liberty Utilities' time lapse between rate cases a management decision and the cause of any resulting harm done to customers from rate shock.<sup>145</sup> Its witness said: "The decision to wait nine years before filing a rate case did not lie with those customers. It was the choice of Liberty Utilities. These customers should not be penalized for Liberty Utilities' failure to file for timely rate adjustments over the years."<sup>146</sup>

6. Silverleaf's phase-in proposal is that rates be phased in over a period of four years with the company earning its authorized rate in year five.<sup>147</sup>

7. Silverleaf's proposed phase-in rates would have Liberty Utilities under-recovering in years one and two, and over-recovering in years three and four<sup>148</sup> with, "an adjustment to reflect the under-recovery during the phase-in period."<sup>149</sup>

8. Staff is not familiar with a phase-in approach that does not compensate a utility for receiving its Commission approved revenue requirement, or that would result in recovery above the revenue requirement.

9. The plan proposed by Silverleaf does not promote rate stability. "Ultimately, under Mr. Stannards's plan, rates in years three and four will have to be

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<sup>144</sup> Exhibit No. 302, Stannard Refiled Rebuttal, Page 16.

<sup>145</sup> Transcript, Page 66.

<sup>146</sup> Exhibit No. 302, Stannard Refiled Rebuttal, Page 25.

<sup>147</sup> Exhibit No. 302, Stannard Refiled Rebuttal, Page 26.

<sup>148</sup> Exhibit No. 302, Stannard Refiled Rebuttal, Page 26-27, Tables 14 and 15.

<sup>149</sup> Exhibit No. 302, Stannard Refiled Rebuttal, Page 26.

higher than they would have been if the entire revenue requirement was put into the initial rates under a normal rate design.”<sup>150</sup>

10. Carrying costs are the interest the utility could have earned on the revenue it received; if the utility received its full Commission approved rate rather than a lesser amount. Carry costs occur when, during the phase-in, the utility's rates are not designed to collect the Commission approved revenue requirement during the initial years of the phase-in.<sup>151</sup>

11. Silverleaf is not supportive of allowing carrying costs for Liberty Utilities, as its witness said: “The purpose of the phase-in is to mitigate the impact of a large rate increase, the magnitude of which is principally driven by Liberty Utilities failure to file for periodic rate adjustments... Accordingly, the carrying cost of a phase-in should be borne by Liberty Utilities.”<sup>152</sup>

12. Customers are not being penalized by the utility waiting nine years to file a rate case. The Commission agrees with Staff's witness that, “although the rate increase being proposed is high, the customers did have the advantage of paying lower rates over the past few years rather than paying the higher rates sooner... Customers are advantaged by paying a lower rate between actual rate cases than they otherwise would have paid if Liberty had received a rate increase prior to this rate case.”<sup>153</sup>

13. Phasing-in rates for just the Silverleaf service areas would result in an undue and unreasonable preference.

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<sup>150</sup> Exhibit No. 103, Busch Surrebuttal, Page 5.

<sup>151</sup> Exhibit No. 103, Busch Surrebuttal, Page 5.

<sup>152</sup> Exhibit No. 302, Stannard Refiled Rebuttal, Page 27.

<sup>153</sup> Exhibit No. 103, Busch Surrebuttal, Page 8.

**Conclusions of Law and Decision:**

Silverleaf proposes that the Commission require Liberty Utilities to phase-in its new rates for the Silverleaf service area.<sup>154</sup> It is unclear from William Stannard's testimony whether he is proposing phase-in rates for Silverleaf's service area only or for all of Liberty Utilities service areas. Phase-in rates should not be applied in this rate case under either proposition.

The rate increase for Liberty Utilities' service areas is significant compared to what its customers had previously been paying. The Commission's last approved rate increases for Liberty Utilities' water and sewer systems was in 2011 for the KMB properties, 2007 for the Silverleaf properties, and 2009 for the Noel properties.<sup>155</sup> The Commission does not agree that Liberty Utilities' decision to not come to the Commission for a rate increase earlier was merely a management decision devoid of other factors. Liberty Utilities has invested \$1,952,614 for water and \$621,830 for sewer improvements to meet Department of Natural Resource standards and improve the quality of service.<sup>156</sup> Additionally, because Liberty Utilities has not come to the Commission for a rate case in several years, its customers have benefited from having low, stable rates for a significant time. Silverleaf's argument that Liberty Utilities' customers are being "punished" for the "management decision" of not applying for a rate case sooner is unpersuasive.

Phase-in rates for Liberty Utilities' service areas are not appropriate. Silverleaf's proposed phase-in rate plan is not a gradual increase in rates toward earning a

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<sup>154</sup> Exhibit No. 302, Stannard Refiled Rebuttal, Page 25.

<sup>155</sup> Exhibit No. 105, Harrison Direct, Page 5.

<sup>156</sup> Exhibit No. 105, Harrison Direct, Pages 5-6.

Commission approved revenue requirement, but a period of under-earning followed by a period of over-earning, followed by a reduction to a Commission approved revenue requirement. This does not conform to predictability or stability of rates for customers; customer rates would go up every year for four years before going down to a Commission approved revenue requirement. Under the proposed phase-in, if Liberty Utilities were to have a rate case within the next six years, customers would not see the same rates yearly for more than half a decade.

If Silverleaf is proposing that the phase-in rates apply only to Silverleaf service areas, then the Commission would be treating one group of Liberty Utilities' customers different than others without a compelling reason. The result would be inequitable for rate payers, with some service areas paying their full cost of service while the Silverleaf service area does not during the first two years of the phase-in. This shortfall of revenue from the phase-in service area could result in a detriment across the whole system due to less money being available for customer service or maintenance.<sup>157</sup>

Likewise, not allowing carrying costs from the revenue shortfall places an undue burden on the utility. Silverleaf suggests that carrying costs should be disallowed because of the time lapse in Liberty Utilities filing a rate case. As stated earlier, customers benefited from low rates for a longer period of time due to the company not requesting a rate increase. Not allowing carrying costs would punish the company without wrongdoing and potentially incentivize more frequent rate case filings and rate case expense, some of which would ultimately be borne by the rate payers.

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<sup>157</sup> Exhibit No. 103, Busch Surrebuttal, Page 7.

The Commission concludes that any change in rates for Liberty Utilities should be applied at one time and not phased-in over time. Carrying cost treatment does not need to be determined as the Commission is not applying any phase-in of rates.

**C. Future Rate Case Exemption**

- ***Should Silverleaf service areas be exempt from consideration in a subsequent rate case?***

Silverleaf has requested that they be exempted from consideration in any future rate case based upon a system acquisition by Liberty Utilities. The Commission will determine whether to exempt Silverleaf from any future Liberty Utilities rate cases.

**Findings of Fact:**

1. Silverleaf has proposed that the Silverleaf systems should not be included in any future rate cases solely related to Liberty Utilities acquisition of another system.<sup>158</sup>

2. The water and sewer systems that serve Silverleaf are separate and detached from Liberty Utilities' other systems.<sup>159</sup>

3. Liberty Utilities was approved to acquire seven additional water systems (including Ozark International, Inc.) in Case No. WM-2018-0023, potentially adding 900 customers to its system.<sup>160</sup>

4. The Commission's Staff recommends that a utility come in for a rate case or rate review recommendation within 18-24 months after completing acquisition of a new system if there are anticipated major capital improvements, material changes in the

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<sup>158</sup> Exhibit No. 302, Stannard Refiled Rebuttal, Page 6.

<sup>159</sup> Exhibit No. 302, Stannard Refiled Rebuttal, Page 7.

<sup>160</sup> Exhibit No. 105, Harrison Direct, Page 8.

composition of the acquiring utility customer base, or if the operational characteristics of the acquiring utility may change.<sup>161</sup>

5. The Commission's Staff has recommended that Liberty Utilities file another rate case within two years.<sup>162</sup>

6. Another reason the Commission's Staff recommends that Liberty Utilities file a rate case within the next two years is that the company's books and records were not being kept in accordance with Commission rules. A review in 18-24 months will ensure books are being kept appropriately and rates set accordingly.<sup>163</sup>

7. Silverleaf is concerned that it is unfair for Silverleaf systems to be punished by additional rate case costs and other "substantial burdens" based upon Liberty Utilities acquisition of an unrelated system.<sup>164</sup>

8. Liberty Utilities expects to file a rate case within the next few years, due to its recent acquisition of a number of additional water systems from Ozark International, Inc., and its desire to address, among other things, the issues of overhead allocations and shared services and, also, to pursue tariff and rate consolidations.<sup>165</sup>

9. While Liberty Utilities has received approval to acquire the Ozark International, Inc. systems, closing on the sale and transfer has not yet occurred.<sup>166</sup>

10. Liberty Utilities' acquisition of additional systems has the potential to benefit Silverleaf customers.<sup>167</sup>

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<sup>161</sup> Exhibit No. 103, Busch Surrebuttal, Page 9.

<sup>162</sup> Exhibit No. 105, Gateley Direct, Page 5.

<sup>163</sup> Exhibit No. 103, Busch Surrebuttal, Page 9.

<sup>164</sup> Exhibit No. 302, Stannard Refined Rebuttal, Page 5.

<sup>165</sup> Exhibit No. 1, Schwartz Direct, Page 8.

<sup>166</sup> Exhibit No. 103, Busch Surrebuttal, Page 9.

<sup>167</sup> Exhibit No. 103, Busch Surrebuttal, Pages 10-11.

11. Liberty Utilities has three full time employees that work out of its Noel office.<sup>168</sup> According to the company, all employees providing services to Liberty Utilities are employed by Liberty Utilities Service Corp.<sup>169</sup> The Company uses outside contractors to perform water and wastewater operator functions, meter reading, maintenance, and operations for all of Liberty Utilities systems except for Noel.<sup>170</sup>

12. One of the Commission's Staff's recommendations to Liberty Utilities is that it perform a cost benefit analysis prior to any future rate case to determine if use of in-house employees would be more cost effective than paying outside contractors.<sup>171</sup>

13. Although Silverleaf is currently served by a separate rate schedule, it is part of Liberty Utilities. In order for the Company to achieve fair and reasonable rates for all of its customers, all of its revenues, expenses and investments need to be reviewed as part of a rate case. This is particularly important to ensure the proper allocation of the costs of shared services and corporate overhead allocations.<sup>172</sup>

#### **Conclusions of Law and Decision:**

Silverleaf's proposition that the Silverleaf system be excluded from a future rate proceeding is premised on two assertions: 1) Systems acquired by Liberty Utilities are unrelated to Silverleaf's cost of service, and 2) Systems acquired by Liberty Utilities will negatively impact the rates of the Silverleaf system.

The first assertion is incorrect because while Silverleaf is a separate system from the other Liberty Utilities systems, and while it is not being consolidated like the KMB

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<sup>168</sup> Exhibit No. 105, Harrison Direct, Schedule PRH-d2, Page 8.

<sup>169</sup> Exhibit NO. 1, Schwartz Direct, Page 3.

<sup>170</sup> Exhibit No. 105, Harrison Direct, Page 7.

<sup>171</sup> Exhibit No. 105, Harrison Direct, Page 8.

<sup>172</sup> Exhibit No. 3, Schwartz Surrebuttal, Page 3.

system, it still shares the same management and corporate structure. Any change in that management or corporate structure will necessarily change the cost of service for the Silverleaf system. Additionally Liberty Utilities currently uses outside contractors to service and maintain the Silverleaf and some other Liberty Utilities systems. Should that change, it would also impact Silverleaf's cost of service.

The second assertion is incorrect because the effect of any change to corporate structure or management is speculative and not necessarily negative. Many of the suggestions the Commission's Staff has made, such as cost analysis of contractors and using continuous chlorine monitoring equipment in the KMB system,<sup>173</sup> have the potential to reduce cost of service. The acquisition of the Ozark International, Inc. system and 900 additional customers has not closed yet, and the impact of such an addition is speculative as to overall rates. However, as Staff witness James Busch points out, an addition of 37 percent more customers will likely lower Silverleaf's cost of service through depreciation alone. Also, adding customers under shared corporate management, coupled with other shared services, is likely to positively affect Silverleaf's cost of service in subsequent rate proceeding.

Section 393.130.2, RSMo addresses preferential treatment:

No ... water corporation or sewer corporation ... shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand collect or receive from any person or corporation a greater or less compensation for ... water, sewer [service] ..., except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

Subsection 3 adds:

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<sup>173</sup> Exhibit No. 105, Gateley Direct, Pages 2-3.



No ... water corporation or sewer corporation shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The statute says that utilities cannot give any “undue or unreasonable” preference or disadvantage to any particular customer, or class of customers, or locality.

As stated above regarding phase-in rates, separating out one system for exclusion from a future rate case creates both an undue and unreasonable preference and an advantage to the Silverleaf system over other systems. An increase in rates that does not apply to one system burdens the other systems with the cost of shared services and management. Likewise, if some customers are excluded from review, those customers in the excluded service area will not be recognized in rates, and the utility could collect revenues above those authorized. An effective rate case requires that all relevant factors are reviewed in order to set just and reasonable rates.<sup>174</sup>

The Commission concludes that the Silverleaf systems should not be exempted from any future rate case. The Commission is not ordering that Liberty Utilities file a rate case within two years.

D. **Customer Service**

- *Has Liberty Utilities adequately responded to customer service issues?*
- *Does the Commission wish to take any action regarding customer service issues?*

OMCA intervened in this rate case because of concerns it had about what it considered inadequate service by Liberty Utilities in providing water service. The

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<sup>174</sup> Exhibit No. 103, Busch Surrebuttal, Page 12.

Commission will determine what, if any, service issues exist, and decide if any action needs to be taken to resolve or improve service.

**Findings of Fact:**

1. OMCA's concerns in this case are specifically whether the service provided by Liberty Utilities is safe and adequate, and whether the rates the company proposes are just if service is not consistently safe and adequate.<sup>175</sup>

2. Don Allsbury, the property manager employed by OMCA testified as to water and sewer issues he recorded between 2009 and 2018 at the condominiums in Ozark Mountain Resort.<sup>176</sup> The issues recorded by Don Allsbury are summarized as follows:

- a. 2009 – Five water main breaks
- b. 2010 – Several water main freezes
- c. 2011 – One valve malfunction
- d. 2012 – One loss of water pressure
- e. 2015 – Several frozen water meters
- f. 2015 – Over 42 days of high, low, and no water pressure
- g. 2018 – Two frozen water meters<sup>177</sup>

3. In April 2018, Liberty Utilities terminated its contract with outside contractor R K Water Operations LLC after experiencing several issues involving quality of service provided. Before that time, the Ozark Mountain system was primarily

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<sup>175</sup> Transcript, Page 71.

<sup>176</sup> Exhibit No. 401, Allsbury Direct, Pages 1-2.

<sup>177</sup> Exhibit No. 112, Roos Rebuttal, Page 2.

operated by R K Water Operations LLC.<sup>178</sup> Ozark Mountain was purchased from Silverleaf Resorts Inc. in 2005 and is part of the Silverleaf system.<sup>179</sup>

4. Liberty Utilities is planning to remedy the issues and concerns raised by OMCA. Its witness explained:

“[T]he fact that the issues identified and included in Mr. Allsbury’s direct testimony do not extend beyond January 2018, that the Company has already made significant improvements in the quality of service provided and is preparing a list and plan to remedy the issues and concerns raised by OMCA. Specifically, Mr. Allsbury identified multiple issues and reports of water pressure issues. As a result, the Company is currently installing generators in Ozark Mountain’s pressurized water system so that customers will continue to have water during power outages. The Company anticipates that the installation of these generators will be complete by the end of August 2018.”<sup>180</sup>

5. Staff met with Paul Carson, Liberty Utilities’ Operations Manager, on February 9, 2018. From that meeting Staff determined that the water pressure problems in 2015 were a combination of equipment failure and operator error. Staff determined that the incidents recounted in Don Allsbury’s testimony have been resolved. According to Staff’s witness, “The water system has been repaired and is currently a reliable source of water. Staff is not aware of any current operational issues with the Ozark Mountain Resort’s water system.”<sup>181</sup>

6. Liberty has agreed to make changes to bring it into compliance with Commission Rule 4 CSR 240-13.040 as part of the Partial Disposition Agreement adopted by the Commission in this case. Staff’s witness testified, “Liberty has stated it is modifying contract procedures, and referring all customer inquiries to its call center so

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<sup>178</sup> Exhibit No. 2, Schwartz Rebuttal, Page 3.

<sup>179</sup> Exhibit No. 302, Stannard Refiled Rebuttal, Page 3.

<sup>180</sup> Exhibit No. 2, Schwartz Rebuttal, Pages 7-8.

<sup>181</sup> Exhibit No. 112, Roos Rebuttal Pages 2-3.

that all customer inquiries are logged and properly responded to in a timely manner. In Staff's opinion, replacement of the PRV [pressure release valve], the new contract operator, and Liberty's recent customer service changes have led to more reliable service."<sup>182</sup>

7. Some service issues have not been resolved. Rotting meter boxes reported to Liberty Utilities in 2015<sup>183</sup> have still not been repaired.<sup>184</sup> Don Allsbury described multiple occasions where calling Liberty to report customer service problems failed to produce satisfactory results because either the company offices were closed, or the company would not act without information unavailable to Allsbury.<sup>185</sup>

**Conclusion:**

OMCA intervened in this case largely because it was concerned that Liberty Utilities was requesting, and would receive, a rate increase for the Ozark Mountain service area without addressing what it felt were numerous instances of inadequate service. While this is not a formal complaint case, the Commission has the responsibility to examine all relevant factors when determining rates.<sup>186</sup> During the hearing, the Commission inquired of OMCA as to what it would like the Commission to do when it comes to customer service.<sup>187</sup> OMCA answered simply, "Better customer service, use of in-house employees, prompter reporting not a month later[.]"<sup>188</sup>

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<sup>182</sup> Exhibit No. 112, Roos Rebuttal, Pages 3-4.

<sup>183</sup> Exhibit No. 401, Allsbury Direct, Page 4.

<sup>184</sup> Exhibit No. 401, Allsbury Direct, Page 8.

<sup>185</sup> Exhibit No. 401, Allsbury Direct, Pages 175, 178.

<sup>186</sup> *State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 56 (Mo. banc 1979).

<sup>187</sup> Transcript, Pages 75, 77.

<sup>188</sup> Transcript, Page 77.

The Commission recognizes that Liberty Utilities has already made some changes such as terminating its contract with unsatisfactory third party contractors. Liberty Utilities has also agreed to other changes related to customer service that are contained in the Partial Disposition Agreement. OMCA in its brief asked the Commission to order Liberty Utilities to do six things:

- 1) Record all customer inquiries *and service-related complaints* received by Company personnel, as well as all customer inquiries and service-related complaints received and reported by the Company's contractors, in the customer's account records in the customer information system.
- 2) Require Liberty to require all its contractors to report all customer inquiries and service-related complaints to Company personnel, at or near the time the inquiry is received, but no later than one business day thereafter.
- 3) Require Liberty to use local employees for normal, day to day operations.
- 4) Require Liberty to use local employees or local contractors to provide all on-site water system repairs, and where local contractors are utilized, require a local employee to either provide direct, on-site supervision while the work is performed, or to inspect and document the contractor's work no later than one business day after the work is performed.
- 5) Require Liberty's operations manager to make an on-site visit at the Silverleaf water system with Mr. Allsbury within 30 days of issuance of the Commission's Report and Order in this Rate Case, and to document all issues of concern reported to him by Mr. Allsbury.
- 6) Require Liberty to include with specificity, in its 5-year capital improvements plan, how it will resolve issues of concern at the Silverleaf water system reported by Mr. Allsbury, and to specify firm deadlines by which it resolve them.

OMCA also asks that the Commission take into consideration Liberty Utilities' customer service history in determining what rate increase would be just and reasonable to both Liberty Utilities and its customers.<sup>189</sup>

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<sup>189</sup> EFIS No. 135, Ozark Mountain Condominium Association, Inc.'s Post Hearing Brief.

**Decision:**

The Commission concludes that based upon the evidence offered in relation to customer service issues, and in consideration of progress made in addressing customer service issues, Liberty Utilities shall do the following:

- 1) Record all service-related complaints received by Company personnel, and service-related complaints received and reported by the Company's contractors, in the customer's account records in the customer information system.
- 2) Require all its contractors to report all service-related complaints to Company personnel, at or near the time the inquiry is received, but no later than one business day thereafter.
- 3) Require Liberty's operations manager to make an on-site visit at the Silverleaf (Ozark Mountain is in the Silverleaf system) water system with Mr. Allsbury within 90 days of issuance of the Commission's Report and Order in this Rate Case, and to document all issues of concern reported to him by Mr. Allsbury.
- 4) Include with specificity, in its 5-year capital improvements plan, how it will resolve issues of concern at the Silverleaf water system (Ozark Mountain is in the Silverleaf system) reported by Mr. Allsbury, and to specify firm deadlines by which it will resolve them.

The Commission is not changing or reducing the rates it is authorizing due to any customer service issues.

**THE COMMISSION ORDERS THAT:**

1. Liberty Utilities' motion to strike OPC's response to *Notice of no Objections to Non-unanimous Stipulation and Agreement, Request to Modify Hearing Schedule, and Motion for Expedited Treatment* is denied.
2. Silverleaf's motion to strike the testimony of Keith Magee is denied.

3. No party timely objected to the *Non-Unanimous Stipulation and Agreement*. The Commission is treating the *Non-Unanimous Stipulation and Agreement* as non-unanimous. The Commission is not adopting the *Non-Unanimous Stipulation and Agreement*.

4. The Commission adopts the provisions, other than those issues disputed at the evidentiary hearing, of the *Partial Disposition Agreement and Request for Evidentiary Hearing* filed on May 24, 2018, including attachments. The signatories are ordered to comply with the terms of these partial disposition agreements, which are attached hereto as Attachment A and incorporated herein by reference as if fully set forth.

5. Liberty Utilities is authorized to file tariff sheets sufficient to recover revenues approved in compliance with this order. Liberty Utilities shall file its compliance tariff sheets no later than November 5, 2018.

6. Liberty Utilities shall file the information required by Section 393.275.1, RSMo 2016, and Commission Rule 4 CSR 240-10.060 no later than November 8, 2018.

7. The Staff of the Missouri Public Service Commission shall file its recommendation concerning approval of Liberty Utilities' compliance tariff sheets no later than November 8, 2018.

8. Any other party wishing to respond or comment regarding Liberty Utilities' compliance tariff sheets shall file its response or comment no later than November 8, 2018.

9. This Report and Order shall become effective on November 3, 2018.

**BY THE COMMISSION**



*Morris L. Woodruff*

Morris L. Woodruff  
Secretary

Silvey, Chm., Kenney, Hall, Rupp, and  
Coleman, CC., concur.

Clark, Regulatory Law Judge



**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 9<sup>th</sup> day of  
January, 2019.

In the Matter of Application for a Rate )  
Increase Request for Liberty Utilities )  
(Missouri Water), LLC d/b/a Liberty Utilities )

**File No. WR-2018-0170**

**ORDER APPROVING RECONCILIATION OF CONTESTED ISSUES**

Issue Date: January 9, 2019

Effective Date: January 9, 2019

Section 386.420.4, RSMo 2016, requires the Commission to prepare and approve a detailed reconciliation regarding the dollar value and rate or charge impact of the contested issues decided by the Commission in this rate case. The law requires the Commission to allow the parties an opportunity to provide written input regarding that reconciliation.

On November 29, 2018, the Commission directed Liberty Utilities (Missouri Water), LLC d/b/a Liberty Utilities to file a reconciliation by December 10, 2018. Any party wishing to respond to Liberty Utilities' proposed reconciliation was directed to do so by December 14, 2018. On December 6, 2018, Liberty Utilities requested an extension of time to file a reconciliation. That request was granted and Liberty Utilities was given until December 17, 2018, to file a reconciliation, with any responses to the reconciliation due no later than December 21, 2018. Liberty Utilities filed a reconciliation with the Commission on December 17, 2018. The Commission's Staff and The Office of the Public Counsel filed responses on December 21, 2018, recommending the Commission approve the reconciliation.

The Commission finds that the reconciliation submitted by Liberty Utilities is an accurate representation of the dollar value and rate or charge impact of the issues decided by the Commission. The Commission further finds that the submitted reconciliation satisfies the requirements of Section 386.420.4, RSMo 2016. The Commission will approve the reconciliation filed by Liberty Utilities.

**THE COMMISSION ORDERS THAT:**

1. The reconciliation filed on December 17, 2018, by Liberty Utilities (Missouri Water), LLC d/b/a Liberty Utilities is approved.
2. This order shall be effective when issued.

**BY THE COMMISSION**



A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff  
Secretary

Silvey, Chm., Kenney, Hall, Rupp, and  
Coleman, CC., concur.

Clark, Regulatory Law Judge

**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

**APPLICATION FOR REHEARING**

Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. (herein "Silverleaf") respectfully submits this Application for Rehearing pursuant to Section 386.510, RSMo and Commission regulation. Silverleaf asks the Commission to rehear this case for the following issues.

I.       The Commission abused its discretion by admitting the written surrebuttal testimony and hearing testimony of Keith Magee (herein "Magee") into the legal record and relying on that testimony in determining Liberty Utilities' (Missouri Water) (herein "Liberty Utilities") allowed return on equity.

It is undisputed that Liberty Utilities did not disclose Magee as an expert witness in this case until the last day of discovery thereby entirely thwarting Silverleaf's ability to conduct meaningful discovery on Magee. The Commission's admission of Magee's surrebuttal testimony and hearing testimony is an abuse of discretion in that it violated Silverleaf's substantive right to defend and protect its interests on the contested issue of cost-of-capital in this contested case.

On June 22, 2018 Jill Schwartz, Senior Manager of Rates and Regulatory Affairs for Liberty Utilities Central Region filed written direct testimony in this case. In her direct testimony Schwartz attached the direct testimony of Keith Magee, a retained expert witness for Liberty Utilities in another unrelated case, for a subsidiary natural gas rate company, Liberty Utilities Midstates, Docket Number GR-2018-0013.

Silverleaf, in this case, propounded a data request No. 4(b) on March 30, 2018 which asks Liberty Utilities to provide the name of the individuals that would testify regarding return on equity and capital structure on behalf of Liberty Utilities. See attached **Schedule A**. Liberty Utilities responded that "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 was on notice – since at least May 24, 2018 filing of the Partial Disposition Agreement – that return on equity and capital structure were contested issues in this case. The direct testimony of Jill Schwartz filed June 22, 2018 is itself evidence that Liberty Utilities understood that the issue of return on equity and capital structure were contested issues and that any expert witness on that issue would need to be disclosed. Yet, Liberty Utilities did not disclose Magee as an expert witness in this case until August 3, 2018 – the last day of discovery under the procedural schedule – during the deposition of Schwartz. At the very least, Liberty Utilities had over *two months* to disclose Magee as an expert witness. On August 7, 2018 Liberty Utilities filed the surrebuttal testimony of Magee.

Magee's surrebuttal testimony purports to "update" his direct testimony from Liberty Utilities' natural gas case, Liberty Utilities' Midstates, Docket No. GR-2018-0013. Magee's "update" includes, for the first time, an "expected earnings analysis" of "the water utility industry." *See*, Exhibit 4, Surrebuttal Testimony, Magee 18:4-10. It is disingenuous and false to suggest that Magee's water-industry "updates" are merely responsive to prior testimony in this case. The "updated" analysis, to include the water industry, is clearly the case-in-chief of Liberty Utilities' return on equity and capital structure request in this case.

On August 8, 2018 Silverleaf filed its "Motion to Strike the Surrebuttal Testimony of Keith Magee and Motion for Expedited Treatment" attached, referenced and incorporated herein

as **Schedule B**. On August 9, 2018 the Commission issued its "Order Denying Motion for Expedited Treatment", but withheld ruling on Silverleaf's motion to strike, providing, "the Commission will consider this motion in its report and order." Order Denying Motion for Expedited Treatment.

On October 24, 2018 the Commission issued its Report and Order in this case and denied Silverleaf's motion to strike. The Commission justified the admission of Magee's decision with the following statement, "Silverleaf had notice of Keith Magee as a potential witness, and also the content of his testimony, from Jill Schwartz's direct testimony and the accompanying Keith Magee direct testimony from GR-2018-0013." Report and Order, P. 9. It would be difficult to pack more misapprehension into a single sentence.

Silverleaf fully believed that Liberty Utilities (Missouri Water) would retain and call a cost-of-capital expert in this case. It was this belief that caused Silverleaf to propound a data request to Liberty Utilities (Missouri Water) seeking this very information. It was a data request that Liberty Utilities was legally obligated to respond to in a timely manner so that Silverleaf could conduct sufficient discovery.

The Commission's position is profoundly flawed. Under this ruling, Silverleaf apparently should have conducted discovery by taking an "educated guess" as to who Liberty Utilities might ultimately call as an expert witness, despite the fact that there was an outstanding data request that asked *that very question*. Liberty Utilities did not respond to Silverleaf's data request regarding an expert witness until Schwartz's deposition on the last day of discovery. The Commission's rationale directs Silverleaf to assume either Liberty Utilities' bad-faith or incompetence in failing to supplement its data request. Silverleaf was, according to the

Commission's decision, to proceed with discovery on Magee because his direct testimony from another case was simply attached to Schwartz's direct testimony in this case.

The notion that Silverleaf was on "notice" of "the content of [Magee's] testimony, from Schwartz's direct testimony" is not only wrong as to Silverleaf, but professionally insulting to Magee. The fact that Schwartz attached Magee's direct testimony from a natural gas case to her direct testimony in this case is only indicative of Jill Swartz's belief – *not Keith Magee's* – that such analysis is applicable in any way to this case. Silverleaf had no idea what Magee's position in the Liberty Utilities' (Missouri Water) case was until he filed his surrebuttal testimony. The Commission's suggestion that Silverleaf should have somehow inferred "the content of his testimony" in this case because Schwartz attached his direct testimony from a different case does not say much for Commission's view of Magee's impartiality, credibility or analytical due diligence. It is only in Magee's surrebuttal testimony in this case that he renders any opinion whatsoever about Liberty Utilities (Missouri Water) or the water utility industry at all.

The admission of Magee's testimony is an abuse of discretion that violated Silverleaf's right to conduct meaningful discovery and resulted in fundamental unfairness and prejudice to the substantive rights of Silverleaf. See, *State vs. Lorenz*, 620 S.W.2d 407, 409 (Ct. of App. E. D., 1981). The decision is also inconsistent with the Commission's own regulation, 4 CSR 240-2.090(1), which adopts the Missouri Rules of Civil Procedure. Implicitly, Rule 56.01(B)(5)(6) of the Missouri Rules of Civil Procedure imposes an obligation to disclose expert witnesses within a timeframe that meaningful discovery can be conducted. Obviously no discovery can be accomplished if the expert is not disclosed until the final day of discovery.

The Commission's admission of Magee's testimony is also contrary to the controlling statute regarding administrative depositions, Section 536.073 RSMo<sup>1</sup> Section 536.073 RSMo grants any party in a contested case a statutory right to "take and use depositions" in the case. This statutory right cannot be exercised without timely disclosure of the expert witness.

There are procedural issues which arise during the course of regulatory litigation in which reasonable minds can disagree. This is not one. The parties to a contested case must be afforded the right to conduct discovery on expert witnesses. The Commission's ruling denying Silverleaf's motion to strike, the admission of Keith Magee's surrebuttal and evidentiary hearing testimony, and the Commission's reliance on that testimony in forming its return on equity decision puts the Commission well outside any regulatory discovery norm and is a clear violation of Silverleaf's substantive rights in this case.

II. The Commission erred in categorizing Liberty Utilities as a small water and sewer company under the Small Utility Rate Procedure (SURP) because Liberty Utilities' has more than 8,000 customers. The time-share owners of Silverleaf properties are customers of Liberty Utilities as the word "customer" is defined under 4 CSR 240-3.010(7) and Liberty Utilities' tariff.

Commission Rule 4 CSR 240-3.010(7) defines customer as "any person, firm, partnership, corporation, municipality, cooperative, organization, governmental agency, etc., that accepts financial and other responsibilities in exchange for services provided by one (1) or more public utilities."

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<sup>1</sup> Missouri Administrative Procedure Act "operates to fill gaps not addressed within the PSC statutes." *State ex rel. A & G Commercial Trucking v. Public Serv. Comm'n*, 168 S.W.3d 680, 682-83 (Mo.App.2005).

Liberty Utilities' tariff defines a customer as: "Any person, firm, corporation or governmental body which has contracted with the company for water service or is receiving service from company, or whose facilities are connected for utilizing such service."

On February 8, 2018 Silverleaf filed a motion to dismiss this case based on the definition of "customer" under 4 CSR 240-3.010(7), as well as Liberty Utilities' tariff language. Silverleaf's Motion to Dismiss attached, referenced and incorporated herein as **Schedule C**. In short, the time-share owners of Silverleaf properties are customers of Liberty Utilities as the word "customer" is defined under PSC regulations and Liberty Utilities' own tariff.

In denying Silverleaf's motion to dismiss, the Commission extrapolates from the definition of "customer" an additional requirement of being "directly financially responsible to the utility." Order Denying Motion to Dismiss, Pg. 6. The Commission's extrapolation to require a contractual link with the utility disregards the actual definition of "customer." The language of the statute and Liberty Utilities' own tariff requires only financial responsible in exchange for utility service, and does not mention "direct financial responsibility to the utility."

As explained in Silverleaf's motion to dismiss, the Commission's definition of "customer" mocks the purpose of the SURP, which is to assist actual small utilities, and invites large utilities (like Liberty Utilities) to manipulate their corporate structure to skirt the procedural requirements of Missouri statute (See Section IV below). So in addition to being inconsistent with the definition of "customer" provided by PSC regulation and Liberty Utilities' own tariff, the Commission's definition is also inconsistent with the policy purpose of SURP.

Silverleaf provided evidentiary support that the time-share owners of Silverleaf bear financial responsibility in exchange for utility service. Evidentiary hearing exhibits 304 through 308 are affidavits, deeds, and the declaration of rights of the Silverleaf management and owners



of Silverleaf properties. These exhibits undisputedly show the time-share owners of Silverleaf bear financial responsibility in exchange for utility services. Silverleaf agrees with the Commission that the time-share owners do not have direct financial responsibility to Liberty Utilities (Missouri Water), but Silverleaf disagrees that the definition provided by PSC regulation or Liberty Utilities tariff require such a direct financial agreement with the public utility.<sup>2</sup>

III. The Commission erred in finding that all of Staff's work-papers, reports and analysis regarding Liberty Utilities *prior* to the filing of direct testimony constitute "confidential settlement communication" and in striking the portions of William Stannard's rebuttal testimony which used information derived from Staff's 120-Report.

On June 30, 2018 Staff filed a motion to strike certain portions of William Stannard's rebuttal testimony claiming that all analysis, work-papers, reports – every aspect of Staff's work constituted a "confidential settlement communication." On June 31, 2018 Silverleaf filed its "Response to Staff's Motion to Strike" attached, referenced and incorporated herein as **Schedule D**. On August 2, 2018 the Commission granted Staff's motion to strike.

Silverleaf agrees with the Commission that the information contained in the Disposition Agreement, a settlement communication which offers specific contractual terms and conditions to Liberty Utilities, constitute a confidential settlement communication. However, Silverleaf disagrees with the Commission's positions that all of Staff's regulatory work commencing from the moment Liberty Utilities requested a revenue increase is protected by the confidential settlement communication privilege.

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<sup>2</sup> It should be noted that the Commission treated the time-share owners of Silverleaf as "customers" for the purposes of justifying its rate-design in this case. The Commission observed the water usage of two "account holders" that directly reflected the seasonal "utility service" of time-share owners. *See* Report and Order, P. 37.

This exceedingly broad definition of the settlement communication privilege expands the privilege far beyond the public policy rational for the privilege, which is to encourage settlement discussions. The Commission's decision turns the "settlement communication privilege" into a tool against government transparency and has no connection to Staff's ability or incentive to make settlement offers.

IV. The Commission erred in not requiring Liberty Utilities to file a tariff in its request for a rate increase because Missouri statute only authorizes a single method by which a utility may seek a rate change and that is by filing a tariff (or "rate schedule") with the Missouri Public Service Commission.

The SURP<sup>3</sup> fundamentally alters the detailed process set forth by Section 393.140(11) and 393.150(1)(2) for a utility to change its rates by filing a new tariff. Specifically, the SURP inverts the statutory process and allows the utility to not only request a rate change, but for the Commission to adjudicate and authorize the request without the utility filing a tariff. Under the SURP a tariff is not required until after the Commission renders a decision on the merits of the utility's request.

Under the "file and suspend" method enshrined in Sections 393.140(11) and 393.150 the tariff itself becomes a contested issue itself when the Commission suspends the tariff and sets a procedural schedule. Missouri statute does not envision or authorize the utility (regardless of size) to simply "request" via a letter additional revenues to be authorized by the PSC. Instead, the statutes articulates a process by which a utility files a tariff which will ultimately have the full force and effect of state law after the Commission acts on it.

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<sup>3</sup> The Small Utility Rate Procedure was amended during the course of this case and is located at 4 CSR 10-240-10.075. Now referred to as the Staff Assisted Rate Case.

But the inversion of the normal process, regardless of its policy merits or lack thereof, is not authorized by Missouri statute, and is in fact contravened, by existing Missouri statute. This issue was brought to the Commission's attention on June 11, 2018 with Silverleaf filing "Silverleaf's Response to Staff's Proposed Procedural Schedule" attached, referenced and fully incorporated herein as **Schedule E**. Silverleaf objects to the Commission's failure to require Liberty Utilities to file a tariff prior to the evidentiary hearing. Silverleaf does not contend that the Commission is limited to a file-and-suspend rate case in order to change rates, but that the utility is limited to filing tariffs in order to initiate a rate case.

Additionally, by failing to require Liberty Utilities to file a tariff the Commission violated Silverleaf's procedural rights under Section 536.063, RSMo. Section 536.063 provides that a "reasonable opportunity shall be given for the preparation and presentation of evidence bearing on any issue raised or decided or relief sought or granted." Here again, the *Liberty Utilities (Missouri Water)'s tariff is the contested issue*. While underlying issues such as cost-of-service or rate-design will impact the substance of the tariff, it is the tariff itself that has the full force and effect of state law. It is the tariff itself that legally binds Liberty Utilities (Missouri Water) and its customers. By failing to require Liberty Utilities to file a tariff, the Commission denied Silverleaf the opportunity to present evidence on the key legal document that, as of the date of this Application for Rehearing, does not exist, but will be impacted by the Commission's Report and Order in this case.

For all of the reasons set forth above, Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. respectfully ask the Commission to grant this Application for Rehearing, find that Liberty Utilities (Missouri Water) is not eligible under the Staff Assisted Rate Case Procedure, rescind the Staff Assisted Rate Case Procedure in its entirety for lack of statutory authority and

direct Liberty Utilities (Missouri Water), LLC to file a tariff pursuant to Section 393.140(11) and 393.150.

Respectfully Submitted,

STINSON LEONARD STREET LLP

/s/ Joshua Harden

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1201 Walnut St. Suite # 2900  
Kansas City, MO 64106  
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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 2<sup>nd</sup> day of November 2018.

Jamie Myers at Jamie.Myers@psc.mo.gov  
Casi Aslin at Casi.Aslin@psc.mo.gov  
Sara Giboney at giboney@smithlewis.com  
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Paul Boudreau at paulb@brydonlaw.com

/s/ Joshua Harden

# SCHEDULE A



Liberty Utilities (Missouri Water) LLC.

Docket No. WR-2018-0170

Silverleaf Data Request -4

Page 1 of 1

Data Request Received: 03/30/18

Date of Response: 05/03/18

Request No. 4

Respondent: Jill Schwartz

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**DATA REQUEST:**

Please provide the names of all individuals that would testify on behalf of Liberty Utilities regarding its requested rate increase, including the subject matter of said person's testimony.

- a. Specifically, provide the name of the individual(s) that would testify regarding the Liberty Utilities' rate consolidation proposal.
- 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.
  - ii. Provide a description of all communications between the Company and any member of the Staff of the Missouri Public Service Commission regarding this issue of the return on equity or capital structure in this matter. If such communications are written, please provide the written communication(s).
- c. Provide the name of the individual that would testify on behalf of the Company regarding customer complaints and the Company's response to customer complaints.
- d. Provide the name of the individual(s) that would testify on behalf of Liberty Utilities regarding the allocation of corporate expenses to Liberty Utilities' water and sewer systems.

**RESPONSE**

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.

# SCHEDULE B

**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,

STINSON LEONARD STREET LLP

/s/Joshua Harden

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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 8<sup>st</sup> day of August 2018.

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/s/ Joshua Harden

# SCHEDULE C

**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 DISMISS, OR IN THE ALTERNATIVE, TO ORDER LIBERTY  
UTILITIES (MISSOURI WATER), LLC TO FILE A TARIFF PURSUANT TO  
SECTION 393.140(11)**

COME NOW, Orange Lake Country Club, Inc. and Silverleaf Resorts, Inc. ("Movants"), pursuant to 4 CSR-2.080 and files this Motion to Dismiss, or in the Alternative, to Order Liberty Utilities (Missouri Water), LLC to File a Tariff. For its cause, the Movants state the following:

**I. Procedural Background**

On December 15, 2017 Liberty Utilities (Missouri Water) filed a letter with the Secretary of the Missouri Public Service Commission pursuant to 4 CSR 240-3.050, Small Utility Rate Case Procedure ("SURP"), requesting a \$995,844 increase in water revenues and a \$196,617 increase in its annual sewer system revenues. On December 19 Staff filed its "Small Utility Rate Case Timeline". On January 13, 2018 Liberty Utilities (Missouri Water) filed a "Request for Consideration and Notice of Proposals" which asks Staff and the Office of Public Counsel to "consider the consolidation of customer rates, service charges, and rules and regulations in their investigations." On January 17, the Movants filed their joint application to intervene in the case, which was granted on January 29. On January 30, Ozark Mountain Condominium Association filed its application to intervene, which has not yet been granted as of the time of this filing.



## II. Introduction

Algonquin Power & Utilities, the corporate parent of Liberty Utilities (Missouri Water) is a multinational company based in Oakville, Ontario with annual revenues of more than \$2,000,000,000, total assets of more than \$10,000,000,000 and more than 2,200 employees. Suffice it to say that Liberty Utilities (Missouri Water) has access to enormous capital and technical resources, and may in fact seek recovery from Missouri water consumers for allocated investment in plant used to serve other companies across the Algonquin Power & Utilities corporate chart.

Although Liberty Utilities (Missouri Water) in this case chose to file under the SURP, it does not fit the profile of a small utility that this procedure was designed to benefit. Movants are asking the Commission to dismiss these consolidated cases, or in the alternative to order Liberty Utilities (Missouri Water) pursue its proposed rate increases by filing tariffs under the traditional, statutory “file and suspend” procedures. Intervenors desire a meaningful opportunity to prepare and present evidence in these cases and will be denied that opportunity if the SURP is utilized. The SURP is also not necessary to advance Liberty Utilities (Missouri Water) interests because it is not the type of small, unsophisticated utility for which the SURP was designed.

While Movants are aware that the Commission may be sensitive to the impact of rate case expenses generated by a rate case for a smaller system, that concern is not relevant in this particular case. The facilities owned and operated by Liberty Utilities (Missouri Water) were originally constructed and operated by Silverleaf Resorts, Inc. to serve its resort properties in Missouri. Accordingly, the majority of all revenues received by Liberty Utilities (Missouri

Water) are actually paid by Silverleaf Resorts,<sup>1</sup> indicating that Silverleaf Resorts would also absorb the majority of all rate case expenses generated in this case.

### **III. Traditional File and Suspend Ratemaking versus the SURP**

In a “file and suspend” rate case, the utility institutes a rate case by filing tariffs involving a general rate increase, filing general information concerning the rate increase request that will be of interest to the public, and filing supporting direct testimony. See generally, Section 393.140(11) RSMo (2016)<sup>2</sup>, 4 CSR 240-3.030, 4 CSR 240-2.065(1). Unless the Commission otherwise orders, increases in the utility’s rates may not take effect except after 30 days’ notice to the Commission and publication for thirty days. §393.140(11). The Commission has the authority, upon reasonable notice, to conduct a full hearing into the propriety of the tariffs and, pending the hearing and its decision, it may suspend the operation of the tariffs for a total of 300 days beyond their effective date if their effective date does not allow sufficient time for the Commission to determine if they are just and reasonable. §393.150(1)(2).

If the Commission suspends the tariffs,<sup>3</sup> the filing becomes a contested case and a full hearing is required. *Id.* and 536.010(4). When the Commission exercises its discretion to hold a hearing, its decisions must be supported by competent and substantial evidence. *State ex rel. Transp. Delivery Co. v Publ Serv. Comm’n of Mo.*, 414 S.W.2d 322, 327 (Mo. App. W.D. 1967). In any such hearing, the burden of proof to show that the rate increase is just and reasonable is upon the utility proposing the increase. §393.150(2). In a contested case, parties are entitled to due process, including among other protections notice of hearing and a reasonable opportunity to

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<sup>1</sup> Based on Liberty’s 2016 Annual Report, Liberty reported revenues of \$1,060,638. Of this amount, Silverleaf Resorts, Inc. paid \$612,776, or 57.7%.

<sup>2</sup> All statutory chapter and section references hereinafter are to RSMo (2016), unless otherwise noted.

<sup>3</sup> Movants acknowledge that by non-action alone, the Commission can let a requested rate go into effect. *State ex rel. Laclede Gas Co. v. P.S.C.*, 535 S.W.2d 561, 566.

prepare and present evidence bearing on any issue raised or decided, or relief sought or granted. §§536.063 and .067. All parties have the right to be heard and to introduce evidence, there must be a full and complete record of the proceedings, and the Commission must make a report and order. §386.420(1)(2)(4). These due process requirements are not met unless the parties are afforded a full and fair hearing at a meaningful time and in a meaningful manner. *State ex rel. Fischer v. Public Service Commission*, 645 S.W.2d 39, 43 (Mo. *en banc* 1983). In a typical rate case, witness testimony is pre-filed, discovery is conducted, and public hearings are held, all within deadlines established by the Commission to provide the parties' sufficient opportunity to fully develop their positions.

SURP, in contrast, is a procedure borne entirely of Commission regulation, 4 CSR 240-3.050, *et seq.* The procedure, as described by the Commission, was "designed to reduce the barriers between a small company and a Commission decision."<sup>4</sup> As Jacob Westen, Staff Deputy Counsel for the Water and Sewer Division of the PSC, noted in the recent SURP rulemaking hearing, through SURP: "Staff is able to provide assistance to the unsophisticated companies that might have trouble being able to put together a rate case."<sup>5</sup> Utilities to which SURP is available include water and sewer companies with 8,000 or fewer customers. 4 CSR 240-3.050(1). About this limit, Mr. Westen testified: "I think the 8,000 number is sourced from the statutes that Mr. Smith identified [Sections 393.146, 393.320, 393.145, RSMo.] and because those are identified as small utilities that may have operational issues or need receivership or need to be acquired."<sup>6</sup> This reasoning comports with the small utility companies that have recently taken advantage of

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<sup>4</sup> In the Matter of a Requested Rate Increase for Annual Sewer Operating Revenues by Hickory Hills Water & Sewer, WR-2014-0167, SR-2014-0166, Order Directing Filing, p. 2 (August 13, 2014).

<sup>5</sup> AX-2018-0050, In the Matter of a Proposed Rule Regarding Staff Assisted Small Utility Rate Cases, Tr. Rulemaking Hearing, Vol. 1, p. 6, ll. 22-25 (Dec. 21, 2017).

<sup>6</sup> *Id.* at p. 16, ll. 3-7.

SURP: Terra Du Lac Utilities, Rogue Creek Utilities, Osage Water, S.K.&M Water and Sewer Co., Oakbrier Water Co., Raccoon Creek Utility Operating Company, Ridge Creek Water Company.

In a “file and suspend” rate case, there is at least the theoretical possibility that the Commission will take no action to suspend the tariff and it will automatically go into effect without any other process. In contrast, once a SURP is filed, the process outlined in the regulation must be followed or the tariff will never be filed at all. This is because a SURP is initiated not by filing tariffs, but by a small utility company filing a letter with the Commission’s Secretary specifying the amount of overall revenue increase it is requesting. 4 CSR 240-3.050(2).

Thereafter, there is significant amount of process in the SURP, but an intervening party is not guaranteed any meaningful participation in that process. SURP does not require (or even contemplate) the disclosure of a party’s case-in-chief to the other parties through prepared direct testimony, or the development of issues or evidence through prepared rebuttal or surrebuttal testimony. Nor is there a procedural schedule developed after a procedural conference with the presiding officer and all the parties. Instead, Staff, “files a timeline under which the case will proceed, specifying due dates[.]” Nor, if the timeline filed by Staff in this case is any indication, does it contemplate any party other than Staff propounding discovery. Rather, Staff simply investigates the rate request, and Office of Public Council (“OPC”) may investigate the rate request if it wants to. 4 CSR 240-3.050(6). Investigation may include review of the utility’s cost of service, operating revenues, rate design, charges, tariffs, and operational or customer service issues. *Id.* Staff, within 90 days of the letter filing, must provide its preliminary investigative/auditing report of the utility to the utility and public counsel. 4 CSR 240-3.050(9). Within 120 days of the filing of the letter Staff is to provide its “settlement proposal” to both the

utility and public counsel. 4 CSR 240-3.050(10). Within 150 days of the letter filing, Staff and the utility are to file a full or partial "disposition agreement." 4 CSR 240-3.050(11). SURP does not contemplate an intervenor participating in the investigation, contributing to a settlement proposal or entering into a full or partial disposition agreement. It is process without participation for an intervening party, which is only logical for those truly small utilities where there are no intervening parties.

Only *after* a disposition agreement is filed are the small utility's proposed tariffs filed. 4 CSR 240-3.050(14)(16). This would appear to be an intervenor's first opportunity, possibly as late as 150 days into the process, to learn exactly how the small utility is proposing to increase its rates. At that point, the tariffs state an effective date of 30 days after filing if the disposition agreement is executed by the utility, Staff and OPC, or an effective date of 45 days after filing, if the disposition agreement is executed only by the utility and Staff. *Id.* The utility must send notice to its customers of the proposed tariff provisions and must invite customers to submit comments within 20 days thereafter. *Id.* Within 5 days after the end of the public comment period, OPC must file a pleading indicating its position or requesting a local public hearing or evidentiary hearing. 4 CSR 240-3.050(15)(17). OPC may also request an evidentiary hearing after a local public hearing. 4 CSR 240-3.050(19). In the request for an evidentiary hearing, OPC must specify the list of issues for the requested evidentiary hearing. 4 CSR 240-3.050(20). *Only* if OPC requests an evidentiary hearing are the pending tariff provisions suspended and the case resolved through contested case procedure process. *Id.*

There is no provision in the SURP under which an intervening party can request an evidentiary hearing. The intervenor party is not provided with the small utility's evidence supporting its rate increase or an opportunity to "investigate" and is not considered a party (or

hold-out) to the disposition agreement. In the event an evidentiary hearing *is* ordered, the Commission's decision and order must be issued and effective no later than 11 months after the SURP was opened, through contested case procedures consistent with the requirements of due process and with fairness to the participants and the utility's ratepayers. 4 CSR 240-3.050(20)(24).

In short, although Movants have been granted intervention, during the SURP, Movants will have no meaningful opportunity to participate, and even if the SURP eventually resulted in an evidentiary hearing, Movants' opportunity to participate will be materially limited by the short amount of time (relative to a regular rate case) left on the clock. Because Movants desire to participate in any proceeding in which a rate increase for Liberty Utilities (Missouri Water) is considered, Movants ask that the Commission dismiss this SURP and require Liberty Utilities (Missouri Water) to proceed under the statutory file and suspend procedures, where Movants will be assured due process. Movants believe such an order would be entirely consistent with the spirit of 4 CSR 240-3.050(21), which permits a party (Staff or the utility) to move the Commission to resolve the utility's rate increase request through contested case procedures, considering the requirements of due process and fairness to the participants in the SURP and the utility's ratepayers.

#### **IV. SURP Small Water and Sewer Utilities Versus Liberty Utilities (Missouri Water)**

As noted above, SURP is "designed to reduce the barriers between a small company and a Commission decision"<sup>7</sup> and "to provide assistance to the unsophisticated companies that might

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<sup>7</sup> In the Matter of a Requested Rate Increase for Annual Sewer Operating Revenues by Hickory Hills Water & Sewer, WR-2014-0167, SR-2014-0166, Order Directing Filing, p. 2 (August 13, 2014).

have trouble being able to put together a rate case."<sup>8</sup>

4 CSR 240-3.050(1) limits the SURP to water and sewer companies serving 8,000 or fewer customers. 4 CSR 240-3.010(7) defines customer as "any person, firm, partnership, corporation, municipality, cooperative, organization, governmental agency, etc., that accepts financial and other responsibilities in exchange for services provided by one (1) or more public utilities." The definition of "customer" does not require a contractual relationship between the customer and the public utility. Rather, the regulation defines customer as the person that accepts financial responsibility for *utility services*, it does not ask who has financial responsibility to the *public utility*.

Where there is an intermediary entity which simply passes through the utility bills, it is the number of end-user customers which should count for the purposes of determining SURP eligibility, not the number of intermediary entities, which do not own, control or manage any of the assets which provide service to the end-user customer.

The end-user definition of customer comports with the spirit of the SURP regulation and prevents the perverse scenario of a large and legally sophisticated public utility company taking advantage of the SURP regulation to skirt the traditional rate case process. The end-user definition of customer, for purposes of SURP eligibility, also works in concert, rather than against, the policy interest for small, financially fragile and distressed water and sewer utilities being acquired by larger utilities.

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<sup>8</sup> AX-2018-0050, In the Matter of a Proposed Rule Regarding Staff Assisted Small Utility Rate Cases, Tr. Rulemaking Hearing, Vol. 1, p. 6, ll. 22-25 (Dec. 21, 2017).

In 2013 Algonquin Water Resources of Missouri, LLC changed its name to Liberty Utilities (Missouri Water). Liberty Utilities (Missouri Water) is a subsidiary of Algonquin Power & Utilities, Corp. As opposed to the small utilities mentioned above, Liberty Utilities (Missouri Water) has many affiliate water and sewer companies spanning across the United States of America. According to its website, "Liberty Utilities delivers safe, reliable drinking water to over 150,000 customer connections. We pump, treat, and deliver potable water to homes, schools, hospitals, and businesses."<sup>9</sup> The states in which Liberty Utilities provide service include Arizona, California, Texas, Illinois, Arkansas and Missouri. In Missouri, Liberty Utilities serves the following communities: Noel, Branson, Kimberling City, Cedar Hills, Catawissa, House Springs, Pacific, Scotsdale, Cape Girardeau, Branson, and De Soto.<sup>10</sup>

According to its 2016 Annual Report, Liberty Utilities (Missouri Water) claims 1,698 residential customers and 269 commercial customers, equaling a total of 1,975 customers. One of those customers is Silverleaf Resorts, which operates three resort properties in Missouri served by Liberty Utilities (Missouri Water). Silverleaf Resorts is an intermediary entity between Liberty Utilities (Missouri Water) and the 36,686 time-share vacation homeowners of these resort properties which pay Liberty Utilities (Missouri Water) for water and sewer services. Interpreted consistently with the purpose of the SURP, Liberty Utilities (Missouri Water's) actual number of end-user customers greatly exceeds the 8,000 customer threshold for filing under SURP. The classification of Liberty Utilities (Missouri Water) as a small utility, for the purposes of SURP eligibility, ignores both reality and the purpose of the SURP.

## **V. Rate Case Expense**

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<sup>9</sup> <https://libertyutilities.com/commercial/about/what-we-do/water-and-wastewater.html>

<sup>10</sup> *Id.*



Movants have considered whether Liberty Utilities (Missouri Water's) decision to file under the SURP may have been motivated by a concurring opinion filed by former Commissioner Jefferson Davis in WR-2006-0458.<sup>11</sup> In that case, Mr. Davis opined that Algonquin Water Resources of Missouri, LLC (the predecessor entity) should have filed under the SURP, rather than filing a tariff, precipitating a general rate case. Mr. Davis' argument was based on his desire to reduce rate case expense.

The current situation renders this policy justification inapplicable and illogical. The Movants represent nearly 60% of Liberty Utilities (Missouri Water) revenues in Missouri, based on Liberty Utilities (Missouri Water's) 2016 annual report. The Movants will bear roughly the same percentage in rate case expense. In this case the customers that will bear rate case expense will be the 36,686 end-user customers, which is beyond the customer limits of the SURP. Further, the Movants would rather shoulder their share of rate case expense for the due process afforded by the general rate case, than take the minimal reduction in rate case expense and go without a meaningful opportunity to participate.

Mr. Davis also opined, "This case is one of first impression for this Commission in that a small water company opted not to make use of the small company rate case procedures. The practice should be the exception rather than the norm exercised by parties seeking a rate increase because of the impact it has on the ratepaying customers."<sup>12</sup> While the Movants understand the concern underlying these comments, Movants respectfully disagree with the characterization of Liberty Utilities (Missouri Water) as a "small water company." The process authorized by the

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<sup>11</sup> In the Matter of the Tariff Filing of Algonquin Water Resources of Missouri, LLC, to Implement a General Rate Increase for Water and Sewer Service Provided to Customers in its Missouri Service Areas, WR-2006-0425, Concurring Opinion of Chairman Jeff Davis (March 13, 2007).

<sup>12</sup> *Id.*

Missouri legislature under Section 393.140(11), RSMo. ("file and suspend method") should be the procedural rule to changing utility rates for a utility the size and sophistication of Liberty Utilities (Missouri Water). See generally, *State ex rel. Jackson County*, 532 S.W.2d 20 (Mo. *en banc* 1975). The SURP represents a process created by the Missouri Public Service Commission, not the state legislature, to deal with a particular population of small utilities which are financially sensitive and unequipped to handle the traditional regulatory process. The Commission should be cautious in substituting its process over the process established by state statute, particularly with regards to a utility which clearly does not fit the intended purpose of the SURP regulation.

## **VI. Conclusion**

The Commission is granted deference in the interpretation of its own rules. See generally, *Matter of Verified Application and Petition of Laclede Gas Company*, 504 S.W.3d 852, 859 (Mo. Ct. App. W. D., 2016). The Commission should define "customers" to limit SURP's applicability to 8,000 or fewer end-user customers. This interpretation respects and effectuates the purpose of SURP without allowing it to be abused by large and sophisticated utilities which clearly it was not designed. This interpretation recognizes that what is a regulatory "barrier" to one party may be "due process" to another party.

The SURP reduces the procedural timeline, and the filing and evidentiary requirements of a monopoly public-utility to increase their rates. SURP provides a needed regulatory alternative for small utilities with less than 8,000 end-user customers, where no other interested party seeks intervention. The Commission does these truly needy small water and sewer utilities no good by

adhering to a definition of customer which allows for large, sophisticated utilities to bypass the traditional ratemaking process.

WHEREFORE, Orange Lake Country Club, Inc. and Silverleaf Resorts, Inc. respectfully asks the PSC to dismiss the small utility rate case proceeding filed by Liberty Utilities (Missouri Water), or, in the alternative, order Liberty Utilities (Missouri Water) to file tariff pursuant Section 393.140(11).

Respectfully Submitted,

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/s/Joshua Harden

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been emailed to all counsel of record this 8<sup>th</sup> day of February, 2018.

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/s/Joshua Harden

# SCHEDULE D

**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

**SILVERLEAF RESORTS, INC. AND ORANGE LAKE COUNTRY CLUB, INC.'S  
RESPONSE TO STAFF'S MOTION TO STRIKE**

COME NOW, Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. (herein "Silverleaf"), by and through undersigned counsel, in response to the Motion to Strike and Motion for Expedited Treatment (herein "Motion") filed on July 30, 2018 by the Staff of the Missouri Public Service Commission in response to the Rebuttal Testimony filed by William Stannard on behalf of Silverleaf. For its cause, Silverleaf states the following:

On April 24, 2018 the parties to this case received via e-mail from Staff, "Company/Staff Agreement Regarding Disposition of Small Water and Sewer Company Revenue Increase Request Liberty Utilities (Missouri Water), LLC D/B/A Liberty Utilities." Staff's proposed Disposition Agreement set forth specific terms and conditions offered by Staff to resolve all of the issues in this case. Silverleaf agrees that Staff's proposed Disposition Agreement, which sets forth, for settlement negotiation purposes, specific terms and conditions for purpose of settling this case, was and is a confidential settlement communication.

However, Silverleaf disagrees with Staff that all of its regulatory work commencing from the moment Liberty Utilities filed for a rate increase constitutes a "confidential settlement communication." Staff seeks to have a wide variety of documents and analyses from outside of the Disposition Agreement deemed a "confidential settlement offer," not just the proposed Disposition Agreement itself. The list of documents include draft revised tariff sheets; Staff audit

workpapers; Staff rate design workpapers; and any other documents supporting (or unrelated to) Staff's recommendation made in the Disposition Agreement. The documents Staff seeks to shield from the Commission and the legal record include Staff's Audit Report, the Consumer Experience Final Report, Report of Water and Sewer Department Field Operations and Tariff Review, Depreciation Schedules, Rate Base Worksheet, draft water and sewer tariffs, and the individual EMS runs for all Liberty Utility water and sewer systems. Neither Missouri case law, the regulations of the Missouri PSC nor common sense support this incredibly expansive view of settlement offer confidentiality.

The case law that Staff cites in its Motion supports the position that a Settlement Offer or Agreement is a "confidential settlement communication" and should not be admitted as evidence of guilt or liability with the trier of fact. Silverleaf agrees that the draft disposition agreement offered by Staff on April 24, 2018 (which ultimately led to the non-unanimous partial disposition agreement filed May 25, 2018) was covered by settlement offer confidentiality. Silverleaf would also agree that the verbal communications specifically regarding the draft disposition agreement would also be covered under settlement agreement confidentiality. The quantitative analyses conducted by Staff prior to the settlement offer do not directly relate to the amounts offered in the settlement and should be viewed as independent documents from the Day 120 settlement offer itself. The scope of the confidential settlement communication is the settlement offer itself. To interpret the Rule otherwise would lead to the absurd conclusion that the Staff's audit work papers, Staff rate design workpapers, and any other documents supporting Staff's recommendations regarding settlement cannot be relied upon as evidence by the Commission as the Commission is asked to determine whether to approve the settlement proposal. In effect, Staff's interpretation would render Staff's reports meaningless and unavailable to the

Commission for any purpose since the Commissioners obviously would not participate in negotiating a settlement on which it must rule.

The case law cited by Staff does not support the proposition that all work product produced by Staff preceding the draft disposition agreement is also covered by settlement offer confidentiality. In fact, reports and audits regarding water utilities have not been historically excluded from the record on the basis that they constitute a settlement offer. Commission Rules explicitly state:

Reports, work papers, or other documentation related to work produced by internal or external auditors, consultants, or attorneys, except that total amounts billed by each external auditor, consultant, or attorney for services *related to general rate proceedings shall always be public...* . 4 CSR 240-2.135(2)(5) (emphasis added).

An interpretation that bundles these workpapers and documents under the umbrella of a “settlement offer” not only would deprive the Commission of evidence on which to rely in making a decision, it plainly contradicts the Commission’s Rule. The Commission Rules clearly exclude these documents from the scope of settlement confidentiality.

Fundamentally, and consistent with the purpose of 4 CSR 240-2.135(2)(5), removing the records would strip vital evidence from the docket and would infringe on the due process rights of parties. The Staff prepared reports at issue cannot be questioned in this docket if the Staff’s overly restrictive position were to apply. Parties would have no opportunity for cross-examination or to rebut these positions in evidence and argument simply because it could not reference the disposition agreement that forms the evidentiary backbone of the Staff position. In fact, in the case of a non-unanimous settlement, a party would be prevented from questioning the assumptions underlying the Staff analyses or the role of the analyses in developing the non-

unanimous settlement. This creates the risk of serious due process concerns and potentially leaves the Commission with no evidentiary record on which to rely in approving such a settlement. Staff points to 4 CSR 240-2.090(7), to wit: "Facts disclosed *in the course* of a prehearing conference and settlement offers are privileged and, except by agreement, shall not be used against participating parties unless fully substantiated by other evidence." (Emphasis added.) Under Staff's interpretation, "in the course" extends from the moment Liberty Utilities filed its rate request. Also, Staff refers to 4 CSR 240-3.050(10) regarding Staff's filing of a 120-day settlement proposal. But the language of the regulation clearly differentiates between the Disposition Agreement and other components which are to be provided. Those components include the documents at issue in the Motion.

It further stretches credulity to consider all of Staff's voluminous work product and analysis to be a "settlement offer." These documents (in many cases formulaic analyses) cannot logically be deemed "negotiable" in any way. The Missouri Court of Appeals, Eastern District dealt with the boundaries of settlement offer confidentiality in *Holtmeier v. Dayani*, "A valid compromise requires mutual concessions or a yielding of opposing claims. *Maugh v. Chrysler Corp.*, 818 S.W.2d 658, 660 (Mo.App.1991). An offer of compromise is made with the idea of mutual concessions. *Id.*" 862 S.W.2d 391, 403-04 (Mo. App. E.D. 1993). Staff's desire to pack literally all of its work product and analysis under the "settlement offer" umbrella runs counter to this definition of a legitimate settlement agreement.

In *Holtmeier* the Court also notes that "[o]ne exception to the rule that settlement negotiations be excluded is that if an offer of settlement also constitutes an admission of an independent fact pertinent to an issue between the parties, then the offer of settlement is admissible on the trial of such issues. *Owen*, 642 S.W.2d at 414." *Id.* In fact, all of Silverleaf's



references to Staff's 120-day Proposal (and the voluminous material conveyed with it) are to establish independent facts pertinent to the issues between the parties; specifically various discrepancy between Liberty Utilities revenue requirement numbers and Staff's analysis. At no point does Silverleaf use the 120-Day proposal as an admission of guilt or a statement against interest by Staff. None of the policy rationales supporting settlement offer confidentiality are applicable to the rebuttal testimony filed by Mr. Stannard on behalf of Silverleaf.

Quite the opposite of Staff's assertion, a dramatic extension of the confidentiality of settlement offers to include all proceeding analysis, work product and reports will certainly hinder settlement negotiations and offers. Just as a new extension of confidentiality would remove any value from the workpapers for the Commission, it would similarly reduce the meaningfulness of these analyses for parties to a proceeding. For example, if Silverleaf understood that Staff's position was that all of its analysis, work product and reports preceding its Disposition Agreement were considered by Staff to be confidential settlement communications and could not be subject to scrutiny or questioning, Silverleaf likely would have approached settlement discussions far differently. For instance, Silverleaf may not have participated and simply sought the information via discovery.

Also, the policy rationales supporting the confidentiality of settlement offers do not fit the situation at hand. As the case law cited by Staff in its Motion provides, the policy rationale for settlement offer confidentiality is based on: 1) encouraging parties to settle and 2) the fear that a jury may view a settlement offer as an indication of the merits of the underlying case. Commission Rule compels the parties to seek to settle; so, no additional encouragement is needed. And given that every case under SURP must include settlement discussions pursuant to Commission Rule, the existence of discussions says nothing about the merits of one party's case

relative to another. Consequently, the policy rationale for open discourse about regulated ratemaking should take the highest priority. *See, e.g.*, 4 CSR 240-2.135(5); 4 CSR 240-2.135(1) (establishing a presumption that items at the Commission should be open to the public).

Silverleaf also notes that a settlement offer is not the same as an executed settlement. An executed non-unanimous settlement must still be supported by an evidentiary record before it can be approved by the Commission. To the extent that Staff's work papers preceding the execution of a non-unanimous settlement are used as evidentiary support for the partial Disposition Agreement, then an intervenor, such as Silverleaf is entitled to inquire and opine on the evidence. Liberty filed direct testimony that plainly discusses the terms of the partial Disposition Agreement and, without complaint from Staff, has publicly disclosed information that Staff now calls confidential in the context of testimony from a Silverleaf witness.<sup>1</sup> Any claim of confidentiality as to the settlement offer ended on June 22, 2018, when Liberty publicly filed key terms of the settlement offer and underlying Staff documents. Any confidentiality has been waived by Liberty's public disclosure.

Staff wrongly claims that the portions of Silverleaf's rebuttal testimony related to the partial Disposition do not correspond to another party's direct case. As evidenced by the pages of discussion of the Partial Disposition and the Staff reports in Ms. Schwartz's Direct Testimony

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<sup>1</sup> *See* Direct Testimony of Jill Schwartz at 4 ("I will address the Partial Disposition Agreement filed on May 24, 2018. I will address the unresolved revenue requirement and rate design issues of concern to the Company"); *id.* at 5 ("On April 24, 2018, Staff circulated a proposed disposition agreement that, among other things, suggested a water revenue requirement increase of \$818,800 (a 92.4% increase) added to existing revenues of \$871,317 for an overall annual level of water operating revenues of \$1,690,117. In addition, Staff suggested a sewer revenue requirement increase of \$196,792 (a 75.8% increase) added to existing revenues of \$258,381 for an overall annual level of sewer operating revenues of \$455,163."); *id.* at 6 ("It is my understanding that Staff's financial analysis department recommended, and Staff used, a capital structure including 42.83% equity capital and a return on that equity ("ROE") of 9.75%.")

(see footnote 1), Silverleaf's rebuttal testimony absolutely relates to previously filed direct testimony. Staff's claim is factually inaccurate and should be rejected.

For these reasons, Silverleaf asks the Commission to deny Staff's Motion in its entirety and to grant any further relief deemed just and necessary.

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 31<sup>st</sup> day of July 2018.

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/s/ Joshua Harden

# SCHEDULE E

**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 Rate Increase.	)	SR-2018-0171

**SILVERLEAF AND ORANGE LAKE COUNTRY CLUB'S  
RESPONSE TO STAFF'S PROPOSED PROCEDURAL SCHEDULE**

COMES NOW, Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. (herein "Silverleaf") responding to the Non-Unanimous Proposed Procedural Schedule filed by the Staff of the Missouri Public Service Commission ("Staff"). Silverleaf does not oppose the dates proposed in the proposed schedule, but writes to emphasize that Liberty Utilities (Missouri Water), LLC ("Liberty Utilities"), the applicant and the party with the burden of proof in this proceeding, is compelled by law to file evidence in support of all contested issues, including the proposed tariff that itself is contested in this case.

**I. BACKGROUND**

1. On April 3, 2018 Silverleaf filed a request for an evidentiary hearing in this case. Silverleaf in that filing explained that a failure to hold an evidentiary hearing on contested issues in this case would result in a violation of basic due process.
  
2. At the April 4, 2018 Agenda Meeting the Commission denied Silverleaf's motion to dismiss this case. In that Agenda meeting, part of the rationale expressed for denying the motion to dismiss was that Silverleaf would eventually be given an opportunity for an evidentiary hearing, thereby assuaging some of Silverleaf's due process concerns stemming from Liberty Utilities' use of the Small Utility Rate Procedure (SURP) in this case.

3. On April 11, 2018 Liberty Utilities filed its Suggestions in Opposition to the [Silverleaf's] Request for an Evidentiary Hearing.

4. On April 20, 2018 a procedural conference was held to take up the matter of an evidentiary hearing. In that procedural conference the administrative law judge indicated his intent to not rule on Silverleaf's request for an evidentiary hearing until submission of the "150-day Disposition Agreement."

5. On May 24, 2018 Staff filed a non-unanimous partial disposition agreement and request for an evidentiary hearing.

6. On May 29, 2018 (nearly 2 months after Silverleaf's initial request for an evidentiary hearing) the Commission issued its Order Directing Filing of Proposed Procedural Schedule.

7. On June 5, 2018 Staff filed a non-unanimous proposed procedural schedule. That proposed schedule, over Silverleaf's objection, does not require Liberty Utilities to file as part of its direct evidence the proposed tariff that will implement the rates for which it seeks approval.

## **II. THE MISSOURI APA REQUIRES THAT LIBERTY UTILITIES FILE DIRECT EVIDENCE SUPPORTING EACH CONTESTED ISSUE**

8. Although Silverleaf is generally supportive of the proposed procedural schedule filed by Staff, Silverleaf refused to be a signatory to the non-unanimous proposed procedural schedule because it fails to require Liberty Utilities to file its proposed tariff with its direct evidence.

9. Liberty Utilities' proposed tariff is itself a contested issue in this case. Clearly the rates reflected in the tariff will result from the Commission's decision on contested cost of service issues. But the proposed tariff also encapsulates at least three issues that require specific

evidence separate and apart from the cost of service issues: (1) whether and how to consolidate separate service areas; (2) allocation of costs between water and sewer and across customer classes; and (3) design of the rates themselves (i.e., customer charge vs. volumetric rate). Notably, Staff in this case has identified these issues as remaining in dispute in its Partial Disposition Agreement. Thus the tariff in this case remains heavily contested and should not be viewed as merely a compliance filing to reflect prior decisions. The tariff is itself a fundamentally contested issue upon which parties have a right to provide evidence and argument.

10. The Missouri APA requires that “[r]easonable opportunity shall be given for the preparation and presentation of evidence bearing on any issue raised or decided or relief sought or granted.” Section 536.063.

11. Any order resulting from this docket must comply with principles of due process, comply with statutory authority, and be supported by competent and substantial evidence. Section 536.140(2).

12. A failure to provide an opportunity for parties to contest in evidence and argument the proposed tariff violates principles of due process and fails to comply with the Missouri APA. A failure by Liberty to provide direct evidence in support of its contested tariff cannot be supported by competent and substantial evidence.

13. While the SURP generally allows for the filing of a tariff as a compliance filing to implement the Disposition Agreement, that only works if the Disposition Agreement is uncontested. *See*, Section 536.060. By its own terms, the Partial Disposition Agreement leaves open numerous contested issues, including several tariff-related issues. Pursuant to Section

536.063, Silverleaf must be given the opportunity to provide evidence and argument on the tariff. Otherwise, any resulting order could be fatally flawed and cannot stand up on appeal.

### **III. WHEN A UTILITY REQUESTS A RATE CHANGE IT MUST FILE TARIFF(S)**

14. It has been suggested that Liberty Utilities need not file its proposed tariff because this is a SURP proceeding, and the SURP rules view the tariff as a compliance filing intended to implement the Disposition Agreement. As noted above, that only works if the Disposition Agreement stipulates to all issues, leaving nothing contested. Where contested issues remain, parties must be allowed the opportunity to provide evidence and argument pursuant to the Missouri APA, which in this case requires that Liberty Utilities file its proposed tariff with its direct evidence.

15. In addition to the clear requirements of the Missouri APA, Silverleaf also disagrees with Staff's understanding that Commission rules do not require Liberty Utilities to file its proposed tariff with its direct evidence.

16. Silverleaf believes that in processing a rate case, the Commission is not specifically limited to the "file and suspend" procedure found in Section 393.150, RSMo. The specific authority of the Commission to change a utility's rates can be found in several different statutes. *See generally*, Sections 393.150.1 (the file and suspend method) and 393.260 (customer complaints). Also, several statutes refer to the Commission's authority to change rates upon its own motion within the context of a hearing. *See*, Sections 393.140(5), 393.150, 393.270, RSMo.

17. However, Missouri courts have found that a utility is limited to Section 393.150, RSMo. (file and suspend) in requesting a rate change. *See State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 27 (Mo. en banc 1975). A utility cannot initiate a "complaint"



against its own rates in order to skirt the filing of a rate schedule when requesting a rate change. *Id.* So, while the Commission may not be limited to a specific process for initiating and reviewing a change in rates for a utility, a utility initiating a rate increase on its own authority is.

18. Liberty Utilities has explicitly requested "an increase of \$995,844 in its annual water system operating revenues and an increase of \$196,617 in its annual sewer system operating revenues." Liberty Utilities Request for Increase in Annual Water and Sewer System Operating Revenues filed December 15, 2017. Accordingly, Liberty Utilities initiated this rate case, and the process must follow the requirements associated with that fact.

19. To overcome this fact it has been suggested that under the SURP the Commission is acting upon its own "motion" or "initiative" to change the utility's rates -- thereby alleviating the requesting utility's need to file a tariff. Silverleaf believes this to be a disingenuous fiction. This argument requires: 1) ignoring the utility's actual rate increase request and 2) the belief that the Commission can make a motion through the operation of a regulation, 4 CSR 240-3.050(3). Under this argument the Commission acts upon its own initiative without ever having to take an action, but rather through the automatic operation of a regulation. Further, the regulation at issue does not allow the Commission any choice of action, to wit: "Upon receipt of the letter, the secretary of the commission will cause a rate case to be opened..." See, Sections 3.050(3) ("when a small utility's letter is filed, the secretary shall cause a rate case to be opened..."(rescinded)), and, 10.075(3)(A)2 ("Upon receipt of the letter, the secretary of the commission will cause a rate case to be opened...").

20. This interpretation of a Commission "motion" or "initiative" would unlawfully seek to act on behalf of and to bind future commissions to a specific course of action.

21. Silverleaf does not believe that the Missouri legislature ever intended, or authorized, a utility to seek a rate increase without filing a proposed tariff at some point in the process – especially one with the size and sophistication of Liberty Utilities.

WHEREFORE, Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. respectfully request that the Commission require Liberty Utilities (Missouri Water), LLC to file its proposed tariffs at the time it files the rest of its direct case in this docket, consistent with the requirements of law. Silverleaf further requests such additional relief to which it may be entitled.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been emailed to all counsel of record this 11th day of June 2018.

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**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 9<sup>th</sup> day of  
January, 2019.

In the Matter of Application for a Rate )  
Increase Request for Liberty Utilities )  
(Missouri Water), LLC d/b/a Liberty Utilities )

**File No. WR-2018-0170**

**ORDER DENYING APPLICATION FOR REHEARING**

Issue Date: January 9, 2019

Effective Date: January 9, 2019

On October 24, 2018, the Missouri Public Service Commission issued a Report and Order effective November 3, 2018, regarding Liberty Utilities (Missouri Water), LLC d/b/a Liberty Utilities' tariffs designed to implement a general rate increase for water and sewer service. On November 2, 2018, Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc. filed an application for rehearing.

Section 386.500.1, RSMo 2016, states that the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear." In the judgment of the Commission, Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc.'s application for rehearing does not demonstrate sufficient reason to rehear the matter. The Commission will deny the application for rehearing.

**THE COMMISSION ORDERS THAT:**

1. Silverleaf Resorts, Inc. and Orange Lake Country Club, Inc.'s Application for Rehearing is denied.

2. This order shall be effective when issued.

**BY THE COMMISSION**



*Morris L. Woodruff*

Morris L. Woodruff  
Secretary

Silvey, Chm., Kenney, Hall, Rupp, and  
Coleman, CC., concur.

Clark, Regulatory Law Judge