



positions to resolve controversy quickly and efficiently.<sup>2</sup> Moreover, substantive settlement content is generally inadmissible as evidence, to keep from prejudicing the trier of fact for or against any party with information not ultimately relevant to the positions argued at hearing before the tribunal.<sup>3</sup>

The Commission's practice rule 4 CSR 240-2.090(7) explicitly acknowledges the understanding that settlement is privileged, and not appropriate for presentation to the trier of fact:

(7) 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. Moreover, the Commission's Small Utility Rate Case Procedure in 4 CSR 240-3.050<sup>4</sup> also deems that specific actions in the case are considered settlement. Small Utility Rate Case Procedure 3.050(10), in relevant part, provides:

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<sup>2</sup> *Eisenmann v. Podhorn*, 528 S.W.3d 22, 32 (Mo. Ct. App. 2017) ("Evidence of settlement offers or agreements is generally inadmissible because public policy favors the settlement of disputes"); *Malan*, 942 S.W.2d at 427-428. The *Malan* court expressly stated "[t]he desire to encourage settlements is fully applicable to settlement of administrative actions." *Id.* at 428.

<sup>3</sup> *Hackman v. Dandamudi*, 733 S.W.2d 452, 458 (Mo. App. E.D. 1986) ("Settlement agreements tend to be highly prejudicial and therefore they should be kept from the jury unless there is a clear and cogent reason behind admitting a particular agreement."); *O'Neal v. Pipes Enterprises, Inc.*, 930 S.W.2d 416, 423 (Mo. Ct. App. 1995) ("The basic rule, in Missouri and elsewhere, is that evidence of settlement agreements is not admissible. ... This is because settlement agreements tend to be highly prejudicial and, thus, should be kept from the jury unless a clear and cogent reason exists for admitting a particular settlement agreement."); *State ex rel. Malan v. Huesemann*, 942 S.W.2d 424, 428 (Mo. App. W.D. 1997) ("The danger of admitting evidence of settlements is that the trier of fact may believe that the fact that a settlement was attempted is some indication of the merits of the case. ... This policy also applies in situations involving a completed settlement with another party in the same or in a different case. Thus, *Asbridge v. General Motors Corp.*, 797 S.W.2d 775, 781 (Mo.App.1990), held that the trial court had not erred in excluding evidence that the plaintiff settled with one of the defendants during jury deliberations, stating, '[s]ettlement agreements tend to be highly prejudicial and should be kept from the jury unless there is a clear and cogent reason for admitting a particular settlement agreement.'").

<sup>4</sup> Liberty filed this action while *Small Utility Rate Case Procedures* 4 CSR 240-3.050 were effect, and the case continues under those rules. The rule was rescinded on April 30, 2018, and replaced with 4 CSR 240-10.075, *Staff Assisted Rate Case Procedures*.

(10) No later than one hundred twenty (120) days after a case is opened, ***the staff shall provide a settlement proposal*** to the utility and the public counsel. ***This proposal shall include the staff's recommended changes*** pertaining to the following: the utility's annual operating revenues; the utility's customer rates; the utility's service charges and fees; the utility's plant depreciation rates; the utility's tariff provisions; the operation of the utility's systems; and the management of the utility's operations. ***The staff shall also provide the following with its settlement proposal:*** draft revised tariff sheets reflecting the staff's recommendations; ***a draft disposition agreement reflecting the staff's recommendations;*** its audit workpapers; its rate design workpapers; and any other documents supporting its recommendations. ***A disposition agreement is a document that sets forth the signatories' proposed resolution of some or all of the issues pertaining to the utility's revenue increase request.***

Emphasis added. The rule puts parties to a Small Utility Rate Case Procedure on notice that the Day 120 Staff settlement offer is indeed settlement. Furthermore, the case timeline that Staff files at the beginning of the case also notifies participants that the information provided at Day 120 is settlement, and the related correspondence up to Day 150 is also settlement. See, the relevant portion of which has been reproduced below:<sup>5</sup>

[Continued on Next Page]

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<sup>5</sup> Case No. WR-2018-0170, EFIS Item No. 2, *Small Utility Rate Case Timeline*, p. 2.

Target Day	Target Due Date	Calendar Due Date	Case Activity	Responsible "Party"
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\* \* \*

120	04/14/18	04/16/18	<b><i>Staff's Settlement Proposal Packet</i></b> Sent to Utility & OPC and Arrangements Made for Conference Call or Meeting to Discuss the Proposal	Case Manager
130	04/24/18	04/24/18	Conference Call or Meeting Held with Utility & OPC <b><i>to Discuss Staff's Settlement Proposal</i></b>	Utility, OPC & Staff
135	04/29/18	04/30/18	<b><i>Utility &amp; OPC Notify Staff of Whether They Agree with the Settlement Proposal</i></b> (if not, the reasons for that and suggested changes to the settlement proposal documents are provided to the Case Manager)	Utility & OPC
			Utility Must Respond <b>OR</b> Agree to Extension of Agreement Filing Due Date <b>OR</b> Staff May File Motion to Dismiss Case	Utility; Case Manager
140	05/04/18	05/04/18	<b><i>Agreed-Upon Changes to Settlement Proposal Documents Completed and Final Disposition</i></b> Agreement Sent to Company for Signing (copy also sent to OPC; OPC may or may not sign)	Case Manager
			Continued Compliance with Section 4 of Rule Confirmed (case can be dismissed in case of non-compliance)	Case Manager
145	05/09/18	05/09/18	Signed Disposition Agreement Returned to Staff	Utility; OPC (if applicable)
			Staff Sends Revised Tariff Sheets and Draft Tariff Filing Transmittal Letter to the Utility	Case Manager
150	05/14/18	05/14/18	Staff Files <b><i>Executed Disposition Agreement</i></b>	Case Manager

(Emphasis Added in bold and italics.)

In accordance with both 3.050(10) and the *Small Utility Rate Case Timeline*, Staff delivered its settlement proposal to the parties to this case via email. In the opening sentence the Case Manager identified that the attachments were "Staff's settlement offer in accordance with Day 120 on the amended timeline." See, Exhibit A, attached.<sup>6</sup>

Silverleaf and Orange Lake present and rely upon  
privileged Settlement Information in Rebuttal Testimony

On July 20, 2018, Silverleaf and Orange Lake filed Rebuttal Testimony that nevertheless directly references the "Staff Day 120 Report" twelve times, in substantive

<sup>6</sup> The parties agreed to an extension of the timeline dates detailed above.

manner, as a part of its arguments presented to the Commission. A list of instances and description of use follows:

Location of reference to Settlement	Nature of settlement information used
Page 8: lines 22-23	Use of Day 120 Settlement Offer's cost of debt
Page 13: lines 16 – 19	Use of Day 120 Settlement Offer's proposed revenue requirement
Page 14: lines 1 – 15; Table 6; fn. 5	Use of Day 120 Settlement Offer's proposed revenue requirement and ROR
Page 15: lines 1 – 3; Table 7	Use of Day 120 Settlement Offer's proposed revenue requirement and ROR
Page 18: line 18 – Page 19: line 3, and lines 10 – 13; Table 9	Use of Day 120 Settlement Offer's proposed revenue requirement and ROR. Direct comparison of Staff's Day 120 Offer to Staff's Direct filed case and to existing and Staff corrected Direct rates
Page 20: lines 1 – 5; Table 10	Direct comparison of Staff's Day 120 Settlement Offer to Staff's Direct filed case and to existing and Staff corrected Direct rates

Further, any of Silverleaf's and Orange Lake's arguments in response to the Day 120 settlement offer are improper rebuttal testimony pursuant to the Commission's Practice and Procedure regulations. Regulation 4 CSR 240-2.130(7) prescribes the functions of direct, rebuttal, and surrebuttal testimony. In a situation where all parties may file direct testimony, "rebuttal testimony shall include all testimony which ***is responsive to the testimony and exhibits contained in any other party's direct case.***"<sup>7</sup> Any argument that rebuts the *settlement offer* and not Staff (or any other party's) *direct* case is therefore improper rebuttal, and violates this Commission practice rule.

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<sup>7</sup> Emphasis added. Practice Regulation 4 CSR 240-2.130(7)(B).

### Staff's Attempt to Resolve

Undersigned counsel for Staff contacted counsel for Silverleaf and Orange Lake on Tuesday July 24, 2018, by telephone to notify counsel for Silverleaf and Orange Lake of Staff's concerns. While meaningful discussion occurred, no resolution was reached. Counsel for Silverleaf and Orange Lake subsequently labelled the Rebuttal testimony as "confidential" under 4 CSR 240-2.135 in EFIS. On Wednesday, July 25, 2018, undersigned counsel notified counsel for Silverleaf and Orange Lake by email that Staff continued not to waive settlement confidentiality, and Staff's preferred resolution was for the self-revision of the above identified uses of settlement information out of the filed rebuttal testimony. Undersigned counsel notified Silverleaf and Orange Lake counsel that if the rebuttal testimony could not or would not be corrected by July 27, 2018, this motion would follow.

On July 27, 2018, counsel for Silverleaf and Orange Lake filed a "public" version of the "confidential" Rebuttal testimony where Day 120 settlement references were redacted. Unfortunately, this effort does not resolve the issue. As long as the July 20, 2018, filing remains available, even as "confidential," the trier of fact may still review the settlement information. Settlement information, as described by case law above, is privileged and is rarely appropriate before the trier of fact. Thus, the potential for improper influence—for or against any party--still exists. As a result, this motion follows.

### Conclusion

Missouri case law and the Commission recognize that settlement discussions are privileged and confidential, and not admissible before the trier of fact. The Small Utility Rate Case Procedures identify that Staff's proffered audit results at Day 120 are settlement. When Staff provided the information to the parties for the Day 120 deadline,

it identified that it was settlement. That settlement information is not filed in EFIS for review by the Commission.

At no point has Staff waived the privilege or confidentiality of its settlement offer. No agreements have been made between Staff and Silverleaf and Orange Lake, or with any of the parties generally, waiving the confidentiality of the Day 120 settlement offer. The information relied upon for Rebuttal testimony was not otherwise available to Silverleaf and Orange Lake but for the Staff's Day 120 settlement offer. There is no other evidence before the Commission to substantiate the information of the Day 120 offer. Moreover, to the extent the rebuttal testimony rebuts the privileged settlement information, it is improper rebuttal under 4 CSR 240-2.130(7)(B).

#### Motion for Expedited Treatment

Pursuant to 4 CSR 240-2.080(14), Staff respectfully requests the Commission, at its discretion, hold a telephone conference or issue a decision on the motion on July 31, 2018, if such conference is not deemed necessary by the Commission to rule on the motion. Staff respectfully asks for expedited treatment because of the potential harm of potential prejudice, not only to Staff, but to *any* parties, for or against their positions, by the presentation of settlement information outside of the context of an agreed-to settlement document. Staff filed this pleading as soon as it could, granting time to attempt to informally resolve the matter with opposing counsel.

**WHEREFORE** Staff respectfully moves the Commission to issue an order:

A. If the Commission deems necessary, setting a telephone conference on Tuesday, July 31 to argue Staff's *Motion to Strike*; and, or alternatively;

B. If such argument is not necessary for the Commission to make a determination, direct the striking of the July 20, 2018 rebuttal testimony from Silverleaf and Orange Lake, and direct the removal of that version from the EFIS case file; and

C. Grant any further relief deemed just and necessary.

Respectfully submitted,



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Attorney for the Staff of the  
Missouri Public Service Commission

### **CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile, or electronically mailed to all parties and or counsel of record on this 30th day of July, 2018.

**/s/ Jacob T. Westen**



**Westen, Jacob**

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**From:** Gateley, Curtis  
**Sent:** Tuesday, April 24, 2018 3:00 PM  
**To:** 'Joshua.Harden@stinson.com'; 'giboney@smithlewis.com'; 'Smith, Ryan'; To: Dean Cooper; 'Jill Schwartz'; 'lera.shemwell@ded.mo.gov'; Roth, Keri; Paul Boudreau; Williams, Hampton  
**Cc:** Aslin, Casi; Westen, Jacob; Busch, Jim; Myers, Jamie  
**Subject:** Liberty Water Day 120  
**Attachments:** Auditing Department Report.pdf; Disposition agreement.docx; Liberty Utilities CXD Final Report.pdf; Sewer Tariff.docx; Water and Sewer Department Report.pdf; Water Tariff.docx; EMS Cape Rock Village sewer.pdf; EMS Cedar Hill Estates water.pdf; EMS Crest View Acres water.pdf; EMS High Ridge Manor water.pdf; EMS Hillshine Community water.pdf; EMS Holiday Hills, Timber Creek, Ozark Mountain water.pdf; EMS Lakewood Hills water.pdf; EMS Noel water.pdf; EMS Scotsdale water.pdf; EMS Timber Creek and Ozark Mountain sewer.pdf; EMS Warren Woods water.pdf; Depreciation Schedules.pdf; Rate Base Worksheet.pdf

**Categories:** Important, Case Matter

Please find attached Staff's settlement offer in accordance with Day 120 on the amended timeline. This offer does not yet include attachments A and F, as Staff is still working on the rate design portion. Rather than hold up the process, we are sending these out now and will follow up with the rate design before the end of the week.

Workpapers will be transmitted with the completed rate design.

Curt Gateley  
Missouri Public Service Commission  
573-526-6029