

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

In the Matter of the Application of The Empire)
District Electric Company, The Empire District)
Gas Company, Liberty Utilities (Midstates)
Natural Gas) Corp., and Liberty Utilities)
(Missouri Water) LLC for an Affiliate)
Transactions Rule Variance)

Case No. AO-2018-0179

APPLICATION FOR REHEARING

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Denotes Confidential Information that has been Redacted

September 13, 2019

NON-PROPRIETARY

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APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel (“OPC”) and applies to the Commission to rehear this case because the Commission’s August 15, 2019, *Report and Order* is unlawful, unjust, and unreasonable¹ as follows:

1. In its *Report and Order*, “subject to . . . ten safeguards,” the Commission grants The Empire District Electric Company (“EDE”) , The Empire District Gas Company (“EDG”), Liberty Utilities (Midstates Natural Gas) Corp., and Liberty Utilities (Missouri Water) LLC (the “Applicants”) a variance that relieves them from complying with the competitive bidding requirement—the requirement of obtaining competitive bids when purchasing information, assets, goods or services from an affiliate or demonstrating why competitive bids were neither necessary nor appropriate—of the Commission’s affiliate transactions rules applicable to investor-owned electric and natural gas public utilities (20 CSR 4240-20.015(3)(A) and 20 CSR 4240-40.015(3)(A)) for all of their affiliate transactions.²

2. The Commission’s *Report and Order* granting the Applicants relief from the Commission’s competitive bidding requirement of its affiliate transactions rules is unlawful,

¹ Section 386.500, RSMo. See also Section 386.515, RSMo.

² Regardless of the Commission’s affiliate transactions rules 20 CSR 4240-20.015(3)(A) and 20 CSR 4240-40.015(3)(A), in proceedings before this Commission there is no presumption of prudence for transactions between utilities such as The Empire District Electric Company, The Empire District Gas Company, Liberty Utilities (Midstates Natural Gas) Corp., and Liberty Utilities (Missouri Water) LLC, and their affiliates, including each other. *Office of the Public Counsel v. Missouri Public Service Commission*, 409 S.W.3d 371 (Mo. Banc 2013).

unjust, and unreasonable (1) because the Commission unlawfully dismissed as irrelevant EDE's transactions with its affiliate Liberty Utilities Company ("LUCo") when it terminated its \$200 million line-of-credit facility in February of 2019 and when it refinanced its \$90 million in secured first mortgage bonds in June of 2018; (2) the Commission unjustly and unreasonably restricted the definition of a money pool to be limited to a cash management arrangement among utilities, and (3) because the Commission unjustly and unreasonably granted a variance from the competitive bidding requirements for affiliate transactions in that the facts the Commission found and relied on for good cause to grant the variance are limited to four benefits and ten safeguards which do not establish a "substantial, factual, reasonable, and not minor" reason for why when EDE, EDG, or Midstates Natural Gas engage in any transaction with any affiliate, or even when it participates in a LUCo-administered money pool, it should not be required to competitively bid the terms and conditions of that transaction or show why competitively bidding those terms and conditions was neither necessary nor appropriate.

3. The purpose of the Commission's affiliate transactions rules is to deter public utilities from engaging in transactions with their affiliates on terms more beneficial to those affiliates than they would be with independent unaffiliated third parties or on terms more costly to the public utility than if the public utility were to undertake the activity that is the subject of the transaction on its own. The purpose of the competitive bidding requirement of those rules is to establish the benchmarks against which to measure a public utility's transactions with its affiliates—in this case joining a money pool administered by LUCo.

4. It occurs to the OPC that other parties and the Commission may view that the Commission's affiliate transactions rules require that every advance into and out of LUCo's utilities money pool involving EDE, EDG, or Midstates Natural Gas must be competitively bid.

That is not the OPC's view regarding LUCo's utilities money pool as presented in the agreement made Schedule LU-MTT-1 to Applicants' witness Timpe's direct testimony.³ What must be competitively bid are the terms and conditions upon which they would join and participate in a money pool, *i.e.*, the terms and conditions of the money pool agreement itself. During his January 29, 2019, deposition Staff witness Murray testified to the importance of competitive bidding as follows:

Q. As I recall, as part of this Stipulation & Agreement utilities have the option, I think it's up to them to determine whether or not they can borrow cheaper than participating in – than through the money pool. How will they know that they can borrow cheaper without engaging in a competitive bidding process?

A. I don't know if there is an objective way other than competitive bidding.⁴

(1) Error of law to disregard probative evidence

5. The Commission erred as a matter of law when it concluded in the following unnumbered paragraph from pages 17-18 of its *Report and Order* that evidence of The Empire District Electric Company's ("EDE") recent financial activities involving affiliate transactions with LUCo were irrelevant, *i.e.*, without probative value:

Public Counsel offered objections to a finding of good cause in the form of evidence of alleged past wrongdoings. The Commission finds these objections not germane to this case. Public Counsel also offered scenarios of behavior that may occur in the future as an argument against a finding of good cause. The Commission likewise finds these offerings not germane to this case. Public Counsel offered objections based on the Applicant's and LUCo's past and future business decisions. The Commission is not in a position to second-guess a utility's business decisions outside of a prudence review, which this case is not.

³ Ex. 1, Applicants' witness Mark Timpe direct testimony, Sch. LU-MTT-1, Money Pool Agreement.

⁴ Ex. 8, OPC witness Schallenberg rebuttal testimony, Sch. RES-R-7 (January 29, 2019, deposition of Staff witness Murray), p. 31.

6. Before Algonquin Power and Utilities Corp. acquired the Applicants in 2017, EDE had a \$200 million line-of-credit facility it used for its short-term cash needs. Those needs included support for EDE’s commercial paper program through which it could issue up to \$150 million in commercial paper and the money pool EDE administered for itself and some of its affiliates, including EDG.⁵ LUCo (Liberty Utilities Company) established a \$500 million line-of-credit on February 23, 2018.⁶ The same day EDE terminated its \$200 million line-of-credit facility, and LUCo allowed EDE to begin relying on LUCo’s \$500 million line-of-credit, to support EDE’s \$150 million commercial paper program and the EDE money pool.⁷ EDE did not competitively bid for a new line-of-credit facility at or near the time it terminated its \$200 million line-of-credit;⁸ however, EDE did not, and presently does not, pay anything for relying on LUCo’s \$500 million line-of-credit.⁹ These actions involving affiliates are probative of whether the Commission should grant the Applicants variances from the competitive bidding requirement of its affiliate transactions rules.

7. Further, EDE’s June 2018 refinancing of \$90 million in secured first mortgage bonds with a 15-year unsecured promissory note to LUCo¹⁰—an affiliate transaction—is probative as to whether the Commission should grant the Applicants variances from the competitive bidding requirement of its affiliate transactions rules. EDE did not competitively bid that refinancing, which included a “debt placement fee” of \$450,000 that EDE paid to LUCo and

⁵ Applicants’ witness Timpe Tr. 2:32-33; Ex. 1, Applicants’ witness Timpe direct testimony, p. 4; Ex. 8, OPC witness Schallenberg rebuttal testimony, Sch. RES-R-5 (January 30, 2019, deposition of Applicants’ witness Timpe), p. 23-24 (as corrected by Ex. 2, Applicants’ witness Timpe surrebuttal testimony, Sch. MTT-S-1); Ex. 8, OPC witness Schallenberg rebuttal testimony, p. 4.

⁶ Applicants’ witness Timpe Tr. 2:74-75 and Ex. 18C; Ex. 1, Applicants’ witness Timpe direct testimony, pp. 6-7.

⁷ Applicants’ witness Timpe Tr. 2:32-33.

⁸ Ex. 10 (Applicants’ response to OPC DR 1078).

⁹ Applicants’ witness Timpe Tr. 2:33; Ex. 10 (Applicants’ response to OPC DR 1078).

¹⁰ Applicants’ witness Timpe Tr. 2:37-39.

interest at the rate of 4.53%.¹¹ However, LUCo obtained the funds from its unsecured \$500 line-of-credit facility at interest rates that have, so far, fluctuated between 3.25 and 3.8125%, and LUCo did not incur the \$450,000 “debt placement fee” EDE paid to it.¹² Secured debt is less costly than unsecured debt and commercial paper is less costly than a line-of-credit facility.¹³ EDE had access to its own commercial paper, and it could have issued new secured first mortgage bonds.

8. Although relevant for other reasons, these activities particularly are relevant to LUCo’s utilities money pool¹⁴ because the administrator, participants, and contemplated participants—including the Applicants—are all affiliates and the terms of the agreement governing that money pool include affiliate transactions with rates based on LUCo’s \$500 million line-of-credit facility and, potentially, LUCo-issued commercial paper.

(2) Money Pool definition

9. In its *Report and Order* the Commission defines a money pool as follows:

A Money Pool is a cash management arrangement amongst utilities, under which a utility may make short-term loans (less than 365 days) to affiliates when it has excess cash, and may make short-term borrowings from affiliates when it has short-term cash needs. Excess funds will also be invested in short-term high-quality liquid investments (such as money market funds) after the needs of borrowing participants have been met.

The Commission cites to paragraph 16 of the Application as support for that definition. That paragraph follows:

¹¹ Applicants’ witness Timpe Tr. 2:39-41; Ex. 10 (Applicants’ response to OPC DR 1078).

¹² Ex. 18C; Applicants’ witness Timpe Tr. 2:41.

¹³ Applicants’ witness Timpe Tr. 2: 40, 90-91; Ex. 1, Applicants’ witness Timpe direct testimony, p. 8; Staff witness Murray Tr. 2:118-119; Ex. 8, OPC witness Schallenberg rebuttal testimony, Sch. RES-R-7 (January 29, 2019, deposition of Staff witness Murray), p. 26.

¹⁴ Ex. 1, Applicants’ witness Mark Timpe direct testimony, Sch. LU-MTT-1, Money Pool Agreement.

The "Money Pool" is a cash management arrangement among the utilities, under which a utility may make short term loan (less than 365 days) to other affiliates when they have excess cash, and may make short-term borrowings from other affiliates when they have short-term cash needs. Excess funds will also be invested in short-term high-quality liquid investments (such as money market funds) after borrowing participant needs have been met. LUCo is the administrator of the Money Pool and guarantees all loans made by eligible borrowers. Participants contributing excess funds to the Money Pool will receive a pro-rata share of all loan and/or investment interest.

As defined in the Application "Money Pool" refers to a specific money pool administered by LUCo, not a generic money pool. Generically, any group can participate in a money pool, which is nothing but a pooling of each individual participant's excess cash to be used for some particular purpose, often to meet the cash needs of participants with cash shortfalls. The following testimony demonstrates this broad definition:

Applicants' witness Timpe:

LUCo desires to employ a money pool, a cash management tool commonly used by corporations, including public utilities, in order to minimize external borrowing and associated costs and/or invest all available cash throughout its organization. Upon Commission approval, the Applicants would become participants in the proposed money pool.¹⁵

OPC witness Schallenberg:

A money pool is an arrangement where a group of parties, often affiliates pool their excess cash, usually daily, then, from that pooled excess cash, distribute cash to pool participants who need cash. To address situations where the pooled cash is insufficient to satisfy all of the cash needs of the participants, the pool is supplemented with money from other sources; typical sources are funds drawn from a line-of-credit facilities or obtained from commercial paper issuances.¹⁶

While not characterized as a money pool, the last eleven pages of Exhibit 19C provide an example of the cash flows of an operating money pool—recordings of cash transfers between LUCo and its affiliates, and LUCo draws and payments on its \$500 million line-of-credit facility.

¹⁵ Ex. 1, Applicants' witness Timpe, p. 3.

¹⁶ Ex. 8, OPC witness Schallenberg rebuttal testimony, p. 3.

(3) Lack of Good Cause

10. The Commission’s grant of a variance that relieves the Applicants from complying with the competitive bidding requirement of the Commission’s affiliate transactions rules applicable to investor-owned electric and natural gas public utilities (20 CSR 4240-20.015(3)(A) and 20 CSR 4240-40.015(3)(A)) for all of their affiliate transactions is unjust and unreasonable because the facts—four benefits and ten safeguards—the Commission found and relies on for good cause to grant the variance do not even establish a “substantial, factual, reasonable, and not minor” reason for why when EDE, EDG, or Midstates Natural Gas join in a LUCo-administered money pool, they should not be required to competitively bid for participating in a money pool or show why competitively bidding is neither necessary nor appropriate, *i.e.*, why they should not be required to establish a benchmark against which the propriety of EDE, EDG, and Midstates Natural Gas participating in LUCo’s money pool can be measured—through competitive bidding or otherwise. The need to competitively bid before joining LUCo’s utilities money pool is especially acute. In that money pool investing participants with excess cash, like Midstates Natural Gas, will be charged a fixed percentage (7.18% for Midstates Natural Gas¹⁷) of LUCo’s \$500 million line-of-credit facility commitment costs, a line-of-credit that LUCo uses to support all of its borrowing activities, not just those related to its money pools.

11. Even if they were sufficient to support a variance for the Applicants to join LUCo’s utilities money pool, which they are not, because the facts the Commission relies on for granting the variance are limited to the Applicants’ participation in LUCo’s utilities money pool, they do not support the Commission’s broad relief from the requirement of the Commission’s

¹⁷ Ex. 13.

affiliate transactions rules to competitively bid transactions with affiliates or show why competitively bidding those transactions is neither necessary nor appropriate for all of their affiliate transactions.

12. In the recent past EDE has engaged in financial transactions with LUCo separate and apart from LUCo's utilities money pool, where LUCo used its \$500 million line-of-credit facility. It is undisputed that in June of 2018 EDE refinanced \$90 million of its secured first mortgage bonds by executing a 15-year unsecured promissory note with its parent LUCo without competitively bidding the refinancing;¹⁸ however, there is no evidence in the record that EDE could not have obtained lower cost refinancing through competitive bidding; instead, the evidence supports that EDE could have refinanced the bonds at a lower costs by issuing new first mortgage bonds or commercial paper.¹⁹ Further, with the exception of the seventh safeguard—"During the period that outside borrowing or lending is being utilized by an Applicant Utility [Applicant], any administrative costs that are not related to a specific borrowing or lending under the Liberty Utilities Co. ("LUCo") Credit Agreement should not be charged to that Applicant Utility [Applicant],"²⁰ each of the safeguards to which the Commission subjects the variances expressly and explicitly pertains to a LUCo-administered money pool. In the circumstance described above where EDE executed an unsecured long-term note with LUCo when it could have issued its own secured first mortgage bonds or commercial paper and which does not involve LUCo's utilities money pool, the seventh safeguard provides no protection since EDE did not lend to or borrow from a non-affiliate.

¹⁸ Applicants' witness Timpe Tr. 2:37-39; Ex. 18C.

¹⁹ Applicants' witness Timpe Tr. 2: 40, 90-91; Ex. 1, Applicants' witness Timpe direct testimony, p. 8; Staff witness Murray Tr. 2:118-119; Ex. 8, OPC witness Schallenberg rebuttal testimony, Sch. RES-R-7 (January 29, 2019, deposition of Staff witness Murray), p. 26.

²⁰ *Report and Order*, p. 9, ¶31.

13. Similarly, Midstates Natural Gas has both advanced cash to LUCo and received advances from LUCo numerous times between February 23, 2018, and May 31, 2019.²¹ Overall during that time period Midstates Natural Gas's advances to LUCo exceeded those it received from LUCo by \$17,975,000.²² LUCo has not charged interest for the advances it made to Midstates Natural Gas,²³ but the evidence indicates that Midstates Natural Gas also did not receive any interest on its advances to LUCo.²⁴ Based on Exhibit 19C, since late March of 2018, had Midstates Natural Gas retained its excess cash, **

** Midstates Natural Gas's participation in intercompany advances has provided it with little, if any, benefit—although LUCo benefitted by lowering the draws on, and therefore interest costs of, its \$500 million line-of-credit facility.

14. There is no evidence in the record in this case upon which the Commission can find good cause for why when EDE, EDG, or Midstates Natural Gas engage in financial transactions with affiliates that do not involve a money pool, transactions such as EDE's refinancing of its secured first mortgage bonds with an unsecured long-term promissory note with LUCo or Midstates Natural Gas's advances to and from LUCo,²⁵ they should not be required to competitively bid those transactions or show why competitive bidding was neither necessary nor appropriate.

15. Moreover, the facts upon which the Commission relies to find good cause are not only insufficient for the Commission to grant EDE, EDG, or Midstates Natural Gas variances for

²¹ Ex. 19C, Applicants' witness Timpe, Tr. 2:81.

²² *Id.*

²³ Applicants' witness Timpe, Tr. 2:30.

²⁴ Ex. 19C.

²⁵ OPC anticipates that if LUCo creates a money pool that it administers, the Applicants would participate in that money pool rather than continue to engage in these types of intercompany advances.

all of their affiliate transactions, they are also insufficient to grant any of them a variance to allow them to join in a LUCo-administered money pool.

Four Benefits

16. In the decision section of its *Report and Order*, the Commission states, “In this case, [the] evidence [of good cause] consists of at least four benefits and ten safeguards.”²⁶

Earlier in that same section of its *Report and Order*, the Commission describes the four benefits as follows:

Applicants and Staff both testified to at least four substantial reasons showing good cause related to the requested waiver of the requirement of competitive bids anticipated: 1) lower borrowing interest cost; 2) lower borrowing administrative costs due to lower transactional and documentation requirements; 3) higher interest and investment revenue from excess cash; and 4) having an immediately available line of credit.²⁷

17. In its *Report and Order* the Commission made the following findings of fact regarding these four “benefits”²⁸:

16. One anticipated advantage of the Money Pool is lower borrowing costs for participants in the Money Pool when compared to other commercial lending markets since the commercial paper market effectively provides continuous bidding with borrowing rates expected to be as low or lower than rates Applicants could obtain elsewhere, and with Applicants paying the lowest rate available under the LUCo Credit Agreement.

17. A second anticipated advantage of the Money Pool is that it will likely reduce borrowing costs by avoiding competitive bidding and associated record keeping for individual transactions on a daily basis.

18. A third anticipated advantage of the Money Pool is to increase interest and investment income due to the higher returns from lending excess cash into the Money Pool.

²⁶ P. 16.

²⁷ P. 15.

²⁸ Pp. 6-7, footnotes omitted.

19. A fourth anticipated advantage of the Money Pool is having a line of credit immediately available for use in emergencies, temporary disruptions, and cash flow timing differences.

18. Based on the Commission's findings, the existence of any of these anticipated advantages is derivative of the agreement governing "the Money Pool" (LUCo's utilities money pool), not whether that agreement is competitively bid or a showing is made of why competitive bidding that agreement was neither necessary nor appropriate. Further, as explained following, when viewed appropriately from an individual public utility perspective, the evidence shows that few of the anticipated advantages exist for EDE, EDG, or Midstates Natural Gas.

Lower Borrowing Interest Cost

19. With regard to the first "anticipated advantage"—lower borrowing interest cost, EDE's commercial paper program, like those of Spire Missouri through Spire Inc., Ameren Missouri, KCP&L, and GMO, is rated A2/P2 (Standard & Poors/Moody's).²⁹ This is a tier 2 marketable commercial paper rating.³⁰ Therefore, EDE already has access to the interest rates of the commercial paper market, which are lower than those of lines-of-credit³¹; and participating in LUCo's utilities money pool will not provide it with lower borrowing interest cost, even if LUCo accesses the commercial paper market. Further, since EDG participates in EDE's money pool, which is backed by EDE-issued commercial paper, it too already has access to the lower borrowing interest cost of commercial paper, access that it has had for many years.³² The Applicants admit as much in their application to which the Commission liberally cites for its findings of fact. In paragraph 20 of that application, which is predicated on LUCo's utilities

²⁹ EDE witness Timpe, Tr. 2:29-30 (EDE); Ex. 6, Staff witness Murray direct testimony, pp. 3-4.

³⁰ Ex. 6, Staff witness Murray direct testimony, pp. 1-2.

³¹ *Id.* at p. 2.

³² *Id.* at pp. 3-4.

money pool being supported by LUCo's line-of-credit facility (then \$200 million with JP Morgan Chase, N.A.), the Applicants state:

Regarding Paragraphs 15-19 above, and with respect only to Empire Electric and Empire Gas, please note that Empire Electric has its own commercial paper program which is backed by Empire Electric's own \$200 million credit facility led by Wells Fargo Bank. This credit facility is used to support the working capital needs of Empire Electric and Empire Gas and its funding rates are lower than those available under the Money Pool. Therefore, Empire Electric and Empire Gas will only participate in the Money Pool as lenders of excess cash and will only borrow from the Money Pool if and when it offers a lower cost of funds.³³

20. Further, by not joining LUCo's utilities money pool, EDE, EDG, and Midstates Natural Gas can continue to avoid paying any of LUCo's \$500 million line-of-credit facility annual commitment fees (capped at \$750,000)³⁴; presently, if EDE and EDG do not join LUCo's utilities money pool they will avoid 41.57% of those commitment fees.³⁵ Since at least March of 2017, EDE has not needed a line-of-credit anywhere near the \$500 million of LUCo's line-of-credit facility.³⁶ The Commission's Staff's analysis the Commission relies on in its order does not recognize this important consideration. If EDE were to bid for a line-of-credit properly sized for its needs, the bids likely would be better for EDE than what EDE would get by joining LUCo's utilities money pool.

21. Even if LUCo initiates a commercial paper program with an A-2/F-2 rating,³⁷ the interest on borrowings from LUCo's utilities money pool will be no lower than those available in EDE's money pool. Between when LUCo originated its \$500 million line-of-credit in February of 2018 and the end of May of 2019, Midstates Natural Gas has funded LUCo with a net of

³³ Ex. 8, OPC witness Schallenberg rebuttal testimony, Sch. RES-R-8 (Deposition Exhibits, Ex. 1, 1-29-19, verified Application for Variance), p. 7.

³⁴ Ex. 5, Staff witness Bolin surrebuttal testimony, p. 4.

³⁵ Ex. 13.

³⁶ Ex. 17.

³⁷ F-2 is the Fitch 2nd tier rating; Ex. 6, Staff witness Murray direct testimony, p. 3.

\$17,975,000 that LUCo applied to LUCo's \$500 million line-of-credit.³⁸ With access to EDE's commercial paper program, neither EDE nor EDG will realize any borrowing interest cost lower than what is already available to them by participating in LUCo's utilities money pool, even with a LUCo commercial paper program. While Midstates Natural Gas might obtain some lower borrowing interest cost benefit from participating in LUCo's utilities money pool with a LUCo commercial paper program, historically Midstates Natural Gas generally has **³⁹; and Midstates Natural Gas could obtain that same benefit from participating in EDE's money pool. As of May 31, 2019, Midstates has advanced to LUCo \$17,975,000 more than LUCo has advanced to it, which should almost eliminate any need for it to borrow funds from LUCo, since it can draw down on its \$17,975,000 of advances to LUCo in excess of its advances from LUCo.

Lower Borrowing Administrative Costs

22. The source to which the Commission cites for the second anticipated advantage—"that it [LUCo's utilities money pool] will likely reduce borrowing costs by avoiding competitive bidding and associated record keeping for individual transactions on a daily basis"—follows:

Q. (By Ms. Carter) And what would, in your opinion, that good cause [for the Applicants to not have to engage in competitive bidding in order to participate in the money pool] be?

A. [Applicants' witness Mark Timpe] The good cause is that we, I believe, have shown evidence that the borrowing rates that would be made available to the money pool are competitively set in the commercial loan market and/or in the commercial paper market in the future pretty much on a daily basis.⁴⁰

³⁸ Ex. 19C; Applicants' witness Timpe, Tr. 77-81.

³⁹ *Id.*

⁴⁰ Ex. 8, OPC witness Schallenberg rebuttal testimony, Sch. RES-R-5 (January 30, 2019, deposition of Applicants' witness Timpe), p. 58.

The cited deposition testimony does not support avoiding competitive bidding and associated record keeping for individual transactions on a daily basis. It is the terms and conditions of a money pool that the rules require be competitively bid, *i.e.*, the money pool agreement itself, not the participants' daily transactions in the money pool.

23. Further, LUCo is already tracking advances to and from its affiliates on a daily basis.⁴¹ It is also tracking daily draws and payments on its \$500 million line-of-credit on a daily basis.⁴² There is no evidence that competitive bidding the terms and conditions of a money pool will result in any daily recordkeeping beyond what LUCo is already doing.

24. By competitively bidding the terms and conditions of the LUCo utilities money pool agreement or demonstrating why that competitive bidding is neither necessary nor appropriate, without a variance from the Commission's affiliate transactions bidding requirements, EDE, EDG, and Midstates Natural Gas can avoid any higher borrowing costs that would be caused if they otherwise would have to competitively bid and keep associated records for individual transactions on a daily basis. The asserted advantage does not exist for EDE, EDG, or Midstates Natural Gas.

Increased Interest and Investment Income From Lending Excess Cash into the Money Pool

25. As Mr. Timpe testified, money market fund rates are lower than commercial paper rates which in turn are lower than line-of-credit rates.⁴³ On a daily basis, participants in LUCo's utilities money pool who contribute cash into the money pool receive income on that contribution as follows:

⁴¹ Ex. 19C.

⁴² *Id.*

⁴³ Ex. 1, Applicants' witness Timpe, pp. 4-5, 11; Tr. 40.

- Up to the point where aggregate borrowings match aggregate contributions each contributor receives interest at the lowest available LUCo line-of-credit or commercial paper rate on its contribution. (And each borrower pays interest at that rate).
- When contributions exceed borrowings, in proportion to its contribution to the aggregate contribution, each contributor receives interest on its contribution to that excess at a lower high-quality, short-term rate.
- When borrowings exceed contributions, if LUCo decides to invest its excess cash or borrow from its line-of-credit facility or other source, LUCo will become the funding source and, to the extent it provides them, it receives the same interest as any other contributor.⁴⁴

26. The Commission has subjected the Applicants' variance from its affiliate transactions rules competitive bidding requirements to LUCo's utilities money pool being supported by a commercial paper program rated A2/F2 or higher (Fifth Safeguard). As a result the interest that participants in LUCo's utilities money pool get will be no higher than commercial paper rates, which are higher than money market fund or other high-quality, short-term rates. While commercial paper rates may be higher than other alternatives available to EDE, EDG, or Midstates Natural Gas, without competitive bidding what those alternatives might be are unknown. In any event, the Commission has not quantified the extent of this investment interest benefit which is offset by the allocated costs of the \$500 million line-of-credit and LUCo's commercial paper program, presumably of no more than \$500 million in commercial paper.⁴⁵

⁴⁴ Ex. 1, Applicants' witness Timpe, Sch. LU-MTT-1, §§1.06, 2.03, & 2.04.

⁴⁵ Commercial paper programs require line-of-credit support up to the maximum amount of commercial paper that may be issued. In other words the value of commercial paper issued will not exceed the unused credit available to the issuer on its line-of-credit facilities.

27. The Commission erred by overlooking several aspects when comparing the costs of EDE's \$200 million credit facility and the costs of LUCo's \$500 million line-of-credit facility. First, EDE supports its money pool with a \$150 million commercial paper program that until February 23, 2018, it supported with its \$200 million line-of-credit facility.⁴⁶

28. Second, EDE had that \$200 million line-of-credit facility before it became an affiliate of LUCo in 2017.⁴⁷

29. Third, EDE terminated its \$200 million line-of-credit facility on February 23, 2018,⁴⁸ the same day that LUCo's \$500 million line-of-credit facility became effective.⁴⁹

30. Fourth, EDE's short-term borrowings have not exceeded \$46.75.million since January of 2017, well below the \$150 million available to it from its commercial paper.⁵⁰

31. Because of the difference in the dates, available credit, terms and circumstances when EDE entered into its \$200 million credit facility and when LUCo entered into its \$500 million line-of-credit facility, comparing them is essentially comparing apples and oranges. However, even if one ignores these glaring differences, Staff witness Bolin's analysis upon which the Commission relies is flawed in that it assumes EDE supported its money pool with the entire \$200 million of its credit facility. At a bare minimum, her analysis should be revised to reduce the total commitment fees of \$350,000 by 25% $[(\$200 \text{ million} - \$150 \text{ million}) / \$200 \text{ million}]$, which equals \$262,500. This amount is less than the cost of LUCo's credit facility commitment fees that would be charged to EDE & EDG if they join LUCo's utilities money pool, independent of any borrowing or investing activities on their behalves. Competitive

⁴⁶ Applicants' witness Timpe Tr. 2:32-33.

⁴⁷ *Id.*

⁴⁸ Applicants' witness Timpe Tr. 2:32.

⁴⁹ Applicants' witness Timpe Tr. 2:74-75 and Ex. 18C; Ex. 1, Applicants' witness Timpe direct testimony, pp. 6-7.

⁵⁰ Ex. 17, Applicants June 10, 2019, response to OPC data request no. 1095.

bidding is needed to determine whether EDE & EDG can obtain better terms than those LUCo is offering by participation in its utilities money pool.

32. The Commission’s conclusory finding in paragraph 42 on page 11 of its Report and Order—“The fees associated with LUCo’s line of credit will be cheaper for Applicants compared to the money pool administered by Empire Electric”—is not supported by the testimony to which the Commission cites to support that finding and, most likely erroneous. That testimony is a comparison of costs related to EDE’s terminated \$200 million line-of-credit facility with those related to LUCo’s current \$500 million line-of-credit facility. The costs of EDE’s money pool are not in evidence, but EDE is relying on LUCo’s \$500 million line-of-credit facility to support its money pool without being directly charged by LUCo for doing so. EDE terminated its \$200 million line-of-credit facility and did not competitively bid a new one because LUCo committed to support EDE’s commercial paper needs at no cost. LUCo now desires to change that relationship, but the Commission’s affiliate transactions rules require that EDE competitively bid for the terms of a new credit facility to determine whether its commercial paper can be supported on better terms from a nonaffiliated financial entity.

33. Further, the second page of Exhibit 17 demonstrates that EDE’s short-term cash needs have been well below even the lower \$150 million since at least January 1, 2017.

34. The Commission’s related finding in paragraph 43—“The Empire money pool line of credit costs \$350,000”—is erroneous. EDE’s \$200 million line of credit it terminated February 23, 2018, had a commitment fee of \$350,000 per year, but EDE now supports its money pool with a \$150 million commercial paper program and LUCo’s \$500 million line-of-credit facility.⁵¹

⁵¹ Applicants’ witness Timpe Tr. 2:32-33.

35. Regardless, while EDE, EDG and Midstates Natural Gas may realize increased interest and investment income from contributing their excess cash into LUCo's utilities money pool, that would occur from their participation in that money pool, not from the agreement governing that money pool not being competitively bid or no showing being made of why it was neither necessary nor appropriate to competitively bid that agreement.

Immediately Available Line of Credit

36. Access to funds in LUCo's utilities money pool is governed by LUCo's money pool agreement,⁵² not by competitively bidding the terms and conditions of the LUCo utilities' money pool agreement or demonstrating why competitive bidding is neither necessary nor appropriate. LUCo has sole discretion as to funding the money pool and is not required to do so.⁵³

Ten Safeguards

37. In the first sentence of paragraph 36 in the *Findings of Fact* section of its *Report and Order* the Commission states, "Good cause to approve the requested competitive bidding variance is supported by the ten safeguards outlined in the Agreement's paragraph 6 because they offer similar consumer protections as those contained in the affiliate transaction rule." The competitive bidding requirement of the Commission's affiliate transactions rules exists to establish the benchmarks against which a public utility's transactions with its affiliates may be measured for whether they are on terms more beneficial to those affiliates than they would be

⁵² Ex. 1, Applicants' witness Timpe, Sch. LU-MTT-1.

⁵³ Applicants' witness Timpe Tr. 2:41-43; Ex. 1, Applicants' witness Timpe, Sch. LU-MTT-1, §104.

with independent, unaffiliated third parties. The ten safeguards do not replace or eliminate the need for that benchmark.

38. The second safeguard—“Applicant Utilities may not borrow from the Money Pool if the Applicant Utility [Applicant] could borrow at a lower cost directly from outside banks or other third party financial institutions or through the sale of its own commercial paper”⁵⁴—comes closest, but falls short. As part of addressing the insufficiency of that safeguard, the OPC will address a related finding of fact, specifically the following finding of fact in paragraph no. 41 on page 11 of its *Report and Order* (footnotes omitted.);

41. Public Counsel’s witness Robert Schallenberg’s (*sic*) testified that the Applicants would lose their ability to borrow or lend to third parties upon joining the LUCo Money Pool. However, Applicants do not lose the ability to borrow or lend to third parties, rather the ability to borrow or invest with third parties is a safeguard listed in the Agreement filed January 24, 2019.

39. The primary source from Mr. Schallenberg’s testimony to which the Commission cites follows:

Q. Is there anything else that concerns you about the settlement agreement?

A. It appears to me that the Missouri Applicants will lose their ability to borrow or lend to entities other than LUCo once they sign up to participate in LUCo's money pool. Missouri Applicants' witness Mr. Timpe testified:

Q. If The Empire District Electric Company joins in the Liberty Utilities Co. money pool, will The Empire District Electric Company still be in a position to borrow from non-affiliates?

A. No.

Q. Why not?

A. It doesn't have any existing agreements with anyone to do so.⁵⁵

⁵⁴ *Report and Order*, p. 8, ¶26.

⁵⁵ In his errata sheet provided after Mr. Schallenberg prefiled his rebuttal testimony Mr. Timpe provided more explanation by adding the following sentence to his last answer: “However, there's nothing precluding The Empire District Electric Company or The Empire District Gas Company from pursuing other alternatives from non-affiliates.” (Ex. 2, Applicants’ witness Timpe, surrebuttal testimony, Sch. Exhibit MTT-S-1). That addition is consistent with his deposition testimony on pages 55-56 that follows:

Q. Earlier in response to a question about Empire potentially borrowing from outside of the pool, I think you indicated that they would not be able to. Could you turn -- look at the Non-

40. That testimony is clear Mr. Schallenberg is simply stating that, based on Mr. Timpe's sworn deposition testimony, it *appears* to him that the Applicants will be unable to borrow or lend from third parties if they participate in LUCo's utilities money pool. Mr. Timpe's testimony he quotes demonstrates that Mr. Schallenberg's basis for stating that inability is not a legal matter, but a practical one—because they do not have any arrangements with third-parties to borrow or lend now, there is no reason to think they will if they participate in LUCo's utilities money pool, *i.e.*, such arrangements are not impermissible, but as a practical matter not expected to exist.

41. Unlike the rule requirement of competitive bidding to obtain the information needed to evaluate the availability of lower borrowing costs from third parties, the second safeguard does not prescribe how the Applicants obtain the information needed to determine whether they could borrow at a lower cost from a third party or by issuing its own commercial paper. The Applicants' witness Timpe testified to the practical issue as follows: "It [EDE] doesn't have any existing agreements with anyone to do so."⁵⁶ And later elaborated further,

Unanimous Stipulation and Agreement and turn to Page 3, Paragraph 6A? Is it your understanding that that portion that that term of the stipulation would allow Empire, if able, to borrow from outside of the pool?

A. Yeah. And my answer was maybe more technical than the way I interpreted the question, so let me respond to that. Today, Empire has no other credit agreements with any other bank or affiliate or anything that would allow it to borrow outside of going to Liberty. So that doesn't mean that, according to the stip, that if it saw an opportunity to go outside, it had an opportunity to find better loan rates, that it would not do that.

Q. So, in other words, the money pool agreement, as modified by the stipulation agreement, does not prevent an applicant utility from seeking funds from outside of the pool?

A. Correct. It's just there's no standing agreement

Ex. 8, OPC witness Schallenberg rebuttal testimony, Sch. RES-R-5 (January 30, 2019, deposition of Applicants' witness Timpe), pp. 55-56.

⁵⁶ Ex. 8, OPC witness Schallenberg rebuttal testimony, Sch. RES-R-5 (January 30, 2019, deposition of Applicants' witness Timpe), pp. 38-39.

“Today, Empire has no other credit agreements with any other bank or affiliate or anything that would allow it to borrow outside of going to Liberty.”⁵⁷

Perverse terms of LUCo’s utilities money pool agreement

42. LUCo’s money pool agreement includes a requirement that, to the extent they are not directly assigned based on borrowings from the money pool, the participants in both LUCo’s utilities and non-utilities money pools are to pay an allocated share of the “cost of compensating balances and fees (the “**Costs**”) paid by LUCo to maintain credit lines used to fund [those money pools] based on a four factors—“(i) utility plant expenses, (ii) customer count, (iii) non-labor expenses, and (iv) labor expenses.”⁵⁸ Those **Costs** include an annual commitment fee for LUCo’s \$500 million line-of-credit facility of \$750,000 reduced by borrowings at the rate of 0.15 basis points multiplied by the average annual amount borrowed.⁵⁹ If any of the Applicants participate in LUCo’s affiliate money pool under the terms of that agreement, they will become responsible for approximately 47% of the allocated **Costs** whether they invest or borrow (EDE and EDG, 41.57%, and Midstates Natural Gas, 7.18%).⁶⁰

43. This allocation method is inherently unfair. Among the money pool participants, the borrowers need the support of the funds that LUCo may provide through its \$500 million line-of-credit facility or commercial paper, not the participants who provide their excess cash to the pool, participants such as Midstates Natural Gas would be with its accumulated excess cash of \$17,975,000 as of May 31, 2019, advanced to LUCo.⁶¹

⁵⁷ *Id.* at 55-56.

⁵⁸ Ex. 1, Applicants’ witness Timpe, Sch. LU-MTT-1, §§1.07(b).

⁵⁹ Ex. 5, Staff witness Bolin, pp. 4-5.

⁶⁰ Ex. 13.

⁶¹ Ex. 19C; Applicants’ witness Timpe, Tr. 77-81.

44. For example, if a money pool participant with excess cash were to retain that cash rather than provide it to the money pool and LUCo draws on its line-of-credit to fund the pool for borrowing participants, then the participant who retains its cash would be responsible for less of LUCo's **Costs** for maintaining credit lines to fund the pool—the portion related to the participant borrowings would be directly assigned to those participants, and the participant retaining its cash could invest it outside the money pool for a return. When evaluating participation in LUCo's utilities money it is the actual return that will be earned on cash put into the pool, not just the interest rate, *i.e.*, the impacts of the **Costs** on the return must be considered.

45. Further, if any entity not participating in a LUCo money pool were to reduce the outstanding balance on LUCo's line-of-credit at a lower cost to LUCo, thereby reducing LUCo's **Costs** for maintaining credit lines to fund the pool, while borrower participants would benefit by paying lower allocated **Costs** rather than direct **Costs**, participants with excess cash will be responsible for even more of those **Costs** than they would have been responsible for absent the line-of-credit outstanding balance reduction.

46. That both of these circumstances actually could arise, and one almost certainly will, is found in the information contained in Exhibits 18C (LUCo line-of-credit facility transactions) and 19C (Intercompany cash transfers and LUCo line-of-credit facility transactions from February 23, 2018, through May 31, 2019).

47. Exhibit 19C shows that Midstates Natural Gas is an entity that, if it retained its cash, would rarely **
. If Midstates Natural Gas were to invest its cash with third parties, it could avoid the **Costs and, even with a lower investment interest rate, potentially realize a greater return than if it participates in LUCo's utilities money pool. Midstates Natural Gas needs to competitively bid to identify its best option.

48. Exhibit 18C shows that in May of 2019 Algonquin Power and Utilities Corp. **

** . As a cost-free advance to

LUCo, in LUCo's utilities money pool that transaction would have increased the **Costs** to participants who put cash into that money pool without them getting any compensating benefit. Again, if Midstates Natural Gas were to invest its cash with third parties, it could avoid the **Costs** and, even with a lower investment interest rate, potentially realize a greater return than if it participates in LUCo's utilities money pool. Midstates Natural Gas needs to competitively bid to identify its best option.

49. The largest single borrowing against LUCo's \$500 million line-of-credit facility is the \$90 million LUCo borrowed to fund EDE's 15-year promissory note in June of 2018 used to pay off EDE's first mortgage bonds that matured then.⁶² These financing transactions show that the \$500 million capacity of LUCo's line-of-credit facility is more likely to be used for purposes other than to support LUCo's money pool. Mr. Timpe told LUCo's Board of Directors in a memorandum dated October 4, 2017, **

**⁶³ This is not a purpose for which LUCo's utilities money pool participants should bear extra costs or forego addition income.

50. Notably, LUCo's maximum outstanding balance on its \$500 million line-of-credit facility has never even approached one-half of the \$500 million available,⁶⁴ and its intercompany advances have never approached even one-fifth of that available \$500 million.⁶⁵ The record is barren of evidence of how LUCo determined the \$500 million capacity of its line-of-credit

⁶² Ex. 18C; Applicants' witness Timpe Tr. 2:37-39.

⁶³ Ex. 9C.

⁶⁴ Ex. 18C; Applicants' witness Timpe Tr. 2:37-39.

⁶⁵ Ex. 19C.

facility. One cannot discern to what extent, if any, that capacity was determined based on supporting EDE's commercial paper or LUCo's money pools.

WHEREFORE, for the grounds set forth above, the OPC respectfully applies to the Commission to rehear this case.

Respectfully,

/s/ Nathan Williams
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 13th day of September 2019.

/s/ Nathan Williams