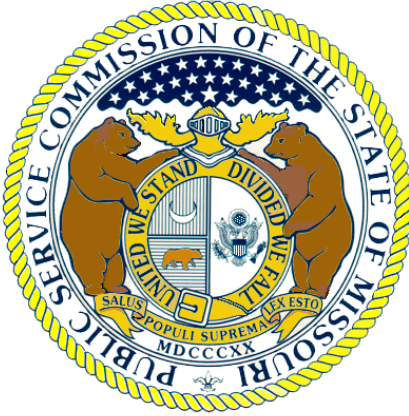


BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI



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.)

File No. AO-2018-0179

REPORT AND ORDER

Issue Date: August 15, 2019

Effective Date: September 14, 2019

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File No. AO-2018-0179

APPEARANCES

The Empire District Electric Company, The Empire District Gas Company, Liberty Utilities (Midstates Natural Gas) Corp., and Liberty Utilities (Missouri Water) LLC:

Diana Carter, Liberty Utilities, 428 Capitol Avenue, Room 303, Jefferson City, Missouri 65101.

Staff of the Missouri Public Service Commission:

Karen Bretz, Senior Counsel, **Steve Dottheim**, Deputy Counsel, **Mark Johnson**, Deputy Counsel, **Kevin Thompson**, Chief Staff Counsel, and **Annabella Attias**, 200 Madison Street, Suite 800, Jefferson City, Missouri 65102.

Office of the Public Counsel:

Nathan Williams, Chief Deputy Public Counsel, 200 Madison Street, Suite 650, Jefferson City, Missouri, 65102.

Regulatory Law Judges: Ron Pridgin and Charles Hatcher

REPORT AND ORDER

I. Procedural History

On December 29, 2017, The Empire District Electric Company (“Empire Electric”), The Empire District Gas Company (“Empire Gas”), Liberty Utilities (Midstates Natural Gas)

Corp. (“Liberty Midstates”), and Liberty Utilities (Missouri Water) LLC (“Liberty Utilities”) (collectively “Applicants”) filed an application seeking a variance from the Commission’s competitive bidding rules for electric and gas utilities (the “Application”).¹ If the requested variance is granted, the holding company parent of Applicants, Liberty Utility Co. (“LUCo”), will seek to establish a Money Pool², distributing loans and investing excess cash of the money pool members without engaging in competitive bidding or cost documentation for those transactions.

The Commission issued notice of the Application and provided an opportunity for interested persons to intervene. No applications to intervene were received.

The Applicants’ original verified Application asked for two variances; one from the competitive bidding requirement³ and one from the asymmetrical pricing requirement.⁴ On May 31, 2018, the Staff of the Commission (“Staff”) filed its Recommendation and Memorandum recommending that the Commission reject the Application. Staff recommended a denial based on a lack of showing of good cause. The Memorandum stated “neither proposed variance by the Applicants meets the standard of being in the best interests of the utilities’ regulated customers.”⁵ The Memorandum further stated,

¹ Commission Rule 4 CSR 240-20.015(3)(A) and 4 CSR 24-40.015(3)(A). The rules are identical, except for exchanging the word ‘electrical’ with ‘gas’.

² The *Application For Variance* defines “money pool” in paragraph 16 as “a cash management arrangement among utilities, under which a utility may make short-term loans (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 by eligible borrowers. . . .”

³ Commission Rule 4 CSR 240-20.015(3)(A) and 4 CSR 24-40.015(3)(A); *see also Application for Variance*, paragraph 15.

⁴ Commission Rule 4 CSR 240-20.015(2)(A) and 4 CSR 24-40.015(2)(A) The rules are identical, except for exchanging the word ‘electrical’ with ‘gas’; *see also Application for Variance*, paragraphs 12-14.

⁵ Memorandum, page 2, footnote 4.

“Applicants have provided no assurance that participation in the Money Pool would not adversely impact Missouri utility customers’ rates.”⁶

Staff filed a *Nonunanimous Stipulation and Agreement* (“Agreement”) on its own and the Applicants’ behalf on January 24, 2019. The Agreement, which waives the competitive bidding requirements, is supported by Staff only if LUCo funds the Money Pool with at least an A2/F2-rated commercial paper program.⁷ The Agreement disposes of the second requested variance by Applicants, the waiver to the asymmetrical pricing requirements.⁸ The Agreement is not being approved in this Order as it becomes a statement of position of the signatory parties upon an objection from a party.⁹

The Office of the Public Counsel (“Public Counsel”) filed its objection to the Agreement on January 28, 2019. The Commission held an evidentiary hearing on June 27, 2019. In total, the Commission admitted the testimony of four witnesses and 19 exhibits into evidence. On June 28, 2019, the Commission directed all parties to file responses to Commission suggestions made at the hearing. Post-hearing briefs were filed by July 18, 2019, with the last filing in the case occurring July 19, 2019, and the case was deemed submitted for the Commission’s decision on that date.¹⁰

⁶ Memorandum, page 2.

⁷ Originally filed as confidential, the information concerning the backing of the Money Pool via a rated commercial paper program is now treated as public information. See Tr. Vol 2, pp.130-131 (where Applicants’ attorney waived confidentiality, stating the information could be public). See *also* Staff’s Post-Hearing Brief at p. 2; The Office of the Public Counsel’s Initial Brief at p. 19; and Initial Post-Hearing Brief of the Missouri Utilities at p. 4-5 – all of which refer to LUCo’s commercial paper program in publicly available documents.

⁸ *Nonunanimous Stipulation and Agreement*, paragraph 8. In summary, the Applicants will not be transacting with each other or other regulated utilities, each Money Pool transaction will be between LUCo, which is not regulated by the Commission, and a single member of the Money Pool. Therefore, no variance from the rule governing regulated-utility-to-regulated-utility transactions is necessary. See Direct Testimony in Support of Nonunanimous Stipulation and Agreement of Kimberly K. Bolin, p. 7, lines 19-24.

⁹ Commission Rule 4 CSR 240-2.115(2)(D).

¹⁰ “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).

In their Application, Applicants also requested a waiver of the 60-day notice requirement found in Rule 4 CSR 240-4.017(1).¹¹ That request will be ruled on in this Report and Order.

II. Findings of Fact

Any finding of fact for which it appears that the Commission has made a 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.

1. Public Counsel “may represent and protect the interests of the public in any proceeding before or appeal from the public service commission.”¹² Public Counsel participated in this matter.

2. Staff is a party in all Commission investigations, contested cases and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.¹³

3. Empire Electric is a Kansas corporation engaged in the business of providing electric and water utility services in Missouri. Empire Electric is an “electrical corporation” and a “public utility,” as defined in Sections 386.020(15) and (43), RSMo 2016.¹⁴

4. Empire Gas is a Kansas corporation engaged in the business of providing natural gas service in Missouri. Empire Gas is a “gas corporation” and a “public utility,” as defined in Sections 386.020(18) and (43), RSMo 2016.¹⁵

¹¹ *Application for Variance*, paragraph 24.

¹² Section 386.710(2), RSMo 2016; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

¹³ Commission Rules 4 CSR 240-2.010(10) and (21) and 2.040(1).

¹⁴ *Application for Variance*, paragraph 1.

¹⁵ *Application for Variance*, paragraph 2.

5. Liberty Midstates is a Missouri corporation engaged in the business of providing natural gas service in Missouri. Liberty Midstates is a “gas corporation” and a “public utility”, as defined in Sections 386.020(18) and (43), RSMo 2016.¹⁶

6. Liberty Utilities is a Missouri limited liability company engaged in the business of providing water and sewer service in Missouri. Liberty Utilities is a water and sewer utility subject to the jurisdiction of the Commission.¹⁷

7. Applicants are affiliates of each other and subsidiaries of the parent holding company LUCo.¹⁸

8. The Commission’s affiliate transaction rules require competitive bids when obtaining services from an affiliated entity.¹⁹

9. The Applicants desire to participate in a Money Pool.²⁰

10. 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.²¹

11. LUCo would administrator the Applicants’ Money Pool and guarantee all loans by eligible borrowers.”²²

12. LUCo currently has a Money Pool backed by a \$500 million line-of-credit.²³

¹⁶ *Application for Variance*, paragraph 3.

¹⁷ *Application for Variance*, paragraph 4.

¹⁸ *Application for Variance*, paragraph 6.

¹⁹ Commission Rule 4 CSR 240-20.015(3)(A) and 4 CSR 24-40.015(3)(A).

²⁰ *Application for Variance*, paragraph 15.

²¹ *Application for Variance*, paragraph 16.

²² *Application for Variance*, paragraph 16.

²³ Direct Testimony of Mark T. Timpe, p. 9, lines 13-15.

13. LUCo is in the process of establishing a Money Pool backed by commercial paper.²⁴

14. Commercial paper is short-term unsecured debt sold by large corporations to institutional investors and other corporations. Being that commercial paper is unsecured, it is a market that is only available to companies with strong credit ratings (i.e. at least investment grade).²⁵ Spire Missouri, Ameren Missouri, Kansas City Power & Light, and KCP&L Greater Missouri Operations all have access to commercial paper.²⁶

15. The Applicants do not seek approval of the Money Pool agreement between LUCo and the Applicants.²⁷

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 bidding²⁸ with borrowing rates expected to be as low or lower than rates Applicants could obtain elsewhere²⁹, and with Applicants paying the lowest rate available under the LUCo Credit Agreement.³⁰

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.³¹

²⁴ Surrebuttal Testimony of Kimberly K. Bolin, p. 2, lines 20-21.

²⁵ Direct Testimony in Support of Nonunanimous Stipulation and Agreement of David Murray, CFA, p. 1.

²⁶ Direct Testimony in Support of Nonunanimous Stipulation and Agreement of David Murray, CFA, p. 2.

²⁷ *Motion for Additional Time, Request for Expedited Treatment, and Request for Ruling*, Filed April 17, 2019, paragraph 4.

²⁸ Direct Testimony of Mark T. Timpe, p. 4; Mark T. Timpe Deposition, p. 58.

²⁹ Direct Testimony of Mark T. Timpe, p. 5; Surrebuttal Testimony of Mark T. Timpe, p. 3, p. 4, and p. 7; Direct Testimony in Support of Nonunanimous Stipulation and Agreement of Kimberly K. Bolin, p. 4.

³⁰ Direct Testimony of Mark T. Timpe, p. 5, lines 14-16.

³¹ Mark T. Timpe Deposition, p. 58.

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.³²

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.³³

20. In general, money pools provide higher returns to lenders, lower borrowing costs to borrowers than are commercially available, overdraft protection, and investment of excess cash.³⁴

21. On January 24, 2019, Staff and Applicants filed their Agreement, which resolved all issues between Staff and the Applicants.³⁵

22. On January 28, 2019, Public Counsel filed an objection to the Agreement.³⁶

23. The Agreement includes ten safeguards against perceived or potential regulatory or statutory violations.³⁷

24. The Applicants have agreed to comply with the safeguards.³⁸

25. The first safeguard³⁹ reads, “Applicant Utilities⁴⁰ may borrow from the Money Pool only if the interest cost on borrowing from the Money Pool does not exceed the

³² Surrebuttal Testimony of Mark T. Timpe, p. 7, and p. 9.

³³ Surrebuttal Testimony of Mark T. Timpe, p. 5, and p. 11.

³⁴ Rebuttal Testimony of Robert E. Schallenberg, p. 3.

³⁵ *Nonunanimous Stipulation and Agreement*.

³⁶ The Office of the Public Counsel’s Objections to the Non-Unanimous Stipulation and Agreement filed January 24, 2019.

³⁷ *Nonunanimous Stipulation and Agreement*, paragraph 6.

³⁸ Response to Order Directing Filing, paragraph 2; Initial Post-Hearing Brief of the Missouri Utilities, pp. 6-7.

³⁹ Safeguard language for the first and second Safeguards has been updated to reflect the changes recommended by the Commission, and accepted by the Applicants, in accordance with paragraph 11 of the Agreement. See *Order Directing Filing*, Issued June 28, 2019; *Response to Order Directing Filing*, Filed July 12, 2019 (paragraph 2). The recommended changes and submitted language was approved by the Commission. See *respectively Response to Order Directing Filing*, Filed July 12, 2019 (paragraphs 3-5); Agenda minutes for August 7, 2019.

actual interest cost for the funds obtained or used to provide the funds borrowed by the Applicant Utility. The Money Pool is designed to benefit all participants but shall not be operated as a profit center for LUCo. A reduction in LUCo's interest expense shall not be considered 'profit'.⁴¹

26. The second safeguard reads, "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."⁴²

27. The third safeguard reads, "Applicant Utilities will not borrow from outside the Money Pool in order to make loans to Borrowing Affiliates."⁴³

28. The fourth safeguard reads, "An Applicant Utility may only loan funds through the Money Pool if the Applicant Utility [Applicant] cannot earn a higher rate of return on investments of similar risk in the open market, or if the Applicant Utility will earn no less than the rate the Applicant Utility [Applicant] would have earned on investments in existing short-term investments accounts maintained by the Applicant Utility during the period in question."⁴⁴

29. The fifth safeguard provides that a variance of the competitive bidding requirement with respect to borrowing rates is acceptable so long as Liberty Utilities funds the Money Pool via an A2/F2-rated (or higher) commercial paper program (without any mark-up in the interest rate). If Liberty Utilities' commercial paper program is rated

⁴⁰ The Empire District Gas Company, Liberty Utilities (Midstates Natural Gas) Corp., and Liberty Utilities (Missouri Water) LLC.

⁴¹ *Nonunanimous Stipulation and Agreement*, paragraph 6(a).

⁴² *Nonunanimous Stipulation and Agreement*, paragraph 6(b).

⁴³ *Nonunanimous Stipulation and Agreement*, paragraph 6(c).

⁴⁴ *Nonunanimous Stipulation and Agreement*, paragraph 6(d).

lower than A2/F2 then the waivers of the Commission's Affiliate Transactions Rules are rescinded, and the requirements of those Rules immediately are in full force and effect.⁴⁵

30. The sixth safeguard reads, "An Applicant Utility shall maintain evidence of the competitiveness of the rates associated with the funds borrowed from or lent into the Money Pool on an ongoing basis, and provide such evidence to Staff upon request."⁴⁶

31. The seventh safeguard reads, "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]."⁴⁷

32. The eighth safeguard reads, "On the same date it files its annual Affiliate Transactions Report, Applicant Utilities will submit an annual report to the Commission for the prior calendar year, which summarizes the activities of the Money Pool, including monthly summaries of investments, earnings, borrowings and interest rates for all participants."⁴⁸

33. The ninth safeguard reads, "Applicant Utilities will file a copy of any proposed amendment to the Money Pool Agreement, with the Commission and serve a copy of the filing on Staff, Public Counsel, and any party to the Applicant Utilities' most recently preceding Money Pool case before the Commission."⁴⁹

34. The tenth safeguard reads, "Applicant Utilities agree that they will not lend surplus funds to the Money Pool which will be loaned to a future LUCo affiliate which is a future member of the Money Pool without filing notice with the Commission and serving a

⁴⁵ *Nonunanimous Stipulation and Agreement*, paragraph 6(e).

⁴⁶ *Nonunanimous Stipulation and Agreement*, paragraph 6(f).

⁴⁷ *Nonunanimous Stipulation and Agreement*, paragraph 6(g).

⁴⁸ *Nonunanimous Stipulation and Agreement*, paragraph 6(h).

⁴⁹ *Nonunanimous Stipulation and Agreement*, paragraph 6(i).

copy of the filing on Staff, Public Counsel, and any party to the Applicant Utilities' most recently preceding Money Pool case before the Commission. In its filing the Applicant Utilities are required to

- 1) identify the full name of the future member,
- 2) identify the future member's affiliate relationship with Applicant Utilities [Applicants],
- 3) describe the future member's corporate organization, and
- 4) state the future member's business purpose."⁵⁰

35. On January 24, 2019, Staff filed testimony in support of the Agreement.⁵¹

36. 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. Allowing the Applicants to borrow or lend outside of the Money Pool when market conditions are more economical (second and fourth safeguards)⁵² is a safeguard to the utility's finances, which in turn protects ratepayers.

37. The Agreement's market monitoring requirement (safeguard six) supports a finding of good cause to grant the variance because it provides similar protections that the affiliate transaction rule strives to achieve,⁵³ as it safeguards against LUCo taking financial advantage of Applicants on days when third party borrowing or lending rates may be desirable.

⁵⁰ *Nonunanimous Stipulation and Agreement*, paragraph 6(j).

⁵¹ Direct Testimony in Support of Nonunanimous Stipulation and Agreement of Kimberly K. Bolin; Direct Testimony in Support of Nonunanimous Stipulation and Agreement of David Murray, CFA.

⁵² Direct Testimony in Support of Nonunanimous Stipulation and Agreement of Kimberly K. Bolin, p. 4, lines 18-22.

⁵³ Direct Testimony in Support of Nonunanimous Stipulation and Agreement of Kimberly K. Bolin, p. 4, lines 22-25.

38. The Agreement's funding via an A2/F2-rated (or higher) commercial paper program (without any mark-up in the interest rate) supports a finding that good cause exists. This funding source should ensure the best market rates without the need to competitively bid each transaction.⁵⁴

39. The fifth safeguard ensures that the Applicants will not be charged short-term interest rates any higher than standard market rates charged for A2-F2-rated commercial paper.⁵⁵

40. The loss of an A2/F2-rating in the commercial paper program backing the Money Pool will require the Applicants to return to competitive bidding.⁵⁶

41. Public Counsel's witness Robert Schallenberg's testified that the Applicants would lose their ability to borrow or lend to third parties upon joining the LUCo Money Pool.⁵⁷ 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, 2019.⁵⁸

42. The fees associated with LUCo's line of credit will be cheaper for Applicants compared to the money pool administered by Empire Electric.⁵⁹

43. The annual commitment fee associated with LUCo's line of credit can be lower than the annual commitment fee for the Empire money pool line of credit. The

⁵⁴ Direct Testimony in Support of Nonunanimous Stipulation and Agreement of Kimberly K. Bolin, p. 5, lines 1-4.

⁵⁵ Direct Testimony in Support of Nonunanimous Stipulation and Agreement of David Murray, CFA, p. 4, lines 4-7.

⁵⁶ Direct Testimony in Support of Nonunanimous Stipulation and Agreement of David Murray, CFA, p. 4, lines 7-11.

⁵⁷ Rebuttal Testimony of Robert E. Schallenberg, p. 6, p. 15, p. 18, p. 20 (citing Mark T. Timpe Deposition page 38-39), and p. 21.

⁵⁸ Surrebuttal Testimony of Kimberly K. Bolin, p. 8; *see also* Mark T. Timpe Deposition, p. 55; *see also Nonunanimous Stipulation and Agreement*, paragraph 6(b), (d), and (g).

⁵⁹ Surrebuttal Testimony of Kimberly K. Bolin, p. 4, lines 4-18.

Empire money pool line of credit costs \$350,000. The annual fee for LUCo's Money Pool line of credit is based only upon the unused balance.⁶⁰

44. Businesses routinely pay administrative fees to have an available line-of credit⁶¹.

45. A utility would incur costs if it issued its own debt.⁶²

46. .

47. The Applicants have not communicated with the Commission within the one hundred fifty (150) days prior to the filing of the *Application for Variance* regarding any substantive issue likely to be addressed in this case.⁶³

III. Conclusions of Law

48. Empire Electric is an “electrical corporation” and a “public utility”, as defined in Sections 386.020(15) and (43), RSMo 2016.

49. Empire Gas is a “gas corporation” and a “public utility”, as defined in Sections 386.020(18) and (43), RSMo 2016.

50. Liberty Midstates is a “gas corporation” and a “public utility”, as defined in Sections 386.020(18) and (43), RSMo 2016.

51. Liberty Utilities is water and sewer utility subject to the jurisdiction of the Commission as provided in Chapters 386 and 393, RSMo.

⁶⁰ Surrebuttal Testimony of Kimberly K. Bolin, p. 4, line 20 to p. 5, line 3.

⁶¹ Surrebuttal Testimony of Mark T. Timpe, p. 5, and p. 11.

⁶² Direct Testimony in Support of Nonunanimous Stipulation and Agreement of Kimberly K. Bolin, p. 5, lines 10-12.

⁶³ *Application for Variance*, Verification pages.

52. Rule 4 CSR 240-20.015(3)(A) and 4 CSR 240-40.015(3)(A), which apply to electric and gas utilities respectively, both require competitive bids when obtaining services from an affiliated entity.

53. Rule 4 CSR 240-20.015(10)(A)(1) and 4 CSR 240-40.015(10)(A)(1), which apply to electric and gas utilities respectively, allow for requests for variance from the provisions of Rule 20.015.⁶⁴

54. Variance requests are governed by Rule 4 CSR 240-2.060(4), and must meet a standard of good cause.

55. Good cause "generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law, or to put it more concisely, a "[l]egally sufficient ground or reason."⁶⁵ Similarly, "good cause" has also been judicially defined as a "substantial reason or cause which would cause or justify the ordinary person to neglect one of his [legal] duties."⁶⁶ Of course, not just *any* cause or excuse will do. To constitute good cause, the reason or legal excuse given "must be real not imaginary, substantial not trifling, and reasonable not whimsical."⁶⁷ And some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.⁶⁸ Moreover, a finding of good cause "lies largely in the discretion of the officer or court to

⁶⁴ The rules' internal cross-reference is outdated, and should refer to 4 CSR 240-2.060(4).

⁶⁵ *Black's Law Dictionary* 692 (6th ed. 1990).

⁶⁶ *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective "ordinary person" standard. See, e.g., *Cent. Mo. Paving Co. v. Labor & Indus. Relations Comm'n*, 575 S.W.2d 889, 892 (Mo. App. W.D. 1978) ("[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.") *Id.*

⁶⁷ *Belle State Bank v. Indus. Comm'n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977). See also *Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (to show good cause, reason given must be real, substantial, and reasonable). *Id.*

⁶⁸ See generally *Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975); *Havrisko v. U.S.*, 68 F.Supp. 771, 772 (E.D.N.Y. 1946); *The Kegums*, 73 F.Supp. 831, 832 (S.D.N.Y. 1947).

which the decision is committed" and "depends upon the circumstances of the individual."⁶⁹ (Original footnotes numbered 25-31.).⁷⁰

56. Since Applicants brought the Petition, they bear the burden of proof.⁷¹

57. The burden of proof is the preponderance of the evidence standard.⁷²

58. In order to meet this standard, Applicants must convince the Commission it is "more likely than not" that its claims are true.⁷³

59. A nonunanimous stipulation and agreement is treated as a joint statement of the party-signatories when a party objects, except no party is bound by it, and all issues remain for determination after a hearing pursuant to Rule 4 CSR 240-2.115(2)(D).

60. Commission Rule 4 CSR 240-4.017(1) requires 60-day notice prior to filing a case.

61. Commission Rule 4 CSR 240-4.017(1)(D) allows for waiver of the 60-day notice requirement, and outlines how good cause can be met.

62. Good cause to waive the 60-day notice requirement is defined as, "a verified declaration from the filing party that it has had no communication with the office of the commission within the prior one hundred fifty (150) days regarding any substantive issue likely to be in the case..."

⁶⁹ *Wilson v. Morris*, 369 S.W.2d 402, 407 (Mo. 1963); *Matter of Seiser*, 604 S.W.2d 644, 646 (Mo. App. E.D. 1980).

⁷⁰ Rebuttal Testimony of Robert E. Schallenberg, p. 11, lines 3-21 citing *In the Matter of the Tariffs of Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks – L&P Increasing Electric Rates for the Services Provided to Customers in the Aquila Networks – MPS and Aquila Networks – L&P Service Areas*, Report and Order issued May 17, 2007.

⁷¹ "The burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue". *Clapper v. Lakin*, 343 Mo. 710, 723, 123 S.W.2d 27, 33 (1938); see also Section 393.150.2. RSMo.

⁷² *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).

⁷³ *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez*, 936 S.W.2d at 109 -111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

IV. Decision

The issue presented in this case is whether Applicants have proven by a preponderance of the evidence that good cause exists to grant them a variance from the competitive bidding requirements for affiliate transactions. The Commission finds the Applicants have shown good cause to grant the requested variance from the competitive bidding requirements, subject to the terms of the Agreement which are restated above in this *Report and Order*.

The definition of good cause used by the Commission focuses on the concept of the substantiality of the reason given. Paraphrasing: the reason for the waiver must be substantial, factual, reasonable, and not minor.

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.

In addition to those four benefits, Staff and Applicants contend that the standard to award the requested variance is good cause, and both cite the benefits and the safeguards listed in the Agreement as evidence of good cause. The Commission agrees. The Agreement provides a list of ten safeguards against perceived or potential regulatory or statutory violations. For example, requiring documentation of the competitiveness of the borrowing and lending rates ensures the variance is in the best interests of the utilities' regulated customers. Safeguards such as limiting the interest charged to the actual interest cost for the funds obtained, or requiring the best lending and borrowing rates for each

Applicant on each transaction gives assurance that participation in the Money Pool will not adversely impact Missouri utility customers' rates.

The Applicants have the burden of proof to show that good cause exists for the requested variance. In this case, evidence consists of at least four benefits and ten safeguards. No credible evidence was introduced which convincingly disputed any of those four benefits. Public Counsel's witness unsuccessfully argued that the Empire Electric money pool⁷⁴ would be financially better⁷⁵, that Applicants could physically and financially comply with the competitive bidding process⁷⁶, the Empire Electric money pool could earn more in investment income by investing in higher risk instruments⁷⁷, and the waiver would impair the Commission's ability to protect ratepayers of Empire Electric and Empire Gas.⁷⁸

The Commission finds the testimony of the Staff's and Applicant's witnesses to be more credible on the financial comparison of LUCo's and Empire Electric's money pools. The fees associated with LUCo's line of credit will be cheaper for Applicants compared to the money pool administered by Empire Electric. Further, the annual commitment fee associated with LUCo's line of credit can be lower than the annual commitment fee for the Empire Electric money pool line of credit. The Empire Electric money pool line of credit costs \$350,000 annually. The annual fee for LUCo's Money Pool line of credit is based only upon the unused balance. Moreover, the Agreement bases the waiver of the competitive bidding requirements on LUCo establishing its commercial paper program with at least an A2/F2 rating. Finally, the Commission is only conditioning a grant of the

⁷⁴ A money pool is currently being administered by Empire Electric, however its commercial paper program will end upon the operation of LUCo's Money Pool being backed by its equivalently A2/F2-rated commercial paper program. Such a decision has the *prima facie* appearance of a business decision, and is not at issue in the present request for variance.

⁷⁵ Rebuttal Testimony of Robert E. Schallenberg, p. 4, lines 8-10, p. 20, lines 1-8, and p. 23, lines 14-16.

⁷⁶ Rebuttal Testimony of Robert E. Schallenberg, p. 12, lines 18-20.

⁷⁷ Rebuttal Testimony of Robert E. Schallenberg, p. 16, lines 14-15.

⁷⁸ Rebuttal Testimony of Robert E. Schallenberg, p. 4, lines 8-13.

requested variance upon compliance with the terms of the Agreement, the the Commission is not making any decision as to prudence or ratemaking treatment of any money pool transactions nor agreeing to a limitation of its investigatory or statutory powers..

The Commission rejects the suggestion that potential higher risk investing by the Empire Electric money pool serves as an objection to the interest and investment benefits of the LUCo Money Pool.

Whether Applicants can comply with a rule is not a question of finding good cause. The Applicants clearly testified they could comply, but at a cost. They argued that savings of that cost of compliance is evidence in showing good cause, and the Commission agrees.

Based on the testimony of Applicant's and Staff's witnesses, the ten safeguards are found to be protective of the interests of the ratepayers, as well as a contributor to a finding of good cause. The safeguards insure the Applicants will obtain the best borrowing and lending rates available, will not borrow to lend, will document competitive rates even though not competitively bidding each transaction, and will inform Staff of new members, among other protections. The Commission finds the described reasons for granting a variance from the competitive bidding requirements to be substantial, reasonable, and factual.

Public Counsel offered arguments against the draft language of the Money Pool Agreement⁷⁹ between LUCo and Applicants. The Commission finds these arguments ill-placed as the evidence shows the Applicants were not seeking Commission approval of the Money Pool Agreement. The Applicants seek a variance from the competitive bidding requirement for affiliated entities. That variance requires only a showing of good cause.

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

⁷⁹ This is not referring to the Stipulation and Agreement, referenced throughout this Order as the 'Agreement'.

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.

This case is a request for a variation from the competitive bidding requirements in the electrical and gas utility affiliate transaction rules. Those rules are in place to protect a utility from giving a financial advantage to a corporate affiliate utility. The rules show that affiliate transactions have the potential for abuse, and the rules, such as competitive bidding of each transaction, protect the utility's finances, which ultimately protects the ratepayer.

Applicants request this waiver to avoid getting competitive bids on each transaction when they make certain financial transactions with affiliates. The financial transaction at issue is borrowing and lending money in LUCo's existing Money Pool. Any analysis of the conditions of the Money Pool is limited, and relates to whether there are substantial protections in place that provide the good cause to waive the affiliate transaction competitive bidding rule so that ratepayers are protected as they would be under the affiliate transaction rule.

The LUCo Money Pool is currently backed by a line-of-credit, and with this approval will expand that backing to include a commercial paper program. A commercial paper program is a source of lower interest rates than a line-of-credit. The commercial paper market effectively provides continuous bidding. Continuous bidding in the commercial paper market allows the utility to be proactive in its borrowing and investing rather than reactive in having a financial situation of need or excess cash, and then needing to bid the

transaction. The Commission also notes the ratepayer protection that if the A2/F2-rating is not met, then the Applicants must return to competitive bidding (safeguard five). The Commission likewise recognizes that the borrowing and lending rate comparison with third party providers serves to protect the Applicants from being financially exploited, which in turn protects the ratepayer (safeguards two and four). The Commission recognizes that capping the borrowing interest cost to the lending interest cost incurred (safeguard one), and the restriction on Applicants borrowing from third parties in order to lend into the Money Pool (safeguard three) both serve to protect the financial interests of the Applicants independent of the parent LUCo, which in turn protects the ratepayers.

Maintaining evidence of the competitiveness of rates (safeguard six), restricting administrative costs when an Applicant utilizes third party borrowing or lending (safeguard seven), and annual reporting of Money Pool activities (safeguard eight) are also found to protective of the finances of each Applicant independent of their parent LUCo. The requirement to notify the Commission of any new Money Pool participants (safeguard ten), with the requirement of filing any amendments to the Money Pool Agreement (safeguard nine) both serve to allow the Commission and the public to keep informed of Money Pool expansions and changes so that ratepayers are as protected as they would be under the affiliate transaction rule.

These ten safeguards, along with the advantages discussed, as well as the Commission's ability to address future issues, all contribute to the Commission's finding of good cause to grant Applicant's requested variance from the competitive bidding requirements in the affiliate transaction rules.

Applicant's original request for a waiver from the asymmetrical pricing requirements is found to be withdrawn under the terms of the Stipulation and Agreement.

The unopposed evidence shows the Applicants filed verification that they did not communicate with the Commission on substantive matters likely to be at issue in this case. Therefore, we find Applicants have met the requirements for a finding of good cause to waive the 60-day notice requirement.

THE COMMISSION ORDERS THAT:

1. The *Application for Variance* filed on December 29, 2017, by The Empire District Electric Company, The Empire District Gas Company, Liberty Utilities (Midstates Natural Gas) Corp., and Liberty Utilities (Missouri Water) LLC seeking a variance from the Commission's affiliate transaction competitive bidding rules for electric and gas utilities, is granted subject to the ten safeguards set forth above.
2. The 60-day notice requirement of 4 CSR 240-4.017(1) is waived.
3. This order shall become effective on September 14, 2019.



BY THE COMMISSION

Morris L. Woodruff

Morris L. Woodruff
Secretary

Silvey, Chm., Kenney, Hall, Rupp, and
Coleman, CC., concur;
and certify compliance with the
provisions of Section 536.080, RSMo.

Hatcher, Regulatory Law Judge

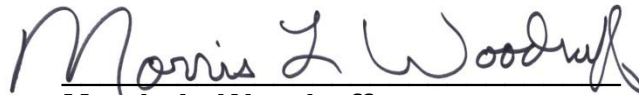
STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 15th day of August 2019.




Morris L. Woodruff
Secretary

MISSOURI PUBLIC SERVICE COMMISSION

August 15, 2019

File/Case No. AO-2018-0179

**Missouri Public Service
Commission**

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**Missouri Public Service
Commission**

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Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,



**Morris L. Woodruff
Secretary**

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.