



Before discussing the Company's request, itself, the OPC notes that the intervention period for this case has closed, and intervention has been granted to only one party – the Missouri School Boards' Association (MSBA). Accordingly, the additional protections the Company seeks would apply only to MSBA's access to data. However, the implications for the OPC, is that the Company's request to predesignate information such as Board of Director minutes as "Highly Confidential" would shift the burden of proving the reasonableness of special designations from Liberty, and onto the OPC, the Staff, and MSBA. Therefore, the Company's request directly contradicts the Commission's rules on confidential designations, which places the burden on the utility to demonstrate why each designated document should receive heightened protection. Further, the request negates the regulatory intent to require that each redaction within a document is necessary to protect the Company's competitive interests.

#### **I. MEETING THE CONFIDENTIAL INFORMATION REQUIREMENTS**

There are two portions of Commission regulation 20 C.S.R. 4240-2.135, Confidential Information, that specify the requirements to successfully obtain a protective order. These subsections are 20 C.S.R. 4240-2.135(3) and 20 C.S.R. 4240-2.135(4). Subsection (3) requires a request for a protective order to include the following: That the party requests the protective order-

1. By filing a separate pleading denominated "Motion for Protective Order"[;]
2. The pleading shall state *with particularity* why the moving party seeks protection *and what harm may occur* if the information is made public;

3. The pleading shall also state whether any of the information for which a claim of confidentiality is made can be found in any other public document[.]<sup>1</sup>

The second relevant subsection, subsection (4), further clarifies:

(4) The commission may order greater protection than that provided by a confidential designation upon a motion explaining *what information must be protected, the harm to the disclosing entity* or the public that might result from the disclosure of the information, and an explanation of how the information may be disclosed while protecting the disclosing entity and the public.”<sup>2</sup>

Both of these subsections share two requirements for the Commission to grant a Protection Order Motion—1) the requesting party specify *what* the information at issue is and 2) the requesting party specify the *harm* that disclosure will cause.

Essentially, this regulation acknowledges the sensitive nature of some information that a utility may present, which would need a higher confidentiality designation. However, the regulation also demonstrates an understanding that the party requesting a higher level of confidentiality must specify the information it seeks to restrict *and* prove that disclosure of that information will cause the requesting party harm.

### **A. Liberty Midstates’ Motion is Missing Particularity**

As stated *supra* page 2, a proper motion for a protective order requires the Company<sup>3</sup> to state, with particularity, the information that it is requesting the Commission to designate as “Highly Confidential.” In this case, however, the Company’s request is purposefully inexact, anticipating “*at least* the following

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<sup>1</sup> 20 C.S.R. 4240-2.135(3) (emphasis added).

<sup>2</sup> 20 C.S.R. 4240-2.135(4) (emphasis added).

<sup>3</sup> The requesting party, in this instance.

information will need to be designated as ‘Highly Confidential’: the negotiated terms and conditions of contracts, pricing information for certain customers, board of directors materials, and information regarding system planning and forecasting.”<sup>4</sup>

The phrase “at least,” and the Company’s emphasis of that phrase, creates an expectation that the Company will impose a “Highly Confidential” designation upon an untold amount of information beyond the four listed examples. Therefore, Liberty Midstates is not only vague about the information for which it is seeking a “Highly Confidential” designation, but the Company also fails to express the categories of information for which such a designation is appropriate.

The categories of information that the Company has deemed “Highly Confidential” are broad beyond what the Commission should consider appropriate for such a designation. There is no reason for information regarding system planning and forecasting to require a “Highly Confidential” designation when that information relates only to the regulated utilities. Furthermore, there is likely information within the Board of Directors materials that does not provide any advantage to Liberty Midstates’ competitors.<sup>5</sup>

The OPC would be remiss not to highlight the Company’s proposed language in §6, requesting the Commission approve “[m]aterials and information divulged by Liberty or other parties”<sup>6</sup> receive the “Highly Confidential” designation. By

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<sup>4</sup> *Liberty Midstates’ Motion for Protective Order*, p. 2 § 5, GR-2024-0106, EFIS Item No. 46.

<sup>5</sup> Though, the OPC cannot specify what information would provide such an advantage, as the Company has—thus far—prohibited the OPC from viewing this information.

<sup>6</sup> *Motion for Protective Order*, p. 2 § 6.

requesting this particular subsection be part of the Company's protective order, Liberty Midstates is making the request even more broad than the phrase "*at least*" implies. The materials and information that the Company is requesting be part of the protective order has no relation to the four areas Liberty Midstates listed earlier in its motion.

The Company is seeking permission to limit a large swath of its information as "Highly Confidential," rather than having to thoughtfully examine whether its confidentiality is appropriate in this context. Thus, the request goes against the original intent of 20 C.S.R. 4240-2.135.

**B. Liberty Midstates has not Specified the Harm from Disclosure.**

Subparts (3) and (4) also both require the requesting party explain the harm that may result with the disclosure of the information at issue. The Company does state that disclosing the information at issue is "[c]ompetitively sensitive."<sup>7</sup> The Protective Order Motion also states that it is seeking the "Highly Confidential" designation "To prevent harm to Liberty and prevent the creation of a competitive advantage for parties to this proceeding over liberty and non-party competitors."<sup>8</sup> However, the Company does not provide any explanation of how the harm it is seeking to prevent would arise, or what that harm would look like.

Moreover, while Liberty Midstates' parent company, Algonquin Power & Utilities Corporation ("APUC"), has branches of its business in the competitive

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<sup>7</sup> Id. at p. 1 § 2.

<sup>8</sup> Id. at p. 2 § 6.

market, the Company, itself, is not one of them. Liberty Midstates' motion conflates an unspecified competitive advantage that may apply to its unregulated businesses with a possible harm that may apply to its regulated businesses. Liberty Midstates is not a competitive company but is, rather, a natural monopoly.

To reiterate, the OPC does recognize that there are some aspects of the information that, if disclosed, could cause the Company at the center of this case harm. However, the Protective Order Motion is not particular enough to determine even the category that the information at issue is or how it would cause that harm. Therefore, the Company has failed to adequately specify the harm that would result in the disclosure of the information at issue with its motion.

## II. SHIFTING THE BURDEN OF PROOF

The OPC further takes issue with Liberty Midstates seeking to shift the burden of proof regarding the proper confidentiality designation to the party seeking the information. Regulation 20 C.S.R. 4240-2.135(1), Confidential Information, states:

(1) All items filed in case proceedings before the commission shall be open to the public unless protected pursuant to this rule or otherwise protected by law.”

Each subsection after (1) makes clear that the party seeking a confidentiality designation is the party that is obligated to prove the necessity of that designation.<sup>9</sup>

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<sup>9</sup> See 20 C.S.R. 4240-2.135(2)(A) (“Any person may submit to the commission . . . information designated as confidential[.]”); See 20 C.S.R. 4240-2.135(3)(A) (“[A]ny person may seek a protective order from the commission designating specific information as confidential.”); See 20 C.S.R. 4240-2.135(4) (The commission may order greater protection . . . upon a motion explaining what

Yet, in its Protective Order Motion, Liberty Midstates requests a protective order that states, in relevant part, “Materials and information divulged by Liberty or other parties *shall be considered to be ‘Highly Confidential’ if so designated at the time of disclosure.*”<sup>10</sup> The Company further requests language that states:

If a party disagrees with the “Highly Confidential” designation of any information, the party shall follow the informal discovery dispute resolution procedures set forth in Commission Rule 20 CSR 4240-2.090(8). If the party exhausts these dispute resolution procedures, the party may file a motion challenging the designation.<sup>11</sup>

20 C.S.R. 4240-2.135 clearly requires parties seeking a higher level of confidentiality to explain what information must be held to that higher confidential standard, and what harm may result if that information is not provided more confidentiality. The Company, however, is seeking the ability to provide a blanket “Highly Confidential” designation and require other parties to prove that designation overly restrictive.

This proposed language essentially eliminates the utility’s burden to demonstrate with particularity the information to be designated highly confidential and the harm that could occur with each designation. The OPC urges the Commission to require the Company to explain with particularity the material the Company seeks to designate as “Highly Confidential,” and the harm that will occur for each document, rather than a blanket protection that is overly broad and shifts the burden to other parties to prove the designation is improper.

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information must be protected, the harm to the disclosing entity or the public that might result from the disclosure of the information[.]”)

<sup>10</sup> *Motion for Protective Order*, p. 2 § 6(a). (emphasis added).

<sup>11</sup> <sup>11</sup> *Id.* at p. 3 § 6(c).

## CONCLUSION

To be clear, this Office would not concern itself with Liberty Midstates' confidentiality designations under normal circumstances. However, prior to filing its Protective Order Motion, the Company took a substantial amount of time to provide its tax returns to the OPC and, when Liberty Midstates did produce this documentation, it was designated as "Highly Confidential." The OPC is not aware of any past instance where the Commission found tax returns to be "Highly Confidential," either when the tax returns were Liberty Midstates' in past years, or from other Missouri utilities. This higher designation, alone, raised the OPC's alarm bells when the Company filed this Protective Order Motion, causing this Office to look closer.

While the OPC does recognize that there is information that Liberty Midstates may produce that requires a "Highly Confidential" designation, it is difficult for the Office to ignore the departure from customary practice the Company's Protective Order Motion seeks. The basis that the Company provides in its request for a higher level of confidentiality lacks substance. Further, the language Liberty Midstates proposes unduly shifts the burden of proving the correct standard of confidentiality on to the party seeking the information.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission either reject or substantially restrict the Company's Motion for a Protective Order, as filed, in this case.



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CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this 22nd day of July, 2024.

/s/ Anna Martin