

**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

STAFF'S POST-HEARING BRIEF

COMES NOW Staff of the Missouri Public Service Commission ("Staff") and for its
Post-Hearing Brief, states as follows:

Background

The Empire District Electric Company, The Empire District Gas Company, Liberty Utilities Corp, and Liberty Utilities LLC ("Applicants") are Commission-regulated subsidiaries of an unregulated holding company named Liberty Utilities, Co. ("LUCo"). LUCo is owned by Algonquin Power & Utilities Corporation. Applicants and LUCo are affiliates, as defined in the Commission's affiliate transactions rules.¹ Applicants filed an *Application for Variance* on December 29, 2017, seeking variances from the asymmetrical pricing² and competitive bidding³ requirements of the Commission's affiliate transactions rules related to Applicants' participation in a money pool⁴ administered by LUCo.

¹ 4 CSR § 240-20.015(1)(A).

² 4 CSR § 240-20.015(2) (electric); 4 CSR § 240-40.015(2) (gas). The rules are exactly alike, except for the words "electric" and "gas."

³ 4 CSR § 240-20.015(3) (electric); 4 CSR § 240-40.015(3) (gas). The rules are exactly alike, except for the words "electric" and "gas."

⁴ A money pool is a cash management tool that gives participants access to short term cash. Participants may borrow from the money pool to meet short term cash needs and may contribute excess funds to the money pool and earn interest. Applicants, *Application for Variance*, AO-2018-0179, ¶ 16 (December 29, 2017).

In its May 31, 2018 *Staff Recommendation*, Staff recommended that the Commission deny both variance requests, finding that Applicants failed to show good cause and that approval could increase Applicants' cost to provide service.⁵ However, after negotiations Staff and Applicants entered into a *Nonunanimous Stipulation and Agreement* ("Stipulation"), filed January 24, 2019. According to the Stipulation's terms, Staff supports Applicants' request for a variance from the competitive bidding requirements if LUCo funds the Money Pool with an at least A2/F2-rated commercial paper program and implements protections to prevent cross-subsidization between Applicants and LUCo.

Introduction

Staff requests that the Commission (1) grant Applicants' request for a waiver from the competitive bidding requirements and (2) adopt the Stipulation terms, with modifications the Commission suggested at the hearing.⁶ Staff and Applicants and the Office of Public Counsel ("OPC") could not agree on issues to be heard at the hearing. Staff and Applicants jointly submitted one issue, while OPC submitted seven, with subparts. Staff and Applicants' single issue is essentially the same as OPC's first issue. As Staff stated in its position statement, all OPC issues, except its first, are argumentative, irrelevant,⁷ request improper advisory opinions,⁸ and/or raise due process concerns

⁵ Staff of the Public Service Commission, *Staff Recommendation*, AO-2018-0179, 3 (May 31, 2018).

⁶ Trial Tr., 86-87, 113, 120-21, 132, 135. See also Missouri Public Service Commission, *Order Directing Filing*, AO-2018-0179 (June 28, 2019); and Staff of the Public Service Commission & Applicants, *Response to Order Directing Filing* (July 12, 2019).

⁷ For example, OPC's fifth and seventh issues relate to entirely different dockets.

⁸ "The Commission [is] restricted to determining the complaint before it, and it should not be issuing decisions with 'no practical effect and that are only advisory as to future, hypothetical situations.'" State ex rel. Laclede Gas Co. v. Public Service Com'n of State, 392 S.W.3d 24, 38 (Mo. Ct. App. 2012) (citation omitted).

because they are unrelated to Applicants' request for a variance, and therefore are not properly before the Commission. Without proof of an actual violation, OPC speculates how Applicants may violate the affiliate transactions rules in the future. OPC has recourse if it believes Applicants have violated a Commission rule or order – it may bring a complaint or argue that related costs should be denied in Applicants' future rate cases.

An evidentiary hearing was held June 27, 2019. Four witnesses presented testimony, and 19 exhibits were entered into evidence. At the hearing, the Commission suggested conditions to the Stipulation. On June 28, 2019 the Commission directed all parties to file responses to these suggested conditions by July 12, 2019 and state whether the parties wanted to attempt stipulation negotiation. Staff and Applicants found common ground addressing Commission suggestions, but OPC did not.⁹ OPC did not respond to the Commission's June 28 order. For this reason, Staff files its post-hearing brief and requests an order.

Argument

Staff and Applicants' Issue: Should the Commission grant the Applicants a variance from Commission Rules 4 CSR 240-20.015(3)(A) and 4 CSR 240-40.015(3)(A), the bidding requirements of the Commission's electric and gas affiliate transaction rules?

Yes. Applicants request a waiver from the Commission's competitive bidding rules to facilitate their participation in a money pool administered by LUCo. Applicants have frequent short term cash needs, and it is burdensome for them to continuously competitively bid every lending transaction. For this reason, Applicants intend to enter into a Money Pool Agreement.¹⁰ According to Section 1.04 of the Money Pool

⁹ Missouri Public Service Commission and Staff & Applicants, *supra* note 6.

¹⁰ Applicants do not request Commission approval of the money pool or its terms. Trial Tr., 8-9.

Agreement, pooled funds and surplus LUCo funds would be accessed first for short term lending. If pooled and LUCo funds are insufficient, LUCo's commercial paper would be drawn upon. LUCo's commercial paper program is close to final.¹¹

Paragraph six of the Stipulation contains safeguards to prevent cross-subsidization between Applicants and LUCo, accomplishing the goal of the Commission's asymmetrical pricing rules. Some safeguards are described here. As stated above, the entire agreement is conditioned on LUCo instituting an investment grade commercial paper program. Additionally, an Applicant may borrow from the money pool only if it cannot borrow from a third party at lower cost.¹² LUCo's commercial paper rate will be available to Applicants without mark-up. Member utilities must monitor markets and maintain evidence of the competitiveness of money pool rates. This evidence must be provided to Staff upon request. Applicants will file reports summarizing money pool activities with their annual affiliate transactions reports.

Furthermore, Mark Timpe, Director, Treasury for LUCo, testified that the money pool is not designed to be a revenue source for LUCo, and the intention is that the money pool will benefit ratepayers of LUCo subsidiaries.¹³ Staff and Applicants are in favor of language unequivocally stating that the money pool will not be a profit center for LUCo, consistent with the Commission's suggestion.¹⁴

OPC argues that the Empire Money Pool makes the LUCo Money Pool redundant. The Empire Money Pool has its own commercial paper program, backed by LUCo's line

¹¹ *Id.* at 92, 99.

¹² This language incorporates the Commission's suggestion. *Id.* at 86, 120-21, 135. See also Missouri Public Service Commission and Staff & Applicants, *supra* note 6.

¹³ *Id.* at 87.

¹⁴ *Id.* at 87, 113, 132. See also Missouri Public Service Commission and Staff & Applicants, *supra* note 6.

of credit. LUCo does not charge Empire for this line of credit.¹⁵ However, because the LUCo Money Pool program will have investment grade commercial paper capability in the near future at a rate likely slightly less than the Empire Money Pool's commercial paper program,¹⁶ it is the Empire Money Pool that is redundant. Furthermore, only Applicants Empire Gas and Empire Electric are members of the Empire Money Pool. LUCo is entitled to make decisions regarding its subsidiaries and internal money management. It is reasonable for all subsidiaries – including Applicants – to be in the LUCo Money Pool. If the Commission orders the Stipulation's terms, good cause exists to grant Applicants a variance from the competitive bidding requirements so they will not need to frequently obtain price quotes for short term lending.

OPC Issue 2: Do the terms of Section 1.07(b) of LUCo's money pool agreement with its regulated subsidiaries for allocating to the Applicants specific costs of their affiliate LUCo's credit lines that may fund that money pool comply with the Commission's affiliate transactions rules standards which require that "[a] regulated electrical [or gas] corporation shall not provide a financial advantage to an affiliated entity" (4 CSR 240-20.015(2)(A) and 4 CSR 240-40.015(2)(A))?

Yes. 4 CSR 240-20.015(2)(A) and 4 CSR 240-40.015(2)(A) are part of the asymmetrical pricing requirements of the affiliate transactions rules. Section 1.07(b) of the Money Pool Agreement states that credit line costs that cannot be directly allocated to an Applicant utility will be allocated according to a four-factor allocation methodology comparing utility plant expenses, customer count, non-labor expenses, and labor expenses.¹⁷

OPC's argument is that under the Money Pool Agreement, Applicants would subsidize LUCo by paying fees for LUCo's \$500 million line of credit, while LUCo would

¹⁵ *Id.* at 33, 93-94.

¹⁶ *Id.* at 92, 99.

¹⁷ This breakdown is shown in hearing Ex. 13.

control the line of credit and could use it for any purpose.¹⁸ However, the Stipulation's safeguards, described on page four herein, are designed to prevent cross-subsidization, particularly paragraph 6(b) which states that an Applicant may not borrow from the money pool if it can borrow at a lower cost directly from a third party.¹⁹

OPC Issue 3: Are the terms of Sections 2.01 and 2.06 of LUCo's money pool agreement with its regulated subsidiaries sufficiently vague that how LUCo may select the basis for charging operational money pool costs and the method to determine its costs provides a preference to LUCo that does not comply with the Commission's affiliate transactions rules standards which require that "[e]xcept as necessary to provide corporate support functions, the regulated electrical [or gas] corporation shall conduct its business in such a way as not to provide any preferential service, information or treatment to an affiliated entity over another party at any time (4 CSR 240-20.015(2)(B) and 4 CSR 240-40.015(2)(B))?"

No. 4 CSR 240-20.015(2)(B) and 4 CSR 240-40.015(2)(B) are also part of the asymmetrical pricing rules. Section 2.01 of the Money Pool Agreement states that LUCo will manage the money pool "on an 'at cost' basis." Section 2.06 states that LUCo's decisions regarding money pool operation are final.

OPC's argument is that Sections 2.01 and 2.06 would grant LUCo discretion regarding allocation of administrative costs and are vague so that Applicants would subsidize LUCo.²⁰ These sections are not vague, especially when read with Stipulation paragraph 6(b).

OPC Issue 4: Will any increased interest, investment revenues or decreased borrowing costs to The Empire District Electric Company, The Empire District Gas Company, and Liberty Utilities (Midstates Natural Gas) Corp due to their participation in LUCo's money pool with its regulated subsidiaries benefit their captive retail customers? Will interest, investment revenues be offset by LUCo's money pool expenses?

¹⁸ Trial Tr., 132.

¹⁹ This language incorporates the Commission's suggestion. *Id.* at 86, 120-21, 135.

²⁰ Office of the Public Counsel, *The Office of the Public Counsel's Position on the Issues*, AO-2018-0179, 12-13 (June 13, 2019).

Yes, participation in the money pool will benefit Applicants' customers. No, interest and revenue will not be offset by LUCo money pool expenses. OPC's argument is that the Empire Money Pool already has a commercial paper program, supported at no cost by the LUCo line of credit,²¹ and that Applicants' participation in the LUCo Money Pool will not benefit their ratepayers. OPC also argues that Applicants paying LUCo line of credit costs is inequitable, especially to an Applicant such as Midstates Natural Gas, which has historically been a cash source for LUCo.²²

OPC should be assuaged by the Stipulation's protections, especially paragraph 6(b), described on page four herein. Furthermore, both Mr. Timpe and Robert Schallenberg, Director of Policy at the Office of Public Counsel, testified that money pool participants should pay money pool costs.²³ One reason LUCo created a money pool is to remedy the inequity of Empire not paying LUCo's line of credit fees,²⁴ which are presumably allocated to and paid by other entities who use LUCo's line of credit.²⁵

OPC Issue 5: Have The Empire District Electric Company, The Empire District Gas Company, Liberty Utilities (Midstates Natural Gas) Corp, and Liberty Utilities (Missouri Water) LLC complied with the Commission's rules and orders since they became subsidiaries of Algonquin Power & Utilities Corp.?

Yes. Applicants became subsidiaries of Algonquin Power & Utilities Corp. in 2016. OPC states that Applicants have not followed the Commission's affiliate transactions rules since they became Algonquin subsidiaries and are bad actors that cannot be trusted in the future. OPC criticizes Empire for terminating its \$200 million line of credit and using

²¹ Ironically, OPC both praises the low cost Empire Money Pool and criticizes Empire for not receiving bids before using LUCo's line of credit. See OPC Issues 5 and 7.

²² *The Office of the Public Counsel's Positions on the Issues*, supra note 20, at 13-17.

²³ Trial Tr., 93-94, 134.

²⁴ *Id.* at 93-94.

²⁵ Mr. Timpe testified that if it was charged, Empire's cumulative cost for LUCo support of its commercial paper program would be \$302,000. *Id.*

LUCo's \$500 million line of credit without receiving competitive bids.²⁶ Receiving bids was unnecessary, because Empire pays LUCo nothing for the line of credit.²⁷

OPC also faults Empire Electric for not receiving bids before refinancing \$90 million in bonds by executing a promissory note with LUCo.²⁸ Mr. Timpe testified that contemporaneous to this, an Applicant was nearly three times oversubscribed in a private placement debt offering. This formed the basis of the interest rate for the \$90 million refinancing and effectively tested the market, creating no need for Empire to receive outside bids.²⁹

OPC Issue 6: Does LUCo's money pool agreement with its regulated subsidiaries address the Applicants' record-keeping requirements and access to LUCo's books and records for the Commission to ensure compliance with the Commission's affiliate transactions rules as expressed in rules 4 CSR 240-20.015(5)&(6) and 4 CSR 240-40.015(5)&(6)?

Yes. OPC argues in its position statement that because Applicants have no employees, a nonregulated affiliate entity with no incentive to follow Commission rules will maintain Applicants' business records.³⁰ OPC overlooks 4 CSR 240-20.015(5) and 4 CSR 240-40.015(5) which state that Applicants' affiliates must maintain books and records. These rules describe the types of business records that these affiliates must maintain;³¹ they do not include information about business decisions that OPC seeks.³² Additionally, Applicants, like all regulated utilities, must follow Commission rules, subject

²⁶ *Id.* at 19; *The Office of the Public Counsel's Positions on the Issues*, *supra* note 20, at 17-18.

²⁷ Trial Tr., 33, 93-94.

²⁸ *Id.* at 21-22, 38-39; *The Office of the Public Counsel's Positions on the Issues*, *supra* note 20, at 18.

²⁹ Trial Tr., 105-08.

³⁰ *The Office of the Public Counsel's Positions on the Issues*, *supra* note 20, at 19-20.

³¹ They include documentation of affiliate transactions costs, description of allocation methodologies, description of services received, evaluations of services received, etc.

³² *The Office of the Public Counsel's Positions on the Issues*, *supra* note 20, at 19-20.

to any Commission-granted variance. It is irrelevant whether the Money Pool Agreement addresses all Commission rules – Applicants must follow them regardless.

OPC Issue 7: Is The Empire District Electric Company complying with the following conditions the Commission imposed on it in Case No. EM-2016-0213:

- a. Empire will not obtain financing services from an affiliate unless such services comply with Missouri's Affiliate Transaction Rules 4 CSR 240-20.015 and 4 CSR 240-40.015;
- b. "Empire shall maintain corporate officers who have a fiduciary duty to Empire"; and
- c. "Empire shall maintain its own board of directors with a majority of non-management independent directors?"

Yes. In Case No. EM-2016-0213 the Commission approved the merger of Liberty Sub Corporation with The Empire District Electric Company. As part of this case, Empire Electric stipulated to numerous conditions.

OPC Issue 7 is similar to OPC Issue 5. OPC criticizes three Empire transactions completed without competitive bidding: Replacing Empire Electric's line of credit with LUCo's line of credit,³³ refinancing \$90 million in bonds by executing a promissory note with LUCo,³⁴ and transferring Empire Electric employees to Liberty Utilities Service Corporation, which employs LUCo staff.³⁵ As explained above, there was no reason for Empire to obtain competitive bids to use LUCo's no cost line of credit, and a private placement debt offering contemporaneous with the Empire refinancing established fair market price.³⁶ And finally, it is less than clear whether internal employee transfers trigger the affiliate transactions rules.³⁷

³³ Trial Tr., 19; *The Office of the Public Counsel's Positions on the Issues*, supra note 20, at 17-18.

³⁴ Trial Tr., 21-22, 38-39; *The Office of the Public Counsel's Positions on the Issues*, supra note 20, at 18.

³⁵ *The Office of the Public Counsel's Position on the Issues*, supra note 20, at 20-21.

³⁶ Trial Tr., 105-06.

³⁷ 4 CSR § 240-20.015(1)(B) defines affiliate transaction as a transaction of information, assets, products, or services.

Conclusion

For the reasons set forth in this brief, the Commission should issue an order granting Applicants' request for a variance from the competitive bidding requirements of the affiliate transactions rules and ordering the terms of Staff and Applicants' Stipulation, with the modifications the Commission suggested at the hearing.³⁸

WHEREFORE Staff submits the foregoing *Staff's Post-Hearing Brief* for the Commission's consideration.

Respectfully submitted,

/s/ Karen E. Bretz

Karen E. Bretz
Senior Counsel
Missouri Bar No. 70632
Attorney for the Staff of the
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
573-751-5472 (Voice)
573-751-9285 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been electronically mailed to all counsel of record this 18th day of July, 2019.

/s/ Karen Bretz

³⁸ Trial Tr., 86-87, 113, 120-21, 132, 135. See also Missouri Public Service Commission and Staff & Applicants, *supra* note 6.