



4. On May 6, 2024, Liberty Midstates sent the OPC a list of objections regarding OPC DRs 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, and 3017.<sup>3</sup>

5. Liberty Midstates' objection to OPC DR 3006, in its entirety, states:

This data request ("DR") seeks information held by and regarding APUC—and not regarding the subject of this docket, Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty ("Liberty" or "Company"). Liberty objects to this DR on the bases that it: is overly broad; seeks information that is beyond Liberty's possession, custody, and control; is not proportional to the needs of the case considering the totality of the circumstances; seeks information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence in this proceeding, including on the basis that a Liberty Missouri-regulated utility is not a party to or the subject of documents (E.g., In re Union Elec. Co., 2004 WL 431838, Case No. EO-2004-0108, Order on Reconsideration Concerning Discovery, issued February 26, 2004); seeks information that may be privileged; and seeks highly sensitive commercially information. Without waiving the foregoing objection, the Company will make available for on-site review only items relating to the Company and/or its Missouri operations that are not privileged.

6. On June 20, 2024, the OPC met with Liberty Midstates, via telephone, in order to discuss its objections. After some discussion, Liberty Midstates invited OPC witness, David Murray, to review the information the Company deemed relevant regarding DRs 3006 and 3009. During the meeting, Liberty Midstates also informed the OPC that it would provide a privilege log to address any relevant documentation that the Company had withheld and why.

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<sup>3</sup> *Objections to OPC Data Requests 3000-3017 and Notice of Additional Time Need to Respond to DRs 3006-3017*, Case Nos. GR-2024-0106 & WR-2024-0104 (May 6, 2024) (Attachment B).

7. On July 2, 2024, Mr. Murray went to Liberty Midstate’s Jefferson City office, intending to go through the APUC documents that the Company agreed to provide. Liberty Midstates did not provide any documents relating to DR 3006.

8. Liberty Midstates sent the OPC privilege logs<sup>4</sup> related to OPC DR 3006 and OPC DR 3009 on July 5, 2024.

9. On July 10, 2024, the OPC filed a Notice of Discovery Dispute<sup>5</sup> (“Notice”) regarding these two DRs and the Public Counsel’s attempt to review the relevant APUC information on July 2, 2024. This Notice informed the Commission that the OPC did not agree with Liberty Midstates on the merits of the Company’s objections to OPC DR 3006 or OPC DR 3009.

10. At the Discovery Conference that took place on July 15, 2024, the Company informed the Commission that it intended to provide the OPC with an updated privilege log that was more specific in its claims of privilege.<sup>6</sup> Liberty Midstates further stated that it would have employees compile a list of documents related to OPC DR 3009 that it would be willing to provide.<sup>7</sup> However, the Company stated that any documents related to OPC DR 3006 are privileged and informed the Commission that it would not provide that documentation.<sup>8</sup>

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<sup>4</sup> *Privilege Log—Response to OPC Data Request 3006*, Case Nos. GR-2024-0106 & WR-2024-0104 (Attachment C).

<sup>5</sup> *Public Counsel’s Notice of Discovery Dispute*, GR-2024-0106, EFIS Item No. 45.

<sup>6</sup> *Transcript Volume 1 (Tr.)*, p. 46 (July 15, 2024.)

<sup>7</sup> *Id.* at p. 41.

<sup>8</sup> *Id.* at p. 24.

11. On July 19, 2024, Liberty Midstates gave the OPC a Supplemented Privilege Log<sup>9</sup> to provide more information about withheld documents, as it informed the Commission it would create at the July 15 discovery conference.

12. The OPC has, in good faith, conferred with counsel for Liberty Midstates and presented its concerns to the judge in this matter at a discovery conference prior to the filing of this motion pursuant to Commission Rule 20 CSR 4240-2.090(8)(A).

13. As a result, the OPC now files this motion to request the Commission issue an order compelling Liberty Midstates to respond to and provide full and complete responses, redacted as necessary, to OPC DR 3006, as permitted by Rule 20 CSR 4240-2.090(8)(B).

## ARGUMENT

### **I. OPC DR 3006: APUC's Strategic Review Committee**

At the July 15, 2024 discovery conference, the Company informed the judge and the parties present that it would not produce any of the documentation related to OPC DR 3006. The Company first explained that it would not produce this evidence due to the entirety of these materials being covered by attorney-client privilege or work product protection.<sup>10</sup> Then, Liberty Midstates stated that the information that the OPC sought regarded a speculative future action by APUC and was not relevant. However, the OPC notes that Liberty Midstates' original objection also alleged that OPC's DR 3006 was overbroad, requested information that Liberty Midstates did not

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<sup>9</sup> *Supplemented Privilege Log—Response to OPC Data Request 3006*, Case Nos. GR-2024-0106 & WR-2024-0104 (Attachment D).

<sup>10</sup> *Tr.* at p. 25.

have access to, and was requesting commercially sensitive information. Therefore, the Public Counsel addresses each objection, in turn.

**A. Liberty Midstates' Claims of Confidentiality Pertaining to its Strategic Review Committee ("Committee") Are Not Supported by Law.**

The OPC recognizes that the legal concepts of attorney-client privilege and the work product doctrine have an important role to play in corporate law. However, Liberty Midstates is a natural monopoly. Therefore, the Company's claim that it may restrict access to the entire trove of documents relating to 3006 sparks concern. In Missouri, the party claiming privilege has the burden of proving that such a privilege exists, which the Company has yet to do. Moreover, for the following reasons, the OPC believes that neither attorney-client privilege nor the work product doctrine supports the access limitation that the Company is seeking here.

***1. Attorney-Client Privilege***

One assertion that the Company has made is that all of the documents related to its Strategic Review Committee are protected by attorney-client privilege. However, when the OPC reviewed this issue a bit deeper, it became clear that no such privilege exists in relation to Committee materials.

In Missouri law, a party that is claiming a privilege has the burden of proof to show that such a privilege exists.<sup>11</sup> The party claiming privilege must provide evidence of *each element of attorney-client privilege* for the trial court,<sup>12</sup> and a

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<sup>11</sup> *State ex. Rel. Koster v. Cain*, 383 S.W.3d 105, 116-21 (Mo. App. W.D. 2012); *State v. Hooper*, 552 S.W.3d 123, 130 (Mo. App. S.D. 2018).

<sup>12</sup> In this case, the Commission.

reviewing court, to determine whether that relationship was attorney-client. “A blanket assertion of privilege is not sufficient.”<sup>13</sup>

There are three (3) elements that must be present in order for a party to successfully claim attorney-client privilege. Those elements are:

- (1) The existence of an attorney-client relationship at the time the communication was made or advice was given;
- (2) The relationship existed with regard to the subject matter of the communication or advice; and
- (3) The communication was made in the attorney’s professional capacity and because of the relation of the attorney and the client.<sup>14</sup>

Basically, attorney client privilege requires the party alleging privilege prove three (3) things: “ [1. a] confidential communication [2. b]etween a lawyer and a client [3. f]or the purpose of obtaining or rendering legal advice.”<sup>15</sup> While the Company may now claim that Committee materials are confidential, Liberty Midstates cannot prove that all of the documentation it is withholding is between a lawyer and a client for the purpose of obtaining or rendering legal advice.

The first hurdle that ruins the Company’s claim of attorney-client privilege is the fact that the Committee, itself, does not have legal counsel on it. APUC publicly announced its formation of the Committee in August 2023.<sup>16</sup> In that article, APUC

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<sup>13</sup> See *State ex Rel. Koster; State v. Hooper*, FN 11.

<sup>14</sup> Restatement (Sixth) of Evidence § 502(A) (Mo. Bar 2021).

<sup>15</sup> WIN REED, TAYLOR MATTHEWS, & LINDSEY BRUNO, Attorney-Client Privilege in the Corporate Setting, Lewis Rice (Jan. 2022)(Attachment E).

<sup>16</sup> Algonquin Power & Utilities Corp., *Algonquin Power & Utilities Corp. Will Pursue Sale of Renewable Energy Group Following Strategic Review; Announces 2023 Second Quarter Financial Results*, PR NEWSWIRE, p. 2 (Aug. 10, 2023), <https://www.prnewswire.com/news-releases/algonquin-power--utilities-corp-will-pursue-sale-of-renewable-energy-group-following-strategic-review-announces-2023-second-quarter-financial-results-301897661.html>(Attachment F).

lists the members of that board as Chris Huskilson—APUC’s Chief Executive Officer (“CEO”), Ameer Chande—Chair of the “Risk Committee”, and Dan Goldberg—Chair of the “Corporate Governance Committee”.<sup>17</sup> Of note—none of these individuals is an attorney. While the client—via the corporation—is present, an attorney is absent. Further, the information that 3006 requests relates to work that “could have been performed just as readily by non-lawyers, aided to the extent necessary by a firm of public accountants[.]”<sup>18</sup> Thus, for this reason alone, the documentation that Liberty Utilities wishes to restrict the OPC’s access to does not meet the criteria of attorney-client privilege.

The second hurdle over which the Company stumbles is the requirement that the communication be for or rendering legal advice. As discussed, none of the publicly-announced Committee members holds a legal degree. However, if the Company hoped to claim that perhaps outside counsel was present, that contention still has another concern—what the predominant purpose of the communication is. A corporate employee discussing a legal issue of the corporation with internal or retained legal counsel creates the veil of attorney-client privilege. A corporate employee discussing the corporation’s future business prospects with internal or retained legal counsel does not.<sup>19</sup> On May 11, 2023, APUC’s then-interim (now permanent) CEO stated that the Committee was created “with the goal of determining the path forward that positions each of our businesses for continued growth, enables us to achieve a lower

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<sup>17</sup> Id.; Algonquin Leadership Page, <https://algonquinpower.com/about-us/leadership.html> (last visited Aug. 2, 2024).

<sup>18</sup> *Diversified Indus. V. Meredith*, 572 F.2d 596, 614 (8<sup>th</sup> Cir. 1978).

<sup>19</sup> See Attachment E

cost of capital and maximizes shareholder value.”<sup>20</sup> The purpose of assessing how to improve APUC’s financial standing is clearly business-oriented, rather than legal/regulatory-oriented. Therefore, even if the Commission ignores the lack of any legal professional being part of the Committee, the Committee’s stated purpose proves that attorney-client privilege does not apply.

The OPC does recognize that there may be a few instances wherein the Committee does discuss a legal issue with in-house or retained counsel. Even if there was attorney-client privilege present, that fact would not permit the Company to restrict OPC’s access to any of this material. The appropriate solution is for Liberty Midstates to provide the Committee materials, and redact them as needed.

## ***2. Work Product Doctrine***

During that same discovery conference, the Company further asserted its belief that the documents not covered by the attorney-client privilege were covered, instead, by the work product doctrine.<sup>21</sup> Mo. R. Civ. Pro. 56.01(b)(5) first defines what is known as “fact privilege,” stating, in relevant part:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under rule 56.01(b)(1) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of a case that the adverse party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

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<sup>20</sup> Attachment F at p. 1.

<sup>21</sup> *Tr.* at p. 25.



Notably, this rule does not create a blanket prohibition of fact privilege. Rather, the party seeking this information needs to provide evidence that the adverse party is not able to get this, or substantially equivalent, information without hardship.

The OPC's purpose in seeking materials provided to, and produced by, the Committee is to understand its impressions of the state of the Company and its assets at that time. In August 2023, the CEO<sup>22</sup> of APUC made the Committee's purpose clear by stating "Over the past few months, the AQN Board of Directors, in conjunction with our independent financial advisor, has conducted a thorough review of our businesses *with the aim of enhancing value for our shareholders*["<sup>23</sup> Not only does this statement prove that the Committee's formation did not revolve around any imminent litigation, it also describes the exact information that the OPC *does* wish to see.

The CEO goes on to say, "We believe the value of our assets is not fully realized in our current structure. We therefore determined that focusing on our regulated businesses going forward and pursuing a sale of the renewables business is the best path forward for AQN."<sup>24</sup> When the OPC is reviewing Liberty Midstates' current capital structure and its expected changes to that structure, it is integral that the Public Counsel reviews these documents. When a company is speaking internally, it is more forthcoming about how it views the state of affairs. In public, companies must paint a rosy picture of its financial position, to keep investors interested and to

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<sup>22</sup> Interim, at the time.

<sup>23</sup> Attachment F at p. 1 (emphasis added).

<sup>24</sup> Id.

prevent other companies from taking advantage. Those pressures do not exist when the company is speaking internally. Moreover, APUC knows that it must honestly address its shortcomings in order to fix them.

To say that this information would be difficult for the OPC to obtain without undue hardship unless the Company provided it would be an understatement. The Public Counsel does not know what the internal state of APUC was during the months that the Committee existed. The Public Counsel did not know the breadth or depth of the national or international industry consideration that the Committee took into account when deciding whether to sell its renewable assets. The OPC could not see whether APUC was taking any pressure from shareholders or other groups into account when determining its next steps. Essentially, it would be impossible to get this information if the Commission determined that no order to compel was necessary.

The OPC recognizes that it must also provide proof that there is a substantial need for the Public Counsel to obtain these documents. The OPC's financial expert has been clear as to the reason he needs to review these documents. Specifically, the Committee provides analysis of how APUC was running at the time, as well as the best financial and capital structure moves to make in order to improve profits for shareholders. Therefore, the OPC needs to take into account the information that APUC was reviewing—and its view of that information—in order to assess the

fairness and reasonableness of Liberty Midstates' requested rate of return ("ROR").<sup>25</sup> The Committee determined that the most effective method of reducing APUC's cost of capital is to retain its regulated utilities, which includes Liberty Midstates.<sup>26</sup> The Committee's analysis and the material it used to make that decision directly relates to proper estimation of Liberty Midstates' cost of capital and authorized ROR.

In order to be thorough, the OPC believes it may be necessary to address an argument that it does not believe is relevant in this instance. That argument regards "opinion privilege." Mo. R. Civ. Pro. 56.01(b)(5) defines "opinion privilege," stating:

In ordering discovery of [fact opinion] materials when the required showing has been made, the court shall protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of *an attorney or other representative of a party concerning the litigation.*

Moreover, documents that are purely created in the ordinary course of business are not considered privileged under the work product doctrine.<sup>27</sup> The work product doctrine does not relate purely to information that an attorney created, but must relate to *the attorney's* mental impressions, conclusions, opinions, or legal theories of upcoming litigation. However, an attorney viewing the materials that were provided to the Committee later in preparation of litigation does not, itself, make that document work product. "The work product privilege precludes an opposing party

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<sup>25</sup> Rate of return is a function of the capital structure, cost of common equity, and cost of debt.

<sup>26</sup> As well as its other Missouri affiliates, Liberty (Missouri Water), L.L.C. and The Empire District Electric Company.

<sup>27</sup> *Diversified Indus.* at p. 604.

from discovering materials *created or commissioned by counsel in preparation for possible litigation.*”<sup>28</sup>

Liberty Midstates’ updated privilege logs state that the doctrine applies because within these documents “regulatory litigation strategy [is] discussed” and that this documentation was created “in preparation for contract negotiations.”<sup>29</sup> These reasons, again, fail to explain—with the specificity that courts requires—*why* these documents should be excluded in their entirety, rather than merely redacted.

Regarding the Company’s “preparation for contract negotiations,” the OPC is unaware of any legal protection provided to negotiation preparation. It is possible that Liberty Midstates believes the negotiation may lead to litigation. However, “the work product rule does not come into play merely because there is a remote aspect of future litigation.”<sup>30</sup>

It is also possible that Liberty Midstates believes that the fact that the communications provided in Committee materials is protected by Mo. R. Civ. Pro. 17.06, which states, in relevant part:

“An alternative dispute resolution process undertaken pursuant to this Rule 17 shall be regarded as settlement negotiations. . . . No admission, representation, statement or other confidential communication made in setting up or conducting such process shall be admissible as evidence or subject to discovery[.]”

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<sup>28</sup> *State ex. rel. Malashock v. Jamison*, 502 S.W.3d 618, 620 (Mo. 2016) (emphasis added).

<sup>29</sup> Attachment D.

<sup>30</sup> *Diversified Indus.* at p. 604 (Quoting *Zenith Radio Corp. v. RCA*, 121 F. Supp. 792, 795 (Delaware Dist. Ct. 1954)).

The issue here is that Courts view Mo. R. Civ. Pro. 17.06(a) as specifically stating that the relevant communications are those that are made “during a court-ordered alternative-dispute resolution process[.]”<sup>31</sup> If Liberty Midstates provided any legal citations in the updated privilege logs that it gave the OPC, there would be a greater understanding as to the preparation for contract negotiation privilege to which the Company refers. However, at present, the OPC is unaware of what the referenced-privilege is.

### **B. The Material OPC Sought in 3006 Relates Directly to the Financials in This Case**

So far throughout this process, Liberty Midstates has subtly enforced an idea that discovery should be limited. In a case that determines the basis of how the Company makes money, Liberty Midstates has suggested multiple times that different pieces of information are outside the scope.<sup>32</sup> However, the OPC would like to direct the Commission’s attention to Mo. R. Civ. Pro. 56.01(b)(1), which says:

Information within the scope of discovery need not be admissible in evidence to be discoverable if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

What this portion of the rule means, in effect, is that the rules around discovery are even more broad than the rules that permit the admission of evidence in court. As discussed in §B(1) of this brief, the standard for the admissibility of information in court is whether it makes a fact more or less true.

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<sup>31</sup> *Williams v. Kan. City. Title Loan Co.*, 314 S.W.3d 868 (Mo. W.D. Ct. App. July 13, 2010).

<sup>32</sup> See Attachment B.

At its core, this motion regards the purpose of the Commission, Staff, and the OPC. The Public Counsel believes that, as the regulator of a natural monopoly, the Commission and the OPC are entitled to, at minimum, the information that courts permit parties to see in an outside case. Liberty Midstates views discovery with less transparency. Therefore, it is this Commission's duty to determine which view is correct in this case.

***1. The Committee materials OPC DR 3006 seek are not just future looking.***

The Company argued that the OPC's request to view documents related to the Committee were based on the speculation that APUC would sell its unregulated assets in the future and was, therefore, irrelevant. However, as the OPC has already discussed, our interest in the Committee's documents do not relate to a possible future sale and relates, instead, to the circumstances within APUC that led it to the point of deciding to sell its unregulated assets.

While the Company's characterization of the relevance standard has a strict and specific meaning, Missouri Courts and the general rules of evidence illustrate a different view. Restatement (Sixth) of Evidence § 401 states:

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence or if it tends to corroborate evidence that itself is relevant and bears on the principal issue of the case, and the fact is of consequence in determining the action.<sup>33</sup>

When specifically relating to "logical" relevance, courts have held that the bar to meet this test is rather low.<sup>34</sup> The purpose of the logical relevance test is to help minimize

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<sup>33</sup> At p. 61 (Mo. Bar 2021).

<sup>34</sup> *State v. Sladek*, 835 S.W.2d 308,314 (Mo. Banc 1992).

factual distractions in a case so that the factfinder can understand each party's argument. For a piece of evidence to be "logically relevant," Missouri courts recognize that the information being sought may not be a figurative "smoking gun."<sup>35</sup> Rather, the information that the adverse party is seeking must make "a fact of consequence more probable than not."<sup>36</sup>

The Committee's full name is the "Strategic Review Committee." The term "Review" does not relate to a forward-looking process. Rather, a review is generally accepted to regard the analysis and assessment of the operation of a subject, APUC in this case. Liberty Midstates' capital structure is financed solely via affiliate financing transactions. The costs assigned to LUCo affiliate loans to Liberty Midstates are a function of LUCo's creditworthiness, which may be impacted by APUC's financial condition. The materials provided to this Committee are directly relevant to the business and financial risk of APUC's utility business. APUC had communicated to its investors that one of the goals of the strategic review was to lower APUC's cost of capital. Considering the fact that at the conclusion of the strategic review process APUC announced its plan to transition to a holding company of only regulated utilities, obviously APUC analyzed and assessed the ability to lower its cost of capital by only owning low-risk regulated utilities. Consequently, the Strategic Review Committee's analysis and assessment are relevant to assessing a fair and reasonable cost of capital for Liberty Midstates.

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<sup>35</sup> *State v. Miller*, 208 S.W.3d 284, 28 (Mo. App. W.D. 2006).

<sup>36</sup> *Id.*

The OPC is tasked with representing Missourians in hearings before the Commission. The financial security of one of the biggest utility companies in this state<sup>37</sup> is of great import to the public in general, and its customers in particular. While Liberty Midstates insists that the documentation in OPC DR 3006 relates only to a speculative sale of assets, there is no way for this office to determine what is or is not logically and legally relevant without viewing the information. Moreover, as previously discussed, the information requested in OPC DR 3006 also relates to the present and, importantly, to the past.

If, at the time of the hearing, the OPC is seeking *to present* evidence to the Commission that the Company believes is not legally relevant<sup>38</sup>, then the parties can address that issue before the judge. Until then, the OPC firmly believes that APUC's self-assessment of its stability, cost of capital, and financial health directly relates to the determination of just and reasonable rates for Liberty Midstates.

***2. The corporate structure of the company in Case No. EO-2004-0108 is markedly different than APUC and Liberty Midstates'.***

The documentary evidence that Liberty Midstates cites to relay its point that APUC and the Company are separate entities is Union Electric Company d/b/a AmerenUE. In that case, Commission Staff ("Staff") sought documents from CilCorp and Illinois Power prior to a purchase agreement the utility made with those companies. Staff argued that the discovery was relevant because the information it

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<sup>37</sup> When taking into account the Company's water, wastewater, electricity, and gas contingents.

<sup>38</sup> i.e., Information that the judge believes is *substantially* more prejudicial than probative; Restatement (Sixth) of Evidence § 403 (Mo. Bar 2021).



was seeking could “be used as a yardstick when evaluating Union Electric’s analyses tendered in support of the present transaction.”<sup>39</sup>

In this case, the OPC is seeking information that it believes will relate directly to Liberty Midstates’ cost of capital and financing, which is an area of focus for the OPC . The Public Counsel is not attempting to get information from a separate case to use as a “yardstick” to what is happening here. The OPC is seeking information from Liberty Midstates’ ultimate parent company, APUC. APUC makes decisions on behalf of third-party financing transactions, indirectly financing Liberty Midstates.

Finally, the OPC is not seeking information from affiliate companies that are related, but separate, from Liberty Utilities. APUC is Liberty Utility’s parent company. All of Liberty Utilities’ decisions regarding securities must be approved by APUC’s BOD before they are enacted. Moreover, APUC controls the foundational holding company for this corporation. If the Commission views Liberty’s corporate structure, there is a straight line from APUC to Liberty Utilities.<sup>40</sup> The OPC is not requesting documents and information about Liberty Utilities (Peach State Natural Gas) Corp. or Liberty Utilities (New England Natural Gas Company) Corp. Instead, the OPC is requesting materials related to the financial health and treatment at the level of the parent company. For these reasons, the OPC does not believe the

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<sup>39</sup> *Order on Reconsideration Concerning Discovery*, p. 3, Case No. EO-2004-0108, EFIS Item No. 68.

<sup>40</sup> *Liberty Utilities Response to Staff Data Request No. 3*, Case No. GR-2024-0106 (Mar. 7, 2024) (Attachment G).

arguments central to the *Order on Reconsideration Concerning Discovery* from Case No. EO-2004-0108 are comparable to the ones found here.

### **C. The Company's Other Stated Concerns**

While privilege and relevance took up a majority of the time that the parties discussed OPC DR 3006, the Company mentioned three other reasons that it objected to this request. Of the three remaining objections, Liberty Midstates only mentioned the first objection during July's discovery conference. First, the Company alleged that the information the OPC sought was not in its possession, custody, and control. Second, Liberty Midstates stated that the information the Public Counsel sought in DR 3006 was overbroad for the case at hand, with consideration of all of the circumstances. Finally, Liberty Midstates objected to the Public Counsel's request because it said that the information in this documentation was "commercially sensitive."

#### ***1. Liberty Midstates' Possession, Custody, and Control of Documents Related to OPC DR 3006***

The first of the Company's three minor objections was that the documents that the OPC requested access to were not in Liberty Midstates' possession, custody, and control. However, courts have acknowledged that "[t]he party to whom the discovery is directed need not have legal ownership or actual physical possession, but rather a 'practical ability' to obtain the documents."<sup>41</sup> Regarding "control," courts have

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<sup>41</sup> *Orthoarm, Inc. v. Vorestadent USA, Inc.*, No. 06-730, LEXIS 44429 (E.D. Mo. June 19, 2007)(quoting *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 663, 665 (D. Minn. 2000)).

repeatedly found that parent company documentation falls within the control of the subsidiary, permitting such a court to order their production.<sup>42</sup>

Notwithstanding the legal support, the OPC believes that there are three specific logical issues with the possession, custody, and control argument:

1. Liberty Midstates offered to provide any eligible documents for Mr. Murray's review at its Jefferson City office;
2. At the discovery conference, Liberty Midstates characterized the entire collection of documents;<sup>43</sup> and
3. APUC is the parent company of Liberty Midstates, and is one of the two holding companies (along with LUCo) that Liberty Midstates accesses capital markets through.

Responding to argument 1, the Company may point out that its objection to 3006 provided for the ability for Liberty Midstates to later determine that all of these documents are privileged, by stating, "the Company will make available for on-site review only items relating to the company and/or its Missouri operations *that are not privileged.*"<sup>44</sup> The OPC has already rebuked the validity of Liberty Midstate's privilege argument in §I(A) of this brief, and finds no reason to make those arguments again here.

Liberty Midstates may respond to the OPC's second argument by asserting that it reviewed news articles about the Committee, or perhaps it spoke with a liaison of APUC for a summary of those documents. However, the Public Counsel is then concerned with the accuracy of Liberty Midstates' characterization. If the Company

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<sup>42</sup> Id.

<sup>43</sup> *Tr.* at ps. 20, 24-24,

<sup>44</sup> Attachment B (emphasis added).

wishes to argue that it does not have access to the documents the OPC requested in DR 3006, then every argument that Liberty Midstates made regarding the documents' relevance and confidentiality is speculative. Which goes to argument 3.

Attachment G shows the entire organizational chart from APUC, to Liberty Midstates. APUC is not only one of the two holding companies that provides Liberty Midstates with access to capital markets, but it is the foundation of this utility. The Commission should not permit these large corporations to hide behind complex corporate structures in order to avoid providing regulators with the information they need to develop fair rates. Liberty Midstates could characterize and provide portions of the 3006-related documents because Liberty Midstates is able to attain possession, custody, and control of them. For these reasons, the Commission should compel the Company to grant the OPC access to that information.

## ***2. The Proportionality of OPC DR 3006***

Another objection that Liberty Midstates made regarding OPC DR 3006 is that the information that “is not proportional to the needs of the case considering the totality of the circumstances.”<sup>45</sup> Mo. R. Civ. Pro. 56 defines ‘totality of the circumstances’ as:

“including but not limited to, the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expenses of the proposed discovery outweighs its likely benefit.”

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<sup>45</sup> Attachment B.

The subject that the documents related to the Committee pertains to is integral for the OPC to provide a full assessment of Liberty Midstates' requested ROR, which is a function of the requested capital structure, cost of debt, and ROE.

These documents likely provide insight into Liberty Midstates' internal analysis of the business risk of its regulated utilities and the amount of debt the regulated utilities can incur and still maintain a BBB credit rating. Committee documents will provide the Company's internal assessment of its own risk analysis—rather than the one it is providing to the Commission through its ROR witness. The Committee's assessment of the risk and return analysis in this context will be unavailable to the OPC if the Commission does not compel Liberty Midstates to provide it.

Regarding the resources of the parties, Liberty Midstates has a centralized administrative department within Liberty Utilities Services Company ("Liberty Utilities"). Liberty Utilities and, thus, Liberty Midstates are subsidiaries of APUC. APUC, itself, is a multi-billion-dollar company. A deeper understanding of the Company's own view of its cost of capital will significantly develop the record for purposes of resolving questions around the Company's cost of capital and ROR, an issue that adds 3.6-million-dollars to Liberty Midstates' revenue requirement. Given that Liberty Midstates is a subsidiary of APUC, retrieving this information should not be an undue burden on the Company.

***3. The Commercial Sensitivity of the Documents that OPC DR 3006 Requests.***

Liberty Midstates' final objection is that OPC DR 3006 "seeks highly sensitive commercial[] information."<sup>46</sup> The OPC is unaware as to the rule or regulation related to this objection. Moreover, Section 386.450 permits the OPC access to even highly confidential documents, stating:

At the request of the public counsel and upon good cause shown by him the commission shall require or on its own initiative the commission may require, by order served upon any corporation, person or public utility in the manner provided herein for the service of orders, the production within this state at such time and place as it may designate, of any books, accounts, papers or records kept by said corporation, person or public utility in any office or place within or without this state, or, at its option, verified copies in lieu thereof, so that an examination thereof may be made by the public counsel when the order is issued at his request or by the commission or under its direction. If the Liberty Midstates believes that the Committee documents are confidential, the Company need only mark it as such.<sup>47</sup> If Liberty Midstates believes that the requested information is "Highly Confidential," then the Company may seek a protective order by following the process spelled out in Mo. Code Regs. tit. 20 § 4240-2.135(3). However, neither designation results in the Company's ability to forbid the OPC from accessing this information.

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<sup>46</sup> Attachment B at p. 1.

<sup>47</sup> Mo. Code Regs. tit. 20 § 4240-2.135(5).

## CONCLUSION

The OPC believes that the best method of finding rates that will both provide for Liberty Midstates' success and benefit Missouri consumers is through a cooperative relationship. Such a relationship is formed through trust and good faith. When the Company is so guarded with information the OPC needs to see in order to properly advise the Commission, it impedes the development of that relationship. Liberty Midstates needs to trust the OPC to do its job and follow the law. Until then, the OPC requests that the Commission acknowledge the Public Counsel's right to review this documentation, and order the Company to produce it.

**WHEREFORE**, the Office of the Public Counsel respectfully requests that the Commission direct Liberty Midstates to immediately provide all materials and information responsive to OPC DR 3006, or, in the alternative, consider such other relief as the Commission may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed, or hand-delivered to all counsel of record this fifth (5th) day of August, 2024.

/s/ Anna Martin