

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

In the Matter of the Request of Liberty)	
Utilities (Midstates Natural Gas) Corp.)	
d/b/a Liberty to Implement a General Rate)	Case No. GR-2024-0106
Increase for Natural Gas Service in the)	
Missouri Service Areas of the Company)	

**LIBERTY’S RESPONSE TO THE OFFICE OF PUBLIC COUNSEL’S
MOTION TO COMPEL**

COMES NOW Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty Utilities (“Liberty Midstates” or the “Company”), and, pursuant to Commission Rule 20 CSR 4240-2.080, files its Response to the Office of the Public Counsel’s (“OPC”) Motion to Compel filed on August 5, 2024.

Introduction and Summary of Response

As a matter of law and fact, OPC’s Motion to Compel should be denied for several, equally compelling reasons, each of which stands on its own. OPC seeks information that is irrelevant and disproportional to the needs of this case, any information construed to be relevant is protected by the Canadian solicitor-client privilege, and all information requested is outside of Liberty Midstates’ possession, custody or control. At issue are materials that were created by an affiliate to consider the potential future sale of another unregulated affiliate, which has no relevance to Liberty Midstates’ rate case that is based on a historic test year. OPC’s claimed need for its rate of return witness to review this information rings hollow; under OPC’s theory, filing a rate case opens every document for every affiliate of the utility—regulated or not—to unfettered discovery. While discovery in a rate case may be broad, it is not without an outer limit. OPC’s data request falls unquestionably beyond that outer limit. More fundamentally, OPC’s discovery theories cannot compel production of materials that are privileged communications under Canadian law

involving Algonquin Power & Utilities Corp. (“APUC”) and its attorneys regarding a potential sale of an unregulated affiliate located in Canada.

Further, and as explained below, APUC’s future hypothetical capital structure based on a potential sale of an unregulated affiliate does not impact Liberty Midstates’ capital structure in this rate case. In his own direct testimony, OPC witness Murray recommended a hypothetical capital structure for Liberty Midstates and expressly stated that “I do not consider [APUC] to be an appropriate proxy for this case.”¹ Given that APUC is not an appropriate proxy for his ROR analyses in Mr. Murray’s own words, he certainly does not need APUC’s Strategic Review Committee materials to render his opinion on the appropriate ROR for Liberty Midstates.

Background

On July 10, 2024, OPC filed a Notice of Discovery Dispute to inform the Commission of a disagreement regarding OPC data requests (“DRs”) 3006 and 3009. A discovery conference was held on July 15, 2024. At the conclusion of the discovery conference, OPC was authorized to file a Motion to Compel regarding DR 3006.

OPC’s DR 3006 states:

Please provide all minutes, materials, presentations, etc. involving Algonquin Power & Utilities Corporation’s (“APUC”) Strategic Review Committee, formed in May 2023.

APUC, headquartered in Ontario, Canada, is the ultimate parent company of Liberty Utilities Co. (“LUCo”), which is the holding company for APUC’s regulated utility operations in the United States, including Liberty Midstates. In addition to APUC’s *regulated* utility subsidiaries, APUC owns an ***unregulated*** renewable energy business, which does business as Algonquin Power Co. Neither APUC nor Algonquin Power Co. is a party to this proceeding.

¹ Docket Filing Item No. 50, *Direct Testimony of David Murray on behalf of Office of the Public Counsel*, p. 5 (filed July 18, 2024).

APUC’s Board of Directors initiated a Strategic Review Committee in May 2023 with the express intention of reviewing APUC’s unregulated renewable operations.² The work conducted by the Strategic Review Committee involved APUC management, APUC Board members, internal APUC attorneys, external United States counsel (Weil Gotshal & Manges), external Canadian counsel (Blake, Cassels & Graydon), and outside financial advisors. The Committee’s narrow focus was clear: identify the best long-term future path and options for APUC’s unregulated renewable operations.

By August 2023, APUC declared its intention to pursue a sale of its unregulated renewable operations.³ On August 9, 2024, APUC announced that it entered into an agreement with a buyer for the sale of all its non-hydro unregulated renewable business.⁴

Liberty Midstates has no reason to believe that the future sale of APUC’s unregulated renewable operations, or APUC’s decision to pursue such a sale, could have any retroactive impact on Liberty Midstates’ proposals in this rate case proceeding, which are based on a 2022 historical test year and an update period that ended December 31, 2023—nine months before a potential sale was announced.

Accordingly, Liberty Midstates timely objected to OPC’s DR 3006 on the following grounds:

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

² *Algonquin Power & Utilities Corp. To Conduct Strategic Review of its Renewable Energy Group with Aim of Enhancing Shareholder Value*, [Press Release](#) (May 11, 2023).

³ *Algonquin Power & Utilities Corp. Will Pursue Sale of Renewable Energy Group Following Strategic Review; Announces 2023 Second Quarter Financial Results*, [Press Release](#) (Aug. 10, 2023).

⁴ *Algonquin Power & Utilities Corp. Agrees to Sell Renewable Energy Business to LS Power for Up to \$2.5 Billion*, [Press Release](#) (Aug. 9, 2024).

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 the 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.

After asserting its objections, Liberty Midstates communicated with APUC’s counsel regarding OPC’s DR 3006 because the material requested belonged to APUC and Liberty Midstates had no means by which to access the documents. APUC’s counsel reviewed the requested materials and determined that only three pages mentioned Liberty Midstates. APUC informed Liberty Midstates of the privileged status of the Strategic Review Committee materials, including all three pages that mentioned Liberty Midstates. Accordingly, Liberty Midstates provided a privilege log to OPC describing the nature of the three pages, which was further supplemented following the discussion at the July 15, 2024 discovery conference.

On August 5, 2024, OPC filed its Motion to Compel, claiming that the production of these documents—which predominantly relate to a potential sale of APUC’s unregulated renewable business—is essential to OPC’s assessment of the fairness and reasonableness of Liberty Midstates’ cost of capital and requested rate of return (“ROR”) in this rate case. OPC’s contention, however, fails as a matter of law and fact.

Argument

OPC’s request falls outside the scope of permissible discovery because: (1) it seeks information that is irrelevant and (2) is disproportional to the needs of this case, (3) any information construed to be relevant is protected by the Canadian solicitor-client privilege, and (4) all

information requested is outside of Liberty Midstates' possession, custody or control. As such, OPC's Motion to Compel must be denied.

1. OPC seeks irrelevant information about the potential future impacts of an unregulated affiliate's sale, which cannot have any impact on this rate case based on a historical test year.

Commission Rule 20 CSR 4240-2.090 permits parties to engage in discovery under the same conditions as in civil actions in circuit court. In circuit court and in Commission proceedings, parties may only seek relevant evidence. Broadly defined under Missouri law, relevant evidence must be reasonably calculated to lead to the discovery of admissible evidence. While the concept of relevance is broad, it is not limitless: "The discovery process was not designed to be a scorched earth battlefield upon which the rights of the litigants and the efficiency of the justice system should be sacrificed to mindless overzealous representation of plaintiffs and defendants."⁵

As the party seeking discovery, OPC bears the burden of establishing that the information requested in DR 3006 is relevant.⁶ Despite attempts to establish the relevance of APUC's Strategic Review Committee's documents pertaining to a review of APUC's unregulated renewable business, OPC fails to explain how the requested information could lead to the discovery of any admissible evidence that would have any bearing on this proceeding.

OPC claims that its witness David Murray, who has already provided direct testimony regarding Liberty Midstates' cost of capital and ROR, must obtain this information for the following reasons:

- To "understand [APUC's] impressions of the state of the [Liberty Midstates] Company and its assets"⁷

⁵ File No. ER-2012-0174, Discovery Order (Oct. 16, 2012) (internal citations omitted).

⁶ Mo. R. Civ. P. 56.01(b)(1).

⁷ Docket Filing Item No. 72, *Office of the Public Counsel Motion to Compel* at 9 (filed Aug. 5, 2024).

- To “review[] Liberty’s current capital structure and its expected changes to that structure”⁸
- To understand “what the internal state of APUC was during the months that the Committee existed”⁹
- To gain insight to “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”¹⁰
- To “see whether APUC was taking any pressure from shareholders or other groups into account when determining its next steps”¹¹
- To “assess the fairness and reasonableness of Liberty Midstates’ requested rate of return”¹²
- To conduct a “proper estimation of Liberty Midstates’ cost of capital and authorized ROR”¹³
- To “assess[] a fair and reasonable cost of capital for Liberty Midstates”¹⁴

Of OPC’s expressed purposes for pursuing this information, several are facially irrelevant. For example, the internal affairs of APUC and the Strategic Review Committee’s thought processes and alleged external “pressures” in deciding to pursue a sale of the renewable business have no impact on Liberty Midstates’ costs or proposals in this rate case. Mr. Murray’s supposition that APUC’s purported state of mind could potentially impact Liberty Midstates’ cost of capital in this rate case is meritless and nothing more than a fishing expedition. In his direct testimony submitted on July 18, 2024, OPC witness David Murray explained that the “objective of a ROR witness is to emulate investors’ approaches to analyzing and making investment recommendations as it relates to investing in utility stocks.”¹⁵ In other words, an ROR witness, like Murray, should

⁸ *Id.*

⁹ *Id.* at 10.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 10-11.

¹³ *Id.* at 11.

¹⁴ *Id.* at 15.

¹⁵ *Id.* at 26.

step into the shoes of investors to make recommendations that align with the market. Unquestionably, investors would not be privy to the information that OPC seeks when evaluating the reasonableness of Liberty Midstates' cost of capital or ROR. OPC is entitled to relevant, non-privileged information for the purposes of understanding Liberty Midstates' current capital structure, its expected changes to that structure as proposed in this rate case, and the fairness and reasonableness of Liberty Midstates' proposed ROR and cost of capital. But the remote and speculative possibility that the documents requested in OPC's DR 3006 could reasonably lead to the discovery of relevant information for these purposes strains credulity. In assessing claims of relevance, Missouri courts instruct that "discovery provisions were not designed or intended for untrammelled use of a factual dragnet or fishing expedition."¹⁶ But that is precisely what OPC is attempting—to cast a dragnet over Liberty Midstates' affiliates regarding topics that are plainly irrelevant to this case.

Supported by the direct testimony of Liberty Midstates witness John Cochrane, Liberty Midstates proposed a test year capital structure, factoring in data for the 2023 update period,¹⁷ and an ROR based on the end of the test year, which was December 31, 2022.¹⁸ The information that OPC's DR 3006 seeks regarding the potential future sale of an unregulated affiliate cannot have any logical impact on these historical-based proposals.

At the July 15, 2024 discovery conference, presiding Senior Regulatory Law Judge Charles Hatcher asked OPC repeatedly about how information regarding the future sale of APUC's unregulated renewable business could have any impact on this rate case, and OPC was unable to provide a substantive response:

¹⁶ *State ex rel. Kroger Co. v. Craig*, 329 S.W.2d 804, 806 (Mo. App. Spr. D. 1959).

¹⁷ Docket Filing Item No. 16, *Direct Testimony of John Cochrane*, Direct Testimony at 33-34 (filed Feb. 9, 2024).

¹⁸ Direct Testimony of John Cochrane at 5-6 (filed Feb. 9, 2024).

Law Judge Hatcher: So are you perceiving a circumstance where witnesses such as yourself might say, here's the capital structure in this test year; however, if they sell it, this might be the better capital structure; however, if they sell this part and not that part, this might be the better capital structure. (Transcript at 22:11-17).¹⁹

Mr. Murray: What – what I'm saying it, I believe this strategic review committee is going to identify what they consider to be a proper capital structure for a hundred percent share player regulating utility because that's part of the analysis that they're doing, and that's what our reasonable outcome is. (Transcript at 22:18-24).

...

Law Judge Hatcher: How do you plan to consider these possible future things? (Transcript at 42:12-13).

Ms. Martin: I'm not planning to consider things. That would be more of a – that would be more as – an issue where Dave would – would step in and – (Transcript at 42:14-17).

Law Judge Hatcher: Okay. You're Dave's attorney. How is Dave going to consider these future items? ... So what – what if one of the meetings says, yes, let's sell X, Y, and Z on December 1st, of 2024. How does that play into the rate case? (Transcript at 42:18-20, 43:7-9).

Ms. Martin: I think it's easy to argue that there are present and past circumstances that created the environment wherein that – that asset needed to be moved in – even if an asset is being moved in the future. I think that we will get a more ... holistic view of the state of finances of the company, and the reasons why they're making a decision or possible decisions for the future by looking at both the test year and the present. (Transcript at 43:11-16, 43:19-22).

Law Judge Hatcher: But the standard is potentially leading to admissible evidence. It doesn't need to be admissible, so we're past that, but what I'm asking is, can you respond to the test year and the – the true update period argument of Liberty? (Transcript at 43:23-44:2).

...

¹⁹ See Docket Filing Item No. 68, *Transcript – Volume 1 (Discovery Conference – Jefferson City, MO and via WebEx – July 15, 2024)* (filed July 30, 2024). Please note that due to the quality of the recorded media, portions of the discovery conference were unable to be transcribed and the transcript includes inaudible portions. The transcript may also include misinterpreted words or unidentified speakers. The transcriber was not present at the time of the recording; therefore, the transcript should not be considered verbatim.

Mr. Murray: ... What I anticipate would be there – there would be a comparing and contrasting of – of the risk profile of the nonregulated versus the regulated which directly goes to the cost of capital and – and the assessment of business risk and assessment (inaudible) of capitalization of a hundred percent regulated utility which is what Algonquin is raising. (Transcript at 44:16-23).

After repeatedly failing to provide plausible answers to Judge Hatcher, OPC moved forward with a Motion to Compel that again tries, but fails, to draw any meaningful connection between Liberty Midstates’ historic capital structure and ROR to the Strategic Review Committee materials regarding the potential sale of an unregulated affiliate. OPC cannot articulate the relevancy of the documents requested in DR 3006 because no cogent argument exists.

Because OPC has failed to meet its burden of establishing relevancy,²⁰ OPC’s Motion to Compel must be denied.

2. OPC seeks information that is not proportional to the needs of this proceeding considering OPC’s access to other relevant information, the nonexistent impact of the requested information on the issues in this rate case, and the burden that would result from production of the requested information.

Missouri Rule of Civil Procedure 56.01(b)(1) further limits the scope of discovery to relevant, non-privileged information that is proportional to the needs of the case under the totality of the circumstances. The circumstances of this proceeding paint a clear picture that OPC’s DR 3006 seeks information far beyond what is needed to resolve the issues in this rate case.

First, OPC already has access to a plethora of information that it may use to assess the fairness and reasonableness of Liberty Midstates’ capital structure and ROR through publicly available financial reports, Liberty Midstates’ responses to data requests in this proceeding, and through Liberty Midstates’ filed testimony of witness John Cochrane. OPC does not need APUC’s privileged, internal assessments regarding its future decision to sell its unregulated renewable

²⁰ See Mo. R. Civ. P. 56.01(b)(1) (“The party seeking discovery shall bear the burden of establishing relevance.”).

business to determine what proposed capital structure and ROR are reasonable for Liberty Midstates. Further, OPC's attempt to use such information about APUC's intent and underlying thinking for a potential sale of an unregulated affiliate to set Liberty Midstates' cost of capital and return of return in this case would violate the U.S. Supreme Court criteria for determining a reasonable rate of return.²¹

Liberty Midstates provided OPC relevant, non-privileged information related to its capital structure and ROR through responses to the following DRs that OPC submitted: 1300 (consolidated tax returns), 1301 (general ledger), 3000 (actual capital structure), 3002 (cost of short-term debt), 3025 (financing transaction pricing), 3026-3029 (rating agency reports), 3030 (audited financial statements), 3031 (quarterly financial statements), 3033 (quarterly financial statements), 3034 (equity research reports), 3035 (debt issuance pricing analysis), 3036-3037 (investment presentations), and 3038-3046 (executed affiliate financing agreements). OPC also had access to Liberty Midstates' responses to Staff's Data Requests, including the reports prepared by equity research firms that Liberty Midstates provided in response to Staff Data Request No. 0073 that OPC witness Murray indicates he "mainly relied on" for his cost of equity work.²²

Second, information about the financial impacts of APUC's future decision to sell its unregulated renewable operations does not influence the historical financial data that is relevant to this rate case. Beyond Liberty Midstates' robust discovery responses, if OPC desires further

²¹ See *Bluefield Water Works and Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 692-93 (1923) ("A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties ..."); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ("[T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.").

²² Docket Filing Item No. 50, *Direct Testimony of David Murray on behalf of Office of the Public Counsel*, p. 15 (filed July 18, 2024).

financial information regarding APUC, OPC can access future annual reports, financial reports, annual information forms, annual shareholder meeting publications, SEC filings, and SEDAR filings. In no uncertain terms, OPC has adequate information to evaluate Liberty Midstates' cost of capital in this rate case and the Commission should reject OPC's fishing expedition for the Strategic Review Committee materials.

OPC has stated that it needs APUC's Strategic Review Committee documents to understand what APUC's future capital structure may look like after the unregulated renewable business is sold. Putting aside the issue of whether a completed sale of the unregulated business could be relevant to a capital structure determination in a future rate case, this speculative exercise of analyzing APUC's future hypothetical capital structure simply does not – and cannot – impact Liberty Midstates' capital structure in this current rate case. The recently announced agreement reached with LS Power for APUC to sell an unregulated affiliate is not expected to close until the fourth quarter of 2024 or the first quarter of 2025. OPC witness Murray stated in his direct testimony where he recommended a hypothetical capital structure based on “the mid-point of the common equity ratio that APUC had typically communicated to investors it targets for its Regulated Services Group” (with no weight given to APUC's capital structure or that of the unregulated renewable operations) and an ROR based on historical data and a proxy group comparison:²³ “Because APUC is in a state of transition, with recapitalization accompanying this transition, I do not consider it to be an appropriate proxy for this case.”²⁴ If Mr. Murray readily concedes that APUC is not an appropriate proxy for his ROR analyses, he certainly does not need APUC's Committee materials to render his opinion on the appropriate ROR for Liberty Midstates.

²³ *Id.* at 13-14, 30, 37-38.

²⁴ *Id.* at 5.

Finally, DR 3006 seeks information disproportionate to the needs of this case considering the extreme market sensitivity of the requested documents, and the burden imposed on APUC as a non-party to this case if Liberty Midstates is compelled to produce the information sought. These materials are highly confidential analyses and projections, have never been disclosed, and could cause APUC significant harm if required to be disclosed.

Clearly, OPC's DR 3006 seeks information disproportionate to the needs of this case considering that (1) OPC already has access to all of the non-privileged, relevant information needed to assess Liberty Midstates' capital structure and ROR, and (2) the information sought by OPC's DR 3006 has no bearing on the capital structure or ROR issues in this proceeding, and (3) compelling production of this information would impose a heavy burden on non-party APUC. Accordingly, OPC's Motion to Compel must be denied.

3. OPC seeks information that belongs to APUC and is protected by Canadian privilege laws.

Even if the Commission disagrees with Liberty Midstates' relevancy and proportionality objections to OPC's DR 3006, the only documents that can possibly be construed as discoverable are the three pages that contain references to Liberty Midstates' operations, as listed in Liberty Midstates' privilege log that was provided to OPC on July 5, 2024 and supplemented with additional detail on July 19, 2024. Because the purpose of the Strategic Review Committee was to review APUC's unregulated renewable business, it comes as no surprise that the universe of documents referencing Liberty Midstates is minimal.

OPC's suggestion that attorney-client privilege could not apply to the Committee because the Committee did not have legal counsel as a listed member is nonsensical and reflects OPC's lack of understanding with respect to public company matters. As Liberty Midstates' counsel disclosed at the discovery conference pertaining to this dispute, the documents at issue are APUC's

documents. Those documents relate to privileged communications involving APUC and its attorneys regarding a potential sale of an unregulated affiliate located in Canada. Any privilege attached to the communications contained within the documents belongs to the client, APUC—not to Liberty Midstates. Liberty Midstates is not in possession of the documents, and no Liberty Midstates witness has knowledge of the contents of the documents. Instead, Liberty Midstates’ only knowledge of the content of the documents stems from its counsel’s communications with APUC’s counsel. Attachment A provides a Declaration of Dana Easthope, the Vice President and Assistant Corporate Secretary of APUC. As Mr. Easthope attests, the three pages in question that contain broad references to Liberty Midstates are all protected by Canadian privilege laws. Mr. Easthope identifies the internal and external counsel that participated in the Strategic Review Committee for the purpose of providing confidential legal advice regarding APUC’s unregulated renewable business.²⁵ Because APUC and Liberty Midstates cannot be compelled to produce privileged documents, OPC’s Motion to Compel must be denied.

4. OPC seeks documents that are outside of the possession, custody, and control of Liberty Midstates.

OPC’s DR 3006 requests documents that are not in Liberty Midstates’ possession, custody, or control. Liberty Midstates is a subsidiary that is multiple levels removed from APUC on the corporate organizational chart. OPC sweeps aside the corporate separateness between APUC and Liberty Midstates by baldly asserting that 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.”²⁶ The extensively developed record in this proceeding belies OPC’s claim. What OPC is *actually* suggesting is that by filing a rate case, a

²⁵ See Attachment A, Easthope Declaration.

²⁶ OPC’s Motion to Compel at 20.

regulated utility must have access to and produce any document in the possession of any affiliate—even if that document has no relevance to the regulated utility’s rates or service and even if the utility does not itself have access to the records of the affiliate. The Commission has clearly rejected OPC’s position in holding: “There is no generally recognized obligation in civil litigation for parties to obtain information or documents from non-parties to respond to discovery requests.”²⁷

Indeed, just last year the Commission denied similar motions to compel from OPC regarding documents in the possession of a utility’s parent—precisely the same issue OPC raises in its current motion. In Confluence Rivers Utility Operating Company, Inc.’s rate proceeding, OPC requested “all materials/minutes from member meetings pursuant to the US Water Systems LLC Agreement,” which OPC describes as “the ultimate parent company of Confluence Rivers.”²⁸ OPC further claimed that “the information is within the control of Confluence Rivers because two US Water System members are also witnesses for Confluence Rivers.”²⁹ The Commission denied the motion to compel, holding that “Commission will refuse the invitation to designate personal papers within the possession, custody, or control of an individual in that individual's personal capacity as also within the possession, custody, or control of Confluence Rivers.”³⁰ The Commission also found that annual and quarterly financial statements, along with investment presentations, involving the ultimate parent were not in the possession, custody, or control of Confluence Rivers, the regulated utility.³¹

²⁷ *In the Matter of Missouri-American Water Company's Tariff to Revise Water and Sewer Rate Schedules*, Case No. WR-2003-0500 (Mo. PSC Dec. 2, 2003).

²⁸ *In the Matter of Confluence Rivers Utility Operating Company, Inc.'s Request for Authority to Implement a General Rate Increase for Water Service and Sewer Service Provided in Missouri Service Areas*, File No. WR-2023-0006 (Mo. PSC June 7, 2023).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

The Commission’s decision in the Confluence Rivers proceeding is consistent with Missouri court decisions interpreting Rule 58.01(a), which provides that “[a]ny party may serve on another party a request (1) to produce ... any designated documents ... which are in the possession, custody or control of the party upon whom the request is served” OPC claims that by virtue of being in the same corporate organization—along with dozens of other entities—that Liberty Midstates has control over APUC’s documents. “Control,” however, requires that a party have the “right, authority, or practical ability, to obtain the documents from a non-party to the action.”³²

Liberty Midstates does not have the right, authority, or practical ability to obtain the APUC Strategic Review Committee documents. There is no agreement conferring such a right, and as a subsidiary, it has no authority to exercise domain over APUC’s documents. Finally, it lacks the practical ability to obtain the documents as it does not have unrestricted access to all documents that reside with its affiliates, especially those not relevant to its operations.

The Commission has found that even if the documents in question are relevant—unlike those at issue in DR 3006—a utility cannot be required to obtain documents from its indirect parent company that are not in the utility’s possession, custody or control: “As to Staff’s suggestion that Missouri-American should be required to attempt to obtain the information Staff seeks on the theory that, as an affiliate or subsidiary, Missouri-American enjoys superior access to the information in question, such superior access is an assumption and has not been demonstrated.”³³ The Commission found that “Missouri-American has no legal authority to obtain information and documents from its corporate parent and affiliates. An order requiring Missouri-American to

³² *Hancock v. Shook*, 100 S.W.3d 786, 797 (Mo. 2003).

³³ *In the Matter of Missouri-American Water Company's Tariff to Revise Water and Sewer Rate Schedules*, Case No. WR-2003-0500 (Mo. PSC Dec. 2, 2003).

attempt to acquire the information and documents from its parent and affiliates is likely to be unworkable in practice.”³⁴ The same result is commanded here.

The Commission’s decisions are consistent with those of courts. Courts have found that a subsidiary has “control” over information in the possession of a parent company when the two entities operate as a single functional unit, having identical directors or managers.³⁵ It is undisputed that Liberty Midstates and APUC operate as separate functional units.

Because Liberty Midstates lacks possession, custody, and control of the documents requested in OPC’s DR 3006, the Motion to Compel must be denied.

Conclusion

Liberty Midstates takes its regulatory responsibilities seriously and understands the importance of transparency in responding fully and accurately to discovery requests. The discovery process has boundaries, and Liberty Midstates properly objects when discovery requests push beyond the permissible.

Here, OPC has moved beyond the permissible limits of discovery by requesting irrelevant, disproportionate, privileged documents that belong to APUC and are outside of the possession, custody, and control of Liberty Midstates. OPC should not be allowed to exploit the discovery process in a general rate case to conduct a fishing expedition of highly commercially sensitive materials of an unregulated company.

WHEREFORE, Liberty Utilities (Midstates Natural Gas) Corp. requests that the Commission deny the Office of Public Counsel’s Motion to Compel.

³⁴ *Id.*

³⁵ *Gerling Intern. Ins. Co. v. CIR*, 839 F.2d 131 (3d. Cir. 1988).

Respectfully submitted,

/s/ Jermaine Grubbs

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CERTIFICATE OF SERVICE

I hereby certify that the above document was filed in EFIS on this 15th day of August, 2024, and sent by electronic transmission to the Staff of the Commission, the Office of the Public Counsel and counsel for intervenors.

/s/ Jermaine Grubbs