



the discovery in resolving the issues, and whether the burden of the proposed discovery outweighs its likely benefit

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.*<sup>1</sup>

Liberty Midstates claims to view this rule as broad.<sup>2</sup> However, the breadth it alleges only appears to exist insofar as the Company is willing to provide the information.

Liberty Midstates claims that it understands the importance of transparency in responding fully and accurately to discovery requests.<sup>3</sup> However, the Company's interest in preserving its current lack of transparency has created issues with multiple parties, including the OPC.<sup>4</sup>

Despite the Company's assertion otherwise, the Public Counsel has stated why materials related to the Strategic Review Committee ("Committee") are important and relevant to this case. Thus, rather than focusing on the filings and actions that have occurred since the beginning of this case, the OPC will provide a more historical context for this Reply.

### **FACTUAL HISTORY**

1. During 2022 and 2023, Algonquin Power & Utilities Corp. ("APUC") was the parent company of *both* Algonquin Power Company ("APCo") and Liberty Utilities

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<sup>1</sup> Mo. R. Civ. Pro. 56(b)(1)(emphasis added).

<sup>2</sup> *Liberty's Response to the Office of Public Counsel's Motion to Compel*, p. 5, Case No. GR-2024-0106, EFIS Item No. 78.

<sup>3</sup> *Id* at p. 16.

<sup>4</sup> *Missouri School Boards' Association Response to Order Directing Filing*, p. 2 § 7, Case No. GR-2024-0106, EFIS Item No. .

Company (“LUCo”). It was, and still is, listed on the Toronto Stock Exchange and the New York Stock Exchange as AQN.

2. In the third quarter of 2022, APUC’s stock price dropped by nearly 40% over the course of 2 days.<sup>5</sup>

3. On April 17, 2023, a deal for American Electric Power (“AEP”) to sell Kentucky Power to LUCo, a subsidiary of APUC, for \$2.65 billion fell through due, in part, to “[u]ncertain economic conditions.”<sup>6</sup>

4. In May 2023, APUC created the Committee to “review a range of strategic alternatives for APUC’s unregulated renewable business owned by Algonquin Power Co.”<sup>7</sup>

5. The Committee was disbanded approximately 3 months later after recommending to the board of directors (“BODs”) that APUC sell the unregulated renewable business, Algonquin Power Company.<sup>8</sup>

6. The OPC filed its *Motion to Compel* in the above-entitled action on August 5, 2024.

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<sup>5</sup> *Is AQN’s dividend safe? Should I continue investing?*, TAWCAN, Nov. 25, 2022, <https://www.tawcan.com/is-aqns-dividend-safe-should-i-continue-investing/>.

<sup>6</sup> Ethan Howland, *AEP, Liberty Utilities terminate \$2.65B Kentucky Power deal, partly over ‘evolving macro environment’*, Apr. 17, 2023, <https://www.utilitydive.com/news/aep-liberty-utilities-terminate-kentucky-power-deal/647794/>.

<sup>7</sup> *Liberty Response*, Attachment A.

<sup>8</sup> *Id.*

7. On August 9, 2024, APUC announced the sale of its renewable energy business, besides hydro assets, to LS Power for “up to \$2.5 Billion.”<sup>9</sup>

8. The Company filed its response to the OPC’s motion pursuant to the order of the Missouri Public Service Commission (“Commission”) on August 15, 2024.

### ARGUMENT

**I. Liberty Midstates’ Response Characterizes the OPC as a Nefarious Boogyman, Rather than a Concerned Regulator and Representative of the Public.**

*If the Facts are against you, argue the law. If the law is against you, argue the facts. If the facts and the law are against you, pound the table and yell like hell.*

-Carl Sandburg

Every attorney worth their salt is aware of this adage. When a party to a case believes that it will win an argument based on legal theory, that party will focus on the law. If the party believes the facts of the case are more in its favor, the facts of the case become its focus. When, however, a party focuses, instead, on creating its own characterization of the opposing party’s arguments and intent, that is a filing equivalent of pounding the table. Nevertheless, the Public Counsel believes that it is important to correct the record regarding the Motion’s purpose, nature, and intent.

Liberty Midstates first argues that “under OPC’s theory [of discovery], filing a rate case opens every document for every affiliate of the utility—regulated or not—to

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<sup>9</sup> Algonquin Power & Utilities Corp. Agrees to Sell Renewable Energy Business to LS Power for up to \$2.5 Billion, Algonquin Power and Utilities Company (Aug. 9, 2024), <https://investors.algonquinpower.com/news-market-information/news/news-details/2024/Algonquin-Power--Utilities-Corp.-Agrees-to-Sell-Renewable-Energy-Business-to-LS-Power-for-up-to-2.5-Billion/default.aspx>.

unfettered discovery.”<sup>10</sup> The Public Counsel is not sure of the theory that the Company is characterizing in this instance, but the OPC can state without question that it is not true. The Public Counsel is not requesting access to any of APCo’s documents, materials, and analysis.

Rather, the OPC is seeking access to APUC’s documents, material, and analysis. APUC is the company that created the Committee to determine how to lower APUC’s cost of capital, maximize shareholder value and maintain its investment grade credit rating. This Committee recommended that APUC’s BOD divest its non-regulated renewable energy business and retain its regulated utilities. This Committee put forward the option to retain the regulated utilities, including Liberty Midstates. Estimating the cost of capital is a central and material issue in setting Liberty Midstates’ rates. APUC’s financial and business strategies likely impact the cost of capital that it charges its operating companies. The Public Counsel is requesting access to these materials because, between Liberty Midstates’ last rate case and the current one, APUC had a substantial drop in stock price, a failed merger, and the creation of a Committee to determine “actions that are in the best interest of the Company and its shareholders.”<sup>11</sup>

As a result, the OPC has sought the information related to this Committee to ensure that APUC’s view of an “action in the bet interest of the Company and its

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<sup>10</sup> *Liberty Response* at p. 1.

<sup>11</sup> Algonquin Power & Utilities Corp. to Conduct Strategic Review of its Renewable Energy Group with Aim of Enhancing Shareholder Value, PR NEWswire (May 11, 2023), <https://www.prnewswire.com/news-releases/algonquin-power--utilities-corp-to-conduct-strategic-review-of-its-renewable-energy-group-with-aim-of-enhancing-shareholder-value-301821806.html>.

shareholders” does not include direct or indirect recovery of any potential increased cost of capital that resulted from APUC’s strained financial condition. Committee materials provide vital insight on how APUC was balancing its duty to its subsidiaries’ customers with its desire to maximize shareholder value. The possible future<sup>12</sup> sale of Algonquin Power Company’s renewable energy assets does not, itself, hold import to the Public Counsel, the review and assessment of APUC’s risk and cost of capital does.<sup>13</sup>

The OPC further notes that the Company refers to the Public Counsel’s legitimate inquiry as a “fishing expedition” no fewer than four times throughout its response.<sup>14</sup> The legal definition of a “fishing expedition” is described as a party “[u]sing the courts to find out information beyond the fair scope of the [case]. The . . . overly broad use of the discovery process. Discovery sought on general, loose and vague allegations, or on suspicion, surmise, or vague guesses.”<sup>15</sup>

Throughout both the Public Counsel’s original Motion and throughout this reply, the OPC has stated clearly why a thorough review of Liberty Midstates requires access to these materials. When a holding company is the parent of regulated and non-regulated subsidiaries, regulators are the guardrails that ensure captive customers are not subsidizing the unregulated company’s costs. In an effort to perform this duty, the OPC has requested the materials related to one specific APUC committee, that was active for three months, and conducted a performance review of

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<sup>12</sup> At the time.

<sup>13</sup> *Liberty Response* at p. 9.

<sup>14</sup> *Id* at ps. 6, 7, 11, and 16.

<sup>15</sup> Fishing Expedition, Black’s Law Dictionary (6<sup>th</sup> ed. 1990).

APUC's regulated and non-regulated businesses and enacted a plan, wherein APUC chose to retain its regulated assets and divest its non-regulated assets. The information that the Public Counsel is seeking through OPC DR #3006 is far from "general, loose, and vague." OPC DR #3006 requests specific information from a narrow period of time to ensure that Liberty Midstates and APUC abide by the financial regulations created to protect the Company's captive customers.

Liberty Midstates also reverts to the same argument<sup>16</sup> it made at the discovery conference, insinuating that the only pages that could possibly relate to this case are the three that specifically mention Liberty Midstates.<sup>17</sup> After that discovery conference, Liberty Midstates found another 150 pages of BOD documents relating to financing that Mr. Murray was able to review and discover relevant information related to the regulated utilities' cost of capital. If the Company's argument that the only materials relevant to this rate case are the ones that specifically mention Liberty Midstates, then those 150 extra pages of BOD would be irrelevant.

At that same discovery conference, the Company stated that the OPC had to trust them.<sup>18</sup> At the same time, Liberty Midstates compares the *Motion to Compel* to a "scorched earth battlefield upon which the rights of the litigants . . . should be sacrificed to mindless overzealous representation of plaintiffs and defendants."<sup>19</sup> Moreover, Liberty Midstates asserts, without evidence, that the OPC's method of

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<sup>16</sup> *Transcript vol 1 (Tr.)*, page 30 lines 19 through 24.

<sup>17</sup> *Liberty Response* at p. 13.

<sup>18</sup> *Tr.*, ps. 37, 38

<sup>19</sup> *Liberty Response* at p. 5 (*citing* File No. ER-2012-014, Discovery Order (Oct. 16, 2012)).

analysis is unconstitutional<sup>20</sup> and exploitative.<sup>21</sup> The Public Counsel is a small office filled with state employees who take great pride in working to represent the thousands of utility customers throughout this state. The OPC does not have the time or patience to dig through irrelevant documents for some indiscernible reason. The Committee was established to determine the best strategy to lower APUC's cost of capital, increase its shareholder value and maintain 'BBB' credit ratings. The Committee's analysis necessarily included an analysis and evaluation of all of APUC's businesses. The reason this Committee's materials *are* relevant to this case comes down to one word and one term: "financing" and "corporate structure."

## II. **APUC has an Outsized Influence on its Subsidiaries Due to its Corporate Structure and its Method of Financing.**

In an attempt to understand Company's concerns, the OPC considers Liberty Midstates assertion that "under the OPC's theory, filing a rate case opens every document for every affiliate of the utility . . . to unfettered discovery."<sup>22</sup> Liberty Midstates appears to view APUC as an affiliate at the same level as the Company, itself. However, APUC is *not* the same as an Empire District Electric Co., a Liberty Utilities (Missouri Water) LLC, or even a LUCo.<sup>23</sup> APUC is THE parent company that Liberty Midstates is a subsidiary of.

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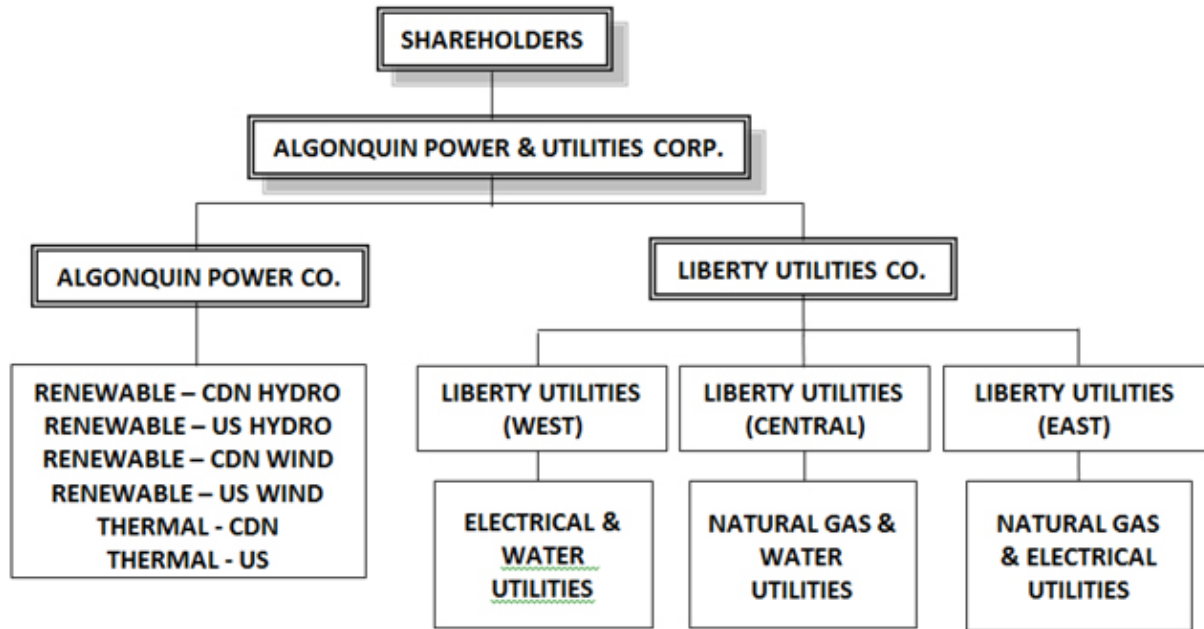
<sup>20</sup> Id at p. 10.

<sup>21</sup> Id at p. 16.

<sup>22</sup> Id at p. 1.

<sup>23</sup> Liberty Utilities Response to Staff Data Request No. 3, Case No. GR-2024-0106 (Mar. 7, 2024).





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Moreover, the only holding companies, which Liberty Midstates has access to third-party markets through are APUC and LUCo<sup>25</sup> and the financing throughout the APUC to Liberty Midstates structure is financed through affiliate transactions.<sup>26</sup> The final important note is that “APUC makes the decisions for LUC[o].”<sup>27</sup> While APUC’s structure is complicated, the main takeaway from this structure is that—APUC makes LUCo’s financial decisions, and LUCo makes Liberty Midstates’ financial decisions. So APUC makes Liberty Midstates’ financial decisions. If a equals b and b equals c, a equals c.

From Heading 1 of the Company’s argument, it is clear that Liberty Midstates does not fully understand the reason that the OPC is requesting these Committee materials. The heading itself, asserts that the Public Counsel is merely requesting

<sup>24</sup> Algonquin Power & Utilities Corp., Annual Information Form, Mar. 28, 2023, <https://www.sec.gov/Archives/edgar/data/1174169/000119312513133176/d481417dex991.htm>.

<sup>25</sup> *Tr.* p. 11 line 21 through p. 12 line 3.

<sup>26</sup> *Id.* at p. 32 line 21.

<sup>27</sup> *Id.* at p. 33 line 11.

information about “potential future impacts of an unregulated affiliate’s sale.”<sup>28</sup> However, what the Public Counsel is *actually* seeking information about regards APUC’s evaluation of its own financial well-being and how to keep it financially stable for its shareholders and its debt investors and creditors.

During the 2022 test year and the 2023 update period, APUC was the parent company of both the holding company that Liberty Midstates is a subsidiary of, LUCo, and the competitive affiliate, Algonquin Power Company. S&P Global Ratings – Ratings Direct assigns the same ‘BBB’ issuer credit rating to APUC, LUCo and The Empire District Electric Co. based on its “Group Influence” credit rating methodology.<sup>29</sup> In its response, the Company states that “The Committee’s narrow focus was clear: identify the best long-term future path and options for APUC’s unregulated renewable operations.”<sup>30</sup> However, APUC’s shareholders are not, themselves, divided into a group that only finances APUC’s unregulated businesses and a group that only finances APUC’s regulated businesses. Shareholders invest in APUC.

When there is a 40% drop in APUC’s stock price there’s a chain reaction felt throughout the company. Cost of capital goes up due to the market’s uncertainty in APUC’s financial condition. Other companies that were once willing to make multi-billion dollar deals with APUC’s subsidiary pull out due to financial uncertainty.<sup>31</sup>

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<sup>28</sup> *Liberty Response* at p. 5.

<sup>29</sup> Omar El Gamal, et. al., “Empire District Co. – Ratings Score Snapshot,” S&P Global Ratings – RatingsDirect, November 3, 2023.

<sup>30</sup> *Id.* at p. 3.

<sup>31</sup> Ethan Howland, *AEP, Liberty Utilities terminate \$2.65B Kentucky Power deal, partly over ‘evolving macro environment’*, Apr. 17, 2023, <https://www.utilitydive.com/news/aep-liberty-utilities-terminate-kentucky-power-deal/647794/>.

Effectively, even if the economic uncertainty was caused by the competitive subsidiary, alone, any financial doors that closed remain unopened to the regulated business. Liberty Midstates repeatedly asserts that the OPC wants to view Committee materials that only effect the future of the unregulated affiliate. However, due to the Committee existing at the APUC level, any resulting financial assessment unavoidably affects LUCo and Liberty Midstates.

### **III. Liberty Midstates Attempts to Use APUC's Foreign Status to Shield it from Regulatory Review.**

The Company tries two different methods of using APUC's status as a Canadian company in order to shield corporate documents from discovery in this case. First, Liberty Midstates applies a Canadian legal privilege, that is much broader than the American privilege, to state that the documents are inaccessible.<sup>32</sup> Then, the Company insists that the Committee materials are outside of Liberty Midstates' possession, custody, and control.<sup>33</sup>

Regarding the Company's assertion that the Committee's materials are protected by "Canadian privilege laws," Liberty Midstates provides a single piece of evidence, without any citation of law to support its claim of Canadian privilege. Nor does the Company provide any legal support for its claim that Canadian law, via the asserted privilege, is controlling in this instance. The Public Counsel, therefore, reiterates that—in Missouri—the burden of proof for a claim of privilege falls upon

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<sup>32</sup> *Liberty Response* at § 3.

<sup>33</sup> *Id.* at § 4.

the party claiming that privilege.<sup>34</sup> Liberty Midstates failed to meet even the minimum threshold required to assert a privilege existed in this instance, much less one that permits the Company to restrict a regulating party from viewing an entire trove of documentation. For this reason, the Commission must deny Liberty Midstates claim of foreign privilege.

Regarding the possession, custody, and control of the documents, the OPC refers, to the broad definition of control as the “ability to obtain upon demand documents in the possession of another.”<sup>35</sup> This court further considers “control” in a parent/subsidiary relationship to be determined by a three-part analysis:

- (1) What is the corporate structure of the party to whom discovery is sought and the non-party who possesses such discovery;
- (2) What connection does the non-party have to the subject matter of the litigation; and
- (3) Will the non-party feel the benefits or burdens that result from the outcome of this case.<sup>36</sup>

In this case, as discussed *supra* § II, APUC is one of the two holding companies that can access third-party markets in this corporate structure. Moreover, as the parent company, APUC is making the financial decisions that LUCo and Liberty Midstates

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<sup>34</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>35</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. 633, 636 (D. Minn. 2000)).

<sup>36</sup> Id. (quoting *Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127, 130 (D. Del. 1986)).

enact. Liberty Midstates is, indirectly, wholly-owned by APUC, and the Company has produced documents on behalf of APUC prior to OPC's Motion in this very case.

Regarding the second piece of the control analysis, again, APUC is one of the two holding companies to whom Liberty Midstates is a subsidiary. In fact, as the parent company, the financial health of APUC may have a greater effect on integral aspects of Liberty Midstates' rates such as cost of capital. Further, in general, it would be difficult to find a subject between a parent and a subsidiary that is more interrelated than the subsidiary's rates. Finally, APUC is close to a direct beneficiary of the outcome of this case. As the parent company, Liberty Midstates' success equals APUC's success. Where the subsidiary financially benefits, the parent financially benefits. Thus, under the *Forestadent* test, the requested documentation is under the Company's control.

### **Conclusion**

The Public Counsel does not fully comprehend why Liberty Midstates and APUC continue to insist that it is somehow dangerous to provide the OPC with information that it deems "highly commercially sensitive." Section 386.450 RSMo permits the OPC to have access to these documents. Moreover, Liberty Midstates has already requested a protective order<sup>37</sup>, which the Commission saw fit to grant.<sup>38</sup> OPC's statutory permission to access confidential documents aside, APUC announced the sale of its non-regulated assets on August 9, 2024. Therefore, while the

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<sup>37</sup> See *Motion for Protective Order*, Case No. GR-2024-0106, EFIS Item No. 46.

<sup>38</sup> See *Order Granting Protective Order*, Case No. GR-2024-0106, EFIS Item No. 76.

Committee's materials may still be sensitive in nature, APUC's sale terms with LS Power are now public.

However, in an effort to make this process more cordial, the Public Counsel offers a compromise as an alternative to ordering the Company to provide the OPC with the requested documents. Rather than merely handing Committee documents over to the OPC, the Commission could appoint a special master to this case to go through them. That way, there is an additional layer of protection between APUC's documents and the public.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission accept this *Response* and compel Liberty Midstates to provide the materials requested in OPC DR #3006 or, in the alternative, appoint a special master to review the Committee documentation and determine the appropriate course of action.

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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 nineteenth (19th) day of August, 2024.

/s/ Anna Martin