

**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        )  
Increase for Natural Gas Service in the         )  
Missouri Service Areas of the Company         )

**File No. GR-2024-0106**

**ORDER DENYING MOTION TO COMPEL**

Issue Date: August 23, 2024

Effective Date: August 23, 2024

On August 5, 2024,<sup>1</sup> the Office of the Public Counsel’s (OPC) Motion to Compel (Motion) was filed.<sup>2</sup> The Motion requested that the Commission direct Liberty Utilities (Midstates Natural Gas) d/b/a Liberty Utilities (Liberty Midstates) to immediately provide all materials and information responsive to data request (DR) 3006. DR 3006 states, “Please provide all minutes, materials, presentations, etc. involving Algonquin Power & Utilities Corporation’s (“APUC”) Strategic Review Committee, formed in May 2023.”<sup>3</sup>

Liberty Midstates is owned by Liberty Utilities Co. (“LUCo”). LUCo is owned by APUC. APUC also owns an unregulated renewable energy business, Algonquin Power Co. APUC formed the Strategic Review Committee in order to discuss the potential of selling Algonquin Power Co. The Strategic Review Committee was formed in May 2023 and disbanded in August 2023. The pending sale of Algonquin Power Co. was announced on August 9, 2024.<sup>4</sup>

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<sup>1</sup> All dates refer to 2024 unless otherwise indicated.

<sup>2</sup> The parties met with the regulatory law judge prior to the filing of OPC’s Motion, in compliance with Commission Rule 20 CSR 4240-2.090(8)(B).

<sup>3</sup> Motion, p. 1.

<sup>4</sup> Algonquin Power & Utilities Corp. Agrees to Sell Renewable Energy Business to LS Power for up to \$2.5 Billion (prnewswire.com/news-releases/algonquin-power--utilities-corp-agrees-to-sell-renewable-energy-

The Commission set a time for responses to the Motion, and on August 15, Liberty Midstates timely filed Liberty’s Response to the Office of Public Counsel’s Motion to Compel (Response).<sup>5</sup> The Response sets forth four objections: relevance, disproportionate to the needs of the case; attorney-client privilege;<sup>6</sup> and possession, custody, or control.<sup>7</sup> On August 19, OPC filed its reply to Liberty’s Response, the Office of the Public Counsel’s Reply to Liberty Midstates’ Response (Reply).

### **Rules of Discovery**

Pursuant to Commission Rule 20 CSR 4240-2.090(1), discovery in Commission cases may be obtained by the same means and under the same conditions as in civil actions in circuit court – thus, the Missouri Rules of Civil Procedure regarding discovery matters apply.

Missouri Rules of Civil Procedure 56.01(b)(1), provides that parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action. Information within the scope of discovery need not be admissible in evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. This rule is not without limitation. The Commission can consider whether the requested discovery is proportional to the needs of the case given the totality of the circumstances.<sup>8</sup> Missouri Rules of Civil Procedure Rule 56.01(b)(1) also provides that the party seeking discovery has the burden of establishing

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business-to-Is-power-for-up-to-2-5-billion-302218796.html) accessed August 15, 2024.

<sup>5</sup> Missouri School Boards’ Association (MSBA) timely responded, stating that it stated it took no position on the discovery dispute regarding DR 3006.

<sup>6</sup> As APUC is headquartered in Canada and Algonquin Power Co. is a trust organized under the laws of Ontario, Canada, the Response refers to solicitor-client privilege.

<sup>7</sup> Due to the findings of the Commission, only the objections of relevance and attorney-client privilege will be addressed.

<sup>8</sup> Missouri Rules of Civil Procedure Rule 56.01(b)(1).

relevance.

## **Relevance**

OPC stated its intent behind obtaining the materials of APUC's Strategic Review Committee is to understand the Strategic Review Committee's impressions of the state of APUC and its assets at that time.<sup>9</sup> Specifically, OPC stated that the Strategic Review Committee provided analysis of how APUC was running, as well as the best financial and capital structure moves to make in order to improve profits for shareholders.<sup>10</sup> OPC stated that DR 3006 seeks information regarding the circumstances within APUC that led it to the point of making a decision regarding Algonquin Power Co.

The Motion states that the information reviewed by the Strategic Review Committee is necessary for OPC to assess the fairness and reasonableness of Liberty Midstates' requested rate of return. Specifically, OPC framed the Strategic Review Committee's province as a determination to retain regulated utilities, rather than a determination of whether to sell Algonquin Power Co.

OPC argued that Liberty Midstates' capital structure is financed solely via affiliate financing transactions from LUCo. OPC argued that the affiliate costs assigned to Liberty Midstates are a function of LUCo's creditworthiness. OPC concluded that LUCo's creditworthiness may be impacted by APUC's financial condition.<sup>11</sup>

OPC's Reply, for the first time, mentions a drop in the stock market price for shares of APUC in 2022. The Reply, again for the first time, mentions a sale of a utility to LUCo

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<sup>9</sup> Motion, p. 9.

<sup>10</sup> Motion, p. 10.

<sup>11</sup> Motion, p. 15.

that fell through in 2023. The Reply argues that these two facts likely impact the cost of capital that APUC charges to its operating companies.

Liberty Midstates' Response stated the sale of Algonquin Power Co. has not been consummated and likely will not be until the fourth quarter of 2024 or the first quarter of 2025. Thus, the possible change to LUCo's or APUC's creditworthiness is a future event that has not yet occurred.

General rate proceedings operate on a test year. The test year in this case is historical - the twelve month period ending December 31, 2022, updated through December 31, 2023. Liberty Midstates' Response argues that information regarding the potential future sale of an unregulated affiliate cannot have any logical impact on an historical test year. Neither OPC's Motion nor its Reply addressed the test year.

Additionally, Liberty Midstates' Response noted that OPC witness David Murray's prefiled testimony in this case stated that APUC's capital structure, due to it being in transition, is not an appropriate proxy for Liberty Midstates' capital structure and rate of return. Mr. Murray's statement supports a view that the documents at issue would not assist OPC in establishing the capital structure or rate of return for Liberty Midstates in the present case.

The Commission is not persuaded by OPC's argument that APUC's Strategic Review Committee materials are relevant to Liberty Midstates' rate proceeding. The rationales offered by the Motion and the Reply do not address the test year, and do not address the fact that Liberty Midstates' proposed cost of capital and proposed rate of return are based on that test year.

## **Privilege**

OPC's Motion argued that there are three elements to a successful claim of attorney-client privilege: existence of an attorney-client relationship at the time of communication; the relationship existed regarding the subject matter of the communication; and the communication was made in the attorney's professional capacity and because of the relation of the attorney and the client. The Motion argued that Liberty Midstates cannot satisfy the first two factors. The Motion posited that there were no attorneys on the Strategic Review Committee, and that the discussion of the Strategic Review Committee was business-oriented.

Liberty Midstates' Response stated that the three documents withheld are privileged communications involving APUC and its internal and external counsel regarding a potential sale of an unregulated affiliate located in Canada. The Response further states that Liberty Midstates is not in possession of the documents, and no Liberty Midstates witness has knowledge of the contents of the documents. Liberty Midstates stated that its only knowledge of the content of the documents stems from its counsel's communications with APUC's counsel. Moreover, Liberty Midstates argues that the privilege belongs to APUC, not Liberty Midstates. The Response also provides an attached declaration from the Vice President and Assistant Corporate Secretary of APUC, Dana Easthope.

Mr. Easthope indicated that three in-house attorneys participated in the meetings of the Strategic Review Committee in their capacities as legal counsel for APUC. The declaration also stated that outside counsel participated in each meeting. The declaration

further stated that the predominant purpose of counsel's participation was to provide confidential legal advice regarding the matters considered by the Strategic Review Committee.

OPC's second objection to privilege was the assertion that the purview of the Strategic Review Committee was business-oriented rather than legal/regulatory-oriented. However, this argument is based on an interpretation of a statement contained in a press release - that the Strategic Review Committee was created with the goal of determining a path forward that positions each of APUC's businesses for continued growth and enables APUC to achieve a lower cost of capital and maximize shareholder value.<sup>12</sup> The Commission cannot conclude that this statement indicates an absence of attorney-client communications in the Strategic Review Committee documents.

After Liberty Midstates filed its Response, OPC filed its Reply. In the Reply, OPC argued that Liberty Midstates' attorney-client claim of privilege is made under Canadian law, and that Liberty Midstates provided no citation or discussion of its claim of foreign privilege. However, pursuant to choice of law principles, the Commission will evaluate the claim of privilege under Missouri law as it is being invoked in a Missouri proceeding, thus the Commission will use the law of the forum to govern admissibility of evidence.<sup>13</sup>

In Missouri, the attorney-client privilege is:

Confidential communications between an attorney and his client concerning the representation of the client are protected by the attorney-client privilege. Privileged material is any professionally-oriented communication between attorney and client regardless of whether it is made in anticipation of litigation or for preparation for trial. To be privileged, the communication must be made in order to

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<sup>12</sup> Motion, pp. 7-8.

<sup>13</sup> *Rosser v. Standard Mill. Co.*, 312 S.W.2d 106, 110, Mo. Supreme Court (1958).

secure legal advice. Absent a waiver, such privileged communications are immune from discovery.<sup>14</sup>

As noted by OPC, the party claiming the privilege must supply sufficient information to enable a determination that each element of the privilege was satisfied. There was an attorney-client relationship at the time of communication as shown by Mr. Easthope's declaration, and counsel's participation was to provide confidential legal advice regarding the matters considered by the Strategic Review Committee. Thus, the Commission finds that Liberty Midstates has met its burden and established that the documents are protected by attorney-client privilege.

### **Conclusion**

The Commission has considered OPC's Motion, Liberty Midstates' Response, OPC's Reply, Missouri statutes, Commission Rules, and the Missouri Rules of Civil Procedure. The Commission finds that the information sought by DR 3006 is not relevant to the underlying action. The Commission finds that even if the information sought by DR 3006 was relevant, it is protected by attorney-client privilege. The Commission will deny OPC's Motion.

OPC's Reply requested the appointment of a special master to review the documents responsive to DR 3006. The Commission will deny this request as the requested documents have been found not to be relevant.

### **THE COMMISSION ORDERS THAT:**

1. OPC's Motion to Compel is denied.
2. This order shall be effective when issued.

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<sup>14</sup> *State ex rel. Kilroy Was Here, LLC v. Moriarty*, 633 S.W.3d 406, 413–14 (Mo.App. E.D. 2021) (internal citations omitted).



**BY THE COMMISSION**

*Nancy Dippell*

Nancy Dippell  
Secretary

Charles Hatcher, Senior Regulatory  
Law Judge, by delegation of authority  
pursuant to Section 386.240, RSMo 2016.

Dated at Jefferson City, Missouri,  
On the 23<sup>rd</sup> day of August, 2024

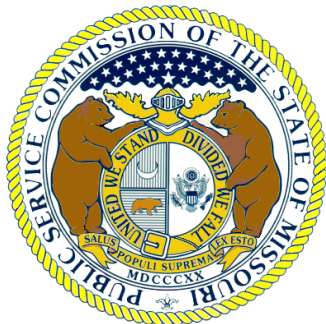


**STATE OF MISSOURI**

**OFFICE OF THE PUBLIC SERVICE COMMISSION**

**I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.**

**WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 23<sup>rd</sup> day of August 2024.**



*Nancy Dippell*  
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**Nancy Dippell**  
**Secretary**

**MISSOURI PUBLIC SERVICE COMMISSION**

**August 23, 2024**

**File/Case No. GR-2024-0106**

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**Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).**

*Sincerely,*



**Nancy Dippell  
Secretary**

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Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.