

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

In the Matter of the Application of The Empire)
District Electric Company, The Empire District)
Gas Company, Liberty Utilities (Midstates Natural) **File No. AO-2018-0179**
Gas) Corp., and Liberty Utilities (Missouri Water))
LLC for an Affiliate Transactions Rule Variance)

STAFF’S STATEMENT OF POSITION

COMES NOW the Staff of the Missouri Public Service Commission (“Commission”) and in response to the Commission’s *Order Granting Motion for Additional Time, Order Granting Expedited Treatment and Order Setting Hearing*, dated April 18, 2019, submits its position statement and argument why OPC’s issues two through six should be struck.

Staff’s Position Statement

1. Should the Commission grant the Applicants a variance from Commission Rules 4 CSR 240-20.015(3)(A) and 4 CSR 240-40.015(3)(A), the bidding requirements of the Commission’s electric and gas Affiliate Transaction Rules?

Yes. Staff supports the Commission granting the Applicants a waiver from the competitive bidding requirements, conditioned on the Commission adopting the terms of the January 24, 2019, *Nonunanimous Stipulation and Agreement* (“Stipulation”).

Good cause exists to grant Applicants a variance from the competitive bidding requirements. Applicants can meet their short-term cash needs more efficiently by leveraging the investment-grade credit rating of Liberty Utility Co. (“LUCo”)¹ and borrowing from the money pool, rather than by competitively bidding individual

¹ David Murray, *Direct Testimony in Support of Nonunanimous Stipulation and Agreement* 4:4-5 (Jan. 24, 2019).

transactions on a daily basis.² Staff support is contingent upon LUCo funding the money pool with at least ** _____ , ** to be passed to Applicants, without mark-up.³ This is a better rate than what Applicants could individually receive.⁴ Applicants and their ratepayers will benefit from Applicants having access to lower cost financing and higher interest income on excess cash. The terms of the Money Pool Agreement and Stipulation provide adequate assurances to protect ratepayers from subsidizing LUCo's operation.

The Commission Should Strike OPC's Issues 2 through 6

OPC presented its issues in its separate April 12th filing, entitled *The Office of the Public Counsel's List of Issues*. OPC's first issue is a restatement of Applicants' and Staff's single issue. However, OPC's issues two through six do not reflect disputes properly presented by the parties in the current proceedings before the Commission. While all parties agree on the list and order of witnesses, order of opening statements, and order of cross-examination, OPC's issues two through six are argumentative, request advisory opinions, and/or are irrelevant and should be stricken. Additionally, to the extent they were not raised in testimony or during discovery, Staff and Applicants have not been put on notice that OPC believes these to be issues, and Commission consideration of them raises procedural due process concerns.

² Kimberly K. Bolin, *Direct Testimony in Support of Nonunanimous Stipulation and Agreement* 5:2-4 (Jan. 24, 2019); See also Mark Timpe, *Direct Testimony* 8:12-15 (Dec. 21, 2018).

³ *Nonunanimous Stipulation and Agreement* ¶ 6(e), AO-2018-0179, 6.e. (Jan. 24, 2019)

⁴ Timpe, *supra* note 2 at 5:8-10.

OPC's issues are as follows:

OPC Issue 2:

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

Section 1.07 of the Money Pool Agreement describes how LUCo's costs for maintaining credit lines will be allocated to Applicants. Section 1.07(a) states that administrative costs directly related to a specific borrowing will be allocated to an Applicant based on the ratio of the Applicant's borrowing to all borrowing. If costs cannot be directly allocated, according to Section 1.07(b) they will be allocated according to a four-factor allocation methodology comparing utility plant expenses, customer count, non-labor expenses, and labor expenses.

OPC appears to be concerned in the abstract that Applicants may violate the asymmetrical pricing rules by reimbursing LUCo for credit line costs at more than fair market price or an Applicant's fully distributed cost to self-provide. The Commission should strike this issue because making a determination about what Applicants may do in the future is irrelevant and would be rendering an impermissible advisory opinion.⁵

⁵ "The Commission [is] restricted to determining the complaint before it, and it should not be issuing decisions with 'no practical effect and that are only advisory as to future, hypothetical situations.'" State ex rel. Laclede Gas Co. v. Public Service Com'n of State, 392 S.W.3d 24, 38 (Mo.App. W.D. 2012) (citation omitted).

That being said, it is Staff's opinion that the direct allocation methodology of Section 1.07(a) is a reasonable approach, because the amount borrowed is a driver of borrowing costs. The indirect allocation methodology of Section 1.07(b) is also reasonable. An allocation based on expenses and customer count reflects the cost of providing the service, because higher expenses and customer count are indicative of greater credit needs and servicing requirements.

Further, as Applicants stated in paragraph four of their *Motion for Additional Time, Request for Expedited Treatment, and Request for Ruling*, pursuant to Applicants' and Staff's Stipulation, Applicants seek only a variance regarding competitive bidding requirements in relation to the money pool. Applicants do not request approval of the money pool as a whole.⁶ A Commission decision now whether LUCo will charge its subsidiaries costs at some future date in violation of the asymmetrical pricing requirements would have the practical effect of being advisory. If OPC believes a violation has occurred, it has recourse; it may bring a complaint or it may challenge these costs in Applicants' next rate cases.

OPC Issue 3:

Are the terms of Sections 2.01 and 2.06 of LUCo's money pool agreement with its regulated subsidiaries sufficiently vague that how LUCo may select the basis for charging operational money pool costs and the method to determine its costs provides a preference to LUCo that does not comply with the Commission's affiliate transactions rules standards which require that "[e]xcept as necessary to provide corporate support functions, the regulated electrical [or gas] corporation shall conduct its business in such a way as not to provide any preferential service, information or treatment to an affiliated entity over another party at any time (4 CSR 240-20.015(2)(B) and 4 CSR 240-40.015(2)(B))"? Will any increased interest, investment revenues or decreased borrowing costs to The Empire District Electric Company, The Empire District Gas Company, and Liberty Utilities (Midstates Natural Gas) Corp due to their participation in LUCo's money pool with its regulated subsidiaries benefit their captive retail customers? Will interest, investment revenues be offset by LUCo's money pool expenses?

Section 2.01 of the Money Pool Agreement states that LUCo will manage the money pool "on an 'at cost' basis." Section 2.06 states that LUCo's decisions are final. OPC believes LUCo in the future may charge money pool administrative costs in violation

⁶ *Motion for Additional Time, Request for Expedited Treatment, and Request for Ruling* ¶ 4, AO-2018-0179 (Apr. 17, 2019).

of the asymmetrical pricing requirements. Similar to OPC's third issue, this issue is irrelevant and a determination would be an impermissible advisory opinion.

OPC also questions whether Applicants' participation in the money pool will benefit Applicants' retail customers. Again, this is irrelevant, because Applicants do not request approval of the money pool as a whole, they ask for a variance of the competitive bidding requirements in relation to the money pool.⁷ By presenting this issue, OPC again asks the Commission to render an impermissible advisory opinion.

OPC has recourse if it believes LUCo is charging its subsidiaries costs in violation of the asymmetrical pricing requirements. It may bring a complaint or challenge these costs in Applicants' next rate cases.

OPC Issue 4

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

LUCo is a subsidiary of Algonquin Power & Utilities Corp.⁸ Here, OPC invites the Commission to engage in a fishing expedition exhaustively examining Applicants' business practices. OPC appears to be using this case as a catchall for all affiliate transactions issues. A determination of this issue is not relevant to Applicants' application for a variance. Again, if OPC believes a violation of Commission rules or orders have occurred, it may bring a complaint before the Commission or request the Commission open an investigatory docket. Such filings would properly present any alleged violation, and allow Applicants opportunity to fully respond. In contrast, in the

⁷ *Motion for Additional Time, Request for Expedited Treatment, and Request for Ruling* ¶ 4, AO-2018-0179 (Apr. 17, 2019).

⁸ *Application for Variance* ¶ 6, AO-2018-0179 (Dec. 29, 2017).

instant case OPC attempts to bootstrap a complaint to an application for a variance from Commission Rules.

OPC Issue 5

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

4 CSR 240-20.015(5) and (6) and 4 CSR 240-40.015(5) and (6) are affiliated transaction record keeping requirements. Applicants, like all regulated utilities, are required to follow all Commission rules, subject to any variance granted by the Commission. It's irrelevant whether the Money Pool Agreement addresses all Commission rules – Applicants must follow them regardless. If OPC believes Applicants are not following Commission rules, it may petition the Commission to open a docket.

OPC Issue 6

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

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

In In the Matter of the Empire District Electric Company, Liberty Utilities (Central) Co. and Liberty Sub Corp. Concerning an Agreement and Plan of Merger and Certain Related Transactions, File No. EM-2016-0213, the Commission approved the merger of Liberty Sub Corp. with The Empire District Electric Company ("Empire"). As part of that case, Empire stipulated to numerous conditions. Hearing evidence and making

determination about an entirely different docket has no bearing on this matter. OPC's sixth issue is irrelevant. OPC is free to bring a complaint or a motion to show cause in the merger case if it believes Empire is not following Commission orders.

WHEREFORE Staff submits the foregoing *Staff's Statement of Position* and requests the Commission issue an order restricting the issue to be determined at the evidentiary hearing to Staff and Applicants' single issue and striking OPC's issues two through six.

Respectfully submitted,

/s/ Karen E. Bretz

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been electronically mailed to all counsel of record this 13th day of June, 2019.

/s/ Karen Bretz