

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

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

**THE OFFICE OF THE PUBLIC COUNSEL’S POSITIONS ON THE ISSUES**

**COMES NOW** the Office of the Public Counsel and states its positions on the issues it listed as follows:

**POSITIONS**

The Office of the Public Counsel’s (“OPC”) opposition to the Applicants’ request for variances from the Commission’s affiliate transactions rules arise from two categories—the terms of the money pool for which the Applicants are seeking the variances, and the Applicants’ recent history of not complying with those affiliate transactions rules, and the Commission’s related ordered merger acquisition conditions.

**Issue 1.** Have The Empire District Electric Company, The Empire District Gas Company, and Liberty Utilities (Midstates Natural Gas) Corp shown good cause for the Commission to grant them variances from the bidding requirements of the Commission’s affiliate transactions rules (4 CSR 240-20.015(3)(A) and 4 CSR 240-40.015(3)(A)) for the purpose of them joining and participating in LUCo’s money pool with its regulated subsidiaries?

**OPC Position:** No.

Presently The Empire District Electric Company (“EDE”) and The Empire District Gas Company (“EDG”) participate in a money pool that EDE operates which is supported by EDE’s capability to issue commercial paper to a limit of \$150 million backed by LUCo’s (Liberty Utilities Co) \$500 million line-of-credit facility. No one disputes that commercial paper interest

rates are lower than line-of-credit interest rates. EDE is incurring costs to be able to issue commercial paper; however, it is not incurring any cost to use LUCo's \$500 million line-of-credit to back its commercial paper capability. When LUCo acquired EDE, EDE had its own \$200 million line-of-credit facility, but on the day when LUCo could first draw on its post-acquisition line-of-credit, EDE terminated its line-of-credit facility and, at no cost to EDE, LUCo began to back EDE's commercial paper with its \$500 million line-of-credit.

If EDE and EDG participate in LUCo's regulated money pool as planned, EDE will eliminate EDE's commercial paper and, therefore, use of LUCo's \$500 million line-of-credit to back that commercial paper, and begin to reimburse LUCo for the costs it incurs to have its \$500 million line-of-credit—either assigned directly based on borrowings from the money pool that are supported by that line-of-credit, or indirectly by an allocation of the fees LUCo pays to have that line-of-credit based on allocators unrelated to their money pool use. They also will share in the costs that LUCo is incurring to duplicate EDE's money pool.

EDE's, EDG's and Midstates Natural Gas's participation in LUCo's regulated money pool would give LUCo a preference because LUCo would directly recover from them its costs to operate its money pool and its costs for the undrawn portion of its line-of-credit, instead of LUCo relying on money pool interest and investment income for recovering those costs, which is standard financial industry business practice.

#### Unfair undrawn line-of-credit cost allocation

EDE, "EDG, and Midstates Natural Gas, are proposing relief from these Commission affiliate transactions rules to participate in LUCo's money pool for its regulated utility subsidiaries where they, as explained in more detail in OPC's position to Issue 2, would pay LUCo's costs for the undrawn portion of LUCo's \$500 million line-of-credit facility in

proportion to four factors. According to the terms of LUCo's applicable money pool agreement, LUCo exercises sole discretion whether to fund the regulated money pool when participants' borrowings would exceed their contributions. LUCo is not restricted on when or for what purpose it can draw on its line-of-credit. One of those purposes may be funding LUCo's separate money pool for its unregulated subsidiaries, a money pool from which LUCo may borrow.

The evidence does not show that the EDE and EDG paying LUCo's costs for the undrawn portion of LUCo's \$500 million line-of-credit facility in proportion to four factors would be better than requiring that their transactions with LUCo be at the lower of fully distributed cost or market, as the Commission's applicable affiliate transactions rules require. While this is sufficient for the Commission to determine the Applicants have not shown good cause for relief from these rules, there are other reasons as well.

#### Conflicts of Interest

Starting long before LUCo acquired them, EDE and EDG, with Empire District Industries, have participated in a money pool EDE operates. Before LUCo acquired EDE, when pooled funds were insufficient, EDE financed short-term borrowings that exceeded the pooled money either by drawing on its line-of-credit or by issuing commercial paper at rates lower than those of its line-of-credit. EDE's available line-of-credit was \$200 million, but EDE's commercial paper issuance limit was \$150 million. After LUCo acquired EDE, according to the Applicants' witness Mark T. Timpe, LUCo became EDE's sole source of short-term funds; LUCo has a \$500 million line-of-credit.

The Applicants' witness Mark T. Timpe is one of EDE's employees who transferred to Liberty Utilities Service Company ("LUSC") in June of 2016. As a LUSC employee, through

one or more service contracts, he continues to provide treasury and cash management services to EDE, as well as other LUCo affiliates. This employee transfer between affiliates is not insignificant, and was a step toward eliminating EDE's direct control over its cash resources. Subsequently on February 23, 2018, LUSC employees took another step toward eliminating EDE's direct control over its cash resources by EDE terminating its \$200 million line-of-credit facility, and LUCo supporting EDE's commercial paper with LUCo's \$500 million credit facility. This means that EDE's money pool is now backed by up to \$150 million in EDE commercial paper which in turn is supported by LUCo's \$500 million credit facility. Presently, EDE is not paying for LUCo's \$500 million credit facility that supports EDE's money pool, but EDE no longer has access to the at least \$50 million for its non-commercial paper short term (a year or less) cash needs that it had with its \$200 million credit facility. Stated differently, EDE terminated its \$200 million line-of-credit facility in reliance on LUCo supporting EDE's money pool and commercial paper with LUCo's \$500 million line-of-credit.

After LUSC employees terminated EDE's \$200 million line-of-credit, LUCo and its subsidiaries began pursuing the creation of a money pool in which all of its subsidiaries, regulated and unregulated, would participate. In response to regulatory concerns, LUCo created a separate money pool for its nonregulated subsidiaries ("LUCo nonregulated money pool"). LUCo is participating in that money pool as an eligible borrower. Empire District Industries exited EDE's money pool, and now is participating in LUCo's nonregulated money pool. One of LUCo's ultimate goals is to be sole source of cash for its subsidiaries' short- and long-term needs, including the short- and long-term cash needs of EDE and EDG. EDE and EDG had complete control of their cash management needs before LUCo acquired them. If EDE and EDG participate in LUCo's regulated money pool, then OPC anticipates that LUSC employees will

terminate EDE's money pool and EDE's ability to issue commercial paper, practically giving LUCo functional control of the management of EDE's and EDG's cash.

Although Section 3.07 of LUCo's money pool agreement notes that the participants ("eligible borrowers") are not "obligated to participate in any transaction contemplated herein if the costs to be charged to such party in connection with such transaction differs from the amount of the charges they are permitted to incur .....under the rules.....of.....any state public utility commission," it does not prohibit them from doing so. Given that the Applicants have neither employees nor independent financial relationships with non-affiliate financial services vendors, there is a significant risk that the LUSC employees who actually operate LUCo and the Applicants will make decisions primarily based on the benefits to LUCo and its owner, not the benefits to the Applicants, and their customers. This is a preference that the Commission's affiliate transaction rules are designed to deter.

Mr. Timpe is an officer of LUCo, but not of any of the Applicants. The LUCo regulated money pool is designed to benefit LUCo, not the Applicants. LUCo's primary motivation for its money pool(s) is to reduce LUCo's borrowings from its \$500 million line-of-credit facility. Further, as OPC explains in its position on Issue 3, LUCo's money pool agreement leaves LUCo with great discretion as to the costs and the amounts that LUCo may charge to the participants in its regulated money pool, rather than requiring that the participants' transactions with LUCo be at the lower of the fully distributed cost to EDE of providing the service to itself, or the market price at which EDE can obtain the same service from an independent third party (e.g., Missouri financial entities). Due to the breadth of LUCo's discretion in its money pool agreement, the Applicants cannot show good cause for relief from the Commission's applicable affiliate transaction rules to participate in LUCo's regulated money pool.

## Rules and Order violations

That this LUSC employee conflict is real is borne out by OPC's position statements on Issues 5 and 7, where OPC explains that EDE, and one or more of the other Applicants, violated the Commission's affiliate transactions rules and conditions the Commission imposed in Case No. EM-2016-0213 (where the Commission authorized LUCo to acquire EDE), when they engaged in the foregoing steps to shift away from EDE to LUCo control of the money pool in which EDE participates. Given their noncompliance with Commission rules and Commission-ordered conditions, absent demonstration of how the Applicants and their customers will benefit from the Commission giving the Applicants the relief they request, the Commission should not give them variances from the Commission's affiliate transactions rules to participate in LUCo's regulated money pool. They have not made that demonstration.

## Net benefit/detriment unknown

As OPC explains in its position on Issue 4, while it is unknown whether the Applicants, or their customers, will economically benefit by the Applicants participating in LUCo's regulated money pool, since the benefits they will get from lower money pool borrowing rates, and interest and investment income, will be offset by money pool expenses. Based on the four factors, EDE would be responsible for about 40% of LUCo's costs for the undrawn portion of LUCo's \$500 million line-of-credit facility, and Midstates Natural Gas would be responsible for about 7% regardless of their money pool borrowing and investment activities. Neither Staff nor the Applicants have specifically identified why it would be more beneficial to operate LUCo's money pool without complying with the Commission's affiliate transactions rules' competitive bidding requirements. Tellingly, every other money pool involving a Missouri electric or gas

utility operates without anyone having sought or obtained relief from the Commission’s affiliate transactions rules’ competitive bidding requirements, including EDE.

The following table shows the breadth of the analysis needed to truly evaluate the benefits and detriments of LUCo’s regulated money pool:

<b>Money Pool Item Financial Treatment</b>	<b>Liberty Utilities Company [Yes, if entity receives benefit. No, if entity receives a detriment ]</b>	<b>Money Pool Utilities [Yes, if entities receives benefits. No, if entities receive a detriment]</b>
Interest And Investment Income on Invested Excess Cash	Yes, but the benefit is reduced if commercial paper capability is added. Main benefit is created by money pool sections 1.07 (b) and 2.01 costs are not charged against this income.	No. Income reduced if commercial paper capability is added. Main detriment is the this income will be offset by sections 1.07(b) and 2.01 costs that will be charged independent of borrowing and investing activities.
LUCo Credit Facility specific borrowing costs	Yes. LUCo is the only entity that can borrow against the credit facility but has a portion of its credit facility costs reimbursed by its utility	No. This is only one of the three charges a utility borrower will receive as a utility money pool participant. The other charges are the unrecovered money costs

Section 1.07 (a)	affiliates who have no control or access to the credit facility.	as well as the costs to operate the money pool. .
LUCo Credit Facility non-specific borrowing costs Section 1.07 (b)	Yes. LUCo gets reimbursed for all costs related to the unused portion of the credit facility by the utility participants and possible over recovery if monies are collected from non-regulated money pool eligible borrowers.	No. The entirety of these costs will be allocated to LUCo money pool utilities based on the ratio of their utility plant expenses, customers, non-labor, and labor expenses for a credit facility that the cannot use, and will be used to benefit of non-money pool transactions (e.g. EDE \$ 90 million loan)
LUCo operation expenses. Section 2.01	Yes. Despite the fact that LUCo will receive interest and investment income from the money pool, LUCO will pay no costs to operate the money pool that creates this income.	No. LUCo does not retain costs and costs will be allocated to all LUCo subsidiaries based a factor unrelated to their money pool activities.

While LUCo first may intend to support its regulated money pool with its investment-grade-rated credit facility, \*\* \*\* as filed, LUCo's money pool agreement provides for, in Section 1.04, the following funding sources and priorities: First, excess funds from the LUCo utility participants like Midstates Natural Gas (Section 1.04 (a)); second, excess funds in the LUCo treasury to the extent that LUCo in its sole discretion



determines to invest such funds in the money pool (Section 1.04 (b)); and third, only when the first two are insufficient, then, at its sole discretion, LUCo may invest proceeds from its credit facility or the sale of \*\* Except to guarantee amounts lent from LUCo's money pool, LUCo's money pool agreement does not obligate LUCo to fund its subsidiaries, or the regulated money pool.

There is no good cause to terminate EDE's fully functioning money pool and expose EDE, EDG, and Midstates Natural Gas to ultimately bearing any part of the duplicative costs that LUCo is incurring to develop its money pool functions that EDE's money pool already has. In addition, Algonquin Power & Utilities Corp.'s ("APUC") affiliates do not use competitive bidding for the goods and services they acquire from each other. If they participate in LUCo's regulated money pool, the Applicants will pay for LUCo's costs to develop its money pools through their section 2.01 costs (Administrative Costs), as LUCo is not separately recording the time it is spending to develop and implement its money pools. Those money pools duplicate many of the functions that already exist in EDE's money pool. LUCo and APUC each have a June 30, 2017, agreement for providing services to their affiliates, including EDE, EDG, and Midstates Natural Gas (which are collectively referred to as "Liberty Utilities Entities"). Both agreements have a Section 2.2 which states the following:

**Section 2.2 Charges.** All services rendered under this Agreement will be provided and charged to Liberty Utilities Entities in accordance with the then effective Algonquin Power & Utilities Cost Allocation Manual ("CAM"), which is set forth at <https://libertyutilities.com/lucam.html> and incorporated herein by reference. Charges for services consist of direct and indirect costs. Direct charges shall include direct labor, direct materials, direct purchased services associated with the related asset or services, and overhead amounts. Where service cannot be direct charged, LUSC shall charge the Liberty Utilities Entity based on the allocation factors and methodologies set forth in the CAM. All employee costs for LUSC employees who perform work for the Liberty Utilities Entity are to be paid by LUSC and direct charged to the Liberty Utilities Entity. Joint and common costs not associated with the provision of services listed above shall be charged based on a

four-factor allocation methodology in the CAM.

This section means that all APUC's and LUSC's costs to operate as separate entities that are not directly charged to an affiliate are allocated to their affiliates, including the Applicants. Therefore, regardless whether or not they participate in LUCo's regulated money pool, the Applicants will be allocated costs that APUC and LUSC incur for its money pools that are not directly charged or that are classified as "joint and common costs."

Both service agreements also include, in section 2.1, a requirement to maintain books and records with the language that follows (Either APUC or LUSC appears in the actual agreements where COMPANY appears in the following):

**Section 2.1 Records.** COMPANY shall maintain adequate books and records with respect to the transactions subject to this Agreement to specifically identify costs subject to allocation, particularly with respect to their origin. In addition, the records must be adequately supported in a manner sufficient to justify to any utility regulatory body recovery of the costs in the rates of the Liberty Utilities Entities. COMPANY shall be responsible for maintaining internal controls to ensure the costs associated with transactions covered by the Agreement are properly and consistently allocated and billed in accordance with the terms and provisions of this Agreement. Each of the Liberty Utilities Entities shall maintain its own books and records in the manner required by law, and in a transparent manner which allows the amounts billed by COMPANY to be readily determined.

This language means that APUC's and LUSC's recordkeeping costs for purposes of creating and operating money pools will be allocated to LUCo's affiliates using the four-factor allocation methodology in APUC's cost allocation manual. This provision for allocation of money pool recordkeeping costs to affiliates that are not directly charged means that *regardless* of whether EDE, EDG, or Midstates Natural Gas participate in LUCo's regulated money pool, those costs will be allocated to EDE, EDG, and Midstates Natural Gas, likewise for LUCo's unregulated money pool.

**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))?

**OPC Position:** No. There is no indication that Section 1.07(b) of LUCo’s money pool agreement will be modified or eliminated for purposes of the Applicants’ participation in LUCo’s regulated money pool; therefore, OPC has raised this issue now to support its position that the Commission should not pave the way for EDE, EDG, and Midstates Natural Gas to participate in LUCo’s regulated money pool. Currently EDE is not paying any costs of LUCo’s line-of-credit facility, and it never has paid them although EDE terminated its \$200 million credit facility and began relying on LUCo’s \$500 million credit facility to support EDE’s \$150 million commercial paper program. If EDE were to execute LUCo’s money pool agreement, EDE would become obligated to pay some of LUCo’s line-of-credit facility costs that EDE is not paying now. If they execute LUCo’s money pool agreement, Section 1.07(b) would require the Applicants to subsidize LUCo by reimbursing LUCo for LUCo’s costs for the undrawn portion of its \$500 million line-of-credit facility when LUCo may use that line-of-credit for any purpose. It would also subsidize LUCo for the costs of that line-of-credit which are not directly assignable to LUCo’s regulated money pool or to any of the Applicants other outstanding borrowings. This provision assigns all these costs to the utilities that participate in LUCo’s regulated money pool, despite the fact that it is LUCo which has the sole discretion to borrow from or otherwise use that \$500 million line-of-credit. LUCo has made no commitment that it must use its line-of-credit

facility to supply funds to satisfy any money pool deficiency caused by regulated money pool participant loan requests exceeding utility and LUCo excess fund investment pooling. Further, LUCo has not dedicated any portion of that line-of-credit only to support LUCo's regulated money pool.

There is no indication that anyone intends to modify Section 1.04 (c). Section 1.04 (c) specifically states that it is LUCo who has the sole discretion to decide when and whether to use its \$500 million line-of-credit facility to fund LUCo's regulated money pool. LUCo relies on its \$500 million line-of-credit to support activities other than its regulated money pool; activities such as acquisitions, long-term affiliate financings (e.g. to support a long-term loan to EDE), a nonregulated money pool from which LUCo may borrow, and loans to nonregulated LUCo affiliates (e.g. LUSC). Thus, charging of all the indirect costs of LUCo's line-of-credit facility to its regulated money pool participants based on non-cost causative factors provides LUCo with a subsidy and an improper financial advantage. This is the type of transaction that the Commission's affiliate transactions rules were created to prevent. This alone—that the Applicants are to be charged for LUCo's costs to have a line-of-credit available to it that is not dedicated to the Applicants and that LUCo may use, and has used, for purposes other than its regulated money pool—shows that the LUCo regulated money pool benefit (good cause) that the Applicants and Staff assert is not based on recognition of the full consequences to the Applicants of joining LUCo's regulated money pool.

**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(es) for charging costs to operate LUCo's money pool and the method to determine those 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))?”

**OPC Position:** Yes. The preference to LUCo is created by the LUCo money pool agreement provision that concedes to LUCo sole discretion for defining its money pool operating costs and whether these costs will offset money pool interest and investment income, or be charged, in whole or in part, to LUCo’s regulated money pool participants or to all of LUCo’s utility subsidiaries. Sections 2.01 and 2.06 of LUCo’s money pool agreement give LUCo the sole discretion to determine these operating costs, the method used to allocate or assign them to utility participants, and to alter both. There is no indication that the Applicants intend to modify sections 2.01 or 2.06 of the agreement. In an arms-length transaction these terms should be defined for a clear understanding of what these costs are, how they will be determined, when they would be audited, who will bear them, and how they are charged. Also, there is no indication that the Applicants have considered developing the cost information needed for them to comply with the Commission’s affiliate transactions rules.

**Issue 4.** 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?

**OPC Positions**

**Question 1:** No. Because they are not included in cost-of-service studies, the Applicants' retail customer rates are not based on the Applicants' short-term investment and interest income and, thus, are not affected by increases or decreases in them. Since investment and interest income is not considered in setting retail customers' rates, the full impact of this income flows to the utility's net income after income taxes are considered. Thus, any increases in short-term investment or interest income increase the utility's earnings that are available to their parent companies—LUCo, and ultimately, APUC. Unlike short-term investment and interest income, short-term debt does impact utility customer retail rates; however, through EDE's money pool and ability to issue commercial paper, EDE and EDG already have access to low-cost, short-term debt, and OPC knows of no valid reason why Midstates Natural Gas could not participate in EDE's money pool.

Whether EDE would increase its investment income by participating in LUCo's regulated money pool is unknown, but there is no reason that, through its own investment activities, EDE should not be able to match or beat the returns it would get by participating in LUCo's regulated money pool.

EDE and EDG will not decrease their borrowing costs by participating in LUCo's regulated money pool. EDE and EDG presently can borrow through EDE's commercial paper program at lower interest costs than they can obtain through LUCo's line-of-credit facility. Even if LUCo's money pool were supported by a \*\*, it would not have a lower interest rate than EDE's commercial paper, which supports EDE's money pool.

Supporting LUCo's regulated money pool with \*\* would benefit net borrowing participants, as borrowing costs based on \*\* would be less than borrowing costs based on LUCo's line-of-credit. However, net investor participants would not

benefit (e.g. Midstates Natural Gas), since investment returns based on \*\* \*\*  
would be lower than those based on LUCo's line-of-credit. Thus, the apparent economic  
advantage to one utility applicant of joining LUCo's regulated money pool (net borrower) works  
to disadvantage another (net investor).

**Question 2 (Will interest, investment revenues be offset by LUCo's money pool expenses?):** Yes. In addition to the uncertainty of whether participants in LUCo's regulated money pool would overall benefit based on their investment and interest incomes and borrowing costs, there is the issue of all the other costs they would incur as participants. If it participates in LUCo's money pool, EDE will pay for the costs LUCo incurs for the redundancy of LUCo creating its money pool and the financial instruments to support it—line-of-credit facility and, potentially, \*\* \*\* program—that EDE already has in place and has been using for years for its money pool and short-term cash needs.<sup>1</sup> But neither EDE, nor any of the other Applicants will have direct access to LUCo's line-of-credit facility or the ability to draw on it at will.

In addition to participants in LUCo's regulated money pool bearing LUCo's costs to create its money pool and for its \$500 million line-of-credit facility, there is Section 1.07(b) of the money pool agreement. That section provides that undrawn line-of-credit facility costs will be allocated to LUCo's regulated money pool participants based on four factors, factors that are unrelated to their borrowing or investing activities. This proposed fee allocation would be inequitable to Midstates Natural Gas, and create a preference for LUCo.

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<sup>1</sup> Before APUC acquired it, Midstates Natural Gas had a money pool that Midstates Natural Gas supported with commercial paper.

At present, the four factors would cause the undrawn line-of-credit facility costs to be allocated 40% to Empire and 7% to Midstates Natural Gas—these percentages may change over time as the factors and who participates in the pool change. However, LUCo, which has unfettered access to its \$500 million line-of-credit, while LUCo’s regulated money pool participants have only the indirect access LUCo gives them, will pay none of the undrawn line-of-credit facility costs. This is case of regulated utility subsidization of an unregulated parent by paying the costs of maintaining that unregulated parent’s line-f-credit for that parent to use for, not only regulated, but also unregulated purposes.

To further illustrate how inequitable this is, and a subsidy to LUCo, consider the circumstances of Midstates Natural Gas. Historically, Midstates Natural Gas has been a source of cash to LUCo and so would be a net investor in LUCo’s regulated money pool. As a net investor, Midstates Natural Gas’s money pool participation would *increase* the undrawn portion of LUCo’s line-of-credit facility, but the line-of-credit commitment fee applies to the *undrawn* portion of LUCo’s line-of-credit. In other words, Midstates Natural Gas would pay *more* of the commitment fee because its’ participation in the money pool *reduces* the amount LUCo draws on its line-of-credit to support its regulated money pool. This is an example of the types of transactions the Commission’s affiliate transactions rules are intended to deter. There is no showing that EDE, EDG, or Midstates Natural Gas, individually or collectively, will benefit overall from participating in LUCo’s money pool, even with the competitive bidding requirements of the Commission’s affiliate transactions rules.

Additionally, if EDE, EDG, and Midstates Natural Gas participate in LUCo’s regulated money pool, then they will be allocated a portion of LUCo’s costs to operate its money pool.<sup>2</sup>

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<sup>2</sup> LUCo money pool agreement Section 2.01 costs.



Further, LUCo may draw on its line-of-credit for unregulated purposes. Those purposes may include (1) supporting LUCo's non-regulated money pool (in which LUCo participates), (2) supporting other activities of LUCo and its non-regulated subsidiaries (e.g. LUCo acquisitions), and (3) supporting long-term financing of affiliates at a profit (e.g., LUCo's refinancing of Empire's \$90 million of first mortgage bonds with a fifteen (15) year note payable to LUCo at 4.53%). Section 1.07 (b) does not address from whom LUCo's credit facility commitment fees are to be recovered, other than from participants in LUCo's money pool, is the type of transaction the Commission's affiliate transactions rules are intended to deter.

Regardless of whether EDE would increase its interest and investment income by participating in LUCo's money pool, it is LUCo, not EDE's customers, who would receive any of EDE's benefit.

**Issue 5.** 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.?

**OPC Position.** No. The Applicants have not exercised effective enforcement of the Commission's affiliate transaction rules 4 CSR 240-20.015 and 4 CSR 240-40.015. The entirety of the Applicants' workforce is employees of their affiliate LUSC. Terminating EDE's \$200 million line-of-credit facility and starting to use LUCo's \$500 million line-of-credit facility without first seeking competitive bids to consider non-affiliate options is contrary to the competitive bidding requirements of the Commission's affiliate transactions rules. It is also non-compliant with those rules unless "when to its best knowledge and belief, compliance with the standards would not be in the best interests of its regulated customers and it complies with the

procedures required by subparagraphs (10)(A)2.A. and (10)(A)2.B. of this rule.” The Applicants have not complied with those subparagraphs.

Not complying with the Commission’s affiliate transactions rules is illustrated by the actions of the LUSC employee(s) who was/were acting for EDE when he/they retired EDE’s \$90 million of first mortgage bonds in 2018 and refinanced them with LUCo long-term debt, debt that LUCo supported with its \$500 million line-of-credit facility. This/these LUSC employee(s) did not seek competitive bids for short- or long-term refinancing of EDE’s \$90 million of first mortgage bonds. Instead he/they created circumstances where, although EDE had access to commercial paper rates, LUCo, at least initially, is reaping the difference between the 4.53% interest rate on a 15-year note with EDE and LUCo’s interest rate on its \$500 million line-of-credit facility. LUSC employee(s) did so despite EDE’s access to commercial paper at rates below LUCo’s \$500 million line-of-credit rate, and without soliciting or obtaining any competitive bids for either long- or short-term refinancing the \$90 million of first mortgage bonds, and without evaluating whether EDE was better off if it refinanced the bonds with short- or long-term debt.

By having EDE provide this financial advantage to LUCo in 2018, one or more LUSC employees also violated one of the Commission’s conditions for approving LUCo’s acquisition of Empire. This is important because EDE’s and LUCo’s failures to comply with (1) these ordered conditions and (2) the Commission’s affiliate transactions rules indicate that it is unlikely they will comply with their commitments in their Nonunanimous Stipulation and Agreement with Staff, in particular their commitment that they will comply with the competitive bidding requirements of the rules, since the Applicants were not engaging in rule-required competitive bidding for financial activities with affiliates before they filed this case.

**Issue 6.** 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)?

**OPC Position.** No. These rules require the Applicants to keep books of accounts and supporting records with sufficient detail to permit verification of their compliance with the rules. The Applicants also must keep their books, accounts, and records separate from those of their affiliates. Without their own employees, these requirements must be met by the employees of the Applicants' non-regulated affiliate, LUSC, acting on the Applicants' behalves. There is little documentation available to review the key decisions LUSC employees made for the Applicants, decisions such as the following:

1. The decision to transfer EDE's treasury department personnel to LUSC, a non-regulated affiliate;
2. The decision to terminate EDE's credit facility and rely on LUCo's new credit facility for EDE's commercial paper support at no cost to EDE and without documentation regarding the terms and conditions between LUCo and EDE for doing so;
3. The decision for EDE to execute a LUCo long-term note that LUCo funded with cheaper short-term debt and charging EDE at a rate above the rate at which EDE could refinance on its own;
4. The decision to refinance EDE's first mortgage bonds without competitive bidding;
5. The decision to rely on LUCo's credit facility to support LUCo's long-term note instead of issuing EDE's commercial paper when refinancing first mortgage bonds;

6. The decision not to enforce the “actual costs” provision in EDE’s services agreement with LUSC; and
7. The decisions regarding the accounting, development, and EDE and EDG payment for a redundant money pool operated by LUCo. Further, there are no approvals by the boards or officers of any of EDE, EDG or Midstates Natural Gas to support that, as to these decisions, they have complied with the Commission’s affiliate transactions rules or authorized any of these affiliate transactions.

EDE has refused to insist that to EDE the fair market value of LUCo developing and implementing a money pool with features EDE already had incurred and paid for when it developed and implemented its existing money pool is zero. The Applicants have provided little or no documentation supporting general compliance with the Commission’s affiliate transactions rules, or for compliance of the specific items identified above.

**Issue 7.** 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?”

**OPC Position:** No. OPC discovered three pre-acquisition EDE financing services that now are being performed by EDE affiliates. The first is EDE’s replacement of its credit facility with LUCo’s credit facility. The second is EDE’s redemption of its \$90 million of first mortgage

bonds by LUCo financings. The third is the transfer of all EDE employees to LUSC, a non-regulated affiliate, who now provides the personnel who make all of EDE's decisions, including those related to financings and financial activities such as creation of and participation in money pools. EDE took all of these actions without using competitive bidding for the services, or obtaining the authorizations or approvals of its officers or board, or by following the procedure set out in 4 CSR 240-20.015(10) for electric utilities and 4 CSR 240-40.015(10) for gas utilities to avoid the otherwise applicable competitive bidding requirements of the Commission's affiliate transactions rules.

Respectfully,

*/s/ Nathan Williams*

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 13<sup>th</sup> day of June 2019.

*/s/ Nathan Williams*