

Control Number: 50569



Item Number: 22

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**DOCKET NO. 50569**

**APPLICATION OF MSEC WASTE  
WATER, INC. FOR AUTHORITY TO  
CHANGE RATES**

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**BEFORE THE  
PUBLIC UTILITY COMMISSION  
OF TEXAS**

**MSEC WASTE WATER, INC.'S RESPONSE  
TO COMMISSION STAFF'S MOTION TO COMPEL**

MSEC Waste Water, Inc. (MSEC WW) files this Response to the Staff of the Public Utility Commission of Texas' (Staff) Motion to Compel, and would respectfully show as follows:

**I. PROCEDURAL HISTORY**

Staff served its First Request for Information to MSEC WW on July 17, 2020. Counsel for MSEC WW and Staff conducted good faith negotiations that failed to resolve the issues. The parties agreed to extend the date for the filing of MSEC WW's objections until August 3, 2020. On August 10, 2020, Staff filed its Motion to Compel responses to its discovery requests, therefore this Response is timely filed.

**II. OBJECTIONS**

MSEC WW objected to the following Requests for Information:

- Staff 1-1 Please provide the names of all board members for each of the three separate boards for: Mid-South Electric Cooperative Association, d/b/a MidSouth Electric Co-op or Mid-South Synergy; MSEC Enterprises, Inc.; and MSEC Waste Water.
- Staff 1-2 Please provide the name and title of any officers, executives, or managers responsible for the day-to-day governance and operations of: Mid-South Electric Cooperative Association, d/b/a MidSouth Electric Co-op or Mid-South Synergy; MSEC Enterprises, Inc.; and MSEC Waste Water.
- Staff 1-3 For each individual listed in response to Staff 1-2, please indicate the entity that employs the individual.
- Staff 1-4 Please admit or deny that the Master Service Agreement between Mid-South Electric Cooperative Association, d/b/a MidSouth Electric Co-op or Mid-South Synergy and MSEC Enterprises, Inc. allows the parent company to exercise control over the operations, management decisions, or policies of MSEC Enterprises, Inc. directly or through an intermediary. If deny, please explain why

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the Master Service Agreement does not allow Mid-South Electric Cooperative Association, d/b/a MidSouth Electric Co-op or Mid-South Synergy to exercise control over the operations, management decisions, or policies of MSEC Enterprises, Inc. directly or through an intermediary.

Staff 1-5 Please admit or deny that the Master Service Agreement between Mid-South Electric Cooperative Association, d/b/a MidSouth Electric Co-op or Mid-South Synergy and MSEC Waste Water allows the parent company to exercise control over the operations, management decisions, or policies of MSEC Waste Water directly or through an intermediary? If deny, please explain why the Master Service Agreement does not allow Mid-South Electric Cooperative Association, d/b/a MidSouth Electric Co-op or Mid-South Synergy to exercise control over the operations, management decisions, or policies of MSEC Waste Water directly or through an intermediary.

Staff 1-6 Please provide a detailed description of the ownership structure and ownership percentages of: Mid-South Electric Cooperative Association, d/b/a MidSouth Electric Co-op or Mid-South Synergy; MSEC Enterprises, Inc.; and MSEC Waste Water.

Staff 1-7 Reference the Master Service Agreement filed as Attachment 2 to MSEC Waste Water's Response to Order No. 3 and Supplement to Application filed on May 6, 2020. Please admit or deny that Kerry Kelton signed the agreement on behalf of both Mid-South Electric Cooperative Association, d/b/a MidSouth Electric Co-op or Mid-South Synergy and MSEC Waste Water.

MSEC WW will not restate the entirety of its objections to these Requests for Information in this pleading, but refers the Administrative Law Judge (ALJ) to those Objections filed on August 3, 2020, and by reference incorporates them herein.

### **III. RESPONSE TO MOTION TO COMPEL**

In Staff's Motion to Compel, Staff argues that the information sought in the discovery requests is necessary in order for Staff to make a determination regarding the "appropriate utility classification" of MSEC WW.<sup>1</sup> Staff further states that "if MSEC WW is determined to be a Class B utility, Staff will recommend the application be found administratively incomplete and MSEC WW will need to file a Class B utility application with additional information..."<sup>2</sup> Staff

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<sup>1</sup> Commission Staff's Motion to Compel at 2 (Aug. 10, 2020) (Motion to Compel).

<sup>2</sup> *Id.*

argues it cannot make such a determination without the requested information. Staff is also apparently laboring under a misunderstanding of the relationship between MSEC Waste Water and MSEC Enterprises when it refers to “service agreements between MSEC WW, its affiliate MSEC Enterprises, Inc., and the parent company of both affiliates...” There are no service agreements between MSEC WW and MSEC Enterprises; the service agreements previously provided are the only ones that exist, and they are between (1) MSEC WW and its parent Mid-South Electric Cooperative, and (2) MSEC Enterprises, Inc., and its parent Mid-South Electric Cooperative.

MSEC WW disputes Staff’s claimed lack of sufficient information to make a determination of the classification of MSEC WW. MSEC WW has provided many pages of information regarding its legal status and the ownership of the utility facilities. There can be no dispute that MSEC WW is a Texas corporation, that MSEC WW owns the wastewater utility facilities, that MSEC WW owns the permits issued by the Texas Commission on Environmental Quality (TCEQ) for the two wastewater treatment plants, that MSEC WW owns the sewer certificate of convenience and necessity (CCN) issued to it by the Commission, and MSEC WW has a total of three customers. There is no additional information required to determine that MSEC WW is a sewer utility appropriately classified under Texas Water Code (TWC) § 13.002(4-d) as a Class D utility. In fact, the Commission has already determined that MSEC WW is a utility.

Staff does not need to know more information about the parent electric cooperative or a sister subsidiary to know that MSEC WW is a Class D utility. The ownership structure of an electric cooperative is neither relevant, nor needed, to know that MSEC WW is a Class D utility. And it is irrelevant whose signatures are on service agreements for the provision of administrative or operational services for MSEC WW in order to determine the classification of MSEC WW as a Class D utility.

Staff’s arguments that these matters are relevant because they were first raised by MSEC WW are not on point, and are certainly incorrect. Stating that “the nature of the questions in

Staff's First RFIs concerns information first raised by MSEC WW," Staff apparently is arguing that because MSEC WW was initially responsive to questions raised by Staff (as ordered by the ALJ), then MSEC WW has waived its ability to contest the relevance of Staff's further inquiry into non-relevant matters.

Staff issued its initial recommendation on administrative completeness on April 15, 2020, recommending that MSEC WW be ordered to provide additional information regarding affiliates, a cost allocation manual, and justification for being considered a Class D utility.<sup>3</sup> MSEC WW filed objections to this recommendation the next day, objecting to the request for information that bore no relevance to the completeness of the application, and asserting that MSEC WW in its application had identified the number of customers it serves, identified its parent company (as required), and provided in work papers various agreements it has with its parent regarding the provision of services to the utility by the parent. No sooner had MSEC WW filed its objections than Order No. 3 was issued, requiring MSEC WW to answer the questions posed by Staff.

As a result, and specifically without waiving its objections, MSEC WW provided additional information to Staff – an organizational chart, a description of the affiliate that provides services in support of the provision of wastewater services, a written description of how costs are allocated or directly billed, and a lengthy explanation referencing the TWC and Commission rules as support for MSEC WW's filing as a Class D utility.<sup>4</sup> MSEC WW by reference incorporates those arguments and citations herein. It can be seen from the Response to Order No. 3 that MSEC WW most certainly did not concede that any of the information requested in these RFIs is now relevant.

Staff next states that "MSEC WW first raised the issue of MSEC WW's separate corporate structure and separate board of directors as justification for MSEC WW's classification

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<sup>3</sup> Commission Staff's Recommendation on Administrative Completeness of the Application and Notice (Apr. 15, 2020) (Staff's Recommendation).

<sup>4</sup> MSEC Waste Water, Inc.'s Response to Order No. 3 and Supplement to Application (May 6, 2020).

as a Class D utility rather than as a Class B utility.”<sup>5</sup> True enough—MSEC WW was asked to provide justification, and it did so in the context of statutory provisions applied to the facts. MSEC WW is a separate corporation, legally incorporated in the State of Texas. Staff does not appear to be challenging that incorporation, but rather wants additional information about MSEC WW’s parent and affiliate, information that has no bearing on the classification of MSEC WW. Staff has provided no support for the relevance of the information. Staff has provided no argument as to how it will make use of any of this information in its determination of the classification of MSEC WW.

Staff makes light of the fact that the Commission has already delved into the financial, managerial, and technical capabilities of MSEC WW as a stand-alone entity in Docket No. 49615 (STM docket).<sup>6</sup> Staff asserts that while this may be the case, the Commission never assessed “whether or not MSEC WW, MSEC Enterprises, Inc., and Mid-South Synergy are managed, governed, and operated by the same set of executives, officers, boards of directors, and employees *such that they are essentially one utility.*”<sup>7</sup> This rather astounding statement is certainly not supported by the record in the STM proceeding. And, Staff has pointed to no instance where a corporate parent or even a corporate affiliate has been required to hold a CCN or have a water or sewer tariff in its name. No reference has been provided by Staff as to how three separate legal corporate entities providing discrete services can be determined to be “one utility.”

Lastly, Staff points to the Commission’s discussions in another docket as the reason for continuing with this discovery effort. As noted by Staff, in Docket No. 47976, the Commission found it difficult to determine which corporate entity within a complex corporate structure

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<sup>5</sup> Motion to Compel at 2.

<sup>6</sup> *Application of MSEC Enterprises, Inc and MSEC Waste Water, Inc for Sale, Transfer, or Merger of Facilities and Certificate Rights in Montgomery County*, Docket No. 49615 (Feb. 28, 2020).

<sup>7</sup> *Id* at 3 (emphasis added).

actually constituted “the utility.”<sup>8</sup> It is not surprising that the Commission found it challenging to unwind that structure and zero-in on the entity that could be identified as the utility. An illustration of the complexity of that structure is attached to this Response as Attachment A.<sup>9</sup> This attachment is a page from the Cost Allocation Manual of the parent of Liberty Utility (Silverleaf Water) the applicant in the docket (referred to as Liberty Silverleaf), showing the ultimate parent Algonquin Power & Utilities Corp, its subsidiaries Liberty Utilities (Canada) Corp, Liberty Utilities Service Corp (LUSC), and “Regulated Utilities.” As described in the final Order in that docket, Liberty Silverleaf is a wholly owned subsidiary of Liberty Utilities (Sub) Corp, which is incorporated in Delaware and is a wholly owned subsidiary of Liberty Utilities Co., a Delaware corporation operating regulated gas, water, sewer and electric utilities in 11 states, which is a subsidiary of Liberty Utilities (Canada) Corp, which is in turn owned by Algonquin Power & Utilities Corp.<sup>10</sup> Liberty Silverleaf has approximately 3,000 water connections and approximately 1,200 active sewer connections, and operates four separate utility systems.<sup>11</sup> Liberty Silverleaf’s water and sewer rate application produced over 800 protests.

Before adopting its Order in Docket No. 47976, the Commission required Liberty Silverleaf to file responses to a number of questions. After unraveling a complex corporate structure and analyzing the answers provided by Liberty Silverleaf, the Commission was satisfied that Liberty Silverleaf was, indeed, the utility: “Liberty Silverleaf is a Class B utility.”<sup>12</sup> The Commission did not delve into board memberships of the five different corporate entities in the chain of ownership of the utility, but rather took at face value the information provided by Liberty Silverleaf.

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<sup>8</sup> *Application of Liberty Utilities (Silverleaf Water) LLC for Authority to Change Water and Sewer Rates*, Docket No. 47976 (Oct. 21, 2019).

<sup>9</sup> Docket No. 47976, Statement of Intent to Change Rates for Water and Sewer Service at 326 (Mar. 19, 2018).

<sup>10</sup> Docket No. 47976, Order at Finding of Fact Nos. 1-4.

<sup>11</sup> *Id.*, at Finding of Fact Nos. 5 and 6.

<sup>12</sup> *Id.*, at Finding of Fact No. 5, Conclusion of Law Nos. 1, 2, and 3.

Staff posed many of the same questions to MSEC WW, and Order No. 5 gave MSEC WW the option of refile as a Class B or answering the questions.<sup>13</sup> MSEC WW chose to answer the questions, as ordered. MSEC WW's responses were in compliance with Order No. 5, and were not concessions to the relevancy of the Staff's current discovery requests, despite Staff's attempts to characterize them as such.<sup>14</sup>

It is instructive to compare both the organization charts of these two utilities – Liberty Silverleaf's shown in Attachment A to this response, MSEC WW's is Attachment B – and their responses to these questions. The organizational charts could not be more different in degrees of complexity.

- The first question asked: what entity constitutes the utility? MSEC WW's response was almost verbatim the same as Liberty Silverleaf's, to-wit: the applicant is the utility because the applicant owns and operates the equipment and facilities used to provide the service, and the applicant receives compensation through its retail rates for providing those services.<sup>15</sup> Liberty Silverleaf described its corporate structure, as did MSEC WW. Liberty Silverleaf stated its owner is not responsible for providing retail services, does not hold the CCN, has never been required to hold a CCN, and is not entitled to demand compensation from customers for Liberty Silverleaf's services to the public. MSEC WW made the same statements.
- The second question asked: which entity or entities own the assets used by the applicant in providing utility service? Liberty Silverleaf responded that it owned the assets; MSEC WW's response was that MSEC WW owns the assets.

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<sup>13</sup> Commission Staff's Supplemental Recommendation on Administrative Completeness of the Application and Notice (Jun. 10, 2020); Order No. 5 (Jun. 11, 2020); MSEC WW had previously provided its organization chart and a full description of its cost allocation procedures.

<sup>14</sup> Motion to Compel at 2.

<sup>15</sup> Docket No. 47976, Liberty Utilities (Silverleaf Water) LLC's Response to Commission Order Requiring Responses to Issues at 1-3 (Sep. 20, 2019) (Liberty Silverleaf Response); MSEC Waste Water, Inc.'s Response to Order No. 5 at 2-3 (Jun. 29, 2020).



- The third question asked: are any employees solely dedicated to the applicant's day-to-day operations? Liberty Silverleaf responded that some employees in Texas work for Liberty Silverleaf as well as other subsidiaries, and it has retained unaffiliated contract operators that are dedicated to two of the systems. MSEC WW's response similarly stated that four employees provide direct services to MSEC WW and the responsibility for day-to-day operations falls solely on these employees.
- The fourth question asked: which entity employs the individuals who perform the utility's day-to-day operations? Liberty Silverleaf replied that a separate entity, Liberty Utilities Service Corp. employs the individuals. Likewise, MSEC WW replied that Mid-South employs the individuals.
- The fifth question asked: which entity directs the employees who perform the day-to-day operations? Liberty Silverleaf responded that it directs the employees. MSEC WW responded that it directs the employees.
- The sixth question asked: which entity directs the day-to-day operations of the applicant? Liberty Silverleaf said it directs its own day-to-day operations, and the same individual who is President of Liberty Silverleaf is also employed by Liberty Utilities Service Corp. MSEC WW responded that it directs its own day-to-day operations.
- The seventh question asked: which entity makes decisions for the applicant regarding investments, loans, and other business activities? Liberty Silverleaf replied that it directs its own day-to-day operations, including investments and other business activities, and when making capital infrastructure and other similar business decisions, Silverleaf confers with its shareholders and parent entities. MSEC WW responded that it makes its own business decisions, including those involving investments, and when making capital infrastructure and other similar business decision, MSEC WW consults with its officers and its own board.
- And finally question 8 asked: if a combination of entities constitutes the utility, how should the commission deal with the entities that are part of the utility but are not

included as parties in this docket; should the entities be joined in the proceeding? Liberty Silverleaf reiterated that only one entity constitutes the utility, that the sole member and parent affiliates of Liberty Silverleaf are not necessary parties because they are not providing utility service, that nothing in the Texas Water Code suggests that the regulation of a utility's shareholders or affiliates as part of the utility is required when the utility is actually responsible for providing service and allowed to receive compensation for the services, and that affiliate transactions are reviewed as part of the application review process. Similarly, MSEC WW's response stated that only one entity constitutes the utility, no other entities are necessary parties because they are not the applicant, neither the utility's sister corporation nor its parent provide sewer utility services or receive payment for such services. MSEC WW further stated that there would be no purpose in making any other entity parties to this proceeding, as the outcome of this proceeding would not affect them at all.

None of Liberty Silverleaf's responses led to another set of questions such as those being propounded now by Staff to MSEC WW. The Commission did not consider it necessary, nor presumably relevant, in that docket to inquire into: (i) the names of all board members for each affiliate or corporate entity in Liberty Silverleaf's chain of ownership (here, RFI Staff 1-1); (ii) the names and titles of all individuals responsible for day-to-day governance and operation of Liberty Silverleaf and each affiliate and all the entities in its chain of ownership (RFI Staff 1-2); (iii) the employer of all such individuals (RFI Staff 1-3); (iv) whether the parent of Liberty Silverleaf can, by agreement, exercise control over Liberty Silverleaf's affiliates (RFI Staff 1-4); (v) whether the parent of Liberty Silverleaf can, by agreement, exercise control over the operations, management decisions, or policies of Liberty Silverleaf (RFI Staff 1-5); (vi) a detailed description of the ownership structure and ownership percentages of every affiliate and entity within the ownership chain of Liberty Silverleaf (RFI Staff 1-6); or (vii) whether Matthew Garlick, identified as both president of Liberty Silverleaf (the utility) and an employee of Liberty Utilities Service Corp (the entity that employs the individuals who perform the utility's day-to-

day operations), may have signed agreements on behalf of both entities (RFI Staff 1-7).<sup>16</sup>

If these questions were not required in Docket No. 47976, a much more complex proceeding than this docket, it is hard to justify their relevance here in order to determine either “who is the utility,” or what classification that utility holds.

Under 16 Texas Administrative Code (TAC) § 22.141(a), parties may obtain discovery regarding any matter, not privileged or exempted . . . that is relevant to the subject matter in the proceeding.<sup>17</sup> Texas Rule of Evidence 401 provides that evidence is relevant if “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”<sup>18</sup> Accordingly, discovery requests must be reasonably tailored to include only matters relevant to the case.<sup>19</sup>

All of the information that might be relevant to a determination of the classification of MSEC WW as a Class D utility has been provided multiple times. MSEC WW has provided the same information that has been required from highly complex entities with thousands of customers and hundreds of ratepayer protests. MSEC WW has 3 customers, 10 connections, and zero protests. The continued investigation by Staff, as illustrated by these discovery requests, will not lead to information that is relevant to the Commission’s proper inquiry in this matter.

Therefore, MSEC WW objects to all of these requests on the grounds that they seek information that is not relevant to the subject matter of this proceeding, nor are they reasonably calculated to lead to the discovery of relevant or admissible evidence.<sup>20</sup> MSEC WW respectfully

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<sup>16</sup> Liberty Silverleaf Response, at 3 and 4.

<sup>17</sup> 16 Tex. Admin. Code (TAC) § 22.141(a).

<sup>18</sup> Tex. R. Civ. Evid. 401; *In re Nat'l Lloyds Ins Co*, 532 S.W.3d 794, 808 (Tex. 2017) (orig. proceeding) (quoting Tex. R. Evid. 401); *In re Liberty County Mut Ins Co.*, 14-19-00932-CV, 2020 WL 3716093, at \*3 (Tex. App.—Houston [14th Dist.] July 7, 2020, no pet. h.); *Diamond Offshore Servs. Ltd v Williams*, 542 S.W.3d 539, 544 (Tex. 2018); *Martinez v. Kwas*, 01-18-01085-CV, 2020 WL 2988452, at \*4 (Tex. App.—Houston [1st Dist.] June 4, 2020, pet. filed).

<sup>19</sup> *In re Liberty County Mut Ins Co.*, 14-19-00932-CV, 2020 WL 3716093, at \*3 (Tex. App.—Houston [14th Dist.] July 7, 2020, no pet. h.); *In re Am Optical Corp*, 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding) (per curiam).

<sup>20</sup> 16 TAC § 22.141(a); Tex. R. Civ. Evid. 401; Tex. R. Civ. Proc. 192.3(a).

requests that its objections to Staff's discovery be sustained and MSEC WW be relieved of responding to these requests. MSEC WW also requests any other relief to which it may show itself justly entitled.

Respectfully submitted,

**LLOYD GOSSELINK ROCHELLE  
& TOWNSEND, P.C.**

816 Congress Avenue, Suite 1900  
Austin, Texas 78701  
(512) 322-5800  
(512) 472-0532 (Fax)  
[gcrump@lglawfirm.com](mailto:gcrump@lglawfirm.com)



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GEORGIA N. CRUMP  
State Bar No. 05185500

**ATTORNEY FOR MSEC WASTE WATER,  
INC.**

**CERTIFICATE OF SERVICE**

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on August 17, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

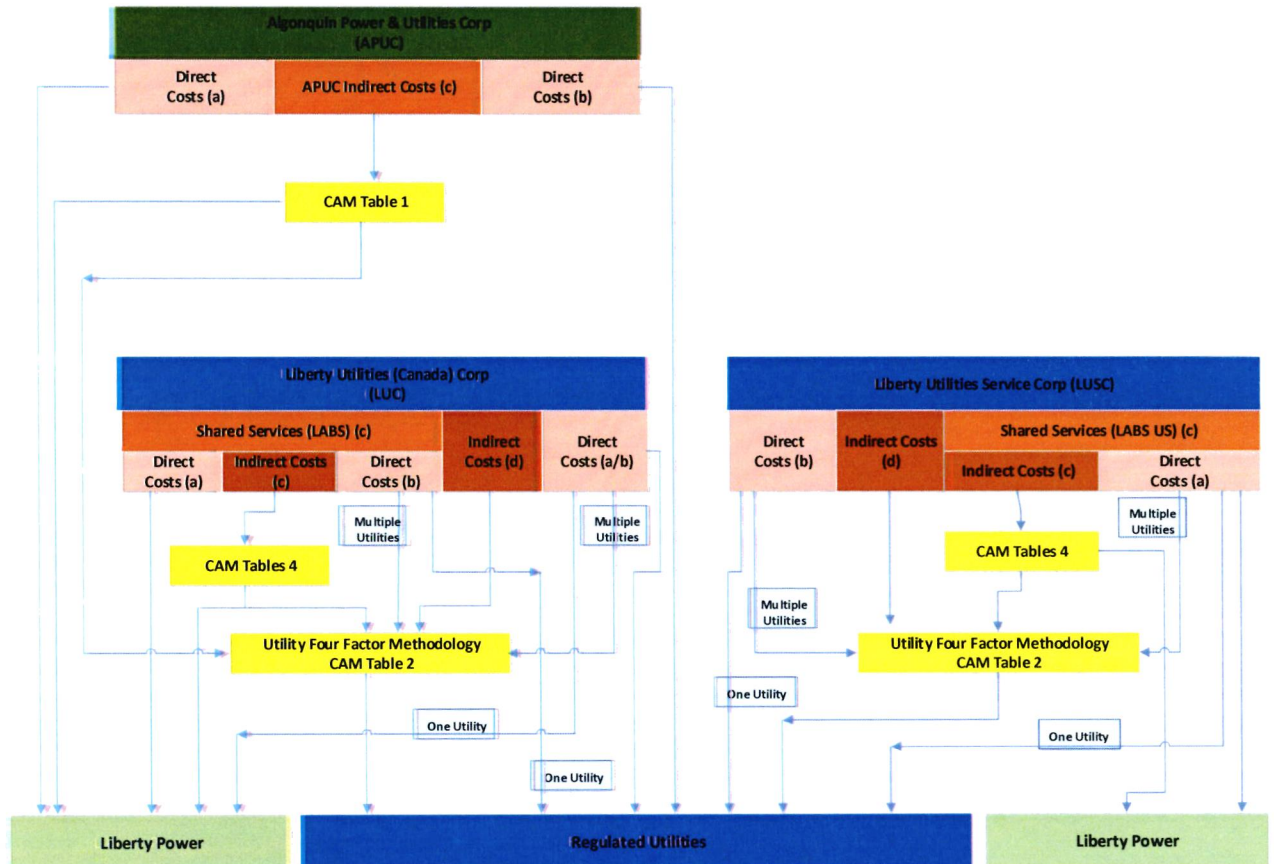


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GEORGIA N. CRUMP

COST ALLOCATION MANUAL

**APPENDIX 6 – COMPOSITE ILLUSTRATION OF ORGANIZATIONAL COST DISTRIBUTION**



Notes:

- (a) Costs that are directly assignable to unregulated companies.
- (b) Costs that are directly assignable to regulated companies.
- (c) Costs that benefit both unregulated and regulated operations
- (d) Costs that benefit all regulated operations.



