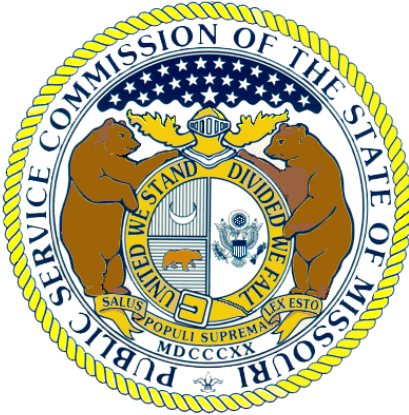


# BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI



In the Matter of the Application of )  
Southern Union Company for the Issuance of )  
an Accounting Authority Order Relating to its )  
Natural Gas Operations and for a )  
Contingent Waiver of the Notice )  
Requirement of 4 CSR 240-4.020(2) )

File No. GU-2011-0392

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## REPORT AND ORDER

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Issue Date: January 25, 2012

Effective Date: February 24, 2012

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In the Matter of the Application of )  
Southern Union Company for the Issuance )  
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its Natural Gas Operations and for a )  
Contingent Waiver of the Notice )  
Requirement of 4 CSR 240-4.020(2) )

## FINAL DECISION GRANTING IN PART, AND DENYING IN PART, ACCOUNTING AUTHORITY ORDER

Issued: January 25, 2012

Effective: February 24, 2012

The application of Southern Union Company (“the Company”) for an accounting authority order (“AAO”) is:

- Granted as to operating and management expenses, and capital costs, because those expenditures constitute extraordinary items. Such items are subject to recording in Account 182.3. Amortization for those items shall start on January 1, 2012, and continue for ten years.
- Denied as to ungenerated revenue.<sup>1</sup> The Company has not carried its burden of proving that its sales dropped, and that any such drop would constitute an “item” for recording in any period. AAOs do not create an item for recording.

This decision does not determine whether any item will be recoverable in a future general rate increase request<sup>2</sup> (“rate case”). This decision constitutes the Commission’s final decision subject to rehearing under Section 386.500, RSMo 2000.<sup>3</sup>

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<sup>1</sup> “Lost revenue,” is the term that the Company and Staff use, but that term is misleading because it suggests that the Company had the money and then lost it, which is untrue. OPC’s term “expected revenue,” is more accurate. “Ungenerated” fully expresses the characteristic determinative of the claim.

<sup>2</sup> As defined at 4 CSR 240-2.065(1).

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## Appearances

For Southern Union Company d/b/a Missouri Gas Energy:

L. Russell Mitten and Paul A. Boudreau  
Brydon, Swearengen & England, PC  
312 East Capitol, P.O. Box 456, Jefferson City, MO 65102.

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<sup>3</sup> 4 CSR 240.2-070(13).

For Staff:

Robert Berlin, Sarah Kliethermes, and Goldie Tomkins  
Missouri Public Service Commission  
200 Madison Street, Suite 800, P.O. Box 360, Jefferson City, MO 65102.

For the Office of the Public Counsel:

Marc Poston  
Office of the Public Counsel  
200 Madison Street, P.O. Box 2200, Jefferson City, MO 65102

Senior Regulatory Law Judge: Daniel Jordan.

### **Procedure**

The Company filed the application on June 6, 2011. On August 19, 2011, Staff filed its recommendation favoring a partial denial of the application and the Company filed a response to the recommendation.<sup>4</sup> The Commission received no application for intervention. The Commission issued notice of a contested case<sup>5</sup> and convened an evidentiary hearing on the application's merits on November 30, 2011. The parties filed briefs on December 23, 2011.

#### **I. Past Commission Decisions**

At the hearing, the parties appropriately shaped their presentations to matters made relevant by the controlling law as they see it. The controlling law, as quoted below, includes Commission regulations that incorporate federal regulations, which have not changed since 1991. Perhaps for that reason, a 1991 Commission decision

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<sup>4</sup> 4 CSR 240-2.080(15).

<sup>5</sup> On September 20, 2011.

("Sibley") figures prominently in all parties' arguments.<sup>6</sup> The Commission's analysis in a past decision may help resolve issues in a later case.

But the parties do not offer analysis to guide the Commission. They offer past findings and conclusions attempting to restrict the Commission's discretion, as if past Commission decisions constitute a body of case law, like appellate court opinions with the weight of stare decisis. Stare decisis does not bind the Commission to past Commission decisions.<sup>7</sup> Such arguments are misleading, and denigrate the authority and duty of the Commission to apply the law to the facts the best it can, which is the same today as it was in the past.<sup>8</sup>

That authority and duty may lead the Commission on any day to read the law differently from the way it read the law 20 years before.<sup>9</sup>

## II. Other States' Decisions

The parties also cite decisions of other commissions. The Company cites a Hawai'i Public Utilities Commission ("Hawai'i PUC") decision ("Hawai'i decision")<sup>10</sup> and

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<sup>6</sup> *In the Matter of the Application of Missouri Public Service for the Issuance of an [AAO]*, 129 P.U.R.4<sup>th</sup> 381 (Dec. 20, 1991).

<sup>7</sup> *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003).

<sup>8</sup> The parties refer to the Sibley decision as though it added something new to USoA, and refer to purported "prevailing case law;" and a Sibley standard, test or requirements. Those references imply that (i) the Sibley decision constitutes a Commission statement implementing, interpreting, or prescribing law or policy; and (ii) such statement generally applies to AAOs. On the contrary, no such Commission statement controls the disposition of this contested case without promulgation as the statutes require. *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 361 (Mo. banc 2001). See also Section 536.021.9, RSMo 2000; Section 386.125, RSMo Supp. 2010.

<sup>9</sup> *Id.* The Company offers a standard under which the Commission may read the law differently only if it can "articulate a sound basis for such a significant change in regulatory policy." *Post-Hearing Brief of the [Company]* at 8-9. In support, the Company cites *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Comm.*, 142 S.W.3d 228, 235 (Mo. App., W.D. 2004), where the court stated, "An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts. 'Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable.' The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision." *Id.* (citations omitted).

Staff and OPC cite a Delaware Public Service Commission (“Delaware PSC”) decision (“Delaware decision”).<sup>11</sup> Those decisions do not bind the Commission<sup>12</sup> and the Commission finds those decisions unpersuasive.

In the Hawai’i decision, the relief, facts, and procedure were significantly different from this case. The Hawai’i utility sought “lost gross margin.”<sup>13</sup> The factual basis was Hurricane Iniki, which destroyed over 30 percent of the utility’s transmission and 30 percent of the utility’s distribution infrastructure. The Hawai’i decision merely approved a settlement just seven weeks after the filing of an application. It cites no controlling authority.

The Delaware decision cites provisions of law that also appear in this decision. But it applies those provisions, without analysis, substituting earlier Delaware PSC decisions for legal reasoning. Earlier Delaware PSC decisions may bind the Delaware PSC, but they do not bind the Commission.<sup>14</sup>

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<sup>10</sup> *Re Citizens Utilities Co., Kauai Elec. Div.*, 138 P.U.R.4<sup>th</sup> 589 (Hawai’i P.U.C., Dec. 9, 1992).

<sup>11</sup> *Re United Delaware, Inc.*, 284 P.U.R.4<sup>th</sup> 496 (Del. P.S.C., Sept. 21, 2010).

<sup>12</sup> *State ex rel. Union Elec. Co. v. Pub. Serv. Comm’n of State of Mo.*, 765 S.W.2d 618, 623 (Mo. App., W.D. App. 1988).

<sup>13</sup> Defined as “revenue lost as a result of its diminished customer base, less variable production costs avoided as a result of diminished demand.” Hawai’i decision at 593.

<sup>14</sup> This moots the Company’s objection to the Delaware decision. The Company objects that the Commission was not asked, and therefore did not take, official notice on the record of the Delaware decision. The Company cites *Prokopf v. Whaley*, 592 S.W.2d 819, 823 (Mo. banc 1980), stating that a reviewing court cannot take official notice of an administrative regulation, which does not apply to the Delaware decision. Because the Delaware decision’s failure to analyze controlling law renders it unhelpful, no prejudice accrues to the Company when we read it.

### III. Standards

The burden of proving the elements of an AAO is with the Company<sup>15</sup> and the quantum of proof is a preponderance of the evidence.<sup>16</sup> Discretion's boundaries generally are careful consideration, justice, and the logic of the circumstances.<sup>17</sup> Under those standards, the Commission independently finds the facts<sup>18</sup> as follows.

### Findings of Fact

1. The Company is a Delaware corporation authorized to do business in Missouri under the fictitious name of "Missouri Gas Energy." the Company's principal office is located at 3420 Broadway, Kansas City, Missouri 64111.

2. The Company provides natural gas services in 29 Missouri counties to approximately 515,000 customers.

3. For the April 2011 billing month, the Company had in the City of:

- a. Joplin, Missouri ("Joplin"):16,165 customers; and
- b. Duquesne, Missouri ("Duquesne"): 533 customers.

### I. The Tornado

4. On May 22, 2011, at 5:17 p.m., the National Weather Service issued a tornado warning for Joplin and Duquesne ("the tornado area") and 24 minutes later, a tornado touched down ("the tornado").

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<sup>15</sup> State ex rel. Tel-Central of Jefferson City, Inc. v. Public Serv. Comm'n of Missouri, 806 S.W.2d 432, 435 (Mo. App., W.D. 1991).

<sup>16</sup> State Board of Nursing v. Berry, 32 S.W.3d 638, 641 (Mo. App., W.D. 2000).

<sup>17</sup> Peters v. ContiGroup, 292 S.W.3d 380, 392 (Mo. App., W.D. 2009).

<sup>18</sup> The findings of fact reflect the Commission's assessments of credibility. Stone v. Missouri Dept. of Health & Senior Services, 350 S.W.3d 14, 26 (Mo. banc 2011).

5. The tornado was a rare multi-vortex tornado, in which the funnel cloud spins off smaller, faster funnel clouds within its edges. The tornado rated an EF-5 on the Enhanced Fujita Scale, the highest rating possible. The tornado was the single deadliest tornado recorded.

6. The tornado took lives and property in the tornado area as follows:

- a. 162 people dead and 900 more injured;
- b. 4,000 residences destroyed and 3,500 more damaged; and
- c. 300 businesses destroyed.

7. The tornado resulted in the disconnection of approximately 3,200 customer meters, which represents 0.62 percent of the Company's customer base.

8. As of the date of the hearing, the Company had reconnected about 1,900 of the customers who lost service due to the tornado.

## II. Expenditures

9. To restore service lost to the tornado, the Company incurred O&M expenses ("O&M") and capital costs ("capital") for repair, restoration, and rebuild activities.

10. Insurance proceeds, government grants, and tax credits will cover some of the O&M and capital.

11. As of July 28, 2011, the Company had spent:

- a. O&M: \$1,042,000.
- b. Capital: \$ 99,500.

12. The projected amounts needed to restore service may run as high as:

- a. O&M: \$1,318,000.

b. Capital: \$6,667,000.<sup>19</sup>

13. Those projected amounts represent proportions of the projected total as follows:

a. O&M: 16.5 percent (1/6).

b. Capital: 83.5 percent (5/6).

14. Amortization will be more accurate the closer it starts to when the Company made the expenditures. Accounting practices amortize expenditures as follows:

a. O&M over five years; and

b. Capital over twenty years.

15. The Company's next rate case will occur no later than approximately September 18, 2013.<sup>20</sup>

### III. Ungenerated Revenue

16. Just after the tornado, in the period May-September 2011, Company revenue was up by \$409,119 in the Company's Missouri service territory overall, over the same period in 2010.<sup>21</sup>

17. Customer payments throughout the Company's service territory fund the Company's fixed costs throughout the Company's service territory.

18. The Company collects revenue under a rate structure called straight fixed-variable ("SFV").

19. SFV attributes each customer's bill to two types of Company cost itemized as follows:

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<sup>19</sup> Company Exhibit 1, page 5 line 9, to page 6 line 7.

<sup>20</sup> Company Exhibit 2, page 20, lines 13 through 16.

<sup>21</sup> OPC Exhibit 2, page 2 line 18, to page 3 line 20.

- a. Fixed: what the Company spends on each customer, whether that the customer consumes gas or not.
- b. Variable: what the Company spends on gas that the customer consumes.

But neither charge represents an exclusive fund for paying the respective cost. The Company may pay either cost amounts collected under either attribution.

20. Any drop in revenue from the tornado area resulting from the tornado-related disconnections (“ungenerated revenue”) threatens neither the Company’s ability to provide safe and adequate service, nor its opportunity to earn a profit.

### **Conclusions of Law**

The Commission independently concludes as follows.

#### **I. Jurisdiction**

The Commission has jurisdiction as follows. The Company is a public utility.<sup>22</sup> Public utilities are within the Commission’s jurisdiction for record-keeping,<sup>23</sup> and rate-setting,<sup>24</sup> both of which are subjects of the parties’ arguments.

Staff and OPC argue that issuing an AAO for ungenerated revenue constitutes retroactive ratemaking and single-issue ratemaking. Retroactive ratemaking and single-issue ratemaking are doctrines founded on constitutional and statutory provisions, respectively. But Missouri case law is directly to the contrary. It states,

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<sup>22</sup> Section 386.020(18) and (43), RSMo Supp. 2010.

<sup>23</sup> Section 393.140(4), RSMo 2000.

<sup>24</sup> Section 393.140(11), RSMo 2000.

generally, that an AAO does not constitute ratemaking.<sup>25</sup> It also states, specifically, that an AAO does not constitute single-issue ratemaking.<sup>26</sup>

Staff and OPC do not make those arguments as to expenditures. Further, Staff and OPC cite no authority for the Commission to determine the validity of the regulations governing this action. Therefore, the Commission will apply its regulations<sup>27</sup> to its findings as follows.

## II. AAOs

The Commission's regulations<sup>28</sup> incorporate 18 CFR 201, the Uniform System of Accounts ("USoA"). USoA is a set of federal regulations that governs utilities' recording of items. USoA includes *General Instructions*, *Definitions*, and *Balance Sheet Accounts Assets and other Debits ("Accounts")*.

### A. Generally

Ordinarily, USoA records any item of profit or loss in the year in which the item occurred ("current" year) as set forth in *General Instructions*:

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<sup>25</sup> *Missouri Gas Energy v. Pub. Serv. Comm'n, State of Mo.*, 978 S.W.2d 434, 438 (Mo. App., W.D. 1998).

<sup>26</sup> *State ex rel. Office of Pub. Counsel v. Pub. Serv. Comm'n of Missouri*, 858 S.W.2d 806, 813 (Mo. App., W.D. 1993).

<sup>27</sup> *State ex rel. Stewart v. Civil Serv. Comm'n of St. Louis*, 120 S.W.3d 279, 287-88 (Mo. App., E.D. 2003).

<sup>28</sup> 4 CSR 240-40.040(1). The Commission made that regulation under the statutory delegation of authority at Section 393.140(4), RSMo 2000, "to prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations [and] forms of accounts, records and memoranda to be kept by such persons and corporations [.]". The Company notes that a change "in the required method or form of keeping a system of accounts" requires six months' notice "to such persons or corporations." Orders of uniform application, as described in that 1913 statute, are now subject to today's statutes on rulemaking. Section 386.250(6); and Sections 536.021 and 386.125, RSMo Supp. 2010. (Compare Section 393.140(8), RSMo 2000, which provides a hearing when the Commission inspects the books of a specific "corporation or person" and makes an order as to a "particular" item.) Rulemaking includes amending a rule. Section 536.021.1, RSMo Supp. 2010. The Commission cannot make a rule through adjudication. *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 361 (Mo. banc 2001). This decision addresses only the Company's right to record the items described in the application, and does not change the uniform method or form of keeping accounts for gas corporations. Therefore, this decision may take effect in less than six months.

[N]et income shall reflect all items of profit and loss during the period with the exception of [certain items].<sup>29]</sup>

And:

All other items of profit and loss recognized during the year shall be included in the determination of net income for that year. [<sup>30]</sup>

"Shall" signifies a mandate and means "must" in the present tense.<sup>31</sup> As Staff aptly describes it, USoA "defaults" to current recording.

The year in which a utility records an item is important because of Commission practice in setting utility rates. Commission practice is to project a utility's future cost of service from a historic test year. If that test year does not include a certain item, that item will not count in setting the rates. Current recording thus excludes items outside the test year from consideration in rate-setting. That is true even for items with far-reaching effects for the utility and the customer.

To protect just and reasonable rates, USoA requires the utility to record certain items in a special account designated "182.3 Other regulatory assets:"

A. This account shall include the amounts of regulatory-created assets, not includible in other accounts, resulting from the ratemaking actions of regulatory agencies. (See Definition No. 31.) [<sup>32]</sup>

Definition No. 31 provides:

Regulatory Assets and Liabilities are assets and liabilities that result from rate actions of regulatory agencies.

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<sup>29</sup> General Instruction No. 7 (emphasis added).

<sup>30</sup> General Instruction No. 7.1 (emphasis added).

<sup>31</sup> *State ex rel. Scott v. Kirkpatrick*, 484 S.W.2d 161, 164 (Mo. banc 1972). That requirement is subject to "a variance from the provisions of this rule, in whole or in part, for good cause shown, upon a utility's written application" under 4 CSR 240-40.040(5). No such application is before the Commission.

<sup>32</sup> Account No. 182.3.

Regulatory assets and liabilities arise from specific revenues, expenses, gains, or losses that would have been included in net income determinations in one period under the general requirements of [USoA] but for it being probable: 1) that such items will be included in a different period(s) for purposes of developing the rates the utility is authorized to charge for its utility services [<sup>33</sup>]

Regulatory assets in Account 182.3 are thus preserved beyond their current year for consideration in later rate case. In Commission practice, that treatment is called “deferral” and a Commission order directing that treatment is called an AAO.

An AAO is only necessary to defer an item that is less:

. . . than approximately 5 percent of income, computed before extraordinary items. Commission approval must be obtained to treat an item of less than 5 percent, as extraordinary. [<sup>34</sup>]

The last sentence expressly provides “Commission approval . . . to treat an item of less than 5 percent, as extraordinary.”<sup>35</sup> Otherwise the utility makes those determinations for itself every day.

To summarize:

- A utility must record all items of profit and loss.
- The utility routinely does that on its own.
- A utility must determine the recording year: current or deferred.
- The utility routinely does that on its own, too.
- No AAO is necessary for any recording, except to defer 5 percent or less.

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<sup>33</sup> Definition No. 31.

<sup>34</sup> General Instruction No. 7.

<sup>35</sup> That plain language shows that two arguments of Staff and OPC to the contrary are meritless: (i) deferral is possible only for amounts greater than 5 percent of income; and (ii) the Company should file rate case.

- Items deferred are preserved for consideration in a later rate case.<sup>36</sup>

The elements of an AAO are as follows.

## B. Extraordinary

USoA makes an exception to current recording for:

Extraordinary items. . . . Those items related to the effects of events and transactions which have occurred during the current period and which are of unusual nature and infrequent occurrence shall be considered extraordinary items. Accordingly, they will be events and transactions of significant effect which are abnormal and significantly different from the ordinary and typical activities of the company, and which would not reasonably be expected to recur in the foreseeable future [<sup>37</sup>]

That language examines an event's:

- Time (during current period);
- Rarity (unusual, infrequent, not foreseeably recurring, activities abnormal and significantly different from the ordinary and typical,); and
- Effect (significant).

Those characteristics are all manifest in the tornado. The tornado occurred in the current period because it occurred on May 22, 2011, which was the period of the application. The tornado was rare because it caused damage unseen in the United States for 60 years. The tornado had a significant effect because it disconnected 3,200 meters.<sup>38</sup> Therefore, "items related to the effects of" the tornado are extraordinary, and are subject to deferred recording.

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<sup>36</sup> Later consideration in a rate case may explain why prior authorization is required for smaller items and not for larger items. As in this case, small items may cause disproportionately large litigation. Such litigation is better before a rate case than during a rate case.

<sup>37</sup> General Instruction No. 7 (emphasis added).

<sup>38</sup> Staff's and OPC's restriction of "significant effect" to dollar amounts has no basis in USoA.

### C. Items

If an event is extraordinary, consequent items are free from current recording. The Company and Staff agree, and OPC does not object, to deferred recording for the O&M and capital (together, “actual expenditures”) required to restore the Company’s service after the Joplin tornado. Because those expenditures are extraordinary, their recording shall be deferred.

#### *i. Amount*

Each party offered evidence of the amounts spent on restoration. But the expenditures were continuing as of the hearing date, so any number based on the record in this action was already obsolete when it was offered. An amount certain for 2011 is ascertainable only when all information for 2011 is available. In other words, this AAO consists of:

. . . just putting all this stuff in a box and saying, hey we're going to take a look at this box later on and determine whether it's appropriate to be . . . recovered or not [<sup>39</sup>]

The Commission has approximated as best it can the eventual amounts required to restore service. But no further finding is necessary or helpful, so the Commission will make its order as to the quality, but not the quantity, of items subject to deferral.

#### *ii. Amortization*

The parties dispute the period and start date of amortization for deferred expenditures. The Company requests a five year period. The record shows that the standard amortizations are (i) five years for O&M, and (ii) twenty years for capital. The Company estimates that the ratio of eventual expenditures will be approximately 5/6

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<sup>39</sup> Transcript, volume II, page 61 line 23 to page 63 line 1.

capital and 1/6 O&M. Therefore, the Commission will set amortization at Staff's recommended ten years.<sup>40</sup> The Commission will order the amortization to begin on January 1, 2011 because a closer start date yields a more accurate result.

### *iii. Conditions*

OPC asks the Commission to condition any AAO on a requirement that the Company file a rate case generally no later than May 22, 2013. The Company argues that such an action is already due by September 18, 2013, because its rate includes an infrastructure and system replacement surcharge ("ISRS"), which requires a rate case every three years. OPC's premise is that General Instruction No. 7 bars deferral below 5 percent, which the plain language refutes.

OPC also asks the Commission to impose a condition that safeguards against deferring expenditures that the Company was scheduled to make anyway because such expenditures are not "related to the effects of" the tornado. That determination will be ripe if the Company offers scheduled items as deferred items in its next rate case. In any event, OPC proposes no such language that would provide what it wants.

Also, OPC proposes no language providing its proposed conditions. The Company does not object to Staff's proposed conditions: including all setoffs and detailed documentation. Therefore, the Commission will grant the application as to expenditures as described, subject to Staff's proposed conditions as set forth in the ordered paragraphs.

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<sup>40</sup> This is less generous than the Company's requested five-year period, but substantially more generous than the weighted average of the periods for capital and O&M.  $(20 \times 5) + (5 \times 1) / 6 = 17.5$ . On this matter the Commission gives weight to Staff's expertise in accounting practice.

### III. Probable Recovery

Staff and OPC argue that the Company must also prove that an item is “probably” recoverable in the next rate case. The Company argues that no such requirement exists. The Company is correct.

#### A. Recording Period

Staff and OPC cite the description of a regulatory asset that appears in both *Definitions and Accounts*.

Staff and OPC read “the Commission will probably allow recovery for such items” in the following:

Regulatory Assets and Liabilities are assets and liabilities that result from rate actions of regulatory agencies. Regulatory assets and liabilities arise from specific revenues, expenses, gains, or losses that would have been included in net income determinations in one period under the general requirements of the Uniform System of Accounts but for it being probable: 1) that such items will be included in a different period(s) for purposes of developing the rates the utility is authorized to charge for its utility services [<sup>41</sup>]

And:

B. The amounts included in this account are to be established by those charges which would have been included in net income, or accumulated other comprehensive income, determinations in the current period under the general requirements of the Uniform System of Accounts but for it being probable that such items will be included in a different period(s) for purposes of developing rates that the utility is authorized to charge for its utility services [<sup>42</sup>]

That language refutes Staff’s and OPC’s reading as follows.

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<sup>41</sup> Definition No. 31 (emphasis added).

<sup>42</sup> Emphasis added.

As the Company notes, the language addresses only the period of inclusion. It describes items that “would have been included in” “one” or “the current” “period “but for it being probable that such items will be included in a different period.” The period of inclusion, current or different, is the only distinction between regulatory assets and other assets under the quoted language. And to be included for purposes of developing rates does not equal “recoverable.” Many items are included in the Commission’s consideration when the Commission develops rates. Some items merit recovery, and others do not, but that determination occurs in a later rate case.

This is plain from other provisions, not cited by Staff and OPC, of Account No. 182.3:

C. If rate recovery of all or a part of an amount is disallowed, the disallowed amount shall be charged to Account 426.5, Other Deductions, or Account 435, Extraordinary Deductions, in the year of disallowance.

D. The records supporting the entries to this account shall be kept so that the utility can furnish full information as to the nature and amount of each regulatory asset included in this account, including justification for inclusion of such amounts in this account. [<sup>43</sup>]

In other words, Account No. 182.3 is for an amount that:

- Would be included in the current period for determining income; but
- Will probably be included in a different period for developing rates;
- For which recovery will be determined later based on records kept.

That simply describes deferred recording: recording an item as paragraph B describes, for determination of recovery in a later rate case as paragraph C describes, based on records as paragraph D describes.

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<sup>43</sup> Account No. 182.3 (emphasis added).

Deferred recording—preserving an item for consideration in a later ratecase—is the relief that an AAO grants, as described by the case law footnoted above and worth quoting here:

In [an earlier] case, the court made it clear that AAOs are not the same as ratemaking decisions, and that AAOs create no expectation that deferral terms within them will be incorporated or followed in rate application proceedings. The whole idea of AAOs is to defer a final decision on current extraordinary costs until a rate case is in order. At the rate case, the utility is allowed to make a case that the deferred costs should be included, but again there is no authority for the proposition put forth here that the PSC is bound by the AAO terms. [<sup>44</sup>]

And:

The Commission authorized [the utility] to defer certain costs by recording them in Account No. 186. The Commission's order did not presume to determine a new rate but effectively permitted [the utility] the option to file a rate case by December 31, 1992, and then to present evidence and argue that the deferred costs recorded in Account No. 186 should be considered by the Commission in approving a rate change.[<sup>45</sup>]

That case law holds that an AAO simply sets an item aside for later consideration in a separate action.

Staff and OPC leave unexplained two crucial matters. The first is why the Commission would determine recoverability twice: once in this action and again in the later rate case.<sup>46</sup> The second is “probability.” Staff and OPC leave probability undefined

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<sup>44</sup> *Missouri Gas Energy v. Pub. Serv. Comm'n, State of Mo.*, 978 S.W.2d 434, 438 (Mo. App., W.D. 1998) (citation omitted).

<sup>45</sup> *State ex rel. Office of Pub. Counsel v. Pub. Serv. Comm'n of Missouri*, 858 S.W.2d 806, 813 (Mo. App., W.D. 1993).

<sup>46</sup> Staff and OPC may believe that, under their theory, they need win only once and the Company must win twice. But see, *State ex rel. Praxair, Inc. v. Missouri Pub. Serv. Comm'n*, 344 S.W.3d 178, 186-88 (Mo. banc 2011).

so neither Commission nor a reviewing court can tell whether the evidence meets that standard.

Therefore, the Commission concludes that “but for it being probable” does not make “probable recovery” an element of the Company’s claim.

#### B. Capitalization of Regulatory Assets

OPC cites Financial Accounting Board Standard No. 71, Section 9 (“FAS 71.9”). FAS 71.9 does not govern this Commission under any law cited. Even if it did, FAS 71.9 does not set requirements for the issuance of an AAO and does not discuss the period for recording an item.

FAS 71.9 constitutes a guideline for accounting treatment of Company assets. That determination must account for Commission actions according to FAS 71.9. FAS 71.9 thus describes the accounting consequences of—not the legal prerequisites for—deferred recording as follows.

First, the Commission may create a regulatory asset:

Rate actions of a regulator can provide reasonable assurance of the existence of an asset.

Second, if recovery of a past cost will generate enough revenue to cover that cost, the Company must capitalize it:<sup>47</sup>

An enterprise shall capitalize all or part of an incurred cost that would otherwise be charged to expense if both of the following criteria are met:

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<sup>47</sup> That treatment, Staff and OPC argue, leads to further undesirable consequences: that an AAO for ungenerated revenue will relieve the Company of business risk, shift that risk to ratepayers, and distort the Company’s financial image. Those considerations can support allocation of a loss to the utility, as in *State of Missouri ex rel. Union Elec. Co.*, 765 S.W.2d 618 (Mo. App., W.D. 1988). The Commission addresses those considerations in its rejection of the ungenerated revenue claim below.

a. It is probable that future revenue in an amount at least equal to the capitalized cost will result from inclusion of that cost in allowable cost for rate-making purposes.

b. Based on available evidence, the future revenue will be provided to permit recovery of the previously incurred cost rather than to provide for expected levels of similar future costs. If the revenue will be provided through an automatic rate adjustment clause, this criterion requires that the regulator's intent be to permit recovery of the previously incurred cost. [<sup>48</sup>]

FAS 71.9 addresses capitalization of deferred claims, not standards for granting the application.<sup>49</sup> Therefore, the word "probable" does not make probable recovery an element of the Company's claim.

#### C. Summary as to Probable Recovery

Staff's "probable recovery" argument creates a new kind of mini-rate case outside of any other rate case. No such intent appears anywhere in the controlling law. The Commission concludes that "probable recovery" is not an element of a claim for an AAO.

### IV. Ungenerated Revenue

The Company also seeks to record ungenerated revenue in Account 182.3 in an amount equal to its fixed cost charge times the customers who lost service due to the tornado. The Company argues that customers disconnected due to the tornado don't pay bills, part of which is earmarked as fixed costs, so the Company cannot pay its fixed costs. Staff and OPC allege that there was no drop in revenue and that nothing prevents the Company from paying its fixed costs. Staff and OPC also argue that

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<sup>48</sup> FAS 71, Section 9 (emphasis added).

<sup>49</sup> "As can be seen, not only do these laws and regulations not share a common purpose, they likewise don't even address a common subject matter." *Dep't of Soc. Servs. v. Senior Citizens Nursing Home Dist. of Ray County*, 224 S.W.3d 1, 14 (Mo. App., W.D. 2007).

revenue not generated, from service not provided, is not an “item” for recording in any period. Staff and OPC are correct.

#### A. No Drop in Revenue and No Unpaid Costs

The Company hypothecates a loss by isolating a drop in revenue in the tornado area. No authority makes that area relevant to exclusion of the rest of the Company’s service territory. On the contrary, Staff and OPC showed that Company revenue is up.

Staff and OPC supported their allegations with evidence that supports the findings above as follows. The maximum number of meters disconnected was less than two-thirds of one percent of the Company’s customer base. Over half were re-connected as of the date of the hearing. Company revenue was up \$409,119 in the months after the tornado over the same time the previous year. The Company made no attempt to rebut that evidence, which negates the Company’s allegation of a “loss.”

Even if there were a drop in revenue, it would not prevent recovery of fixed costs.

The Company argues that:

Consequently, instead of covering its fixed costs through rates, the funds necessary to pay those costs are coming directly from MGE's earnings. Requiring MGE to dip into earnings to cover its fixed costs of providing service acts to deny the company the reasonable opportunity to earn a fair rate of return to which it is entitled by law. [<sup>50</sup>]

But that happens whenever a customer leaves the Company’s service under ordinary events. The Company equates a customer’s departure to a reduced opportunity for profit while ignoring the costs saved by providing no service. The Company offers no authority for its lopsided definition of opportunity to earn.

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<sup>50</sup> Transcript, volume II, page 30, lines 20 through 25.

SFV does not create two types of money. SFV merely attributes the Company's costs of serving a customer class to a line on customer bills. The Company stands SFV on its head, changing it from a description of how the Company collects revenue to a prescription for how the Company shall spend revenue. The Company offered no evidence that revenue continuously generated, from its 511,800 customers not deprived of service, is insufficient to cover fixed costs.

On the contrary, the rates that the Company is collecting throughout the State include amounts for its fixed costs throughout the State. The absence of any real loss makes the case for rejection of ungenerated revenue even stronger than in State of Missouri ex rel. Union Elec. Co.<sup>51</sup> In that case, the item rejected was money actually spent on the aborted Callaway II power plant ("cancellation costs"). The utility claimed recovery of cancellation costs, the Commission rejected that claim, and the Court of Appeals affirmed on that point. Reasons for allocating the loss to the utility included the compensation for business risk that the utility receives in its rates. The Commission need not guarantee the Company's profit, nor shift the risk of disappointing profits to ratepayers, especially when the source of disappointment is the provision of no service.

#### B. No Item

In support of recording ungenerated revenue on a deferred basis, the Company urges the Commission to look only at whether the tornado was extraordinary. Staff and OPC argue that the AAO sought would not only allow the recording of an item, it would create the item recorded. Staff and OPC are correct.

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<sup>51</sup> 765 S.W.2d 618 (Mo. App., W.D. 1988).

An extraordinary item is simply one that would ordinarily be currently recorded according to *Definitions and Accounts*. Account No. 182.3 provides:

B. The amounts included in this account are to be established by those charges which would have been included in net income, or accumulated or other comprehensive income, determinations in the current period under the general requirements of [USoA.<sup>52</sup>]

Definition No. 31 provides:

. . . Regulatory assets and liabilities arise from specific revenues, expenses, gains, or losses that would have been included in net income determinations in one period under the general requirements of [USoA.<sup>53</sup>]

Deferred recording is merely the alternative to current recording.

The Company argues that the Commission must allow deferral of revenues because the Commission allowed deferral of costs in the Sibley decision and USoA applies equally to both. The Company's premise is right but its conclusion is wrong. Consistent application of USoA results in different results on different facts.

As Staff notes, in the Sibley decision, the Commission deferred recording of actual expenditures. This explains the language on which the Company relies:

[T]he decision to defer costs associated with an event turns on whether the event is in fact extraordinary and nonrecurring. [<sup>54</sup>]

Actual expenditures exist in the past, present, or future and represent an exchange of value that the Company must record. Ordinarily, the Company records them currently and, if they are extraordinary, the Company must record them in Account 182.3.

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<sup>52</sup> Emphasis added.

<sup>53</sup> Emphasis added.

<sup>54</sup> 129 P.U.R.4<sup>th</sup> at 385 (emphasis added).

The Company's claim is different. Ugenerated revenue never has existed, never does exist, and never will exist. Revenue not generated, from service not provided, represents no exchange of value. There is neither revenue nor cost to record, in the current period nor in any other.

The Company showed no instance when service not provided resulted in recording any revenue or cost, lost or generated, on a deferred or current basis. That is because the Company cannot have an item of profit or loss when it provides no service, whether the cause of no service is ordinary or extraordinary. Services not provided and revenues not generated are mere expectancies, are things that simply did not happen, and are not items at all.

#### C. Summary as to Ugenerated Revenue

An AAO only determines the period for recording an item but the Company seeks an AAO to create the item itself by layering fiction upon fiction. To issue an AAO for ungenerated revenue would create a phantom loss, and an unearned windfall, for the Company. Therefore, the Commission will deny the AAO as to ungenerated revenue.

#### V. Summary

Each party conflates this action with an irrelevant agenda. The Company wants the Commission to make an item out of something it never records otherwise, while Staff and OPC want the Commission to determine that the newly minted item will not be recoverable when the Company raises it in an action not yet filed. Neither matter is within the function of an AAO.

#### Rulings

Therefore, the Commission issues its AAO as follows.

## **THE COMMISSION ORDERS THAT:**

1. The *Application* of Southern Union Company (“the Company”) for an accounting authority order (“AAO”) to defer recording items related to the effects of the Joplin tornado of May 22, 2011, to Account No. 182.3, Other Regulatory Assets, (“application”) is denied in part and granted in part as follows.

2. The application is denied as to ungenerated revenue as described in the body of this order.

3. The application is granted as to actual incremental operations and maintenance expenses, and capital costs, associated with repair and restoration activities, with depreciation and carrying charges equal to the Company’s ongoing Allowance for Funds Used during Construction rates associated with capital expenditures.

4. Authority to defer recording is conditioned on the following. The Company shall:

- a. Not seek to recover through its Infrastructure System Replacement Surcharge rate any capital costs for which it is deferring depreciation and carrying charges under this order.
- a. Apply, to the total amount of deferred costs, any insurance claim proceeds, government payments, government credits, and other offsets applicable to incremental operation and maintenance expense or capital expenditures.

- b. Ratably amortize deferred costs expense over a ten-year (120-month) period beginning on January 1, 2012, and concluding on December 31, 2021.
- c. Maintain records, invoices and other documents as required by 18 CFR 201, Account No. 182.3. For each expenditure in Account No. 182.3, those records shall support the nature and amount, including any related deferred taxes recorded as a result of the cost deferral, and shall justify inclusion. The Company shall make such records available for review by the Commission Staff, the Office of the Public Counsel, and other interveners, pursuant to 4 CSR 240-2.085 and Section 386.480, RSMo.

5. Nothing in this order shall constitute a finding or conclusion by the Commission of the reasonableness of any amount deferred, and the Commission reserves the right to consider the ratemaking treatment to be afforded any deferred amount.

6. This order shall become effective February 24, 2012.

7. This file shall close on February 25, 2012.

**BY THE COMMISSION**



Steven C. Reed  
Secretary

( S E A L )

Gunn, Chm., Jarrett and Kenney, CC, concur,  
Stoll, C., abstained,  
and certify compliance with the provisions of  
Section 536.080, RSMo.

Jordan, Senior Regulatory Law Judge