BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Spire Missouri Inc. for an Accounting Authority Order Concerning Its Commission Assessment for the 2019 Fiscal Year	))))	**File No. GU-2019-0011**

INITIAL POSTHEARING BRIEF OF

MIDWEST ENERGY CONSUMERS GROUP

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I. BACKGROUND AND OVERVIEW OF POSITION

On July 13, 2018, Spire Missouri filed an Application for an Accounting Authority Order seeking to defer an increase in its regular assessment for fiscal year 2019.[1] As a result of the significant amount of regulatory activity initiated by Spire in 2018, its regulatory assessment necessarily increased. In past years, this same increase has been experienced in the year following Laclede / MGE rate cases. Not surprisingly, however, the regulatory assessment immediately returned to more normal levels in subsequent years when Laclede / MGE did not have rate cases.

As this brief demonstrates, because of the prohibition against retroactive ratemaking, the use of deferral accounting is generally forbidden. That said, however, the Courts have recognized an exception for "extraordinary" costs. Thus, costs arising from ice storms, tornados and floods, that are not otherwise included in rates, may be deferred for recovery in future rate cases. Ordinary costs, such as transmission costs, property taxes and cyber-security costs, since they are already included in rates, are not subject to deferral accounting.

[1] The Commission's fiscal year runs from July 1 through June 30. Therefore, the Commission addressed the 2019 regulatory assessment in an order dated June 20, 2018 in Case No. AO-2018-0379.

In this case, Spire seeks to defer an increase in Missouri regulatory assessment. As the evidence indicates, this is an "ordinary" cost that is already included in rates. Much like an increase in property taxes which the Commission has repeatedly held is not subject to deferral,[2] the Commission should similarly find that an increase in a utility's regulatory assessment may also not be deferred. Importantly, the Commission should also be aware that the increase in Spire's regulatory assessment is primarily a function of Spire's approach in its most recent rate case to "pad its revenue requirement" and raise issues "consistently denied" by the Commission solely for the benefit of its shareholders. Given Spire's approach in that rate case to solely benefit shareholders, it should not now be heard to complain when its regulatory assessment has been increased.

II. THE EXTRAORDINARY STANDARD IS BASED UPON 25 YEARS OF CASE LAW

Historically, and without fail, the Commission has applied the "extraordinary" standard to requests for deferral accounting.[3] The rationale for applying the "extraordinary" standard is justified through over 25 years of Missouri court decisions.

In 1979, and prior to the current statutory authorization for fuel adjustment clauses, the Missouri Supreme Court considered the Commission's utilization of a fuel adjustment clause. In

[2] See, Case No. ER-2014-0370, *Report and Order*, issued September 2, 2015, at pages 55-57 ("The Commission concludes that KCPL has not met its burden of proof to demonstrate that projected property tax increases are extraordinary."). See also, Case No. WU-2017-0351, *Report and Order*, issued December 20, 2017 ("The issue is whether the increase in MAWC's property taxes to the Counties for 2017 and the beginning of 2018 resulted from an event that would be considered "unusual" or "extraordinary" under NARUC USOA. That is to say, did the Counties' implementation of a different standard for assessing MAWC's property taxes cause an unusual, unique and nonrecurring event worthy of exceptional treatment? For the following reasons, the Commission finds they do not. ***There is nothing unusual or extraordinary about paying property taxes to warrant an AAO. It is a recurring expense***.") (emphasis added).

[3] Deferral accounting is involved with both requests for an Accounting Authority Order or a tracker. Under both mechanisms, costs from a previous period are deferred for treatment in a later period.

that decision,[4] the Court held that it is unlawful, absent express statutory authority, to engage in retroactive ratemaking (the recovery of past losses in future rates).

> The utilities take the risk that rates filed by them will be inadequate, or excessive, each time they seek rate approval. To permit them to collect additional amounts simply because they had additional past expenses not covered by either clause is retroactive rate making, i.e., the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate actually established. ***Past expenses*** are used as a basis for determining what rate is reasonable to be charged in the future in order to avoid further excess profits or future losses, but under the prospective language of the statutes, §§ 393.270(3) and 393.140(5), they ***cannot be used to set future rates to recover for past losses due to imperfect matching of rates with expenses***.[5]

Thus, under a strict application of the *UCCM* decision, the Commission is precluded from ever utilizing deferral accounting absent the express statutory authorization contained in statutes like the fuel adjustment clause statute[6] and the gas and water ISRS statute.[7]

Given the broad nature of the UCCM prohibition against retroactive ratemaking, it would appear that any deferral of costs for future consideration would be prohibited absent express statutory authorization. In 1993, however, the Commission recognized that the ratemaking process does provide for utility recovery of extraordinary expenses. In a case involving the rebuild of the Sibley generating station, the Commission sought to provide an exception to the prohibition against deferral accounting / retroactive ratemaking for extraordinary costs.

> The Commission does not consider the granting of the deferrals of extraordinary items either single-issue or retroactive ratemaking as argued by Public Counsel. Retroactive ratemaking occurs when rates are set to recover for past deficiencies or to refund past excesses. . . The deferrals approved in Case No. EO-91-358 do not constitute retroactive ratemaking since they involve items which have been found to be extraordinary and therefore outside the current period match of revenues and expenses. Costs associated with extraordinary events such as losses,

[4] State ex rel. Utility Consumers Council of Missouri v. Public Service Commission, 585 S.W.2d 41 (Mo. banc 1979) (emphasis added, citations omitted) ("UCCM").
[5] *UCCM* at 59 (emphasis added).
[6] Section 386.266
[7] Section 393.1000 et seq.

> cancellations or service threatening timing differences have been authorized by the Commission.[8]

On appeal from the Commission's decision, the Missouri Court of Appeals recognized an exception to the doctrine against retroactive ratemaking, but limited that exception solely to "extraordinary events".[9]

> The Commission's decision to grant authority to defer the costs associated with the Sibley reconstruction and coal conversion projects by recording the costs in Account No. 186 was the result of the Commission's determination that the construction projects were unusual and nonrecurring, and therefore, extraordinary. The Commission determined the projects to be unusual because of their size and substantial cost. The Commission expressed that deferral of costs just to support the current financial status distorts the balancing process utilized by the Commission to establish just and reasonable rates. ***Because rates are set to recover continuing operating expenses plus a reasonable return on investment, only an extraordinary event should be permitted to adjust the balance to permit costs to be deferred for consideration in a later period***.[10]

Thus, absent specific statutory authority, the only authority for the Commission to engage in deferral accounting is the limited exception provided by the Sibley court. Specifically, absent specific statutory authority, the Commission's authority to defer costs is where such costs are extraordinary ("unusual and nonrecurring, and therefore extraordinary").

In the 25 years since the Court's acceptance of the "extraordinary event" exception to the prohibition against retroactive ratemaking, the Commission has faithfully applied that standard to requests for Accounting Authority Orders / trackers. Recently, in a case involving KCPL's request for trackers for transmission costs, property taxes and cyber-security costs, the Commission again applied the "extraordinary" standard and the definition of "extraordinary" provided in the Uniform System of Accounts ("USOA").

[8] Case No. EO-91-358, Report and Order, issued December 20, 1991, 1 Mo.PSC 3d 200, 212-213.
[9] State ex rel. Office of the Public Counsel v. Public Service Commission, 858 S.W.2d 806 (Mo. App. 1993).
[10] State ex rel. Office of the Public Counsel v. Public Service Commission, 858 S.W.2d 806, 811 (Mo.App. 1993) (emphasis added).

> The evidence presented in this case showed that KCPL's transmission costs, while having increased in recent years, are normal, ordinary and recurring operation costs. ***These recurring costs are not abnormal or significantly different from the ordinary and typical activities of the company, so they are not extraordinary and, therefore, not subject to deferral under the USoA***. The Commission concludes that KCPL has not met its burden of proof to demonstrate that projected transmission cost increases are extraordinary, so its request for a transmission tracker will be denied.[11]

Not satisfied with the Commission's steadfast adherence to the "extraordinary" standard, KCPL appealed the Commission's decision to reject deferral accounting for transmission costs, property taxes and cyber-security costs to the Western District Court of Appeals. There, the Court of Appeals again upheld the limited exception to the prohibition against retroactive ratemaking.

> KCPL claims the PSC erred in denying its request for a "tracker" accounting deferral mechanism because the legal conclusion by the PSC that only "extraordinary" items could be deferred as regulatory assets is unlawful and unreasonable because it is contrary to the Uniform System of Accounts ("USOA"), adopted by the PSC, because the USOA does not require that revenues, expenses, gains or losses be "extraordinary" in order to be deferred as a regulatory asset or liability. . . KCPL's arguments regarding the USOA and its alleged right to use a tracking accounting deferral mechanism completely ignore that the PSC's decision that only extraordinary expenses should be allowed such treatment. . . [W]e will not second-guess the PSC's reasoned decision that only extraordinary items may qualify for deferral treatment.[12]

In recent years, recognizing the Commission's inability to extend deferral accounting beyond "extraordinary" events, the utilities have attempted to pass legislation which would allow for broad application of such deferral accounting. For instance, during the 2017 extraordinary session, Senate Bill 6 sought to provide the Commission the statutory authorization to utilize

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[11] *Report and Order*, Case No. ER-2014-0370, issued September 15, 2015, at page 54 (emphasis added). Similarly, the Commission applied the extraordinary standard to KCPL's request for deferral accounting for property taxes at page 56 ("The Commission concludes that KCPL has not met its burden of proof to demonstrate that projected property tax increases are extraordinary, so its request for a property tax tracker will be denied.) and cyber-security costs at page 58 ("The Commission concludes that KCPL has not met its burden of proof to demonstrate that projected CIP/cyber-security increases are extraordinary, so its request for a tracker will be denied.").

[12] In re: Kansas City Power & Light Company, 509 S.W.3d 757 (Mo.App. 2016).

trackers and deferral accounting such that it was not limited by the "extraordinary" standard. Still again, in 2018, House Bill 2058 sought to provide broad statutory authority to implement deferral accounting without the restriction of the "extraordinary" standard. In both cases, the proposed legislation failed to advance through the General Assembly.[13]

Recognizing the lack of express statutory authority to utilize deferral accounting, except in cases of a fuel adjustment clause, infrastructure system replacement surcharge and other specific statutorily authorized mechanisms, the Commission is bound by the prohibition against retroactive ratemaking and the limited exception in situations of "extraordinary" events.[14]

III. THE COMMISSION'S REGULATORY ASSESSMENT IS AN "ORDINARY" COST AND THEREFORE NOT SUBJECT TO DEFERRAL ACCOUNTING.

In the 2012 KCPL case, the Commission considered a KCPL request for a transmission cost tracker. In light of the limited exception to the prohibition against retroactive ratemaking provided by the "extraordinary" standard, the Commission provided guidance as to what type of events would meet the "extraordinary" standard. Relying upon General Instruction 7 of the Uniform System of Accounts, the Commission found as follows:

> 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

[13] Tr. 52.

[14] Spire may argue that the Commission is not bound by the "extraordinary" standard. For instance, in a 2012 KCPL case, the Commission postulated that it was not limited to using the "extraordinary" standard. "Missouri courts have recognized the Commission's regulatory authority to grant a form of relief to a utility in the form of an AAO 'which allows the utility to defer and capitalize certain expenses until the time it files its next rate case.'" "Although the courts have recognized the Commission's authority to authorize an AAO in extraordinary and unusual circumstances, there is nothing in the Public Service Commission Law or the Commission's regulations that would limit the grant of an AAO to any particular set of circumstances." (*Report and Order*, Case No. EU-2012-0131, issued April 19, 2012, pages 2-3). Interestingly, while the Commission postulated that it could utilize a standard other than the "extraordinary" standard, it has also relied upon the extraordinary standard contained within the Uniform Standard of Accounts and approved by the Courts as a limited exception to the prohibition against retroactive ratemaking.

> company, and which would not reasonably be expected to recur in the foreseeable future.
>
> "Rare" does not describe cost increases in the utility business generally. Specifically, Applicants' evidence shows the following as to transmission. Transmission is an ordinary and typical, not an abnormal and significantly different, part of Applicants' activities. Also, Applicants showed that paying more for transmission than in the previous year is a foreseeably recurring event, not an unusual and infrequent event. Thus, "items related to the effects of" transmission cost increases are not rare and, therefore, are not extraordinary.[15]

Just as the Commission held that increases in transmission costs do not constitute an "extraordinary" event, similarly an increase in a utility's regulatory assessment is also not an "extraordinary" event. As Staff witness Oligschlaeger points out, "extraordinary events are events that are unusual, unique and not-recurring."[16] Applying this standard, Staff rightfully concludes:

> Commission Assessment expense is very much of a routine and ongoing nature, and is not associated with the type of rare and unanticipated events (for example, natural disasters) for which AAOs are commonly used. . . Commission Assessment amounts have been billed to and paid by utilities for many years on a set schedule. This process is obviously 'usual', 'ordinary', 'typical', and 'recurring' from the perspective of Missouri utilities. The FERC USOA provides no support for Spire Missouri's attempt to label its Commission Assessment expenses as extraordinary in nature.[17]

In its testimony, OPC agrees with Staff's conclusion that Spire's increased regulatory assessment is not extraordinary. Specifically, OPC points out that the regulatory assessment has been collected each year since 1947 and is expected to continue into the future. "The PSC / OPC assessment is a recurring annual assessment paid by regulated utilities. . . Section 386.370 RSMo has provided for the Commission to collect the annual assessment since July 1, 1947 and there is no indication this will cease in the foreseeable future."[18]

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[15] Report and Order, Case No. ER-2012-0174, issued January 9, 2013, pages 30-31.
[16] Exhibit 100, Oligschlaeger Rebuttal, page 3.
[17] *Id.* at pages 7-8.
[18] Exhibit 200, Roth Rebuttal, page 6.

IV. THE INCREASE IN THE COMMISSION'S REGULATORY ASSESSMENT IS NOT RARE OR UNEXPECTED.

Not only is the Commission's regulatory assessment not "rare", but Spire's own evidence shows that the increase in the regulatory assessment in the year following a rate case is also not rare. Specifically, both Laclede and MGE had rate cases pending in fiscal year 2010.[19] Not surprisingly then, the regulatory assessment increased in fiscal year 2011 before immediately returning to pre-rate case levels.[20] Still again, both Laclede and MGE had rate cases pending in fiscal year 2014.[21] As such, it should not be a surprise to realize that the 2015 regulatory assessment increased before immediately returning to pre-rate case levels.[22] Bottom line, the regulatory assessment increases following a rate case before immediately returning to pre-rate case levels. Certainly, an increase every three / four years does not meet the USOA and Commission requirement that a cost be "rare" in order to be subject to deferral accounting.

Furthermore, the evidence establishes that the increase in the Commission's regulatory assessment was not only common (i.e., not "rare"), it was also expected since it was largely a product of Spire's own actions. As was shown, the increase in the regulatory assessment is to be expected in a year immediately following a general rate case. This is not surprising since a general rate case requires a greater percentage of Commission and OPC resources to be devoted to that industry type during the fiscal year. In the case at hand, however, an even larger amount of resources were devoted to Spire's 2017 / 2018 rate case because of the issues raised by Spire and the litigation approach taken by Spire. The Commission itself took notice of these facts when it pointed out that Spire had "padded its revenue requirement" and raised issues which the Commission has "consistently denied."

[19] See, MGE Rate Case (Case No. GR-2009-0355) and Laclede Rate Case (Case No. GR-2010-0171).
[20] Exhibit 1, Weitzel Direct, page 6.
[21] See, MGE Rate Case (Case No. GR-2014-0007) and Laclede Rate Case (Case No. GR-2013-0171).
[22] Exhibit 1, Weitzel Direct, page 6.

> Additionally, a number of these litigated issues were unique shareholder-focused ratemaking tools, such as the revenue stabilization mechanism, the requested high rate of return of 10.35 percent, three new tracking mechanisms to limit shareholder risk, and earnings-based incentive compensation which has been consistently denied by the Commission. It was Spire Missouri's decision and entirely within Spire Missouri's power to pursue these issues and to file this rate case and the shareholders stood to benefit from those issues. Also, the company witness admitted that the company "padded" its revenue requirement beyond what it expected to receive by pursuing strong positions on issues it did not expect to win, which is clearly to the benefit of the shareholders over the ratepayers.[23]

Certainly, it should not be surprising that Staff and OPC must dedicate an increased level of resources to a rate case when a utility "pads its revenue requirement" and raises issues "consistently denied" by the Commission solely for the benefit of its shareholders. Furthermore, that utility should not be surprised to find that its regulatory assessment has increased in the following year as a result of such a litigation strategy. Ultimately, the increase in Spire's regulatory assessment is entirely a result of its own actions.

Recognizing that Spire has failed to show that its regulatory assessment, or the increase in its annual regulatory assessment, constitutes an "extraordinary" event within the definition provided by the Uniform System of Accounts and the Commission's standard test, the Commission should reject Spire's request to defer such costs.

V. THE INCREASE IN SPIRE'S REGULATORY ASSESSMENT IS NOT MATERIAL.

In addition to the application of the "extraordinary" standard, the Commission has also applied a "materiality" threshold. In this way, the Commission does not concern itself with trivial events that might otherwise be considered extraordinary. For instance, while an ice storm that causes a failure of a single power line might otherwise be considered "extraordinary", that event would not be financially "material." Historically, the Commission applies a 5% threshold for determining materiality. "The 'yardstick' generally used by the Commission to measure

[23] Case Nos. GR-2017-0215 / 0216, *Report and Order*, issued February 21, 2018, pages 52-53.

materiality of a cost proposed for deferral treatment is whether the cost in question is at least equal to 5.0% of the utility's net income."[24]

As applied to the current case, it is unquestioned that the increase in Spire's regulatory assessment does not meet the Commission's materiality standard. "Mr. Weitzel admits at pages 8 and 9 of his direct testimony that the increase in Spire Missouri's fiscal year 2019 Commission Assessment does not meet this standard."[25] OPC provides additional evidence to support such a conclusion.

> In response to OPC's data request 1101, Spire responded that the Company is using total income for 12 months ending June 2018 of $141.8 million to calculate whether Spire's request for an AAO meets FERC's 5% of income threshold. Five percent of $141.8 million is approximately $7.1 million. Spire's annual assessment for fiscal year 2019 is only $4,904,390.63, and the increase in assessment from that used to set rates is $1,661,778, or 1% of income.[26]

Recognizing that Spire's request for deferral accounting for the increase in its 2019 regulatory assessment fails to meet both the "extraordinary" standard and the "materiality" threshold, the Commission should reject Spire's request.

The ratemaking process is not precise and a 1% (net income) change in an expense is not an uncommon event or circumstance. If Spire is allowed to defer an increase in PSC assessments which amount to 1% of its income, where will the requests in the future take us? Will a 1% (net income) change in maintenance expense be subject to deferral or a 1% (net income) change in payroll constitute grounds for an AAO? Furthermore if a 1% change in net income is granted deferral accounting, one can rest assured that percentage threshold will be lowered in future utility deferral requests. By granting this Spire request, the Commission will

[24] Exhibit 100, Oligschlaeger Rebuttal, page 11.
[25] *Id.*
[26] Exhibit 200, Roth Rebuttal, page 7 (as corrected).

be signaling to all Utilities in Missouri to file an AAO request anytime its expenses do not exactly match up with the ratemaking cost of service.

VI. CONCLUSION

As this brief shows, the increase in Spire's regulatory assessment is not an "extraordinary" event. Rather, the regulatory assessment is an ordinary cost that is incurred every year and included in Spire's base rates. Moreover, the increase in the regulatory assessment complained of by Spire is also not material. Rather, the spike in the regulatory assessment occurs every four years consistent with the rate case cycle required under the ISRS statute. Immediately following that rate case, the regulatory assessment immediately returns to normal levels. Finally, the increase in the regulatory assessment is only about 1% of Spire's net income. As such, it is not a material increase for which the Commission has historically granted deferral accounting. Given that the cost increase is not "extraordinary" or "material", the Commission should reject Spire's request for an Accounting Authority Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing pleading has been served by electronic means on all parties of record as reflected in the records maintained by the Secretary of the Commission through the EFIS system.

/s/ David Woodsmall
David Woodsmall

Dated: December 28, 2018