BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Proceeding Under	)	
Section 393.137 (SB 564) to Adjust the	)	Case No. ER-2018-0366
Electric Rates of The Empire District	)	
Electric Company	)	

INITIAL POSTHEARING BRIEF

OF

MIDWEST ENERGY CONSUMERS GROUP

David L. Woodsmall
Woodsmall Law Office
308 E. High Street, Suite 204
Jefferson City, MO 65101
Phone: 573-636-6006
Fax: 573-636-6007
david.woodsmall@woodsmalllaw.com

ATTORNEY FOR MIDWEST
ENERGY CONSUMERS GROUP

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TABLE OF CONTENTS

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COME NOW the Midwest Energy Consumers' Group ("MECG") by and through the undersigned counsel, pursuant to the Commission's April 20, 2019 *Order Amending Procedural Schedule*, and provides its initial post-hearing brief.

I. INTRODUCTION

During the most recent legislative session, there was a great deal of attention on the issue of electric utility legislation. Early on it became apparent that there was a divide between legislative desires of the various electric utilities. While Ameren and KCPL sought the plant in-service accounting ("PISA") legislation that protected capital investment from regulatory lag (SB564), Empire sought a revenue stabilization mechanism that protected it from declining residential electric usage (SB642). Ultimately, those pieces of legislation were joined together and advanced as SB564.

In an effort to make the legislation attractive to consumer advocates serving in the House and Senate, the utilities included some consumer benefits. Specifically, for those utilities that opted into the PISA, there were rate caps, rate moratoriums and a requirement to return all benefits from the recently enacted federal corporate income tax reduction known as the Tax Cut and Jobs Act ("TCJA"). For Empire, interested in the revenue stabilization mechanism, the only customer benefit was the return of the TCJA tax benefits.

Throughout the legislative session, consumer advocates were concerned that, once enacted, the electric utilities would immediately attempt to grab the utility benefits provided by the legislation while seeking to avoid the minimal consumer benefits. As this docket demonstrates, those concerns were well placed. Before the ink on Governor Greitens' signature was even dry, one electric utility began to lay plans to avoid returning the tax benefits that were the crux of the legislative customer benefits. With the assistance of the Commission's Staff,[1] Empire immediately began to claim that the tax provisions (Section 393.137) did not apply to it and that it should not be required to return all of the tax benefits dictated by the statute. As such, Empire sought to avoid the only customer benefit that was intended to inure to the benefit of the Empire customers.

Through this brief, MECG refutes Staff and Empire's assertions that ER-2018-0228 constitutes a "general rate proceeding" within the scope of Section 393.137.1. As OPC has pointed out in its response to Empire's Motion to Dismiss, the term "general rate proceeding" is well defined and refers to a docket that is focused on an "all relevant factors" review of a utility's earnings. Recognizing that Staff's motion contemplated a single-issue review, it did not comply with the Commission's "all relevant factors" definition for a "general rate proceeding."

Moreover, on June 1, 2018, the effective date of Section 393.137, Case No. ER-2018-0228 had been dismissed by the Commission. Specifically, once the Staff moved to

[1] On February 16, 2018, Staff filed identical motions regarding both Ameren and Empire to establish dockets to quantify and return the benefits of the Tax Cut and Jobs Act to Ameren and Empire customers. Concerned that this docket would be viewed as a "general rate proceeding" under Section 393.137, Staff moved, on May 17, 2018, to dismiss its docket against both Ameren and Empire. In an effort to help Empire avoid the express dictates of the General Assembly, Staff rushed to Empire's defense and sought to withdraw its voluntary dismissal. The fact that Staff had allegedly withdrawn its voluntary dismissal is the entire legal basis upon which Empire and Staff rely for the assertion that Section 393.137 does not apply to Empire. Absent Staff's assistance, there would be no question about the applicability of Section 393.137 and Empire's customers would be assured of the return of all of the tax benefits associated with the TCJA and envisioned by the General Assembly.

withdraw its motion initiating this docket, the Commission immediately acknowledged dismissal of the proceeding. As such, Staff's subsequent attempts to withdraw its dismissal, absent some recognition by the Commission, were meaningless. On June 1, 2018, Case No. ER-2018-0228 was a closed docket. The fact that parties subsequently made filings in the docket did not resuscitate that docket.

Ultimately, MECG argues three alternative positions, in order of desirability, designed to ensure that the Empire customers receive the entirety of the tax benefits intended by the General Assembly:

1) As the agency affected by the terms of Section 393.137, the Commission should interpret the term "general rate proceeding" consistent with the FAC regulation. Recognizing that Case No. ER-2018-0228 was not an "all relevant factors" review of Empire's rates, the Commission should find that Empire did not have a general rate proceeding pending on June 1, 2018. As the affected agency, the Courts should ultimately defer to the Commission's interpretation of the phrase "general rate proceeding" and agree to the applicability of Section 393.137.

2) Consistent with the assertions of witnesses for Empire, Staff and Public Counsel, the Commission should find that the enactment of the Tax Cut and Jobs Act is an "extraordinary" event and thereby issue an Accounting Authority Order to capture the benefits of that Act so that they may be returned to customers in a subsequent Empire general rate proceeding.

3) Empire has argued that, in addition to Case No. ER-2018-0228, it had another "general rate proceeding" pending on June 1, 2018. Specifically, despite the fact that the Commission had already approved tariffs in the case, Empire argues that Case No. ER-2016-0223 was a general rate proceeding that was pending on June 1, 2018.[2] MECG argues that, if Case No. ER-2016-0223 is a general rate proceeding for purposes of Empire avoiding the dictates of Section 393.137.1, it also provides the necessary vehicle for the Commission to effectuate return to customers of the benefits of the TCJA. As such, in the event that it determines that Section 393.137 does not apply to Empire, the Commission should issue an order in Case No. ER-2016-0223 requiring the return of these tax benefits to customers.

[2] Despite the approval of rate schedules, Case No. ER-2016-0223 remained open to monitor Empire's compliance with certain PAYS provisions contained in the Commission's Report and Order.

II. PROVISIONS OF SECTION 393.137 IN SB564

Throughout the evidentiary hearing in this matter, the parties routinely grouped the benefits of the Tax Cut and Jobs Act into 3 different buckets: (1) the prospective effect on retail rates of reducing the federal corporate income tax from 35% to 21%; (2) the financial effect of restating the value of Accumulated Deferred Income Taxes ("ADIT") and returning the excess portion of ADIT that is caused by restating that value; and (3) the financial benefits associated with that time period between January 1, 2018 and the date on which rates are changed prospectively (the "stub period."). As the language of the statute makes clear, and the evidence demonstrates, Section 393.137 intended for each of these financial benefits to be returned to customers in totality and not retained by the utility.

First, Section 393.137.3 clearly provides for the prospective adjustment of rates resulting from the reduction of the federal corporate income tax rate.

> [T]he Commission shall have one time authority that will be exercised within ninety days of the effective date of this section to adjust such electrical corporation's rates prospectively so that the income tax component of the revenue requirement used to set such an electrical corporation's rates is based upon the provisions of such federal act [federal 2017 Tax Cut and Jobs Act] without considering any other factor as otherwise required by section 393.270.[3]

Recognizing that, as a result of an emergency clause, Section 393.137 became effective on June 1, the Commission is required to make a prospective change in rates by August 30, 2018 – ninety days of the effective date of Section 393.137.

Second, Section 393.170.3 contemplates a return of excess Accumulated Deferred Income Taxes resulting from the restatement of ADIT at a 21% versus a 35% federal corporate tax rate. Deferred taxes are expenses recorded on the utility's books to

[3] Section 393.170.3.

recognize the liability to pay higher income taxes in the future, because timing differences occur today between the recognition of revenues and expenses for book accounting, as compared to income tax accounting. Through the TCJA, deferred taxes once booked at a 35% tax rate are now significantly overstated when using the current 21% tax rate. As such, a significant portion of ADIT is now considered excess ADIT.

As Staff witness Oligschlaeger recognizes, SB137 also contemplates the return to customers of the benefit associated with restating the ADIT balance using the reduced 21% federal corporate income tax rate instead of the previous 35% corporate tax rate.

[Judge Woodruff]: And I -- the Chairman's question is whether -- is the excess ADIT something that the Commission would be looking at under that – under that section?
[Staff witness Oligschlaeger]: ***I would interpret it as including both the changes to the corporate tax rate as well as an amortization of excess ADIT***.[4]

Empire agreed that Section 393.137 contemplates the return of excess ADIT as well as the prospective effect of a change in federal corporate tax rate.

[Chairman Hall]: And I'm wondering when it says "income tax component," does that include, in your view and professional experience, does that include the ADIT flow back?
[Empire witness Williams]: The excess ADIT, A-D-I-T flow back?
Q. Yes.
A. I believe it would.
Q. And why do you say that?
A. Just based on th-- it flows into income tax expense and then which it is a reduction in income tax expense and determines cost-of-service.[5]

Third, Section 393.137.3 also expressly requires the return of all tax benefits for the stub period.

> The Commission shall also require electrical corporations to which this section applies, as provided for under subsection 1 of this section, to defer to a regulatory asset the financial impact of such federal act on the electrical corporation for the period of January 1, 2018, through the date the electrical corporation's rates are adjusted on a one-time basis as provided for in the immediately preceding sentence.

[4] Tr. 252-253 (emphasis added).
[5] Tr. 200-201.

The fact that Section 393.137 requires a return of benefits associated with all three aspects of the TCJA (prospective impact; return of excess ADIT; and stub period benefits) is also demonstrated by the stipulation executed by Ameren and approved by the Commission. As Staff witness Oligschlaeger acknowledges, the Ameren stipulation included the benefits associated with all three buckets.

[Woodsmall]: Would you agree that the Ameren stipulation included a provision for customers to receive the benefit associated with all three buckets?
[Oligschlaeger]: Okay. And the three buckets being the prospective rate reduction, the stub period amortization, and some flow back of excess ADIT?
Q. Correct.
A. I would agree.[6]

Thus, it is unquestioned that the General Assembly intended and Section 393.137 contemplates that <u>all</u> benefits associated with the enactment of the Tax Cut and Jobs Act would be returned to customers. As the following section demonstrates, however, the Non-Unanimous Stipulation executed by Staff and Empire do not return all these benefits. Rather, that stipulation provides for Empire to keep a significant portion of those benefits.

III. THE NON-UNANIMOUS STIPULATION DOES NOT COMPLY

Contrary to the provisions of Section 393.137, the Non-Unanimous Stipulation executed by Staff and Empire only provides for a return of some of the financial benefits associated with the Tax Cut and Jobs Act. Some of the benefits are unnecessarily delayed; while other benefits are allowed to be kept entirely by Empire.

<u>First</u>, relative to the prospective reduction of rates, the Non-Unanimous Stipulation expressly provides for a reduction in rates to be effective on October 1, 2018.

[6] Tr. 230-231.

> EDE shall file revised retail tariff sheets in an appropriate timeframe that would allow such tariffs to take effect October 1, 2018. The tariffs shall reflect a reduction in base rate revenue as the result of the implementation of the Tax Cuts and Jobs Act of 2017. The reduction in the annual revenue requirement represents the calculated revenue requirement utilized in current base rates utilizing a federal corporate income tax rate of 35%, compared to a recalculated revenue requirement using the reduced federal corporate income tax rate of 21%.[7]

The problematic part of this provision is found in the timing of the prospective rate ("take effect on October 1, 2018."). As pointed out, *supra,* Section 393.137 expressly provides that the prospective change must occur "within ninety days of the effective date of this section." Therefore, the prospective change must occur on or before August 30, 2018. The timing of the prospective change becomes more problematic when, as discussed immediately following, the Non-Unanimous Stipulation does not provide for a return of any stub period benefits to Empire customers. Therefore, by delaying the prospective rate change, the Non-Unanimous Stipulation allows Empire to retain nine months of benefits associated with the reduction in the federal corporate income tax rate.

Second, as indicated, contrary to the express provisions of Section 383.137.3, the Non-Unanimous Stipulation does not provide for deferral and return of the stub period benefits.[8]

[Woodsmall]: And it doesn't provide for any treatment of stub period benefits; is that correct?
[Staff witness Oligschlaeger]: That's correct.[9]

Instead, the Non-Unanimous Stipulation contemplates that Empire will be allowed to retain all benefits during this stub period. Recognizing that the Non-Unanimous

[7] Non-Unanimous Stipulation and Agreement, filed July 17, 2018, provision 3(a).
[8] Section 393.137.3 expressly provides that "[t]he Commission shall also require electrical corporations to which this section applies, as provided for under subsection 1 of this section, to defer to a regulatory asset the financial impact of such federal act on the electrical corporation for the period of January 1, 2018, through the date the electrical corporation's rates are adjusted on a one-time basis as provided for in the immediately preceding sentence."
[9] Tr. 242.

Stipulation quantifies the annual benefits associated with reducing the federal corporate income tax from 35% to 21% as $17.837 million, the value of the stub period benefits that the Non-Unanimous Stipulation allows Empire to retain is approximately $13.3 million.[10]

Third, the Non-Unanimous Stipulation is potentially problematic in that it allows for a deferral of the benefits associated with the restatement of Accumulated Deferred Income Taxes without any showing of "good cause."

> EDE shall establish a regulatory liability to account for the tax savings associated with excess Accumulated Deferred Income Taxes ("ADIT"). (i) EDE will record a regulatory liability for the difference between the excess ADIT balances included in current rates, which was calculated using the 35% federal corporate income taxes, versus the now lower federal corporate income tax rate of 21%. . . (iv) The Signatories intend to appropriately reflect excess ADIT in future customer rates using a methodology consistent with the tax normalization requirements specified by IRS normalization principles.[11]

This provision, allowing for a deferral of the return of excess ADIT delays the return of such benefits to ratepayers. In this regard, it is completely different than the Ameren tax stipulation which provides for immediate recognition.

Importantly, Section 393.137.4 does allow for the deferral, "in whole or in part, of such federal act's financial impacts." Such deferral is premised, however, on a showing of "good cause." Not only does the Non-Unanimous Stipulation fail to set forth the "good cause", but also, throughout the evidentiary hearing, Empire and Staff struggled to enunciate the "good cause" necessary for delaying the benefits associated with returning the excess ADIT. Only when pressed by the Chairman was Empire finally able to provide the good cause required under the statute – its inability to currently quantify the

[10] The period of January 1, 2018 through September 30, 2018 is 272 days of 74.52% of a year. Therefore, the stub period benefits are 74.52% of the annual benefits of $17.837 million or $13.3 million.
[11] Non-Unanimous Stipulation and Agreement, filed July 17, 2018, provision 3(b).

"protected" and "unprotected" ADIT balances or the ARAM period required for return of the protected ADIT balances.[12] After Empire finally enunciated this "good cause", MECG no longer contests the appropriateness of deferring treatment of the excess ADIT along the terms provided under the Non-Unanimous Stipulation.

The reason that the Non-Unanimous Stipulation does not comply with the provisions of Section 393.137 is that it is identical to the Non-Unanimous Stipulation that was executed on April 24, 2018 in the wind docket - *prior* to the enactment of SB564. In other words, despite the fact that SB564 had been passed by the General Assembly and signed into law by the Governor, Staff and Empire did not modify its provisions in order to comply with the express desires of the Legislature.

Q. Staff initially executed the tax -- the tax provisions that are contained in this stipulation in the wind case; is that correct?
A. That's correct.
Q. And -- and that wind case – that stipulation was executed approximately the end of April?
A. April 24th.
Q. Okay. And the exact identical provision is now contained in the stipulation today; is that correct?
A. Substantively I believe there's no -- there's no differences. And maybe there's no wording differences. I can't testify to that.
Q. But substantively you believe they're the same?
A. Certainly in my area, which is more the revenue requirement piece and not the rate design.

* * * * *

Q. Okay. So it is substantively the same. Given -- can you tell me if anything has happened over the intervening time between April 24th and today that you believe affects taxes and how taxes should be handled by electrical corporations in Missouri?
A. I'm sure some parties would consider the passage of SB 564 pertinent to the whole question of how income taxes should be treated for Empire and other companies.[13]

[12] Tr. 253.
[13] Tr. 240-242.

Thus, in the final analysis, if one accepts the "good cause" for deferring any treatment of excess ADIT, the Non-Unanimous Stipulation fails to comply with SB564 in one critical way: the Non-Unanimous Stipulation allows Empire to keep all benefits associated with the Tax Cut and Jobs Act for the period of January 1, 2018 through September 30, 2018. While this may sound trivial, it does amount to over $13.3 million of ratepayer money that Staff and Empire want to divert to Empire's coffers.

Staff and Empire justify their failure to comply with the express provisions of Section 393.137 on the misplaced premise that there was a "general rate proceeding" pending for Empire on June 1, 2018 – the effective date of Section 393.137. As the following section indicates, however, the case relied upon by Staff and Empire (Case No. ER-2018-0228) was not a "general rate proceeding" and was not "pending" on June 1, 2018 - the effective date of Section 393.137.

IV. CASE NO. ER-2018-0228 IS NOT A "GENERAL RATE PROCEEDING" AND WAS NOT PENDING ON JUNE 1, 2018.

In its Motion to Dismiss, Empire erroneously argues that Section 393.137 does not apply to it by virtue of the fact that Case No. ER-2018-0228 was pending before the Commission on June 1, 2018. "Case No. ER-2018-0228 is a "general rate proceeding" and was pending before the Commission on June 1, 2018, thus rendering the entirety of RSMo. §393.137 inapplicable to Empire."[14] As Public Counsel has detailed in exacting detail, however, Empire's argument falls flat by virtue of the fact that: (1) Case No. ER-2018-0228 is not a "general rate proceeding" and (2) Case No. ER-2018-0228 was not pending before the Commission on June 1, 2018.

[14] *Motion to Dismiss*, Case No. ER-2018-0366, filed June 25, 2018, at page 6.

The farfetched nature of Empire's argument is best demonstrated by the fact that the Commission itself did not believe that Case No. ER-2018-0228 was a "general rate proceeding" pending on June 1, 2018. Specifically, SB564 applies solely to Missouri electric utilities that did not have a general rate proceeding pending on June 1, 2018. Along these lines, the Commission immediately opened two dockets upon the enactment of Section 393.137. Specifically, the Commission opened Case No. ER-2018-0362 related to the return of tax benefits to Ameren customers and Case No. ER-2018-0366 related to the Empire tax benefits. Interestingly, the Commission did not open similar cases for KCPL or GMO.[15] Thus, the Commission has seemingly already undertaken a conscious review of each electric utility and considered whether each had a "general rate proceeding" pending on June 1, 2018. Given that it opened this docket in the first place is direct evidence of the fact that the Commission has already concluded that Empire did not have a "general rate proceeding" pending on June 1, 2018.

Ultimately for Empire and Staff to prevail on their argument, the Commission must agree on both of the following points: (1) that Case No. ER-2018-0228 is a general rate proceeding and (2) that Case No. ER-2018-0228 was pending before the Commission on June 1, 2018. As the following discussion demonstrates, Empire's arguments fall flat.

A. CASE NO. ER-2018-0228 IS NOT A "GENERAL RATE PROCEEDING"

As OPC detailed in its response to the Motion to Dismiss, the phrase "general rate proceeding" is a defined term in Missouri. Specifically, the General Assembly repeatedly used that term in Section 386.266 and, pursuant to Section 386.266.9, delegated the

[15] As Staff admits, both KCPL and GMO had "general rate proceedings" pending on June 1, 2018. See. Tr. 231. The KCPL general rate proceeding is Case No. ER-2018-0145 and the GMO general rate proceeding is Case No. ER-2018-0146.

authority to define that term to the Commission. Pursuant to that delegation of authority, the Commission promulgated the following definition of a "general rate proceeding":

> General rate proceeding means a general rate increase proceeding or complaint proceeding before the commission in which all relevant factors that may affect the costs, or rates and charges of the electric utility are considered by the commission.[16]

The Commission utilizes an identical definition of "general rate proceeding" in at least four other places throughout its regulations: 4 CSR 240-20.070(4)(C); 4 CSR 240-20.091(1)(E); and 4 CSR 240-20.092(1)(AA); and 4 CSR 240-20.100(1)(G). Given this, it is apparent that "general rate proceeding" is a term of art and, in enacting Section 393.137, the General Assembly intended to use that well-established definition.

It is apparent, therefore, that the General Assembly intended the phrase "general rate proceeding", in the context of Section 393.137, to refer to a case in which "all relevant factors are considered by the Commission." Based upon this definition then, Case No. ER-2018-0228 is not, and was never intended to be, a "general rate proceeding." As Staff's motion readily demonstrates, Staff had no intentions of conducting an "all relevant factors" review of Empire's earnings within Case No. ER-2018-0228. Instead, that docket was focused solely on returning tax benefits through a single issue rate adjustment.

> **COMES NOW** the Staff of the Missouri Public Service Commission and hereby prays that the Commission will open a rate case to consider the continued propriety of the rate schedules heretofore established for electric service provided by The Empire District Electric Company ("Empire Electric"); and, in that regard, ***to order Empire Electric to show cause, if any it has, why the Commission should not forthwith order it to file tariffs reducing its rates for every class and category of service by the percentage reduction in the federal-state effective income tax rate.***[17]

[16] 4 CSR 240-20.090(1)(D).

[17] *Motion to Open Rate Case and to Require Company to Show Cause*, Case No. ER-2018-0228, filed February 16, 2018, at paragraph 1 (emphasis added).

The fact that Staff did not intend to conduct an "all relevant factors" is more clearly demonstrated later in Staff's motion wherein Staff encourages the Commission to return the benefits of the Tax Cut and Jobs Act to customers "without the necessity of considering all relevant factors in an extended general rate case."

> However a rate case is initiated, the Commission is required to consider all relevant factors in setting just and reasonable prospective rates for utility service rendered. . . . ***Nonetheless, it is possible that the consideration of all relevant factors is unnecessary in this case***. The Commission is authorized to treat an item of operating expense differently where it is just and reasonable to do so. . . . It may be that the impact of the TCJA is like the gross receipts tax analyzed in ***Hotel Continental*** and the natural gas commodity costs considered in ***Midwest Gas Users' Association*** and that ***the Commission may order a reduction in utility rates without the necessity of considering all relevant factors in an extended general rate case***.[18]

Not only did Staff not intend for Case No. ER-2018-0228 to be an "all relevant factors" review of Empire's earnings, and therefore, not a "general rate proceeding"; the evidence also demonstrates that Staff never staffed that case or conducted the discovery in that case necessary to conduct an "all relevant factors" review. Along these lines, Staff readily admits that it did not assign the auditors to Case No. ER-2018-0228 necessary to conduct an "all relevant factors" review.[19] In similar fashion, Staff did not issue any data requests in order to undertake such an "all relevant factors" review.[20] As the Manager of Auditing for the Staff readily acknowledges, the entire focus of Case No. ER-2018-0228 has always been solely on the impact of the Tax Cut and Jobs Act.

[Woodsmall]: In a general rate case, doesn't the Auditing Department typically have a list of standard Data Requests that it issues?
[Oligschlaeger]: In a typical general rate case, yes.
Q. And did any of those standard Data Requests get issued in this case?

[18] *Id.* at paragraphs 18-20 (emphasis added, citations omitted).
[19] Tr. 236.
[20] Tr. 236, 274 and 280.

A. No. ***Because, again, we were focusing on specific Tax Cuts and Job -- Jobs Act impacts***.[21]

Struggling to make the scope of Case No. ER-2018-0228 fit within the well-established definition of a "general rate proceeding", Empire instead relies upon comments made by counsel in other cases conducted prior to the passage of SB564. Specifically, Empire points to comments made during the oral argument conducted on May 24, 2018.

As counsel pointed out during the opening statement in this case, the comments in that case were premature, in that they were made prior to the passage of SB564, and uninformed, in that they were made prior to researching the Commission's definition of "general rate proceeding".[22]

Ultimately, the illogical nature of Empire's argument, that Case No. ER-2018-0228 is a "general rate proceeding", is best demonstrated by the implication of such a finding. Specifically, while all parties admit that it was not an "all relevant factors" review of Empire's rates, Empire's argues that Case No. ER-2018-0228 is nonetheless a "general rate proceeding." The practical effect of such a finding by the Commission would be that all single-issue cases, including fuel adjustments, ISRS adjustments, PGA adjustments, MEEIA adjustments, and RESRAM adjustments, would now rise to the level of being a "general rate proceeding." In effect, Empire's definition of "general rate proceeding" would now encompass the entire universe of Commission cases that affect rates and leave no tangible difference between those single issue rate cases and those case which involve an "all relevant factors" review. Given the ludicrous result of Empire's argument, it should be rejected by the Commission.

[21] Tr. 236 (emphasis added).
[22] Tr. 50-51.

B. CASE NO. ER-2018-0228 WAS NOT PENDING ON JUNE 1, 2018

In its Motion to Dismiss, Empire argues that, not only is it a "general rate proceeding", but also that Case No. ER-2018-0228 was pending before the Commission on June 1, 2018. In reaching that conclusion, however, Empire conveniently ignores the fact that the Commission had closed the case on May 17, 2018 at the request of the Staff. While Empire argues that a subsequent Staff motion somehow resuscitated that docket, such that it was pending on June 1, 2018, the Commission never took action consistent with Staff's subsequent motion. As such, as the Commission's May 17 order explicitly indicates, Case No. ER-2018-0228 was closed on June 1, 2018.

As the docket sheet in Case No. ER-2018-0228 indicates, the Staff voluntarily dismissed Case No. ER-2018-0228 on May 17, 2018. As that dismissal motion indicates, the withdrawal of the case was undertaken for the precise purpose of preventing the legal machinations now being raised in this case.

> Due to uncertainties as to whether the pending case (Case No. ER-2018-0226 or Case No. ER-2018-0228) Staff constitutes a "general rate proceeding pending before the commission"; thus, potentially rendering Section 393.137 inapplicable, Staff hereby voluntarily dismisses this case.[23]

Almost immediately, the Commission acknowledged the voluntary dismissal and closed the case. "The Commission ***acknowledges*** the dismissal of this action and will ***close*** this file."[24]

Subsequently, Staff moved to withdraw its voluntary dismissal. In its Withdrawal of Voluntary Dismissal, Staff noted the following: "Staff prays that ***the Commission will***

[23] *Voluntary Dismissal*, Case No. ER-2018-0228, filed May 17, 2018, at page 2.
[24] *Notice Acknowledging Dismissal of Application and Closing Case*, Case No. ER-2018-0228, issued May 17, 2018 (emphasis added).

permit it to withdraw its *Voluntary Dismissal* filed previously herein and ***reinstate*** this case."[25]

Fatal to Empire's current argument, however, the Commission never took action to either "permit" Staff to withdraw its Voluntary Dismissal or to "reinstate" this case. As such, as Public Counsel as clearly demonstrated in its response to the Motion to Dismiss, Case No. ER-2018-0228 was not pending before the Commission on June 1, 2018. As such, Section 393.137 is clearly applicable to Empire.

During oral argument, Empire weakly questioned whether the Commission's May 17, 2018 *Notice Acknowledging Dismissal of Application and Closing Case* was lawful. Empire erroneously posits that because the order "was effective upon issuance," Empire was denied the opportunity to file an application for rehearing. As such, Empire claims that the Commission's order was unlawful.[26]

Effectively, Empire attempts to extend the 10-day effective date required for a substantive order and apply it to a purely procedural notice. The Commission's rules expressly provide that the Commission was required to dismiss the case as requested by Staff. "An applicant or complainant may voluntarily dismiss an application or complaint ***without an order*** of the commission at any time before prepared testimony has been filed or oral evidence has been offered by filing a notice of dismissal with the commission."[27] The fact that such a dismissal is effective "without an order" of the Commission means that the Commission's notice was not substantive. Instead, the Commission's *Notice* was, at best, a purely ministerial action. To the extent that Empire deems that the Commission's action in regard to this ministerial action is inappropriate or unlawful, then

[25] *Withdrawal of Voluntary Dismissal*, Case No. ER-2018-0228, filed May 17, 2018 (emphasis added).
[26] Tr. 18-19.
[27] 4 CSR 240-2.116.1 (emphasis added).

Empire is vested with the ability to seek redress through a Petition for Mandamus / Prohibition.[28] Empire's attempts to apply the effective date requirement applicable to orders and decisions to a notice that simply "acknowledges" the action that a party takes by right under the regulations stretches the logic of the Commission Act.[29]

In the final analysis, just as with the argument that Case No. ER-2018-0228 is a "general rate proceeding", Empire's assertion that the case was pending on June 1, 2018 is also flawed. That case was closed by the Commission and Staff's subsequent motion could not unilaterally resuscitate that case. Given this, the Commission should find that Section 393.137 is applicable to Empire and order that all financial benefits associated with the Tax Cut and Jobs Act be returned to Empire's ratepayers.

V. CASE NUMBER ER-2016-0023

In addition to arguing that Case No. ER-2018-0228 is a "general rate proceeding" that was pending on June 1, 2018, Empire also argues that Case No. ER-2016-0023 is a general rate proceeding that was pending on June 1, 2018.

> On May 31, 2018, Empire made a filing in its last rate case, Case No. ER-2016-0023, re-opening the case. Thus, Empire actually had two rate cases open before the Commission on June 1, 2018, the effective date of RSMo. §393.137 (as created by SB564).[30]

As such, Empire argues that, by virtue of the existence of Case No. ER-2016-0023 as well as Case No. ER-2018-0228, Section 393.137 does not apply to Empire.

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[28] The writ of mandamus is issued "to compel the performance of a ministerial duty that one charged with the duty has refused to perform." *State ex rel. Office of Public Counsel v. Public Service Commission*, 236 S.W.2d 632 (Mo. 2007) (citing to *Furlong Companies v. City of Kansas City*, 189 S.W.3d 157, 165-66 (Mo. banc 2006).

[29] Consistent with the Chairman's comments at the hearing (Tr. 19) that "we may find that [whether the effective date requirement applies to procedural notices] out," the Commission should consider rejecting Empire's argument for no other purpose than to determine whether it is required to provide an effective period for every notice and procedural order.

[30] *Motion to Dismiss*, Case No. ER-2018-0366, filed June 25, 2018, at page 6, footnote 8. See also, Exhibit 1, Krygier Direct, page 5.

Case No. ER-2016-0023 was a "general rate proceeding" that was filed on October 16, 2015. The Commission issued its *Order Approving Stipulation and Agreement* on August 10, 2016 and approved compliance tariffs on September 6, 2016. The case stayed open simply to monitor Empire's compliance with an approved stipulation provision related to the PAYS program. Empire posits that this proceeding, albeit existing only to determine Empire compliance with a stipulation, constitutes a pending "general rate proceeding" within the meaning of Section 393.137.

That statutory provision, to exempt electric utilities with pending general rate proceedings from the scope of Section 393.137, was included because the Commission could effectuate the return of tax benefits for those electric utilities within the context of those pending general rate proceedings. Only electric utilities without a pending "general rate proceeding" would need to have a special statutory single-issue mechanism to return these tax benefits. For this reason, the statute was extended to Ameren and Empire, but not to KCPL and GMO. Now, through the reference to Case No. ER-2016-0023, Empire seeks to create a third class of utilities: (1) those with a general rate proceeding; (2) those without a general rate proceeding; and (3) those with a general rate proceeding for purposes of avoiding Section 393.137, but not capable of being used for any other purpose.

Legal semantics aside, if Case No. ER-2016-0023 is determined to be a "general rate proceeding," then it provides the vehicle envisioned under Section 393.137 for the return of tax benefits to customers.[31] With this in mind, MECG suggests that the

[31] During oral argument, Staff and Empire's counsel attempted to argue that, while a "general rate proceeding", Case No. ER-2016-0023 is no longer the type of general rate proceeding that would allow for the return of tax benefits as envisioned in Section 393.137. Staff asserts that, while the case is open, it has magically evolved from the general rate proceeding that may change rates to a general rate proceeding that

Commission can use the "general rate proceeding" that Empire claims to be pending on June 1, 2018 and, consistent with Section 393.137, use it to return the "financial impacts" associated with the TCJA.

The appropriateness of such an action is given credibility by the fact that Staff already proposes to use the billing determinants from that case for purposes of allocating benefits and designing rates under the Non-Unanimous Stipulation and Agreement.[32] So long as we are using that case for those purposes, we should also be able to use that case for purposes of returning all "financial impacts" instead of just those financial impacts that Empire deems appropriate to return.

VI. ALLOCATION AND RATE DESIGN

Recognizing that Section 393.137 contemplates that all of the financial effects of the Tax Cut and Jobs Act will not only be quantified, but returned to customers within 90 days, it is imperative that the Commission also determine the appropriate manner to allocate the tax benefits among the Empire retail rate classes as well as to design rates to flow back the tax benefits within the specific rate classes.

As part of the Non-Unanimous Stipulation in Case No. EO-2018-0092, the Signatories agreed to an appropriate allocation of any tax benefits. That same allocation of benefits has been presented in this case and, importantly, no party has objected to that allocation or proposed an alternative methodology. Specifically, that allocation is as follows:

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will no longer allow for a change in rates. Specifically, "the work of determining the prospective revenue requirement and distributing that in rates, developing tariffs to charge the various classes those rates, that work has all been done." (Tr. 46). Effectively, Staff is arguing that Case No. ER-2016-0023 is only a "general rate proceeding" to the extent that it can conveniently be used to deprive customers of the tax benefits that the General Assembly expected to be returned to customers, but not a general rate proceeding for any other rate-setting purpose.

[32] Tr. 273.

Schedule	Tariff ID	Allocation %
Residential	RG	48.08%
Commercial	CB	8.87%
Small Heating	SH	2.38%
General Power	GP	18.29%
Special Transmission Service	SC-P	0.92%
Total Electric Bldg	TEB	8.46%
Feed Mill & Grain Elev.	PFM	0.02%
Large Power	LP	11.54%
Power Transmission	MS	0.002%
Municipal Street Ltg.	SPL	0.61%
Private Ltg.	PL	0.80%
Special Ltg.	LS	0.02%

Source: Non-Unanimous Stipulation, Schedule A.

Once a particular class' allocated portion of tax benefits are determined, it is necessary for the Commission to design rates in order to return those benefits in a just and reasonable manner. In the recent Ameren case which ordered the flow-back of such tax benefits, the parties [including Staff, Public Counsel and MECG] agreed that such tax benefits should be returned to customers through a separate kWh line item credit.

> The revenue requirement reduction applicable to each rate class as a result of the prior step . . . will be divided by the total kilowatt-hour ("kWh") billing units stated for that class. . . . The result of this calculation will be a cents-per kilowatt-hour rate for each service classification that will be applied to all billed usage of customers taking service under those classifications (stated as a separate line item on the customers' bills) to yield separate line item bill credits.[33]

Recognizing that all parties, including OPC, deemed this methodology to be reasonable in the Ameren proceeding, Staff proposed an identical methodology for designing rates in this case. "For ease of administration and consistency with the Ameren Missouri approach, Staff recommends that a similar design be employed for Empire."[34]

[33] Exhibit 4, Lange Rebuttal, page 2.
[34] *Id.* at page 3.

Inexplicably, while agreeing to this methodology in the Ameren proceeding, OPC now proposes an alternative methodology that is contrary to the Ameren methodology. Specifically, where Public Counsel agreed to keep the customer charge constant in the Ameren case and collect any rate reduction through a kilowatt-hour credit, OPC now recommends that none of the credit be collected on the basis of kilowatt-hours and, instead, that the entire credit be collected through a reduction in the Empire customer charges. "OPC recommends that the full impact of the new tax bill be reflected by reductions in Empire's customer charges."[35] OPC makes such a recommendation on the basis that, while the number of customers and therefore customer charges per year are very predictable, "changes to volumetric rate elements may vary based on consumption, which may be influenced by factors such as weather."[36]

As Staff witness Lange explains, however, OPC's proposal to return the credit through a reduction to the customer charge is problematic in that it has the potential to eliminate the entirety of the residential customer charge and thereby give Empire customers the impression that there is no cost to being on the Empire system.

[Judge Woodruff]: You mentioned that you thought a large reduction in the customer charge would unreasonable. What is the reason for that?

[Staff Witness Lange]: . . . So Empire's current residential customer charge, I believe is in the $11 range and the refund of the 17.8 million as allocated to the residential class is about 8.5 million. Empire collects about 1.5 million residential customer charges a year and so that would result in a credit of approximately $5.60. That's going to cut into the return, but it's not – it would surprise me if that would cut into their actual expense of administering -- of having a customer; you know, the mailings, billings, that kind of thing.

If we move that up to the 11 or $12 range, that could cut into what it actually costs them to prepare a bill and they would, you know, then be losing money on the customer charge portion. Obviously, they would still be recouping money on the energy base itself, but

[35] Exhibit 5, Riley Direct, page 8.
[36] *Id.*

we wouldn't want to create the impression that there is no cost to having a customer on the system in and of itself.[37]

Recognizing that the return of tax benefits through a per-kWh credit was agreeable to Public Counsel in the Ameren proceeding, as well the flaws inherent in Public Counsel's proposal to reduce each class' customer charge, the Commission should order a separate line item credit as set forth in Staff's testimony.

VII. IN THE ALTERNATIVE, THE COMMISSION SHOULD ISSUE AN ACCOUNTING AUTHORITY ORDER

At the close of the evidentiary hearing, the Chairman asked the parties, in the event that the Commission finds that Section 393.137 is not applicable to Empire, to brief the issue of whether it would be lawful and appropriate for the Commission to issue an Accounting Authority Order to defer and recover in a subsequent rate case the stub period benefits associated with the corporate tax reduction as well as excess accumulated deferred income taxes. As the following analysis reveals, since the parties agree that the reduction in the federal corporate income tax was an "extraordinary" event occurring no more frequently than every 30 years, it would be lawful and appropriate for the Commission to issue such an AAO.

As an initial matter, it should be pointed out that the Commission's authority to issue an Accounting Authority Order to defer costs is not premised upon the general authority contained in Section 393.140.8. Rather, the Commission's ability to defer extraordinary costs is based entirely on case law. As the following analysis indicates, in the *UCCM* case, the Missouri Supreme Court has held that, absent express statutory authority, the Commission has no authority to defer costs for recovery in future rate cases. In making this statement, the Court specifically rejected the Commission's

[37] Tr. 275.

contention that the general authority contained in Sections 393.130, 393.140 and 393.270 provides the ability to defer costs. As such, the ability to defer costs within the context of a fuel adjustment clause had to wait almost 30 years until express statutory authority was created. Absent such specific authority, the Commission's authority to defer costs is entirely contained in the exception carved out by the *Sibley* court and determined pursuant to the "extraordinary" standard.

1. Utility Consumers Council of Missouri Decision – Precluding Deferrals

In 1979, the Missouri Supreme Court considered the Commission's utilization of deferral accounting through the implementation of a fuel adjustment clause.[38] That decision provides several important points relevant to the Commission's current decision.

First, the Commission is limited to the powers conferred by statute. In any appeal addressing a Commission order, the reviewing court is required to determine whether the Commission's order is lawful and reasonable. "On appeal, our role is to determine whether the commission's report and order was lawful and, if so, whether it was reasonable."[39] Unlike the reasonableness of a commission order, however, there is no deference to the Commission's interpretation of statutory authority. "In determining the statutory authorization for, or lawfulness of, the order we need not defer to the commission, which has no authority to declare or enforce principles of law or equity."[40]

In such an appeal, the reviewing court will look for specific statutory authority for the Commission's action.

[38] See, *Utility Consumers Council of Misouri v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979 ("*UCCM"*).
[39] *UCCM* at 47 (citing to *State ex rel. Dyer v. Public Service Commission*, 341 S.W.2d 795, 802 (Mo.App. 1960).
[40] *Id.* (citing to *Board of Public Works of Rolla v. Show-Me Power Corp.*, 244 S.W.2d 55 (Mo. banc 1952).

> Since it is purely a creature of statute, the Public Service Commission's powers are limited to those conferred by the above statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted. Thus, while these statutes are remedial in nature, and should be liberally construed in order to effectuate the purpose for which they were enacted, "neither convenience, expediency or necessity are proper matters for consideration in the determination of" whether or not an act of the commission is authorized by the statute.[41]

Second, statutory authority: (1) cannot be created out of a Commission's perceived need for such authority; (2) cannot be found in the fact that the Commission and other state utility commissions have historically exercised such authority; or (3) cannot be divined out of the broad general authority conveyed in Sections 386 and 393. Rather, specific statutory authority is required to be shown. (Counsel apologizes for the length of the following quotes. The underlying Supreme Court decision is over 20 pages. Counsel has endeavored to only provide the necessary passages so that the Commission can realize the inquiry of any reviewing court and the Commission's need to be mindful of specific statutory authority).

> Respondents argue application of the FAC to its residential rate structure is authorized because the commission carefully reviewed the legal basis for authorizing those rates, and because the commission and other states in the past permitted such rates. This information, of course, does not aid our inquiry into whether such rates are authorized. Of no greater help is the summary statement that chapter 393, RSMo 1969, gives the PSC full authority over rates.[42]

* * * * *

> Respondents themselves have difficulty pointing to what provisions in the statutes give them authority to utilize a fuel adjustment clause. In their brief, as noted *supra*, they simply argue that "it is clear that the statutes and case law in Missouri authorize such provisions." In oral argument, they admitted that it was hard to find specific sections authorizing an FAC, but that we should approve it on the basis of §§ 393.130, 393.140,

[41] *Id.* at page 49 (citations omitted).
[42] *Id.* at page 51.

> and 393.270, and through application of the principle that where an agency is given broad supervisory authority, deference should be given to its interpretation of a statute. Since FAC's have been used in regard to industrial and large commercial users for 60 years, and because other jurisdictions approve them, it is posited that we should also approve them.
>
> It is for the legislature, not the PSC, to set the extent of the latter's jurisdiction. The mere fact that the commission has approved similar clauses in the past, or that other states permit them, is irrelevant if they are not permitted under our statute.[43]
>
> * * * * *
>
> Respondents, however, state that the statutes as a whole do support their power to utilize a fuel adjustment clause. *Section 393.130* generally sets out basic rules governing the giving of safe and adequate service by the utility, and prevents preferential rates being given one customer. ***Section 393.140 sets out the general powers of the commission***. While this statute gives the PSC general supervisory power over electric utilities, as discussed *supra*, it gives the PSC broad discretion only *within* the circumference of the powers conferred on it by the legislature; ***the provision cannot in itself give the PSC authority to change the rate making scheme set up by the legislature***.
>
> *Section 393.270* empowers the commission to investigate matters about which complaint may be made, or to investigate to ascertain facts necessary to the exercise of its powers and to fix *maximum* rates after hearing and investigation upon consideration of all relevant factors. These provisions give no authority, as we read them, to establish a variable rate by use of a fuel adjustment clause, and in fact disallow such a clause, in that they establish a fixed-rate rather than a variable-rate system, *§ 393.270(2)*, (3), and prescribe the manner in which such rates are to be established.[44]
>
> Since there is no authority to permit a fuel adjustment clause, . . . [w]e thus reverse the judgment of the circuit court affirming the order of the commission allowing the fuel adjustment clause.[45]

Third, absent express statutory authority, deferral accounting, because it results in retroactive ratemaking, is unlawful. In that Supreme Court case, the Court had the

[43] *Id.* at 54 (citations omitted).
[44] *Id.* at 55-56.
[45] *Id.* at 57-58 (emphasis added).

opportunity to address costs that were to be deferred from previous periods for collection in a future rate case (the "surcharge").[46] The Court held that it was unlawful retroactive ratemaking ("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") to allow the utility to collect such deferred fuel costs.

> Under the terms of the FAC approved in 1974, fuel expenses could not be recovered until after a 60-120 day time lag required to determine the proper amount of recovery. The 1976 order reduced this lag. However, fuel costs incurred in the final months before the effective date (June 1, 1976) of the FAC approved in 1976 were not collectible under the old clause because it expired before the necessary lag-time had elapsed. The commission thus enacted a surcharge to allow the utilities to collect these expenses incurred when the old clause was in effect but not collectible under the old clause before it expired. This surcharge is of course illegal in that it is intended to allow collection of monies which could only be collectible due to authorization of a fuel adjustment clause. However, even if a fuel adjustment clause were permitted, the question arises whether the surcharge would be allowable or whether it is unwarranted under any theory.
>
> The utilities argue that this order was permissible, assuming a fuel adjustment clause was permissible, because the commission had a right to treat these uncollected expenses differently than other expenses, and that these are "current fuel expenses which were being collected (with an admitted lag) under the previous fuel adjustment", and thus their collection by surcharge was not retroactive rate making. We disagree.
>
> The utilities cannot mean that the amount of the fuel adjustment charge is determined by *present* ("current") expenses in the month collected, and the fuel expenses of two or three months earlier are simply used as "test month" expenses, because from their brief and under the commission's order, it is apparent that their complaint is that no recovery was had for expenses *incurred* in one of the months during which the fuel charge was in effect. There would be no need to "surcharge" if present expenses were at issue for then the new FAC would cover these expenses.
>
> 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

[46] *Id.* at page 58.

> 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.

Thus, a careful reading of the *UCCM* decision provides two undeniable conclusions. ***First***, it is unlawful retroactive ratemaking for the commission to allow recovery of past deferred costs. ***Second***, retroactive ratemaking is only allowed where the Commission is provided specific statutory authority. While the Commission has specific statutory authority to utilize deferral accounting in Section 386.266 and in the MEEIA legislation, there is no other statutory authority for the Commission to engage in any other instances of deferral accounting. As the following analysis indicates, however, such deferral accounting is allowed where costs are "extraordinary."

2. Sibley Decision – Exception for Extraordinary Costs

In 1993, the Commission considered Missouri Public Service Company's request to defer depreciation and carrying costs associated with its renovation of the Sibley generating station. In that case, the Commission was repeatedly told that the deferral of costs, as requested by Missouri Public Service, was unlawful retroactive ratemaking as defined by the *UCCM* court. In response, the Commission sought to carve out an exception to the doctrine against 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, cancellations or service threatening timing differences have been authorized by the Commission. The Commission's discretion on what items to include in ordering operating expense and what are extraordinary items is broad.[47]

On review, the Court of Appeals agreed with the Commission's claim that there is a limited exception from the doctrine against retroactive ratemaking (deferral accounting) for extraordinary events.

> 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. . . . 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.***[48]

Thus, absent specific statutory authority, the only authority for the Commission to engage in deferral accounting (i.e., retroactive ratemaking) is the limited exception provided by 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").

3. Application of Extraordinary Standard

As set forth, *supra*, the Courts have held that, absent express statutory authority, the Commission has limited authority to defer costs – only when such costs are "extraordinary". As the evidence overwhelming establishes, the reduction of federal corporate taxes is such an "extraordinary" event. In fact, witnesses for Empire, Staff and

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

Public Counsel (each of the parties that presented testimony) agreed that the reduction of federal corporate taxes meets the "extraordinary" standard.

For instance, in questioning from the Chairman, Empire admitted that the implications of the Tax Cut and Jobs Act were "extraordinary."

[Chairman Hall]: Okay. Are you familiar with Accounting Authority Orders?
[Empire Witness Williams]: Somewhat, yes.

Q. Are you familiar with the standard that this Commission employs to determine whether or not an AAO is appropriate?
A. Generally.

Q. So the -- have you had an opportunity to look at those factors in connection with the excess ADIT in this case?
A. I have not, no.

Q. Are you familiar enough with the books that you could pontificate on whether or not the amount at issue is material?
A. The amount of the excess ADIT is material?

Q. Correct.
A. I would say it is material, yes.

Q. And why do you say that?
A. Just because of the estimated value that we have of it now. It's a -- it's 120 million roughly.

Q. Is there a standard that is -- that is sometimes employed to determine materiality?
A. I've seen that employed.· I don't know if -- like if Empire specifically has a threshold for materiality.

Q. Do you think that the amount of excess ADIT at issue in this case is an extraordinary event or is it something that happens every other day?
A. It does not happen every other day. I don't know if I would -- I don't know the specific definitions of extraordinary, but it is not an every day event, no.

Q. And -- and you would agree that it's non-recurring, the requirement to adjust an ADIT balance?
A. I would imagine the only time it would occur again is if there is another change in taxes.

Q. And the last time that occurred at this -- at this level was around 1986; is that correct?

A. That's my understanding.[49]

In similar questioning from the Chairman, OPC witness Riley agreed that the financial implications arising out of an "extraordinary" event like the Tax Cut and Jobs Act meets the Commission's AAO standard.

[Chairman Hall]: Okay. Let's move on to a different topic. Are you familiar with the standards for an accounting authority order?
[OPC Witness Riley]: I'm familiar, yes.

Q. That -- so that standard is -- in order for an AAO to be appropriate, the money at issue must be – the event must be unique, extraordinary, and nonrecurring and the amount of money at issue must be material?
A. That's my understanding, yes.

Q. So looking at the excess ADIT flow back, do you believe that the AAO standard that we just described has been met or would be met based on the facts?
A. Yes. The tax rate changes substantially, 40 percent tax rate. We're talking more than $150 million. It's not going to happen again, you know, until somebody changes the tax rates, which hadn't happened in, you know, 40 years. So it's -- you would considered it nonrecurring. I would believe it will be rather substantial, so yes.[50]

Finally, Staff's witness, with over 36 years of experience with the Missouri Public Service Commission,[51] agreed that deferral of the financial effects of the Tax Cut and Jobs Act would meet the Commission's "extraordinary" standard for issuing an Accounting Authority Order.

[Chairman Hall]: First question is whether the excess ADIT flow back meets the AAO standard of mat-- materiality, extraordinary recurring need?

[Staff Witness Oligschlaeger]: Okay. Does -- maybe I'll try to attack it this way. The passage of the Tax Cuts and Job Act in general and its impact on utility income tax expense I think can be car-- fairly characterized as meeting the unique, unusual -- or unusual, unique and nonrecurring standard that I understand is normally used here at the Missouri Commission to assess AAO requests.[52]

[49] Tr. 171-172.
[50] Tr. 316.
[51] Exhibit 3, Oligschlaeger Rebuttal, page 2.
[52] Tr. 249.

Clearly then, since the Tax Cut and Jobs Act represents an "extraordinary" event, it is lawful, under the strict exception provided by the *Sibley* court, for the Commission to issue an Accounting Authority Order. Moreover, given the materiality of the financial effects associated with that extraordinary event, it is also appropriate for the Commission to issue an Accounting Authority Order. As such, in the event that the Commission finds that the provisions of Section 393.137 do not apply to Empire, MECG asks that the Commission issue an Accounting Authority Order to capture all benefits associated with the Tax Cut and Jobs Act and book them to a regulatory liability.

VIII. CONCLUSION

As the foregoing demonstrates, the return of benefits associated with the Tax Cut and Jobs Act was the only customer benefit underlying the statutory enactment of Empire's desire revenue stabilization mechanism. As such, the Commission should act in a manner that preserves this benefit for customers. With this in mind, the Commission should reject Empire / Staff's argument that Section 393.137 does not apply to Empire. In doing so, the Commission should find that, since it did not contemplate an "all relevant factors" review of Empire's earnings, Case No. ER-2018-0228 was not a "general rate proceeding" within the scope of Section 393.137.1. Moreover, the Commission should find that Case No. ER-2018-0228 was not pending on June 1, 2018. While the Staff took steps to attempt to resuscitate that case, the Commission had closed that case on May 17, 2018.

Consistent with the dictates of Section 393.137, the Commission should, by August 30, 2018, prospectively adjust Empire's rate to account for the reduction of the federal corporate income tax rate. Furthermore, the Commission should capture and

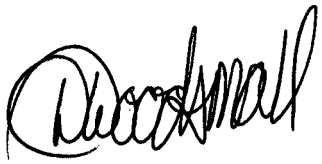
book to a regulatory liability the benefits associated with the stub period (January 1, 2018 through August 30, 2018). Finally, given Empire's explanation that it is currently unable to currently segregate "protected" and "unprotected" excess ADIT, or to determine the appropriate ARAM amortization period, the Commission should find that "good cause" exists to require Empire to book all excess ADIT benefits to a regulatory liability for return to customers in Empire's next general rate proceeding.

In the alternative, in the event that the Commission determines that Section 393.137 does not apply to Empire and given the extraordinary nature of the Tax Cut and Jobs Act, the Commission should issue an Accounting Authority Order to capture all benefits to a regulatory liability for return to customers in Empire's next general rate proceeding.

Finally, the Commission should allocate all tax benefits and flow back such benefits to customers in a manner consistent with the testimony provided by Staff witness Lange.

Respectfully submitted,

WOODSMALL LAW OFFICE

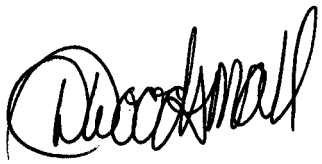


David L. Woodsmall
Woodsmall Law Office
308 E. High Street, Suite 204
Jefferson City, MO 65101
Phone: 573-797-0005
david.woodsmall@woodsmalllaw.com

ATTORNEY FOR MIDWEST ENERGY CONSUMERS GROUP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

Dated: July 30, 2018