BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Missouri Gas Energy for the Issuance of an Accounting Authority Order Relating to its Natural Gas Operations and for a Contingent Waiver of the Notice Requirement of 4 CSR 240-4.020(2)	))))))	Case No. GU-2011-0392

POST-HEARING BRIEF OF THE MISSOURI GAS ENERGY DIVISION OF SOUTHERN UNION COMPANY

I. PROCEDURAL HISTORY

On June 10, 2011, the Missouri Gas Energy division of Southern Union Company ("MGE" or "the Company") filed an application asking the Missouri Public Service Commission ("Commission") to issue an Accounting Authority Order ("AAO") authorizing MGE to defer certain expenses and capital-related costs that the Company incurred and revenues providing fixed-cost recovery that it lost as a result of the May 22, 2011, Joplin tornado. In addition, the Company also requested a waiver of the sixty-day notice requirement prescribed in 4 CSR 240-4.020(2) in the event the Commission determined that the Company's application, which was filed under Section 393.140(4), RSMo, is a contested case.

The Commission Staff ("Staff") filed its "Recommendation to Approve MGE's Application In Part and Deny In Part" ("Staff Recommendation") on August 19, 2011. In that filing Staff recommended the Commission approve the portion of MGE's application that sought authority to defer incremental operations and maintenance ("O&M") expenses and capital-related costs incurred as a result of the May 22, 2011, Joplin tornado, but recommended that the Commission reject the portion of MGE's application that sought authority to defer revenues providing fixed-cost recovery that are being lost as a result of the same tornado.

MGE filed its response to the Staff Recommendation on September 16, 2011. Although the Company's response accepted Staff's recommendation to defer O&M expenses and capital-related costs, MGE disputed the reasonableness of certain conditions recommended by Staff that related to those

deferrals. In addition, the Company disputed the reasonableness of Staff's recommendation to deny the authority to defer lost fixed-cost revenues. Because certain key issues related to MGE's application remained in contention between the Company and Staff, MGE's response also asked the Commission to schedule a hearing for the purpose of receiving evidence on those issues.

Following a prehearing conference held for the purpose of establishing a procedural schedule, on October 11, 2011, MGE filed the direct testimony of its witness Michael R. Noack in support of the Company's application. On November 1, 2011, Staff filed the rebuttal testimonies of its witnesses Amanda C. McMellen and Mark L. Oligschlaeger, and the Office of the Public Counsel ("OPC") filed the rebuttal testimony of its witness Shawn Lafferty. MGE filed surrebuttal testimonies by Mr. Noack and Frank J. Hanley on November 15, 2011. That same date Staff filed Mr. Oligschlaeger's cross-surrebuttal testimony and OPC filed Mr. Lafferty's cross-surrebuttal testimony.

The parties jointly filed a list of issues on November 17, 2011, and jointly filed a "Stipulation of Facts, Order of Witnesses, and Order of Cross Examination" on November 22, 2011. Each party filed its own statement of position On November 22, 2011.

The Commission held an evidentiary hearing on November 30, 2011, for the purpose of receiving testimony and other evidence. The evidentiary record in this case was closed at the conclusion of that hearing.

II. STATEMENT OF FACTS

The facts concerning the event that gave rise to MGE's request for an AAO were not disputed by any witness in this case. As set out in the direct testimony of Mr. Noack, on Sunday, May 22, 2011, at approximately 5:40 p.m., a major tornado struck the City of Joplin, Missouri, and surrounding areas. The tornado, which was designated by the National Weather Service as a category EF-5, the strongest rating on the Enhanced Fujita Scale, followed a six-mile path through the middle of Joplin destroying much of the city's central and south sides. The tornado included winds that exceeded 225 miles per hour, destroyed or severely damaged thousands of residential and commercial structures, killed more than 160

people, and injured hundreds more. It has been described as the worst tornado in the United States in the last sixty years and one of the deadliest in all of American history.[1]

The scope of the tornado's destruction was enormous. The *Joplin Globe* reported that city officials estimate that as many as 7,500 homes were affected by the tornado,[2] and of that number approximately 4,000 dwellings were categorized as "catastrophic losses."[3] Immediately following the tornado, MGE was required to shut down more than ten miles of its gas mains in the area.[4] In addition, the Company estimates it lost approximately 3,200 gas meters as a result of the tornado,[5] a figure which, based on a billing count for the month immediately preceding the tornado, represents more than nineteen percent of MGE's total installed meters in the Joplin/Dusquesne area.[6]

The pace of repair and rebuilding in the Joplin area has been slow. Almost six months after the tornado, building permits had been issued to repair or rebuild fewer than half the damaged or destroyed residential structures,[7] and there is considerable doubt as to how quickly that pace will accelerate in the future. Many residents were delayed in gaining access to their structures and in filing insurance claims for repair or restoration, which necessitated an extension of the deadline for filing those claims.[8] In addition, the recent discovery of lead contamination in some of the areas affected by the tornado will further delay restoration efforts until that hazard can be abated.[9] How long it will take Joplin to fully rebuild – and for MGE to return to pre-tornado customer levels – is anyone's guess.

III. LEGAL, ACCOUNTING, AND REGULATORY LAW STANDARDS APPLICABLE TO MGE'S REQUEST FOR AN AAO

Section 393.140(4), RSMo, confers on the Commission the authority to "prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations." Based on that

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[1] Applicant's Exhibit No. 1, pp. 2-3.
[2] Staff Exhibit No. 3, Schedule 1.
[3] Applicant's Exhibit No. 5, p. 2.
[4] *Id.*, p. 4.
[5] *Id.*
[6] *Id.*, p. 3.
[7] Staff Exhibit No. 3, Schedule 1.
[8] Applicant's Exhibit No. 5, p. 2.
[9] *Id.*, p. 1.

authority, the Commission adopted 4 CSR 240-40.040, which requires every gas utility subject to the Commission's jurisdiction to keep its accounts in conformity with the "Uniform System of Accounts Prescribed for Natural Gas Companies Subject to the Provisions of the Natural Gas Act" ("USOA"), as adopted by the Federal Energy Regulatory Commission. More specifically, that rule adopts all definitions, general instructions, electric plant and operating expense instructions of the USOA, as well as the descriptions of all accounts that comprise a gas utility's balance sheet and income statement for regulatory reporting and ratemaking purposes.

In addition, the Commission consistently has held that Section 393.140(4), RSMo, also provides the legal basis for a utility to request an AAO and for the Commission to grant that relief when appropriate.[10]

The portions of the USOA that are relevant and of primary importance to MGE's application for an AAO are: (1) the description of Account 182.3, Other Regulatory Assets; (2) the definition of "Regulatory Assets and Liabilities"; and (3) General Instruction No. 7.

The USOA states that regulatory-created assets that relate to ratemaking and that are not includible in other accounts shall be booked to Account 182.3, Other Regulatory Assets. The description of that account states, in relevant part, as follows:

> A. This account shall include the amounts of regulatory-created assets, not includible in other accounts, resulting from the ratemaking actions of regulatory agencies. (See Definition No. 31.)
> B. The amounts included in this account are to be established by those charges which would have been included in net income determinations in the current period under the general requirements of the Uniform System of Accounts but for it being probable that such items will be included in a different period(s) for purposes of developing rates that the utility is authorized to charge for its utility services. . . The amounts recorded in this account are generally to be charged, concurrently with the recovery of the amounts in

[10] *See, e.g., In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Order Relating to its Electrical Operations* and *In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Order Relating to its Purchase Power Commitments*, Case Nos. EO-91-358 and EO-91-360, Report and Order (Dec. 31, 1991), pp. 3-4 (hereinafter "the Sibley Order"). This order is part of the record evidence in this case by virtue of the fact that the Regulatory Law Judge took administrative notice of the order prior to the close of the record. (Transcript p. 229, lns. 15-20.)

> rates, to the same account that would have been charged if included in income with incurred . . . .
> C. If rate recovery of all or part of an amount included in this account is disallowed, the disallowed amount shall be charged to Account 426.5, Other Deductions, or Account 435, Extraordinary Deductions, in the year of the disallowance.
> D. The Records supporting the entries to this account shall be kept so that the utility can furnish full information as to the nature and amount of each regulatory asset included in this account, including justification for inclusion of such amounts in this account.

Definition No. 31, which is referenced in the description of Account 182.3 quoted above, defines the phrase "Regulatory Assets and Liabilities" as follows:

> [A]ssets and liabilities that result from rate actions of regulatory agencies. Regulatory assets and liabilities arise from specific revenues, expenses, gains, or losses that would have been included in net income determinations in one period under the general requirements of the Uniform System of Accounts but for it being probable: 1) that such items will be included in a different period(s) for purposes of developing the rates the utility is authorized to charge for its utility services; or 2) in the case of regulatory liabilities, that refunds to customers, not provided in other accounts, will be required.

General Instruction No. 7, which prescribes the criteria for categorizing items affecting profit and loss as "extraordinary," states, in relevant part, as follows:

> *Extraordinary items*. It is the intent that net income shall reflect all items of profit and loss during the period with the exception of prior period adjustments . . . and long-term debt . . . . Those items related to the effects of events and transactions which have occurred during the current period and which are of unusual nature and infrequent occurrence shall be considered extraordinary items. Accordingly, they will be events and transactions of significant effect which are abnormal and significantly different from the ordinary and typical activities of the company, and which would not reasonably be expected to recur in the foreseeable future. (In determining significance, items should be considered individually and not in the aggregate. However, the effects of a series of related transactions arising from a single specific and identifiable event or plan of action should be considered in the aggregate.) To be considered as extraordinary under the above guidelines, an item should be more than approximately 5 percent of income, computed before extraordinary items. Commission approval must be obtained to treat an item of less than 5 percent, as extraordinary. (See Accounts 434 and 435.)

Considered together, the excerpts quoted above show that the USOA prescribes not only a means for determining whether an event that affects a utility's profit and loss is extraordinary but also a means for dealing with the effects of such events outside normal rate case processes that is fair and equitable to utilities and customers alike.

Under the USOA, the most important question is whether the event affecting profit and loss is extraordinary. The means the USOA provides to answer that question are found within the description of "extraordinary item" set out in General Instruction No. 7. Under that definition, an event is extraordinary if it "is of significant effect," is "abnormal and significantly different from the ordinary and typical activities of the company," and "would not reasonably be expected to recur in the foreseeable future." Once an event satisfies the USOA's definition, no further inquiry is required and all items affecting profit and loss related to that event are eligible for deferral to Account 182.3 as regulatory-created assets.

Materiality – or, using the parlance of General Instruction No. 7, "significance" – is not a criterion that must be satisfied in order for an item to qualify as extraordinary or to be deferred. Instead it is merely a guideline whose sole purpose is to inform a utility whether regulatory commission approval is required before an item can be deferred for ratemaking purposes. This is clear from the language of the USOA itself and also from the fact that the USOA specifically allows the deferral of items affecting profit and loss regardless of whether their impact is financially material/significant. Such language is wholly inconsistent with the suggestion by some parties to this case that materiality/significance is a criterion that must be satisfied before a utility can be authorized to defer an item that affects net income.

General Instruction No. 7 is equally explicit as to how materiality/significance is to be calculated. The general rule is that each item affecting profit and loss is to be considered individually, but where items arise from "a single specific and identifiable event" the materiality/significance of those items "should be considered in the aggregate."

The USOA's scheme for dealing with items related to extraordinary events thus reflects an understanding that unless a utility is allowed to defer out-of-period items that affect net income the utility will be forever foreclosed from having those items considered in a general rate case and thereby included in future rates. Yet that is exactly the fate MGE will suffer unless the Commission grants the Company's application to defer all items related to the Joplin tornado that affect its profit and loss – i.e., expenses, capital-related costs, and revenues providing fixed-cost recovery.

Because the Commission has mandated the use of some version of the USOA for all utilities operating in Missouri, it is not surprising that the accounting principles in the USOA have governed the Commission's past decisions in AAO cases. The Commission decision that best articulates these principles is the Sibley Order,[11] where two important regulatory questions related to AAO applications were considered at length and answered. The first question was whether and when the Commission should allow a utility to defer costs that fall outside the test period used to set rates, and the second question was what standards should apply when a utility requests such authority to defer certain items through an application for an AAO.

In considering the first question, the Sibley Order recognized that "[t]he deferral of costs from one period to another period for the development of a revenue requirement violates the traditional method of setting rates."[12] Traditional ratemaking, the Commission explained, is based on revenues and expenses occurring during a historical test year adjusted for known and measurable changes. Under this method, costs that fall outside the test year are rarely considered in determining the revenue requirement used to set future rates. Allowing a utility to defer items from one period to a subsequent period allows the Commission to consider those out-of-period items in a subsequent rate case; however, the Commission cautioned that such an exception "should be allowed only on a limited basis."[13]

With respect to the second question, the Commission agreed that under the USOA a *single criterion* controls the decision of whether a utility should be allowed to defer out-of-period items. That criterion is: Was the event affecting the items for deferral extraordinary? The Sibley Order states that "[t]he decision to defer costs associated with an event turns on whether the event is in fact extraordinary and nonrecurring."[14] Although the Commission acknowledged that other factors can "influence the

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[11] The Staff Recommendation filed in this case describes the Sibley Order as the order where "the Commission stated its criterion for deferral of costs incurred outside a rate case test year," and goes on to state that "[t]he Commission has consistently used this same criterion" in its decisions in all AAO cases since that order. Staff Exhibit No. 2, Schedule 2-2.

[12] Sibley Order, pp. 6-7.

[13] *Id.*, p. 7.

[14] *Id.*, p. 8.

decision,"[15] it was emphatic that "the primary focus is on the uniqueness of the event, either through its occurrence or its size."[16] The Commission went on to state that while factors such as whether the event had a material financial effect on the utility are "also important," such factors are not a "primary concern"[17] and are "not case-dispositive."[18]

The Sibley Order specifically identified and addressed several of these other factors that are related to, but not dispositive of, a utility's application for an AAO. But the Commission rejected pleas to elevage any of those factors to the status of criteria that must be satisfied before a utility's application for an AAO can be granted. In the Sibley Order, the Commission specifically found that each and all of those factors were irrelevant to the question of whether an AAO should be granted, deciding instead that such factors should be considered only in a subsequent rate case where the Commission determines what portion of the previously-deferred items should be included in rates. The Commission stated its conclusions as follows:

> Staff's emphasis on whether the utility was earning above its authorized rate of return at the time of the deferral, whether the expenditures are reasonable and prudently incurred, and whether to include carrying costs in the recovery, are rate case issues and best left for rate case review. Record-keeping procedures and the booking of any offsets associated with the extraordinary event may be requested; whether to allow those offsets is a decision for the rate case. Another reasonable inquiry in the rate case is whether a company's shareholders were compensated to some extent for the extraordinary event in the rate of return authorized by the Commission.[19]

Under Missouri law, an administrative agency is not bound by *stare decisis*; therefore, in deciding MGE's application for an AAO in this case the Commission is not *per se* bound by the findings and conclusions in the Sibley Order. *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n, 328 S.W.3d 329, 340* (Mo. App. 2010). But because Missouri law also prohibits an administrative agency from abandoning principles announced in past decisions for reasons that are arbitrary, capricious, or contrary to law, the Commission cannot abandon the governing principles announced in the Sibley Order in favor of new

[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*, p. 9.

principles developed specifically for this case unless it can articulate a sound basis for such a significant change in regulatory policy. *See*, *McKnight Place v. Health Facilities Cmte.*, 142 S.W.3d 228, 235 (Mo. App. 2004). The record in this case does not provide any basis for such a change.

As noted previously in this brief, the regulatory principles set forth in the Sibley Order closely parallel the accounting principles governing AAOs found in the USOA. Consequently, rejecting the Sibley Order would be tantamount to also rejecting or altering the USOA. But Section 393.140(4), RSMo, which is the same statute that authorized the Commission to adopt the USOA in the first place, limits the Commission's authority to alter, either explicitly or implicitly, a previously prescribed system of accounts. A sentence in the latter portion of that statute states that "[n]otice of alterations by the commission in the required method or form of keeping a system of accounts shall be given at least six months before the same shall take effect." Because the Commission has issued no such notice with respect to the accounting standards, principles, and procedures of the USOA that govern the deferral of extraordinary items, no changes to the USOA can be made in this case. In addition, a decision to deviate from the USOA's standards, principles, and procedures in this case would be arbitrary and capricious unless the circumstances underlying MGE's request for an AAO, and the weight of competent and substantial evidence presented in this case, reasonably can be viewed to justify such action.[20] Consequently, even though it is not bound by *stare decisis*, it most likely would be unlawful for the Commission to deviate from the governing principles announced in the Sibley Order in reaching a decision on MGE's application in this case.

Another question that is related to the legal, accounting, and regulatory standards that apply to MGE's application is whether those standards authorize the Commission to order the deferral of revenues in the same manner that it routinely authorizes the deferral of expenses and capital-related costs. Based on the clear and unambiguous language of the USOA, the answer to that question is "yes." General

[20] Under Missouri law, "arbitrary and capricious" is defined as willful and unreasoning action without consideration of and in disregard of the facts and circumstances. *Psychiatric Healthcare Corp. v. Dept. of Soc. Svcs.*, 100 S.W.3d 891, 900 (Mo. App. 2003).

Instruction No. 7 applies to "all items of profit and loss" that are affected by an extraordinary event. The description of Account 182.3, Other Regulatory Assets, states that "[t]he amounts included in this account are to be established by those charges which would have been included in net income determinations in the current period." In addition, the USOA defines "Regulatory Assets and Liabilities" to include "specific revenues, expenses, gains, or losses that would have been included in net income determinations." These provisions of the USOA make clear that *all* items affecting a utility's net income are eligible for deferral following an extraordinary event. Although Staff appears to agree that revenues are one of the items that affect net income,[21] both Staff and OPC nevertheless oppose MGE's request to defer revenues providing fixed-cost recovery that were lost as a result of the tornado.

No party to this case has been able to identify an instance prior to the Joplin tornado where a Missouri utility sought authority to defer revenues lost as a result of an extraordinary event. But that is not surprising because no Missouri utility previously has been confronted with an event as truly extraordinary as the Joplin tornado. Mr. Noack described the reasons for the Company's unprecedented request as follows:

> MGE's requested accounting authority may be unprecedented in the State of Missouri, but this is reflective of the fact that the event that precipitated the request – the Joplin tornado – is itself without parallel . . . Mr. Oligschlaeger's rebuttal testimony illustrates the difference in the circumstances faced by MGE from those previously experienced by other regulated utilities . . . He notes that wind and ice storms may lead to a greater geographical scope of outages, but concedes that these outages generally last for only a relatively short period of time because the customers resume taking service immediately after the distribution system is restored. In this case, the tornado destroyed homes and businesses such that customers will not be in a position to take service for extended periods even after MGE's system is repaired and available for service restoration. The difference here is the duration of the impact on the revenues collected by MGE.[22]

Looking beyond Missouri, however, MGE's request is not unprecedented because at least one other state utility regulatory commission has authorized a utility to defer expenses, costs, and revenues following an extraordinary event whose effects were similar to those of the Joplin tornado. As described in Mr. Noack's surrebuttal testimony, in 1992 the Hawaii Public Utilities Commission granted a request

[21] Transcript p. 201, lns. 3-5.
[22] Applicant's Exhibit No. 2, p. 18, ln. 14 – p. 19, ln. 6.

by the Kauai Electric Division of Citizens Utilities Company to defer revenues lost as a result of a severe hurricane.[23] The Hawaii Commission appears to have been motivated by the fact that, like in Joplin, it would be months or years before structures destroyed by the hurricane could be rebuilt and the affected utility could restore service to those structures.[24]

In its opening statement in this case, OPC attempted to introduce a second out-of-state regulatory commission decision, one where the Delaware Public Service Commission purportedly denied a water utility's request to defer lost revenues. But there are at least two issues related to the Delaware Commission's decision that render it of no value in this case.

First, the Delaware decision is not evidence in this case. No witness referred to that decision in testimony and OPC did not request the Commission to take administrative notice of the Delaware Commission's order, even assuming such notice could lawfully have been taken. Consequently, the decision cannot be considered by the Commission in deciding MGE's request for an AAO.[25]

But even if the Commission could consider the Delaware Commission's order, the decision reflected in that order is inapplicable because it is contrary to Missouri law. The Delaware Commission denied the utility's application for deferral because the commission concluded that deferring out-of-period costs constitutes retroactive ratemaking. But Missouri courts consistently have held otherwise. Two cases illustrate this point. In *State ex re. Missouri Gas Energy v. Pub. Serv. Comm'n*, 978 S.W.2d 434, 438 (1998), the Missouri Court of Appeals held that the Commission has the authority to issue AAOs that defer out-of-period costs to a future rate case. In *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n*, 210 S.W.3d 330, 336 (2006), the same court specifically held that in Missouri such deferrals do not constitute retroactive ratemaking.

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[23] *Id.*, p. 19, lns. 13 – 19.

[24] *Id.*

[25] Section 536.070(6), RSMo, authorizes the Commission to take official notice of all matters of which courts can take judicial notice. The various items of which courts can take judicial notice are listed in Chapter 490, RSMo; however, actions taken by administrative agencies outside Missouri is not one of the items listed there. Assuming that the Commission could have taken administrative notice of the Delaware Commission's order, the Missouri Supreme court's decision in *Prokopf v. Whaley*, 592 S.W.2d 819, 823 (Mo. banc, 1980), appears to prohibit the Commission from taking notice of that decision now should OPC choose to cite it in its brief.

IV. ARGUMENT

Issue A: Should the Commission enter an order authorizing MGE to defer to Account 182.3, Other Regulatory Assets, actual incremental Operations & Maintenance and capital expenses incurred for repair, restoration, and rebuild activities associated with the May 22, 2011, Joplin tornado, including depreciation and carrying charges equal to MGE's ongoing Allowance for Funds Used During Construction rates?

As reflected in their respective position statements, and also the pre-filed testimonies of their respective witnesses, both MGE and Staff agree that the Commission should enter an order in this case authorizing the Company to defer to Account 182.3, Other Regulatory Assets, actual incremental O&M expenses and capital-related costs incurred for repair, restoration, and rebuild activities associated with the Joplin tornado.

OPC's position statement indicates that it will not oppose the deferral of O&M expenses and capital-related costs "so long as conditions are in place to ensure the accuracy of the deferred amount."[26] But MGE is not completely sure what conditions OPC believes need to be put in place. The Staff Recommendation lists several conditions that Staff believes should attach to any order authorizing the deferral of O&M expenses and capital-related costs, and with but two exceptions, which are discussed *infra*, MGE accepts and agrees with those suggested conditions. Mr. Lafferty's rebuttal testimony discusses the two conditions proposed by Staff that MGE opposes, but he neither specifically endorses those conditions nor proposes any additional conditions of his own. In its position statement, however, OPC for the first time proposes two new conditions: (1) that any deferral of expenses and costs be offset to prevent double recovery of capital expenses; and (2) that any deferral be conditioned on a requirement that MGE file a general rate case within two years from the date of the tornado.[27] Because Mr. Lafferty's testimony does not address the questions of why either or both conditions are necessary or what specific language would be required to implement OPC's proposals, MGE believes it would be both unfair and unlawful for the Commission to consider or adopt either proposal in its final order in this case.

[26] Public Counsel's Position Statement, p. 1.
[27] *Id.*, pp. 1-2.

Issue B: Should the Commission enter an order authorizing MGE to defer to Account 182.3, Other Regulatory Assets, its loss of expected revenues related to the May 22, 2011, tornado, including carrying charges equal to its ongoing Allowance for Funds Used During Construction rate?

The evidence and arguments that have been made in this case regarding MGE's application can be divided into two categories. The first consists of evidence that is relevant to the question of whether the Company should be allowed to revenues proving fixed-cost recovery that have been, and will continue to be, lost as a result of the Joplin tornado. This includes all evidence and arguments that address the standards and guidelines for deferral that are established in the USOA or are contained in past Commission decisions in other AAO cases. The second category consists of evidence regarding issues that relate to items a utility seeks to defer but that the Commission has determined should be considered in a subsequent rate case. In discussing this issue, MGE will separately address each of those categories of evidence and argument.

Category 1: Evidence Regarding Issues Related to the USOA and Past Commission Decisions

Regarding the first category, the legal, accounting, and regulatory standards that govern MGE's request for an AAO were discussed at length earlier in this brief. Those standards make clear that MGE must satisfy only one criterion in order for its AAO application to be granted, and that the same criterion governs not only the Company's request to defer O&M expenses and capital-related costs but also its request to defer revenues providing fixed-cost recovery. That criterion is: Was the event that affected the items MGE seeks to defer an "extraordinary event" as that phrase is defined in the USOA? If the answer to that question is "yes," then the USOA calls for the deferral of *all* items affecting profit and loss that are related to that event. There is not, as Staff and OPC would have the Commission believe, one USOA standard that applies to expenses and capital-related costs and a different standard that applies to revenues.

All parties to this case either explicitly or implicitly agree that the Joplin tornado was an extraordinary event. MGE's and Staff's witnesses explicitly state this obvious conclusion in their

respective pre-filed testimonies.[28] And although OPC's witness never explicitly says so, he, too, agrees that the Joplin tornado was an extraordinary event, because if he believed otherwise there would be no basis for him to support the deferral of O&M expenses and capital-related costs.

MGE and Staff also agree that, just like O&M expenses and capital-related costs, the revenues providing fixed-cost recovery that MGE seeks to defer affect the Company's net income.[29] As Mr. Noack pointed out in both his direct and surrebuttal testimonies, the USOA's description of Account 182.3, Other Regulatory Assets, specifically states that amounts that can be deferred to that account include "those charges which would have been included in **net income, or accumulated other comprehensive net income.**" He went on to note that the USOA's definition of "regulatory assets and liabilities"[30] specifically includes "**revenues**, gains, and losses" as well as expenses. (emphasis original)[31] In addition, as noted *supra*, both the USOA's definition of "extraordinary items" and its General Instruction No. 7 each include the phrase "all items of profit and loss. Unquestionably, revenue is one of those items.

Because the evidence in this case clearly establishes that the Joplin tornado was an extraordinary event and also because revenues are an item that affects a utility's net income, no further inquiry is required, the Commission should, on that basis alone, issue an order authorizing MGE to defer not only O&M expenses and capital-related costs caused by the tornado but also revenues providing fixed-cost recovery lost as a result of that same event.

Staff, however, argues otherwise, insisting that the Sibley Order – and by implication the USOA – establish a second criterion that also must be satisfied before the Commission can authorize the Company to defer its lost revenues. Staff believes that second criterion is materiality,[32] but based on the specific language of both the Sibley Order and the USOA that argument must fail.

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[28] Applicant's Exhibit No. 2, p. 11, lns. 1-5; Staff Exhibit No. 2, Schedule 2-4.
[29] Applicant's Exhibit No. 2, p. 13, lns. 10-20; Transcript p. 201, lns. 3-5.
[30] See USOA Definition No. 3, which is reproduced and discussed *supra*.
[31] Applicant's Exhibit No. 1, p. 14, lns. 9-16.
[32] Staff Exhibit No. 1, Schedule 2-3.

As noted previously in this brief, the Sibley Order includes the following statements about the importance of materiality/significance in cases such as this one:

- "The issues of whether the event has a material or substantial effect on a utility's earnings is *also* important, *but not a primary concern*." (emphasis added);[33] and
- The "five percent standard is thus relevant to materiality . . . *but is not case-dispositive*." (emphasis added)[34]

Because the Commission has stated that considerations regarding the materiality of an item sought to be deferred are "not a primary concern" and are "not case-dispositive," then materiality cannot possibly be a criterion that must be satisfied before MGE's request to defer revenues providing fixed-cost recovery can be granted. Even Mr. Oligschlaeger grudgingly conceded this point.[35]

But it is not just the Commission's Sibley Order that relegates materiality/significance to the status of a secondary and non-essential factor. Under the terms of the USOA, materiality – or significance – is nothing more than a guideline whose sole purpose is to inform utilities if regulatory commission approval is required before items affected by an extraordinary event can be deferred.[36] Moreover, because the USOA specifically allows the deferral of items that are not material/significant, the importance of the materiality/significance guideline is, at best, secondary and cannot under any circumstances be considered a criterion that must be satisfied before an AAO can be granted.

Even if materiality/significance were a mandatory criterion, the O&M expenses and capital-related costs MGE incurred and the revenues it lost as a result of the tornado greatly exceed the USOA's five-percent guideline. The Staff Recommendation specifically concludes that "the required O&M expenditures and the capital-related costs associated with those expenditures have had and will have a material impact on MGE's financial position."[37] If Staff is correct and the total effect of two of the three items the Company seeks to defer in this case already exceeds the USOA's materiality/significance

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[33] Sibley Order, p. 8.
[34] *Id.*
[35] Transcript p. 196, ln. 9 – p. 198, ln 6.
[36] See USOA General Instruction No. 7, *supra.*
[37] Staff Exhibit No. 1, Schedule 2-4.

guideline, then it is axiomatic that adding MGE's lost fixed-cost revenues – which, according to Mr. Lafferty's testimony represents an additional 4.73 percent of net income[38] – will not change the result. Indeed, when all three items are added together, the total affect on net income exceeds ten percent.[39]

But beyond the calculations discussed above, the Commission must not lose sight of the fact that both Staff and OPC advocate measuring materiality/significance is a manner that is wholly inconsistent with the requirements of the USOA. As discussed *supra*, the USOA's definition of "extraordinary items" specifically states that "[i]n determining significance . . . the effects of a series of related transactions arising from a single specific and identifiable event or plan of action should be considered in the aggregate." Despite this clear and unambiguous instruction, both Staff and OPC ask the Commission to separately consider the materiality/significance of MGE's revenues providing fixed-cost recovery.[40] This misapplication of the USOA is what allowed both those parties to file testimony suggesting that the revenues providing fixed-cost recovery that are being lost as a result of the Joplin tornado do not have a material/significant affect on MGE. But testimony premised on such a fundamentally false and inaccurate application of the USOA is of no probative value whatsoever and should be disregarded or rejected for that reason alone.

There are two other additional issues or arguments related to the USOA that MGE anticipates that Staff and/or OPC will raise in their respective post-hearing briefs. The first issue concerns the language in the USOA's description of Account 182.3, Other Regulatory Assets, which states:

> [A]mounts included in this account are to be established by those charges which would have been included in net income determinations under the general requirements of the Uniform System of Accounts but for it being probable that such items will be included in a different period(s) for purposes of developing the rates that the utility is authorized to charge for its utility services.

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[38] OPC Exhibit No. 1, p. 10, ln. 24.

[39] Staff's recommendation estimated that, as a result of the tornado, MGE incurred O&M and capital-related costs of approximately $1.539 million (Staff Exhibit No. 2, Schedule 2-4). Add to that approximately $1.167 million in lost fixed-cost revenue (Applicant's Exhibit No. 1, p. 10, lns. 1-3), and the total affect of all items on the Company's net income exceeds ten percent.

[40] *See, e.g.*, Staff Exhibit No. 2, p. 16, lns. 17-19; OPC Exhibit No. 1, p. 19, lns. 23-25.

Staff, which signaled its concerns about this issue for the first time during its opening statement, appears to believe the definition quoted above creates a "probability of recovery" standard[41] that would require a utility seeking an AAO to prove that all items it seeks to defer will be recovered in a subsequent rate case before the utility can be granted authority to defer those items in the first place. But this argument is unfounded and should be rejected for several reasons.

First and foremost, there is no evidence on the record in this case that supports Staff's argument that: (1) the USOA requires a utility to demonstrate probability of recovery before it can receive authority to defer items affected by an extraordinary event, or (2) probability of recovery is a standard the Commission never has applied in a past AAO case. Neither of Staff's witnesses in this case discusses – or even mentions – the so-called "probability standard" in their pre-filed testimonies. In addition, there is no evidence that the Commission has ever required a utility to demonstrate probability of recovery as a condition precedent to granting its request for an AAO. What evidence there is regarding past AAO decisions suggests the probability standard is a figment of Staff's imagination. For example, the word "probability" occurs nowhere in the Sibley Order or in any Report and Order issued in any of the other AAO cases that Mr. Noack discusses in his surrebuttal testimony.

But beyond the fact that Staff's argument is not supported by competent and substantial evidence on the record in this case or by any past Commission decisions, it is far from clear that the language of the USOA imposes a probability of recovery requirement in the first place. The USOA's description of Account 182.3 simply requires that amounts deferred to that account be "included" in a different period for purposes of determining future rates. But that is precisely what an AAO is designed to do; allow a utility to include out-of-period items in a subsequent rate case so the Commission can determine if some or all of those items should be included in future rates. The following colloquy between Mr. Noack and Staff's counsel illustrates this point:

[41] Transcript p. 43, lns. 18-24.

Q. If you would please take a minute to read for yourself the yellow highlighted portion of Paragraph 182.3 on other regulatory assets.
A. I'm with you.
Q. And to recap what you just read on other regulatory assets, would you agree that the USOA sets forth a requirement that it be probable that charges in a – included in a regulatory asset be used to develop utility rates?
A. That's what the language says, yes.
Q. Okay. And so would you agree that this portion of the USOA on other regulatory assets pertains to MGE's request for an AAO?
A. It – it pertains to our request in that we are asking for a deferral of these costs to a regulatory asset ***so that we can include it in our next rate case and ask for regulatory approval***. (emphasis added)[42]

Although it appears certain *financial* accounting standards, such as FAS 71, require MGE *to determine for itself* before it records a deferral whether it is more likely than not that the Company will recover in a future rate case some or all of the amounts it defers,[43] there is nothing in either the USOA or in past Commission decisions to suggest that a similar requirement applies to AAO applications. Therefore, the Commission should reject Staff's attempt to add such a requirement for the first time in this case.

The second additional issue that Staff and/or OPC may discuss in their respective briefs concerns the definition of "cost" found in the USOA. Again, no witness in this case discussed either the USOA's definition of "cost" or why that definition is important to the Commission's consideration of MGE's application for an AAO. Indeed, Staff's first suggestion that this definition is significant occurred during its cross-examination of Mr. Noack. During that cross-examination Staff read into the record a portion of the USOA's definition of "cost."[44] The full definition of that term is as follows:

> *Cost* means the amount of money actually paid for property or services. When the consideration given is other than cash in a purchase and sale transaction, as distinguished from a transaction involving the issuance of common stock in a merger or a pooling of interest, the value of such consideration shall be determined on a cash basis.

Why this definition is important remains a mystery. As noted above, no witness discusses the definition in pre-filed testimony. Moreover, the word "cost" is not used in any of the provisions of the

[42] Transcript p. 138, lns. 7-22.
[43] *Id.*, p. 215, lns. 1-9.
[44] *Id.*, p. 126, lns. 11-12.

USOA that are relevant to MGE's application, including the definition of Regulatory Assets, General Instruction No. 7, and the description of Account 182.3, Other Regulatory Assets. For example, the USOA's definition of Regulatory Assets applies to all assets and liabilities that "arise from specific revenues, expenses, gains, or losses that would have been included in net income determinations," and similar language is found in the description of Account 182.3. The USOA's General Order No. 7 also never uses the word "costs" but, instead covers "items of profit and loss" that affect net income, which includes both costs and revenues.

It appears Staff raised the USOA's definition of "cost" as a means of challenging MGE's reference to the lost revenues it seeks to defer in this case as revenues that recover fixed-*costs*.[45] But as he pointed out during re-direct examination, the meaning of the term "cost" when used in a ratemaking context is much broader than the USOA's definition of that term. For example, Mr. Noack testified that "cost of capital" is a common ratemaking term that does not fit neatly within the confines of the USOA's definition.[46] He further testified that the same is true for profits that a company pays to its shareholders as dividends, which are a cost the company incurs but that would not qualify as such under the USOA's definition.[47]

And there is one final matter regarding Staff's approach to MGE's request to defer revenues providing fixed-cost recovery that warrants comment in case that matter is discussed in Staff's post-hearing brief. During its opening statement, Staff's counsel repeatedly referred to MGE's revenues providing fixed-cost recovery as "lost profits,"[48] and she repeated this reference during her re-direct examination of Mr. Oligschlaeger.[49] This mischaracterization of the Company's request appeared to be deliberate and was no doubt intended to divert attention from the true nature of that request. As Mr. Noack explained, however, that although the fixed-cost element of MGE's rate structure does contain an

[45] *Id.*, pp. 126-127.
[46] *Id.*, p. 163, lns. 4-7.
[47] *Id.*, lns. 11-15.
[48] *See, e.g., Id.*, p. 44, lns 21-24.
[49] *Id.*, p. 211, lns. 11-12.

increment of profit, eighty-eight percent of that rate element consists of costs that are not related to profit,[50] such as operating expenses and taxes.[51] Thus, while profit is a part of the Company's cost of service used to set rates, Staff's suggestion that the revenues providing fixed-cost recovery that MGE seeks to defer in this case are just "lost profit" is pure fiction.

Category 2: Evidence Regarding Issues That Should Be Considered in a Subsequent Rate Case

In its Sibley Order the Commission identified and addressed several factors that are not relevant to a case where a utility seeks an AAO. Instead, those factors are only relevant to the subsequent rate case where the utility seeks to recover the deferred items in rates. The factors specifically identified in the Sibley Order included whether the utility is earning above its authorized rate of return at the time for the deferral; whether the items sought to be deferred were reasonable and were prudently incurred; whether rate recovery of deferred items should include carrying costs; whether the utility's record-keeping related to the deferred items is adequate; whether there are any offsets associated with the deferred items; whether shareholders were compensated for the risk associated with the extraordinary event when the utility's return on equity was set; and what portion of the deferred items should the utility be allowed to recover in future rates.[52]

Despite the clear distinction between those factors that are relevant to an AAO case and those factors that are relevant only to the utility's next rate case, the pre-filed testimonies of Messrs. Oligschlaeger and Lafferty are devoted in large part to a discussion of factors that are irrelevant to this case. The list of factors discussed in those testimonies includes some of the same factors that were specifically rejected in the Sibley Order, such as the adequacy of MGE's current earnings,[53] the prudency of certain items proposed for deferral,[54] the adequacy of the Company's record-keeping,[55] offsets,[56] and

[50] *Id*, p. 177, lns. 21-25.
[51] *Id.* p. 178, lns. 2-3.
[52] Sibley Order, p. 9.
[53] Staff Exhibit No. 2, pp. 7-11.
[54] *Id.* p. 13.
[55] *Id.* p. 14.
[56] *Id.* p. 15.

whether shareholders were adequately compensated for the risk of the Joplin tornado in the rate of return on equity that was set in the Company's last rate case.[57] Although Mr. Oligschlaeger acknowledged during cross-examination that the Sibley Order specifically found these factors to be irrelevant,[58] neither he nor Mr. Lafferty even attempt to explain why factors that were deemed irrelevant in the Sibley Order should be considered relevant in this case.

Staff's and OPC's witnesses also do not explain why these factors apply only to MGE's request to defer revenues providing fixed-cost recovery. Despite the fact that each of the factors these witnesses discuss in their respective testimonies is broad enough to apply equally to each of the items MGE seeks to defer in this case, neither Mr. Oligschlaeger nor Mr. Lafferty suggests that any of these factors poses an obstacle to the Company's request to defer tornado-related O&M expenses or capital-related costs.

The Sibley Order and the USOA each clearly establish that the only issue the Commission needs to decide in a case such as this one is whether the Joplin tornado was an extraordinary event. If it so finds, the inquiry stops and the Commission should grant MGE's application to defer all items – expenses, capital-related costs, and revenues providing fixed-cost recovery – that were affected by that tornado so those items can be considered in the Company's next rate case. In that rate case the Commission can consider all of the various factors described and discussed by Staff and OPC, and based on its consideration of those factors determine how much of the deferred amounts should be included in future rates. But those factors are not relevant to, and should not be considered in, the present case.

The Commission should keep in mind that following the USOA and the Sibley Order will not harm or adversely affect MGE's ratepayers, because a decision to allow the Company to defer all items affected by the Joplin tornado will not affect current rates in any way.[59] Those rates can only be changed in a future rate case, where the Commission will be free to consider all of the factors raised by Staff and

[57] OPC Exhibit No. 1, p. 14, lns. 4-21.
[58] Transcript p. 199, lns. 11-16.
[59] Applicant's Exhibit No. 1, p. 13, ln. 31 – p. 14, ln. 5.

OPC – as well as other relevant factors – in determining whether any or all of the items of expense, capital-related costs, and revenues should be recovered from ratepayers.

Staff falsely argues that "a Commission decision allowing cost deferral in this proceeding may be argued to necessarily require a subsequent decision by the Commission to allow rate recovery of the deferred amount."[60] Again, however, this is a concern that Staff selectively applies only to MGE's request to defer lost revenues providing fixed-cost recovery. As with its other selective applications of the USOA and the Sibley Order, Staff never explains why its concern does not also apply to the deferral of O&M expenses and capital-related costs. But even beyond the selective application of its concerns, Staff is well aware that a Commission order authorizing a utility to defer an item is no guarantee that the item will be recovered, in whole or in part, in future rates. In the Sibley Order the Commission specifically found that the decision in that case only allowed for deferral of certain items, and that recovery and ratemaking treatment of those items would be reserved for a future rate case.[61] Missouri's appellate courts also have recognized that allowing a utility to defer certain items does not guarantee future recovery of those items in rates. In *State ex rel. Office of the Pub. Counsel v. Pub. Serv. Comm'n.*, 858 S.W.2d 806 (1993) – the appeal of the Sibley Order – the Missouri Court of Appeals stated that there is a "fundamental difference between a rate case and a case involving only accounting procedures" and a "utility is not automatically entitled to recovery of the full amount of deferred charges" in a subsequent rate case.[62]

Issue C: If the Commission authorizes MGE to defer these amounts, when should MGE commence amortizing the deferred amounts to expense?

Staff proposes that the Company commence amortizing any items authorized for deferral in this case as of January 1, 2012.[63] OPC appears to be somewhat ambivalent as to when the amortization commences,[64] but asks the Commission to condition recovery of any deferred costs on the requirement

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[60] Staff Exhibit No. 2, p. 19, lns. 7-10.
[61] Sibley Order, pp. 16-17.
[62] *State ex rel. Office of the Pub. Counsel v. Pub. Serv. Comm'n.* at p. 813.
[63] Staff Exhibit No. 1, p. 3, lns. 10-11.
[64] OPC Exhibit No. 1, p. 9, lns. 3-12.

that MGE file a general rate case on or before May 22, 2013.[65] The Company proposes to commence amortization of any deferrals on the effective date rates set in its next rate case or by no later than January 1, 2013.[66] Mr. Noack explained the Company's proposal as follows:

> The Commission has previously stated that the purpose of an AAO is to give the utility an opportunity to recover extraordinary costs. The total amount of the deferral [requested in this case] will not be known as of January 1, 2012. Also, the Commission rejected a similar Staff proposal in Case No. ER-2008-0318 because of its unjust and unreasonable result. The Company's recommendation that it be authorized to commence the amortization of involved expenses and losses at the earlier of the effective date of rates approved in its next general rate case or by no later than January 2013 is consistent with the Commission's recent policy guidance.[67]

Staff's counter-argument is (1) that it is inappropriate "for utilities to time the booking of their expenses to exactly match the rate recovery of the expense,"[68] and (2) that delaying recovery will result in over-recovery of the deferred amounts.[69] Staff, however, never addressed Mr. Noack's claim that commencing amortization on January 1, 2012, would be virtually impossible because MGE won't know by that date the full amount of O&M expenses, capital-related costs, and lost revenues providing fixed-cost recovery that need to be amortized.

Case No. ER-2008-0318, which Mr. Noack referred to in his testimony, involved a deferral of storm-related expenses by Ameren Missouri (f/k/a AmerenUE). Although the parties to that case agreed to the term over which the deferred costs should be amortized, they left for the Commission the question of when the amortization should commence. Like it has done in this case, Staff argued that the start date of the amortization was of no consequence to the company, and therefore proposed to commence the amortization of Ameren Missouri's deferred storm costs within a short period after the storm. Ameren Missouri, however, proposed to commence the amortization on the effective date of rates set in that company's next rate case. The Commission ultimately adopted Ameren Missouri's position, and in its Report and Order explained why it rejected Staff's position:

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[65] *Id.*, p. 7, lns 12-16.
[66] Applicant's Exhibit No. 1, p. 17, lns. 11-15.
[67] Applicant's Exhibit No. 2, p. 22, ln. 20 – p. 23, ln. 4.
[68] Staff Exhibit No. 1, p. 4, lns. 15-16.
[69] *Id.*, p. 5, lns.1-2.

> The purpose of an AAO is to give the utility an opportunity to recover extraordinary expenses. In granting AmerenUE an AAO . . . the Commission determined the ice storm restoration costs are extraordinary costs, and no party disputes that fact. As Staff points out, an AAO is not intended to absolutely ensure a utility recovers all those extraordinary expenses. However, the utility should be given a reasonable opportunity to make that recovery.[70]

Adopting Staff's proposal to commence on January 1, 2012, the amortization of any items that MGE is authorized to defer in this case will achieve the very result the Commission decided it must avoid in Case No. ER-2008-0318 – i.e., denying the utility a reasonable opportunity to recover the deferred items. Even if MGE were to file a general rate case in January 2012 – which Mr. Noack explained is not a viable option[71] – rates set in that case would not go into effect until sometime in December 2012. That means MGE would be denied *any opportunity* – much less a reasonable opportunity – to collect a portion of the deferred amounts. Add to that the fact that the Company will not even know by January 1, 2012, the full amount of the expenses, costs, and lost revenues it will be entitled to defer under an order issued in this case, and Staff's proposal is shown to be not only unfair but also nearly impossible to implement and administer.

Section 393.1012.3, RSMo, requires MGE to file a general rate case no less frequently than every three years in order to avail itself of the ISRS mechanism, and Mr. Noack testified that in order to comply with that requirement the Company will have to file its next general rate case sometime before the end of 2013.[72] Therefore, adopting MGE's proposal will not unduly delay the date on which the Company commences the amortization of amounts deferred in this case. Moreover, unlike Staff's proposal, MGE's proposed commencement date will enable the Company to know all the amounts that will need to be amortized.

In addition, delaying the start of the amortization period, as proposed by MGE, will not disadvantage customers, whose base rates for gas service cannot change until the Company's next case.

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[70] *In the Matter of Union Electric Company d/b/a Ameren UE's Tariffs to Increase Its Annual Revenues for Electric Service* (February 6, 2009), p. 50.
[71] Applicant's Exhibit No. 2, p. 20, lns. 4-17.
[72] Transcript p. 143, lns. 9-11.

But only MGE's proposal will enable the Company to have a reasonable opportunity to recover the full financial effects of the Joplin tornado. In Case No. ER-2008-0318, the Commission determined that was both an important and a legitimate objective for Ameren Missouri. It is an equally important and legitimate objective for MGE.

Issue D: If the Commission authorizes MGE to defer these amounts, over what length of time should MGE amortize the deferred amounts to expense?

With respect to this issue, both Staff and OPC believe the amortization should occur over ten years,[73] while MGE believes the amortization period should be five years.[74] The Staff Recommendation states that the basis for proposal is Staff's belief that "[p]ast Commission practice has been to utilize a ten-year period for amortizing capital expenditure deferrals."[75] But MGE's evidence in this case conclusively demonstrates that Staff's argument in favor of a ten-year amortization has no merit. Mr. Noack testified[76] that in a Report and Order issued less than five months ago, the Commission found that utilities generally are allowed to recover storm-related deferrals – both O&M expenses and capital-related costs – over a five-year period.[77] He further testified that in recent cases, such as Case No. ER-2008-0318, Staff has recommended a five-year amortization period for storm-related costs and expenses.[78]

Because Staff has recommended a five-year amortization of storm-related costs and expenses, and because the Commission generally has found that amortization period to be appropriate, there is no reason for the Commission to accept Staff's and OPC's proposal for a longer amortization period in this case.

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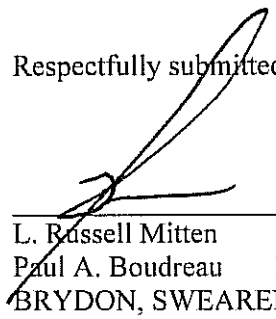
[73] Staff Exhibit No. 1, Schedule 2-5; OPC Exhibit No. 1, p. 8.
[74] Applicant's Exhibit No. 1, p. 17, lns. 11-15.
[75] Staff Exhibit No. 2, Schedule 2-5.
[76] Applicant's Exhibit No. 2, p. 22, lns. 3-9.
[77] *In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase Its Annual Revenues for Electric Service*, Case No. ER-2011-0028 (July 23, 2011), p. 20.
[78] Applicant's Exhibit No. 2, p. 22, lns. 14-15.

V. CONCLUSION

Based on the evidence in this case and the arguments presented above, the Commission should grant MGE's application for authority to defer O&M expenses, capital-related costs, and lost revenues providing fixed-cost recovery attributable to the May 22, 2011, Joplin tornado. That tornado was, unquestionably, an extraordinary event, and under both the regulatory principles announced by the Commission in the Sibley Order and the accounting standards contained in the USOA that fact, alone, provides all the basis the Commission needs to grant the Company's request to defer all of the items in its AAO application. Each of those items – expenses, capital-related costs, and revenues – affects MGE's net income. Accordingly, there is no basis for the Commission to allow the Company to defer expenses and costs but deny it the authority to defer lost revenues providing fixed-cost recovery. The decision to allow MGE to defer those items will have no effect on current rates and will have no effect on future rates unless the Company is able to prove to the Commission in a future rate case that some or all of the deferred amounts should be recovered from customers. If, however, the Commission does not grant MGE the deferral authority it seeks in this case, the Company will forever be denied any opportunity to demonstrate in its next rate case that the items affected by the tornado should be included in the revenue requirement used to set rates in that case.

In addition to granting MGE authority to defer the items requested in its application, the Commission should also find that the amortization of the deferred amounts should not commence until the effective date of rates set in the Company's next rate case and that the period of amortization should be five years. These findings also are consistent with positions taken by Staff and decisions rendered by the Commission in recent cases dealing with the recovery of storm-related items.

Respectfully submitted



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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail to the following counsel this 23rd day of December, 2011:

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