BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Propriety of the	)	
Rate Schedules for Natural Gas Service of	)	File No. GR-2018-0230
Summit Natural Gas of Missouri, Inc.	)	

RESPONSE TO SHOW CAUSE ORDER

COMES NOW Summit Natural Gas of Missouri, Inc. ("SNGMo" or the "Company"), and for its response to the Missouri Public Service Commission's ("Commission") February 21, 2018, *Order Opening Rate Case, Directing Notice, Establishing Time To Intervene, and Requiring Company to Show Cause Why Its Rates Should not be Adjusted* (the "Show Cause Order" or "Order"), provides answers to, and comments regarding, the matters specified therein as follows:

1. **SNGMo's current circumstances do not support a rate reduction, even with consideration of the Tax Cuts and jobs Act of 2017, and, in the absence of a complaint case, the Commission has no statutory authority to order SNGMo to file tariffs to reduce its rates because of a change to reflect the percentage reduction in its effective income tax rate. (Ordered ¶1)**

Current Rate Review

Reducing SNGMo's rates would only be appropriate if, after considering all reasonable factors, SNGMo were earning in excess of a just and reasonable rate. In this regard, it is notable that SNGMo has not been in a rate case before this Commission since 2014 in Case No. GR-2014-0086. The rates set in that case were based on a test year ending September 30, 2013, updated through December 31, 2013, and trued-up through June 30, 2014. Thus, four years will soon have passed since the period examined in that case.

Given that situation, any review of the Company's current rates should be based on the Company's current costs and revenues. In response to the Show Cause Order, the Company has

prepared the attached spreadsheet (**Appendix A-C**)[1] that compares its present revenues to its current revenue requirement and shows that SNGMO's current costs and revenues do not support a rate reduction.

Process

Missouri public utilities have a property interest in money they collect from their customers under an established schedule of rates of which they cannot be deprived by legislative or judicial action without violating state and federal constitutional due process provisions.[2] ***Straube v. Bowling Green Gas Co.***, 227 S.W.2d 666, 671 (Mo. 1950).[3] In fixing just and reasonable rates, the Commission performs a delegated legislative function. ***Lightfoot v. City of Springfield***, 236 S.W.2d 348, 352 (Mo. 1951).

In ***Straube***, appellants brought an action in equity against respondent, a public utility, to determine the ownership of, and to recover, certain funds received by respondent. One fund represented an amount received by respondent from the Registry of the United States Circuit Court of Appeals for the Eighth Circuit pursuant to its affirmance of a Federal Power Commission rate reduction order. The other fund was an alleged excess amount collected by respondent from its customers after the rate reduction order went into effect, but prior to the approval of a revised rate. The Missouri Supreme Court observed that:

> . . . respondent lawfully came into possession, custody and control of both funds . . . Respondent never collected and appellants never paid more than the legally established rate for gas furnished by respondent and appellant's rights were never invaded. (emphasis added)

[1] **Appendix A-C** has been identified as Confidential in accordance with Commission Rule 4 CSR 240-2.135(2)(A)5 (reports, work papers, or other documentation produced by internal or external auditors or consultants.)

[2] ***Mo. Const***. Art. I, §10; ***U.S. Const***. Amend. XIV. *See also,* **State ex rel. Southwestern Bell Telephone Co. v. Pub. Serv. Comm'n**, 416 S.W.2d 109, 114 (Mo. 1967).

[3] *See also,* ***State ex rel. Barvick v. Pub. Serv. Comm'n***, 606 S.W.2d 474, 476 (Mo. App. 1980).

Id. at 671. The Court found that appellants had failed to state a claim under which recovery was available. ***Id***. at 672.

Like the utility in ***Straube***, SNGMo is collecting revenue from its customers under lawful rates established by the Commission in Case No. GR-2014-0086 and these customers are paying no more than was allowed in that case. Consequently, there is no basis for requiring SNGMo to disgorge revenues that, having been collected, are its property.

There are only limited statutory avenues available to the Commission for the purpose of adjusting rates to be charged by a gas utility. A utility may file revised tariffs incorporating a rate increase or decrease (i.e., the "file and suspend" method),[4] the Commission may of its own motion initiate a complaint alleging a utility's rates are unlawful or unreasonable,[5] the Commission may authorize a separate surcharge for certain investments in natural gas infrastructure,[6] the Commission may authorize periodic rate adjustments for environmental compliance costs and certain weather-related non-gas costs within the context of a general rate case[7], and the Commission may, for gas utilities, authorize separate Purchased Gas Adjustment ("PGA") and Actual Cost Adjustment ("ACA") charges.[8] This is because the Commission is an administrative agency that has only those powers conferred by statute either expressly, or by clear implication as necessary to carry out an expressed grant. ***State ex rel. Utility Consumers Council of Missouri v. Pub. Serv. Comm'n***, 585 S.W.2d 41, 58 (Mo. banc 1979) ("UCCM");

---

[4] §§393.140(11) and 393.150 RSMo.

[5] §386.390 RSMo. *See also,* **State ex rel. Jackson County v. Pub. Serv. Comm'n**, 532 S.W.2d 20, 28 (Mo. banc 1975).

[6] §§393.1009, 393.1012, and 393.1015 RSMo.

[7] §386.266 RSMo.

[8] *See*, **State ex rel. Midwest Gas Users Ass'n. v. Pub. Serv. Comm'n**, 976 S.W.2d 470 (Mo. App. W.D. 1998) ("MGUA"). It is worth noting that PGA/ACA adjustment clauses must be established within the context of the customary file-and-suspend method of setting rates. This is discussed in more detail below in the context of topic 4.

State ex rel. City of West Plains v. Pub. Serv. Comm'n, 310 S.W.2d 925, 928 (Mo. banc 1958). In the case of base rates, changes must take into account "all relevant factors". *See,* ***State ex rel. Missouri Water Co. v. Pub. Serv. Comm'n***, 308 S.W.2d 704, 719 (Mo. 1957). These provisions of the Missouri Public Service Commission Act (the "Act") preclude the possibility that other procedural alternatives for effecting a general rate increase or decrease exist. Thus, the Commission does not have the power to order SNGMo to file tariffs to reduce rates for every class and category of service to reflect the singular effect of the Tax Cuts and Jobs Act of 2017.

2. **Comments regarding the requirement to quantify and track all impacts of the Tax Cuts and Jobs Act of 2017 potentially affecting natural gas service rates from beginning January 1, 2018. (Ordered ¶2)**

It is unclear what is intended by the Commission's Ordered ¶2. The Commission certainly has the power to prescribe the system of accounts to be followed by gas corporations and, in fact, has by rule done so. *See*, §393.140(4) RSMo., and 40 CSR 240-40.040. It may also by order prescribe the keeping of other records by utilities. ***Id.*** If this aspect of the Commission's Order (i.e., to "quantify and track" the tax impact of the Tax Cuts and Jobs Act of 2017) is intended to alter, or necessitates the alteration of, the Commission-prescribed method for keeping accounts, the process for doing so provided for in the Act requires a "notice of alterations" no less than six months in advance of the effective date of the change/alteration. ***Id.***

Without clarification from the Commission of what specifically the Company is being requested to do in order to "quantify and track" the impact of the federal tax act as it may affect rates, SNGMo cannot effectively comply with the Order or meaningfully respond. SNGMo suggests that further discussion between the Commission's staff and representatives of the Company to explore this topic would be helpful.

Beyond just the manner or feasibility of compliance, SNGMo questions the practical purpose of identifying and tracking the revenue impact of the Tax Cuts and Jobs Act of 2017. If the objective of such an undertaking is for SNGMo to identify monies collected from its ratepayers in the normal course of business for a future refund, credit or other rate adjustment, such a directive would be tantamount to a redetermination of lawful, approved rates pursuant to which customers have been billed and have paid for service rendered. This would amount to unlawful retroactive ratemaking[9] and, for the reasons set forth above, an unconstitutional confiscation of the Company's property.

3. Comments regarding the requirement to quantify and track excess protected and unprotected ADIT for possible future flow back to ratepayers and the Commission's request to advise on how best such flow back may be accomplished. (Ordered ¶3)

SNGMo is subject to normalization provisions, which require a certain treatment of excess accumulated deferred income taxes (ADIT) resulting from the federal corporate income tax rate reduction. Section 13001 of the Act defines 'excess ADIT' as the excess of:

i. the reserve for deferred taxes (as described in section 168(i)(9)(A)(ii) of the Internal Revenue Code of 1986) as of the day before the corporate rate reductions provided in the amendments made by this section take effect, over

ii. the amount which would be the balance in such reserve if the amount of such reserve were determined by assuming that the corporate rate reductions provided in this Act were in effect for all prior periods.

The excess ADIT normalization provision applies only to accelerated federal tax method/life depreciation differences on public utility property (protected ADIT). It does not apply to excess ADIT on other book/tax temporary differences (unprotected ADIT).

[9] ***UCCM***, 585 S.W.2d at 59 and ***Lightfoot***, 236 S.W.2d at 353.

The excess ADIT normalization provision requires that excess deferred income taxes be used to reduce revenue requirements and revenue no sooner than would occur as the book/tax difference reverses. Under this method — referred to as the Average Rate Assumption Method (ARAM) — SNGMo identifies the deferred tax reversal pattern (comparing book depreciation versus tax depreciation) and reverses the excess ADIT beginning when book depreciation exceeds tax depreciation and the deferred tax turnaround occurs.

An alternative approach — the Reverse South Georgia Method (RSGM) — is permitted only if SNGMo is unable to identify when book/tax differences originate and reverse. Under the RSGM, the excess ADIT is spread ratably over the estimated book life..

Under both approaches, excess ADIT is used to reduce a utility's revenue requirement over the estimated remaining book life of the related assets; however, under the RSGM, the reduction is straight line beginning immediately, while, under ARAM, the reduction does not occur until the book/tax difference begins to reverse.

Before federal tax reform, most non-protected ADIT followed the RSGM — reversing such ADIT at the tax rates in effect when the book/tax difference originated. Excess ADIT on this group of book/tax differences is not subject to the normalization rules, and thus not required to use ARAM. As a result, the excess ADIT for these book/tax differences potentially can be used to reduce income tax expense over a shorter period of time.

4. Comments regarding the *Hotel Continental* and *Midwest Gas User's Ass'n* cases. (Ordered ¶4)

The Commission directed SNGMo to ascertain the bearing, if any, of the ***State ex rel. Hotel Continental v. Burton, et al.***, 334 S.W.2d 75 (Mo. 1960) and ***MGUA*** cases on the topic addressed above in item 1. Specifically, the Commission directed SNGMo to advise the Commission whether these two cases authorize it to adjust the Company's rates without

considering all relevant factors concerning expenses and revenues. For the reasons set forth below, ***Hotel Continental*** and ***MGUA*** do not provide the Commission authority to adjust SNGMo's rates based on a single factor, such as the Tax Cuts and Jobs Act of 2017.

In ***Hotel Continental***, the Missouri Supreme Court addressed the lawfulness of a surcharge on the base rate for service for a gross receipts tax a municipality imposed on Kansas City Power & Light's services its customers within the taxing authority's municipal boundaries. The Court held that the tax adjustment clause ("TAC") was authorized under the Commission's general authority to set just and reasonable rates because it has the power in that context to "determine what items should be included in operating expense and what items should be excluded and how excluded items . . . should be handled and treated . . ." ***Id***. at 80.[10]

The distinction between the two cases (and the reason that ***Hotel Continental*** does not provide legal grounds for a one-issue rate reduction for SNGMo) is that the Commission decided in KCPL's 1957 rate case that a city's gross receipts tax was **not** to be included in operating expense. In contrast, income taxes **were** included in operating expenses in SNGMo's 2014 rate case. The TAC was established in KCPL's rate case giving the tax pass-through legal effect. No such adjustment clause for income taxes was created in SNGMo's rate case and, consequently, there is no authorized tax adjustment mechanism provided for in its effective rate schedules. Having included income taxes in SNGMo's operating expenses, the Commission cannot now tease out decreased tax liabilities for special refunds any more than a higher income tax rate (or property tax rate) could have been spliced into rates as an isolated increase. Similarly, the Commission in the rate proceeding underlying the ***MGUA*** case determined that the gas utility's wholesale natural gas costs should be periodically reconciled through PGA and ACA clauses.

[10] The Missouri Supreme Court affirmed this concept in ***UCCM***. 585 S.W.2d at 52-53.

The Court in ***MGUA*** concluded that the Commission had appropriately determined that the "unique nature of gas fuel costs" justified a rate treatment different from other costs of service similar to its findings regarding the TAC in ***Hotel Continental***. ***Id***. at 480.

Like the TAC addressed in ***Hotel Continental***, PGA and ACA clauses address costs that, by their nature, are not factored into a gas utility's base rates. As such, ***MGUA*** provides no legitimate grounds for adjusting SNGMo's rates because of a change in just one of many items of the expense mix that the Commission considered in 2014 when it established those rates.

To summarize, SNGMo's Commission-approved rate schedules have no income tax adjustment clauses[11] or other applicable rate adjustment mechanisms. As such, there is no basis for changing SNGMo's rates where income tax rates change other than in the context of a general rate or rate complaint case.

5. Final Considerations

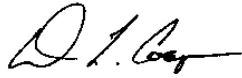
The Commission's Order raises complex constitutional and legal issues, and it would be exceptionally challenging for SNGMo to accurately quantify the impact the Tax Cuts and Jobs Act of 2017 will have on SNGMo's revenues. Each utility's response will be determined by the unique nature of its operations, business and accounting practices and corporate structure. SNGMo is willing to undertake a dialogue with the parties to explore, explain and gain an understanding of the factors bearing on this matter to come to a fair and reasonable outcome for its ratepayers.

---

[11] Implementing an income tax adjustment clause going forward would be legally problematic. Income taxes are like fuel costs incurred by an electric utility which, by their nature, are a type of expense that are so interwoven into the mix of other operational expenses that they cannot reasonably be treated as an isolated pass-through item. As the Commission is aware, a fuel adjustment clause authorized by it was found to be unlawful under the Act on these grounds. *See,* ***UCCM***, 585 S.W.2d at 57-58.

WHEREFORE, SNGMo respectfully requests that the Commission consider the information provided herein and dismiss this case.

Respectfully submitted,



Dean L. Cooper, MBE #36592
Paul A. Boudreau, MBE#33155
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, Missouri 65102-0456
Telephone: (573) 635-7166
Facsimile: (573) 635-3847
Email: Dcooper@brydonlaw.com

ATTORNEYS FOR SUMMIT NATURAL GAS OF MISSOURI, INC.

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 19th day of March, 2018:

Kevin Thompson
Chief Staff Counsel
Staffcounselservice@psc.mo.gov
kevin.thompson@psc.mo.gov

Office of the Public Counsel
opcservice@ded.mo.gov

Richard S. Brownlee III
rbrownlee@rsblobby.com

Tim Opitz
tim@renewmo.org