BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

REPLY POSTHEARING BRIEF OF

MIDWEST ENERGY CONSUMERS GROUP

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MECG REPLY POSTHEARING BRIEF

Pursuant to the Commission's September 5, 2018 *Order Adopting Procedural Schedule*, MECG submits the following reply brief. As this brief demonstrates, MECG, Staff and Public Counsel agree that Spire's request for an accounting authority order should be denied. Specifically, all three of these parties agree on the following points:

- The appropriate standard to apply to requests for deferral accounting is the Court-approved "extraordinary" standard.[1]
- Spire's regulatory assessment, or even the increase in Spire's regulatory assessment, is not extraordinary.[2]
- The increase in Spire's regulatory assessment is approximately 1% of net income. As such, given the definition in the Uniform System of Accounts, the increase in regulatory assessment is not material.[3]

More importantly, these parties, and the Commission, agree that the increase in Spire's regulatory assessment was a direct result of Spire's own actions. That is, as the Commission found, Spire purposefully "padded its revenue requirement" and litigated issues which the Commission has "consistently denied." Recognizing that the Commission, Staff and Public Counsel had to litigate and decide issues that were raised by Spire solely to "pad its revenue requirement", it is not surprising that these additional costs would ultimately trickle through to

[1] Staff Initial Brief, pages 3-9; OPC Initial Brief, page 3; MECG Initial Brief, pages 3-7.
[2] Staff Initial Brief, pages 9-10 and 11-13; OPC Initial Brief, page 3-9; MECG Initial Brief, pages 7-10.
[3] Staff Initial Brief, pages 10-11 and 14; OPC Initial Brief, page 9; MECG Initial Brief, pages 10-12.

Spire in the form of an increased regulatory assessment. Given that these costs are neither extraordinary nor material, and were largely caused by Spire's own actions, the Commission should reject Spire's request to defer these cost increases.

Given the identical positions advanced by MECG, Public Counsel and Staff, MECG will not reply to the briefs filed by Staff and Public Counsel. Instead, MECG will use this reply brief to address several of the more egregious arguments raised by Spire in an effort to justify its misplaced request for deferral accounting.

1. The Denial of Deferral Accounting for the Increase in Regulatory Assessment does not Result in Spire Bearing the Entirety of the Commission, Staff and Public Counsel's Rate Case Expense

During its recently completed rate case, Spire vigorously opposed the sharing of rate case expense. Despite the obvious benefit of rate cases to shareholders, Spire believed that ratepayers should bear the entirety of Spire's rate case expense. Ultimately, the Commission disagreed with Spire and ordered a sharing of Spire's rate case expense.

In its Initial Brief, Spire attempts to seize on the obvious similarity between rate case expenses in that case and the regulatory assessment addressed in this case.[4] In fact, Spire readily claims that, just as the Commission ordered a sharing of Spire's rate case expense in the rate case, it should also order a sharing of the regulatory assessment given that it represents the rate case expense of the Commission, Staff and Public Counsel.

Despite its proclamation in favor of sharing the Commission, Staff and Public Counsel's rate case expense between ratepayers and shareholders, Spire wrongly concludes that this sharing may only be effectuated by the Commission granting the requested deferral of Spire's increase in

[4] "[T]he increase in Commission assessment experienced by Spire Missouri is, in effect, Staff's rate case expense that is being assigned 100% to Spire Missouri's shareholders as Staff indicated that the $1.66 million is primarily associated with Staff and OPC's work in Spire Missouri's rate cases." (Spire Initial Brief, page 10).

regulatory assessment. "Without the requested deferral, there is no way that the shareholders and customers will have an opportunity to share those rate case expenses."[5]

MECG disagrees with Spire that a sharing of the Commission, Staff and Public Counsel rate case expense will occur only if Spire's deferral request is granted. Instead, as this brief demonstrates, given that approximately 65% of Spire's regulatory assessment is already included in rates and being recovered from ratepayers, a sharing of Commission, Staff and Public Counsel's rate case expense will only occur if the Commission denies the request to defer the increase in regulatory assessment. Otherwise, if the deferral request is granted, ratepayers will be paying 100% of Spire's regulatory assessment and Spire shareholders will be paying nothing!

In its Report and Order in Spire's last rate case, the Commission found that, since both ratepayers and shareholders benefit from a rate case, they should share in the cost of a rate case.

> Therefore, it is just and reasonable that the shareholders and the ratepayers who both benefited from the rate case, share in the rate case expense. The Commission finds that in order to set just and reasonable rates under the specific facts in this case, the Commission will require Spire Missouri shareholders to cover half of the rate case expense and the ratepayers to cover half with the exception of the cost of customer notices and the depreciation study.[6]

It is important to recognize that, in addressing rate case expense, the Commission's implementation of a sharing mechanism only addressed Spire's rate case expense. Not surprisingly, rate case expense is also incurred by the Commission, Staff and Public Counsel. These rate case expenses of the Commission, Staff and Public Counsel are passed through to the utility in the form of the regulatory assessment in the subsequent year.

As Spire readily points out, the rates resulting from the last case already reflect Spire's Fiscal Year 2018 Assessment.[7] Thus, ratepayers are currently paying $3.242 million associated with the

[5] Spire Initial Brief, page 10.
[6] *Report and Order*, Case No. GR-2017-0215 / 0216, issued February 21, 2018, at page 53.
[7] Spire Initial Brief, page 3.

rate case and normal operation expense of the Commission, Staff and Public Counsel.[8] Now, Spire seeks to defer the additional $1.66 million of regulatory assessment for recovery from ratepayers in a future rate case. If granted then, ratepayers would be paying 100% of the Commission's Regulatory Assessment for costs that the Commission has already found to equally benefit the Spire shareholders. On the other hand, if the Commission denies Spire's request, then ratepayers will be paying $3.2 million associated with the Commission, Staff and Public Counsel rate case expenses (65%) and Spire's shareholders will be paying the remaining $1.66 million (35%).

Certainly, just as the Commission found that it is appropriate to implement a sharing of Spire's rate case expense; it is a logical extension that the Commission, Staff and Public Counsel's rate case expense be similarly shared. This can only be accomplished by denying Spire's requested deferral request.[9] Clearly then, Spire is mistaken when it claims that sharing will only be accomplished by granting its deferral request. In actuality, such an action would ensure that ratepayers suffer the entirety of the Commission, Staff and Public Counsel's rate case expense even though Spire shareholders benefitted from such activities.

2. The Commission's Regulatory Assessment is a Normal Expense

At page 2 of its Initial Brief, Spire wrongfully asserts that, since the Commission's Regulatory Assessment is not a "normal expense related to the actual provision of utility services", any changes in the level of that expense should be subject to deferral accounting.

Spire's assertion is incorrect. As the evidence indicates, the Commission's Regulatory Assessment is an ordinary expense incurred and paid annually by Missouri utilities. "Section

[8] *Id.* at page 4.
[9] Staff witness Oligschlaeger agrees that, by rejecting Spire's deferral request, the Commission is implicitly creating a sharing of the Commission, Staff and Public Counsel's rate case expense between the Spire ratepayers and the Spire shareholders. (Tr. 66-67).

386.470 RSMo has provided for the Commission to collect the annual assessment since July 1, 1947 and there is no indication this will cease in the foreseeable future."[10]

Not only is the Commission's Regulatory Assessment a normal expense, contrary to Spire's current assertion, it is tied to the "actual provision of utility services." Specifically, given the regulatory paradigm in Missouri, companies are incapable of providing utility service in Missouri absent a certificate of convenience and necessity. Recognizing that all utilities that have a certificate of convenience and necessity incur a regulatory assessment, the regulatory assessment is a necessary component of the utility's provision of services.

That said, Spire undoubtedly is attempting to argue that the regulatory assessment, unlike the cost of gas mains, maintenance and natural gas, is an indirect component of Spire's provision of utility service. In this regard, MECG agrees. That said, however, numerous aspects of Spire's operations are an indirect component of Spire's provision of service. For instance, recognizing that executives do not construct or maintain gas mains or directly purchase natural gas, the cost of those executives are also not a direct component of providing utility service. Additionally, the rental costs for Spire's headquarters are not a direct component of providing Spire's natural gas service. Similarly, the regulatory cost of maintaining tariffs and litigating rate cases is not a direct component of providing utility services. Much as Spire is not allowed to use deferral mechanisms to account for increases in executive compensation or increases in headquarter rent,[11] Spire should not be allowed to use extraordinary mechanisms to defer an increase in its regulatory assessment.

[10] Exhibit 200, Roth Rebuttal, page 6.

[11] Of course, given the numerous requests for deferral accounting in the last decade, Spire would undoubtedly follow the grant of a deferral mechanism for an increase in its regulatory assessment with similar requests for all other costs that are not "directly and exclusively" related to the provision of utility service. As others have opined in this case, the Commission's grant of deferral accounting in this grant will undoubtedly be followed by requests from all utilities to further extend the use of deferral accounting to include other ordinary expenses.

3. The Increase in Spire's Regulatory Assessment was Predictable. As such, it is not Volatile

At pages 3-4 of its Initial Brief, Spire argues that its regulatory assessment over time has been "volatile." "In the past, the variances from year to year for the entities that now make up Spire Missouri (legacy Missouri Gas Energy and Laclede Gas Company) have been volatile." Noticeably, Spire provides no definition or support for its claim that such costs are volatile. As the following demonstrates, given the Commission's historical definition of volatile, the Commission's Regulatory Assessment is not volatile.

In Ameren's 2007 rate case, the Commission considered the volatility of Ameren's fuel costs. There, the Commission held that "[m]arkets in which prices are volatile tend to go up and down ***in an unpredictable manner***."[12] Given this definition, the evidence in this case establishes that since the increase in Spire's regulatory assessment was predictable, it is not volatile. Specifically, it was easily predictable that Spire's 2019 regulatory assessment would increase. In recent years, Spire's regulatory assessment always increased dramatically following a rate case. In 2010, Laclede and MGE both had rate cases pending.[13] Not surprisingly then, the regulatory assessment increased in fiscal year 2011.[14] Still again, both Laclede and MGE had rate cases pending in fiscal year 2014.[15] As such, it should not be a surprise to realize that the 2015 regulatory assessment increased.[16] Given this historical trend, it was entirely predictable that Spire's regulatory assessment would increase in 2019 following its 2018 rate case. As such, Spire's claim that its regulatory assessment is volatile is inaccurate. Such costs are entirely predictable.

[12] *Report and Order*, Case No. ER-2007-0002, issued May 22, 2007, at page 23 (emphasis added).
[13] See, MGE Rate Case (Case No. GR-2009-0355) and Laclede Rate Case (Case No. GR-2010-0171).
[14] Exhibit 1, Weitzel Direct, page 6.
[15] See, MGE Rate Case (Case No. GR-2014-0007) and Laclede Rate Case (Case No. GR-2013-0171).
[16] Exhibit 1, Weitzel Direct, page 6.

The fact that the increase in Spire's regulatory assessment is predictable is important. In past cases, as part of its application of the "extraordinary" standard, the Commission has looked at whether the cost was predictable. In fact, Spire points to previous cases in which the Commission has granted a deferral request on the basis that the incurrence of a cost was "unpredictable".[17] As demonstrated, however, the increase in Spire's regulatory assessment was entirely predictable in this case. As such, it does not meet the Commission's extraordinary standard.

4. The Use of Another Standard for Deferral Request is Unlawful

While applying the legally established "extraordinary" standard, Spire engages in a back-handed plea for the Commission to utilize a weaker, more easily met standard for deferral requests. Specifically, Spire points to dicta from a Commission order for the notion that the Commission can grant deferral requests at its discretion.

> Although the courts have recognized the Commission's authority to authorize an AAO in extraordinary and unusual circumstances, there is nothing in the Public Service Commission Law or the Commission's regulations that would limit the grant of an AAO to any particular set of circumstances.[18]

MECG's concludes that this comment is dicta because is not relevant to the Commission's decision. Rather, since the Commission was merely approving a stipulation and agreement, to which all parties had agreed, comments as to whether the Commission could utilize another standard other than the "extraordinary" standard was entirely speculation.

That said, however, the use of a standard, other than the "extraordinary" standard, for reviewing a deferral request is of questionable legality. As was pointed out in MECG's Initial

[17] See, Spire Initial Brief, page 5.
[18] Spire Initial Brief, page 5 (citing to *In the Matter of the Application of Kansas City Power & Light Company and Greater Missouri Operations Company*, Case No. EU-2012-0131, issued April 19, 2012, at page 3).

Brief,[19] the Commission was prohibited, absent express statutory authority, to utilize any deferral accounting. Rather, since the use of deferral accounting would result in the collection of past expenses in future rates, deferrals necessarily constitute retroactive ratemaking. As the Missouri Supreme Court has held:

> The utilities take the risk that rates filed by them will be inadequate, or excessive, each time they seek rate approval. To permit them to collect additional amounts simply because they had additional past expenses not covered by either clause is retroactive rate making, i.e., the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate actually established. ***Past expenses*** are used as a basis for determining what rate is reasonable to be charged in the future in order to avoid further excess profits or future losses, but under the prospective language of the statutes, §§ 393.270(3) and 393.140(5), they ***cannot be used to set future rates to recover for past losses due to imperfect matching of rates with expenses***.[20]

Later, Missouri courts allowed for a limited exception for extraordinary events to the prohibition against deferral accounting. "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.[21] Thus, while Spire now speculates that the Commission could use an alternative standard, other than the extraordinary standard, such a claim is legally questionable.

That all said, contrary to Spire's current speculation that another standard may be lawful, the Missouri Courts have decided to the contrary. In the Commission decision relied upon by Spire, the Commission cited Section 393.140 for the premise that it was not limited to the extraordinary standard for considering requests for deferral accounting.[22] Noticeably, however,

[19] MECG Initial Brief, pages 3-7.
[20] *UCCM* at 59 (emphasis added).
[21] State ex rel. Office of the Public Counsel v. Public Service Commission, 858 S.W.2d 806, 811 (Mo.App. 1993) (emphasis added).
[22] *In the Matter of the Application of Kansas City Power & Light Company and Greater Missouri Operations Company*, Case No. EU-2012-0131, issued April 19, 2012, at page 3, footnote 6.

the Missouri Supreme Court has already held that Section 393.140 does not provide statutory authority for deferral accounting. In 1979, the Commission considered the legality of the use of deferral accounting as it applies to fuel costs. There, the Commission referenced Section 393.140 as statutory authority for such deferral accounting. The Court, however, held that Section 393.140 does not provide statutory authority for deferral of costs for future recovery.

> Respondents, however, state that the statutes as a whole do support their power to utilize a fuel adjustment clause. . . . *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***.[23]

Thus, while Spire would prefer an easier standard and can point to a previous Commission decision for the use of an easier standard, it is clear that Section 393.140 does not provide the authority for such a standard. Therefore, until the General Assembly provides for an alternative standard, the Commission and Spire are limited to the "extraordinary" standard approved by the Missouri Courts.

5. Changes in Costs are Not Guaranteed Recovery under Traditional Rate Mechanisms

At pages 11-13, Spire bemoans the fact that an increase in its regulatory assessment is "not recoverable under traditional rate mechanisms". Spire's argument represents a fundamental misunderstanding of how traditional ratemaking is designed to work.

It is frequently stated that utility ratemaking is designed to give the utilities an opportunity to earn its authorized return. Within this concept is the recognition that certain costs and revenues may increase and decrease. Just as the customer is not guaranteed to receive the benefit of a cost that decreases or a revenue that increases, traditional ratemaking does not

[23] State ex rel. Utility Consumers Council of Missouri v. Public Service Commission, 585 S.W.2d 41, 56 (Mo. banc 1979) (emphasis added, citations omitted)

guarantee recovery of a cost that increases. Rather, the utility may file a rate case and future rates may increase to reflect an increasing cost, but the utility never recovers the increased cost that occurred in the past. As the Missouri Supreme Court has noted,

> The utilities take the risk that rates filed by them will be inadequate, or excessive, each time they seek rate approval. To permit them to collect additional amounts simply because they had additional past expenses not covered by either clause is retroactive rate making, i.e., the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate actually established.[24]

The ratemaking process envisioned by Spire when it seeks to extend traditional ratemaking to allow for guaranteed recovery of a rate increase such as its current regulatory assessment would be a true "cost plus" form of establishing rates not typically found in utility ratemaking.

WHEREFORE, MECG respectfully requests that the Commission deny Spire's request by finding that the increase in Spire's regulatory assessment is neither extraordinary nor material.

Respectfully submitted,

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[24] State ex rel. Utility Consumers Council of Missouri v. Public Service Commission, 585 S.W.2d 41, 59 (Mo. banc 1979.

CERTIFICATE OF SERVICE

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

__/s/ David Woodsmall_____
David Woodsmall

Dated: January 11, 2019