

**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 ) **Case No. GR-2018-0227**  
Union Electric Company, Doing Business as )  
Ameren Missouri. )

In the Matter of the Propriety of the )  
Rate Schedules for Electric Service of ) **Case No. ER-2018-0228**  
The Empire District Electric Company. )

In the Matter of the Propriety of the )  
Rate Schedules for Gas Service of ) **Case No. GR-2018-0229**  
Empire District Gas Company. )

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

In the Matter of the Propriety of the )  
Rate Schedules for Steam Service of ) **Case No. HR-2018-0231**  
KCP&L Greater Missouri Operations )  
Company. )

In the Matter of the Propriety of the )  
Rate Schedules for Steam Service of ) **Case No. HR-2018-0232**  
Veolia Energy Kansas City, Inc. )

**STAFF’S WRITTEN ARGUMENT**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through the Chief Staff Counsel, and for its *Written Argument* invited by the Commission’s *Order Scheduling Oral Argument Regarding the Issuance of Accounting Authority Orders to Address the Effect of Federal Tax Cuts*, issued on April 18, 2018, in each of these cases,<sup>1</sup> states herein as follows:

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<sup>1</sup> Ordered Paragraph No. 2 states, “Any party wishing to submit written argument before the oral argument may do so no later than May 17, 2018.”

## **ARGUMENT:**

### ***Introduction:***

These are rate cases, commenced by the Commission on its own motion to consider whether or not the rates of certain utility companies<sup>2</sup> are still just and reasonable in view of the enactment of the federal *Tax Cuts and Jobs Act (TCJA)*:

The Commission opened these rate cases to address concerns that the specified electric, gas, and steam utilities' existing rate schedules may no longer be just and reasonable in light of the recently enacted Tax Cuts and Jobs Act of 2017, which reduced the federal corporate income tax rate from 35 percent to 21 percent.<sup>3</sup>

In its *Motion to Open Rate Case and to Require Company to Show Cause*, Staff raised the possibility that the Commission could simply require the several companies to adjust their rates to reflect the percentage change in the income tax rate pursuant to the line of cases beginning with *Hotel Continental* and continuing with *Midwest Gas Users' Association*.<sup>4</sup> This was not a popular theory among the companies, as their responses to the show cause order show.<sup>5</sup>

### ***The Commission's Order of April 18, 2018:***

In its *Order Scheduling Oral Argument Regarding the Issuance of Accounting Authority Orders to Address the Effect of Federal Tax Cuts*, issued and effective on April 18, 2018, the Commission stated that the purpose of the oral argument

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<sup>2</sup> Those major utility companies not presently engaged in an active general rate case.

<sup>3</sup> *In the Matter of the Propriety of the Rate Schedules for Electric Service of Union Electric Company, Doing Business as Ameren Missouri*, Case No. ER-2018-0226 (*Order Scheduling Oral Argument Regarding the Issuance of Accounting Authority Orders to Address the Effect of Federal Tax Cuts*, issued April 18, 2018) p. 2.

<sup>4</sup> *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75 (Mo. 1960); *State ex rel. Midwest Gas Users' Association v. Public Service Commission*, 976 S.W.2d 470 (Mo. App., W.D. 1998).

<sup>5</sup> *Ameren Missouri's Response to Commission's Show Cause Order*, Case Nos. ER-2018-0226 and GR-2018-0227, filed March 19, 2018; *Response to Show Cause Motion and Order*, Case Nos. ER-2018-0228 and GR-2018-0229, filed March 19, 2018; *Response to Order to Show Cause*, Case No. GR-2018-0230, filed March 19, 2018;

is “to address the question of whether the Commission should issue an accounting authority order in each of these cases to preserve any excess revenues resulting from the income tax rate changes for possible adjustment in these or future rate cases.”

***Can the Commission defer revenues via an AAO?***

Section 393.140(8), provides that the Commission shall:

Have power to examine the accounts, books, contracts, records, documents and papers of any such corporation or person, and have power, after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited.

This section expressly authorizes Accounting Authority Orders (“AAOs”), so it is undeniable that the Commission has the authority to order the deferral of any expense or any revenue. A tracker is an accounting device that is a species of AAO and the Commission, therefore, may equally order a tracker if it chooses to do so. A deferral is not single-issue ratemaking because it is not ratemaking at all. ***State ex rel. Office of the Public Counsel v. PSC***, 858 S.W.2d 806 (Mo. App., W.D. 1993).

***Can the Commission return any part of the deferral to the ratepayers?***

Because of the highly unusual nature of the recent tax law change, it is uncertain whether and under what circumstances the Commission could lawfully order a refund of deferred amounts, or order that such amounts be used to lower customer rates prospectively. The Missouri Supreme Court has said, “to direct the commission to determine what a reasonable rate would have been and to require a credit or refund of any amount collected in excess of this amount would be retroactive ratemaking. The commission has the authority to determine the rate to be charged, § 393.270. In so determining it may consider past excess recovery insofar as this is relevant to its

determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery. It may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process.” ***State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n***, 585 S.W.2d 41, 58 (Mo. banc 1979).

***Is there any way around this rule?***

Yes, there are several avenues.

The first way is to examine the recent tax law changes using the model of the PGA/ACA. The rule of ***Hotel Continental v. Burton***, 334 S.W.2d 75 (Mo.1960), allows the Commission to treat one item of operating expense differently than others “where it was reasonable and just to do so.” ***State ex rel. Midwest Gas Users' Ass'n v. PSC***, 976 S.W.2d 470, 478 (Mo. App., W.D. 1998). Income taxes are an item of operating expense. Is it reasonable and just to treat income taxes differently? Yes, if the Commission determines that income taxes are, in fact, different in kind such that there is no possibility of offsetting savings elsewhere that an all-relevant factors analysis would disclose. 976 S.W.2d at 480.

Another potential way to consider the tax law changes is to determine whether the events that led to these changes should be considered “extraordinary;” that is, unique, unusual and non-recurring. Many times in the past the Commission has allowed rate recovery of costs associated with extraordinary events that were not included in the utilities’ current rate levels at the time the extraordinary event occurred because the event could not reasonably be anticipated at the time rates were set.

A reasonable argument can be made that the effects of the Tax Cuts and Jobs Act are extraordinary in nature, and thus analogous to the types of events for which the Commission previously allowed cost deferral treatment and recovery in rates of the deferred costs.

Can the Commission return deferred excess revenues to the ratepayers? Yes, on the grounds discussed above, if the adjustments are charged only prospectively, to future customers on future bills, and the amount charged past customers on past bills is not adjusted up or down or retroactively adjusted. 976 S.W.2d at 481. Note that PGA tariffs are always approved “interim, subject to refund.” To avoid the attachment of the shareholders’ Due Process rights to utility revenues, the Commission should order the subject utilities to replace their tariffs with identical tariffs that are interim, subject to refund.

**WHEREFORE**, Staff prays that the Commission will accept its written argument.

Respectfully submitted,

**/s/ Kevin A. Thompson**

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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was served electronically on all parties of record or their representatives, pursuant to the Service List maintained by the Data Center of the Missouri Public Service Commission, on this 17<sup>th</sup> day of May, 2018.

**/s/ Kevin A. Thompson**