BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Workshop Docket to Explore the Ratemaking Process	**)** **)**	Case No. AW-2019-0127

COMMENTS OF THE OFFICE OF THE PUBLIC COUNSEL

COMES NOW the Office of the Public Counsel ("Public Counsel") and provides the following comments regarding the current ratemaking process and potential changes thereto. Public Counsel recognizes there is room for improvement in most processes, and at the end of these comments suggests changes to help the ratemaking process become more efficient. Any changes should be based upon identified problems not already addressed by the Public Service Commission (Commission) or the Missouri General Assembly; and should be implemented with the foremost goal of protecting the interests of the public while setting just and reasonable rates.

1. The Current Ratemaking Process

Public Counsel suggests that the first step is a thorough examination of the current ratemaking process – a process followed by the Commission repeatedly for decades. The current process enables utilities to provide safe and adequate services at just and reasonable rates while simultaneously earning reasonable returns for investors. This balance, protecting both the public and the utility, has allowed the current process to operate successfully for every public utility regulated by the Commission. Considering this backdrop of success, Public Counsel cautions the Commission against making major changes that may upset this balance and threaten the public's confidence in the fairness of the process that sets the rates paid for utility services that are essential for life.

Ratemaking follows the process provided by § 393.150 RSMo, which seeks to ensure *due process* through an evidentiary hearing wherein the utility has the burden of proof to demonstrate by clear and satisfactory evidence that the rate change is just and reasonable.[1] The General Assembly also granted the Commission significant flexibility in conducting rate cases and the timing of rate cases by allowing the Commission to determine on a case-by-case basis the length of the ratemaking process. The statute recognizes the complexity involved in conducting a full-company audit of a utility's books and records often requires the Commission to suspend rates for a period of up to eleven (11) months, the maximum allowable time for rate case review. Section 393.150, RSMo also authorizes the Commission to process rate cases in a shorter period when the circumstances suggest an eleven-month process is not necessary. This discretionary statute gives the Commission significant flexibility to determine on a case-by-case basis factors surrounding a particular rate change request when setting the procedural schedule.

Factors to be considered when setting a procedural schedule include the magnitude of the rate change and revenue increase sought; and whether the request includes a host of other changes such as changes to rate design, cost shifts between rate classes, tracker mechanisms, promotional programs, depreciation changes, cost shifts between shareholders and ratepayers, and more. If the company seeks a capital structure and return on equity in excess of what the Commission typically orders for utilities, regulatory review could require additional work. The Commission should also consider other cases pending or anticipated before the Commission that would divert resources onto other matters and compromise the ability to conduct a thorough review under a

[1] § 393.150.2 and § 386.430 RSMo.

shortened procedural schedule. Rate cases filed by two utility companies simultaneously, which now occurs with Kansas City Power & Light Company (KCPL) and KCP&L Greater Missouri Operations Company (GMO), and with Spire Missouri, Inc.'s East and West Divisions, require more time to process.[2] These are important considerations that should be made on a case-by-case basis should the Commission contemplate a shorter process, otherwise the ability to properly review the important issues of the case(s) could be severely compromised contrary to the interests of the public.

To get an idea of the extensive work required to review the books and records of just *one* utility, Staff auditor John Cassidy explained the demands on Staff's resources to process Ameren Missouri's rate case, Case No. ER-2012-0166, wherein Ameren Missouri sought a $375.6 million revenue increase, and was awarded a $260.2 million increase by the Commission:

> In that rate case, 29 Staff witnesses sponsored testimony, seven of which were auditors. At least an additional 11 Staff members provided support and administrative assistance with the processing of that rate case. Staff members dedicated approximately 9,094 hours to that rate case during the five and one-half month time span between the Company's direct testimony filing on February 3, 2012, through Staff's rate design direct testimony filing on July 19, 2012. In total, Staff reported approximately 16,305 hours of time in order to process the Ameren Missouri ER-2012-0166 rate case over the 11-month statutory rate case process duration, including the evidentiary hearings, submission of briefs and implementation of the Commission ordered tariffs. In addition, during that rate case Staff performed 665 adjustments to revenues, expenses, plant in service and depreciation reserve in addition to calculating an appropriate rate of return and capital structure, examining the Company's depreciation rates, analyzing its tariffs, and developing an appropriate rate design.[3]

[2] *See* Case Nos. ER-2018-0145/ER-2018-0146 and GR-2017-0215/GR-2017-0216.

[3] *Noranda Aluminum, Inc., et al., Complainants, v. Union Electric Company, d/b/a Ameren Missouri, Respondent,* Case No. EC-2014-0223, *Report and Order, Citing,* Cassidy Rebuttal, Ex. 12, Page 15, Lines 6-18.

This significant workload within one case highlights the need for a lengthy process in future proceedings whenever the particular facts demand it. In most instances, the time necessary to conduct a proper review may be unknown at the time the procedural schedule is set, and it is not until the auditors, accountants, analysts, engineers and attorneys have spent time reviewing the filings, books, records, and data requests that they better understand the time necessary to fully process the case. For this reason, Public Counsel suggests it is far better to err on the side of a longer suspension of the proposed schedules to ensure a meaningful review is possible, as the Commission typically does in rate cases, unless it is clear to all parties from the outset that the issues will be fewer and less contentious.

Another consideration when setting the length of a rate case proceeding is providing sufficient time for settlement. The Commission has recognized that the ratemaking process is by nature adversarial and "all parties, including the company, must be able to present their facts and arguments so the Commission can reach a proper and fair resolution."[4] However, settlement should be possible in every case before the Commission, and encouraging settlement first requires that the parties have a sufficient length of time to conduct their reviews. Many questions arise during the review process, and those questions have an increased change of becoming contested issues requiring resolution by the Commission in an evidentiary hearing if not given a sufficient opportunity for resolution amongst the parties.

[4] *In the Matter of Ameren Missouri's Tariff to Increase Its Annual Revenues for Electric Service*, Case No. ER-2012-0166, *Report and Order*, December 12, 2012, p. 70.

Before making changes to the current process, it is important to identify whether the stated reasons for changes are real concerns not already addressed by the Commission or the Missouri Legislature. The current process has formed over decades of trial and error, and has enabled Missouri's utilities to routinely request and receive rate increases whenever necessary. In addition, the Commission and the Missouri Legislature already addressed many of the claimed reasons for rate case changes – most notably by drastically reducing regulatory lag.

2. Comments on the Draft Rule Changes

To kickoff this workshop process and initiate discussion, the Commission's Staff submitted a draft rulemaking on November 27, 2018. Since the parties had little time to review the proposal before the November 29, 2018 workshop, most stakeholders were not fully prepared to discuss the Staff's draft. For that reason, Public Counsel appreciates this opportunity to submit written comments.

The first issue initiated for discussion by the Staff's draft proposal is the concept of allowing utilities to "elect" to eliminate three months from the review to determine whether the requested rate increase is just and reasonable. Public Counsel recognizes that more efficiencies in the ratemaking process are possible, but eliminating three entire months from an already challenging timeframe for an audit does not promote the public interest in that it creates a process heavily favoring the utility's ability to evade a full review of its requested rate increase. The Legislature purposely established a process that provides the Commission with the flexibility to determine on a case-by-case basis the length of time necessary to process a case, and an automatic shortened process would abdicate that authority without good reason.

During the workshop, the Staff's stated reason for reducing the length of rate cases is to reduce rate case expense. However, there are significant diminishing returns if one reduces rate case expenses, but with a resulting excessive rate far beyond what is just and reasonable. Ratepayers would rather pay an additional three months of rate case expense if it meant the proposed rate increase would receive a proper and thorough review. Public Counsel certainly appreciates efforts to reduce rate case expense, but a shortened rate case process could be counterintuitive because it would create a greater likelihood of increased rates, not reduced rates. A shorter process could also increase rate case expense because there is less opportunity for resolution and settlement of issues, consequentially leading to more contested issues presented to the Commission for resolution in an evidentiary hearing. More contested issues and more hearings would increase rate case expense. There is no reason to suggest a shorter process alone reduces the utility's rate case expense because the company would likely present the same testimony and request as it would under an eleven-month process. A shortened process for Staff and Public Counsel does not shorten the unlimited time or change the resources available that the utility has to prepare its case before filing.

The main argument made by electric companies for shortening the rate case process has to do with a desire to reduce regulatory lag and allow rates to increase quicker.[5] However, the General Assembly already addressed the electric company's concerns through legislation. In 2018, the Missouri Legislature enacted Senate Bill 564, which eliminates most of the regulatory lag that was the basis for electric utilities requesting changes to the ratemaking process. Section 393.1400 RSMo allows Missouri

[5] *A Working Case to Consider Policies to Improve Electric Utility Regulation*, Case No. E2-2016-0313, Staff Report, October 17, 2016, pp. 2, 18.

electric companies to elect regulation under "plant-in-service accounting" ("PISA"). Missouri's three largest electric companies, Union Electric Co. d/b/a Ameren Missouri, KCPL, and GMO, have already elected PISA. This means Ameren, KCPL and GMO will defer *eighty-five percent* of depreciation expense and return for nearly all rate base additions. PISA alone drastically reduces regulatory lag concerns. For some large investments, such as Ameren's proposed wind projects in northern Missouri, the Commission recently ruled that Ameren could recover 100% of the depreciation and return, further eliminating the electric companies' claimed need for changes to the ratemaking process.[6] Moreover, PISA is in addition to a number of other mechanisms to reduce regulatory lag by allowing quicker and period rate increases outside the rate case process, including the fuel adjustment clauses (FAC),[7] the Renewable Energy Standard Rate Adjustment Mechanism (RESRAM),[8] and the Energy Efficiency Investment Charge or Demand-Side Programs Investment Mechanism (EEIC, EEC, DSIM).[9] The Missouri General Assembly has heard the electric company concerns with regulatory lag and responded accordingly – additional drastic changes are unwarranted.

Missouri's gas and water companies also have mechanisms to eliminate most aspects of regulatory lag. The Commission established the purchased gas adjustment (PGA) mechanism to eliminate regulatory lag associated with the costs to purchased natural gas, and the Weather Normalization Adjustment Rider (WNAR) to address

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[6] *In the Matter of the Application of Union Electric Company d/b/a Ameren Missouri for Permission and Approval and a Certificate of Public Convenience and Necessity Authorizing it to Construct a Wind Generation Facility*, Case No. EA-2018-0202, *Report and Order*, December 12, 2018.

[7] § 386.266 RSMo.

[8] § 393.1030 RSMo.

[9] § 393.1075 RSMo.

regulatory lag associated with changes in weather. Additionally, gas and water companies use the infrastructure system replacement surcharge (ISRS) to eliminate a large aspect of regulatory lag associated with system replacements. The Commission and the General Assembly heard the utilities' concerns and responded accordingly.

Despite these concerns with the Staff's concept of an automatic shortened rate case, Public Counsel is not necessarily opposed to a shortened rate case where circumstances suggest it would not compromise the audit, but suggests the Commission maintain an involvement in determining if a particular case justifies a shortened process. The process Public Counsel proposes is one used successful by utilities in the past and simply requires a utility to request a shorter process and explain what good cause exists for a shorter review. Such requests could include explanations of the facts discussed earlier such as fewer issues, a single-company rate request as opposed to simultaneous requests, a request for shorter data request response times, and the upfront filing of more documents and work papers to enable regulators to begin an earlier review. Under circumstances of a simpler filing and upfront documentation provided to the parties, Public Counsel could support a shortened process. Through this workshop case, Public Counsel is hopeful that the creation of such a process is possible.

The Staff's draft rule also seeks to initiate discussion on the concept of *interim rates.* Again, the argument for interim rates is to reduce regulatory lag, which the Legislature addressed. Public Counsel cautions the parties that such a mechanism could lead to increased rate case expense and more time spent on rate cases in that it would necessitate two hearings – one for the initial interim rate increase, and a second "full hearing" as contemplated by § 393.150 RSMo. Moreover, the process already allows for

interim rates on a case-by-case basis, following a hearing, where an emergency threatens the utility and its customers. The Missouri Court of Appeals recognized:

> It may be theoretically possible even in a purposefully shortened interim rate hearing for the evidence to show beyond a reasonable debate that the applicant's rate structure has become unjustly low, without any emergency as defined by the Commission having as yet resulted. Although some future applicant on some extraordinary fact situation may be able to succeed in so proving. Laclede has singularly failed in this case to carry the very heavy burden of proof necessary to do so.[10]

Citing the above decision, the Missouri Supreme Court concluded, "An interim rate increase may be requested where an emergency need exists," and gave no other justification for interim rates.[11] These cases make it clear that an automatic interim rate increase violates the statutory standard because the process suggested by the Staff to initiate discussion would *automatically* allow interim rates without the required due process, evidentiary requirements, or emergency recognized by the courts.

Interim increases could also lead to customer confusion and opposition to the more frequent rate adjustments that interim rates would create. In some instances, the interim rate would increase rates due to the utility's request for an increase, when in fact the company should receive a rate *decrease*. Such was the case for the most recent rate cases before the Commission of KCP&L, GMO, and Spire. In these instances, had the Commission adopted an interim approach, rates would have gone up despite the fact that the companies were already over-earning.

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[10] *State ex rel. Laclede Gas Company v. Public Service Commission,* 535 S.W.2d 561 (Mo. App. 1976) (emphasis added).

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

Public Counsel opposes an automatic interim rate increase, and asks the parties and the Commission to recognize that when a true emergency presents itself, this mechanism is available to the Commission and utilities.

3. Public Counsel's Proposed Changes to the Process

Improvements to the current ratemaking process are possible. One of the primary reasons for the length of the rate case process is the time it takes to gather information from the utility regarding its requested rate increase. More robust upfront filing requirements that include much of the documentation filing requirements included in the Staff's draft proposal would allow the Staff and Public Counsel to begin review without the delay of issuing data requests and waiting twenty days for a response. In addition, enhanced quarterly surveillance reporting of the company's internal reports could provide regulators with a better understanding of the utility's financials ahead of the rate case filing to allow Staff and Public Counsel to better prepare for the case.

True up proceedings are an aspect of rate cases that have evolved over the years to a point where they prevent regulators and interveners from truly understanding the requested revenue requirement until very late in the process. A more efficient process would limit true-up to known items specifically identified with the initial filing, which will enable a more accurate estimate of revenue requirement early in the process, and would provide Staff, Public Counsel and interveners a fair opportunity to address those items, rather than being surprised by them late in the case.

With the increase in surcharges, adjustment mechanisms, promotional programs, trackers, etc., the current rate case process is more complex than ever before. This is much of the reason for the length of rate cases. An idea for creating a more efficient

process is to separate the process for reviewing the revenue requirement from the process for reviewing rate design. This is a process the Commission followed in the past and which could eliminate some of the rate case complexity. Public Counsel encourages the parties to consider and discuss this suggestion in this workshop docket.

Regarding the length of time necessary to process a rate case, Public Counsel encourages a more detailed discussion that walks through each step of a rate case review to identify areas where efficiencies are achievable. An eight-month process, which is shorter than the nine-month process for *small* water and sewer companies,[12] is far too truncated to enable a meaningful review without a number of other changes that allow the regulators to perform the same review currently performed in rate cases. In addition, the Commission should enact changes to shorten the rate case process incrementally, such as starting with an attempt at a ten-month process, to avoid unforeseen problems that could occur with a drastic reduction in the time available to review a requested rate increase.

4. Conclusion

The Commission's primary function is to ensure the State of Missouri's regulated utilities charge just and reasonable rates pursuant to § 393.130 RSMo. When fulfilling this statutory duty the primary consideration is the protection of the public, while protections provided to the utility are "merely incidental."[13] Missouri Courts have repeated this priority of purposes for the past one-hundred years.[14] Public Counsel urges

[12] 4 CSR 240-10.075(13).

[13] *State ex rel. Electric Co of Missouri v. Atkinson,* 204 S.W. 897 (Mo. **1918**); *State ex rel. Crown Coach Co. v. P.S.C.,* 179 S.W.2d 123 (Mo. App. **1944**); *Straube v. Bowling Green Gas Co.,* 227 S.W.2d 777 (Mo. **1950**); *Missouri Public Service Co. v. Trenton,* 509 S.W.2d 770 (Mo. App. **1974**); *DePaul Hospital School of Nursing v. Southwestern Bell Telephone Co.,* 539 S.W.2d 542 (Mo. App. **1976**); and *Office of the Public Counsel v. P.S.C.,* 515 S.W.3d 754 (Mo. App. **2016**).

[14] *Id.*

the parties and the Commission to keep this primary mission in the forefront when considering changes to the important process of setting rates.

WHEREFORE, the Office of the Public Counsel respectfully offers these comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 15th day of January 2019.

/s/ Marc Poston