Missouri Public Service Commission

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December 4, 2000

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Case No. EO-2000-845 – In the Matter of the Application of St. Joseph Light & Power Company for the Issuance of an Accounting Authority Order Relating to its Electrical Operations.

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of a **REPLY BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION.**

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

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Enclosure
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of St. Joseph Light & Power Company for the Issuance of an Accounting Authority Order Relating to its Electrical Operations	))))	Case No. EO-2000-845

REPLY BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION

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Dated: December 4, 2000

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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REPLY BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION

Comes now the Staff of the Public Service Commission of the State of Missouri and for its reply brief in this case states as follows:

Unsurprisingly, St. Joseph Light & Power Company ("SJLP"), in the first line of its initial brief states: "All that is being requested by St. Joseph Light & Power Company in this case is authority to defer some costs on its books until the Commission can have the opportunity to examine them in a future general rate case. That is all that is being requested and that is all the Commission has to decide." The Staff has no quarrel that SJLP's request for an accounting authority order should be limited to this issue; however, SJLP, in this case, also seeks from this Commission assurance of recovery of these costs, an inappropriate request. SJLP then goes on to state that "[t]he test the Commission has utilized in the past to determine whether to authorize such a deferral on a case-by-case basis is whether the costs are 'extraordinary and nonrecurring'" citing to *Re Missouri Public Service Company*, 1 MoPSC 3rd 200, 205 (1991) ("*Re MoPub*"). With this statement the Staff has no quarrel.

The test laid out in *Re MoPub* is not adequate for a proper analysis of the facts before the Commission in this case. Unlike the facts in *Re MoPub* and the other cases where the Commission has addressed the granting of an accounting authority order, both preceding and

following it, here the events that gave rise to costs that SJLP seeks to defer recognizing were created by SJLP's failure to adequately know the systems upon which it relies to operate its plant and provide safe and adequate service to its customers. This failure ultimately led to a SJLP operator leaving the DC oil pump in "off" or "local" rather than "automatic" and resulted in the DC oil pump not starting when Turbine-Generator No. 4 tripped on June 7, 2000. All the costs SJLP seeks to defer recognizing were caused by the DC oil pump not starting when Turbine-Generator No. 4 tripped on June 7, 2000.

SJLP argues that "[i]f the Commission believes that it should establish new criteria for the issuance of accounting authority orders, it should formally propose the new guidelines and allow all utilities in the state to comment on them." In support of this proposition it cites to § 536.010(4), RSMo. 1994, and *NME Hospitals, Inc. v. Dept. of Social Services*, 850 S.W.2d 71 (Mo. banc 1993). In that case the Missouri Supreme Court stated:

> There is no dispute that the disallowance of costs of psychiatric services other than electric shock therapy is a reimbursement standard of general applicability. As such, the standard is a policy change requiring promulgation of a rule. § Section 536.010(4), RSMo 1986, provides, in pertinent part, that the term "rule" means "each agency statement of general applicability that implements, interprets, or prescribes law or policy. . . ." An agency standard is a "rule" if it announces "[a]n agency statement of policy or interpretation of law of future effect which acts on unnamed and unspecified facts. . . ." *Missourians for Separation of Church and State v. Robertson*, 592 S.W.2d 825, 841 (Mo.App.1979).

NME Hospitals, Inc., 850 S.W.2d at 74. In a subsequent case regarding the same issue as to the need for a rulemaking the Missouri Supreme Court, in reaching its holding, relied upon the statements following:

> Not every generally applicable statement or "announcement" of intent by a state agency is a rule. Implicit in the concept of the word "rule" is that the agency declaration has a potential, however slight, of impacting the substantive or procedural rights of some member of the public. Rulemaking, by its nature,

> involves an agency statement that affects the rights of individuals in the abstract. Bonfield, State Administrative Rule Making, § 3.3.1 (1986).

Baugus v. Director of Revenue, 878 S.W.2d 39, 42 (Mo. 1994).

The Staff is not advocating that the Commission engage in rulemaking in this case. The Staff is advocating that the Commission not constrain itself to the test developed in the context of accounting authority orders granted due to floods, storms, other acts of God, state action or federal action, when the facts before it fall outside the scope of those decisions. SJLP's purpose in seeking this accounting authority order from the Commission is to allow SJLP to seek recovery of the costs in a future rate case and to avoid expensing those costs in year 2000. The Staff urges the Commission to keep this purpose in mind when it deliberates on SJLP's application in this case. The Commission should keep in mind when it exercises its discretion, the salient factor of SJLP having control over the events that gave rise to the costs SJLP seeks to defer recognizing.

In support of this position, the Staff points out that prior decisions of this Commission have no *stare decisis* effect, i.e., they do not limit proper exercise of the Commission's discretion. *See State ex rel. GTE North Inc. v. Public Service Comm'n of State of Mo.*, 835 S.W.2d 356, 371 (Mo. App. 1992), where the Missouri Western District Court of Appeals stated:

> An administrative agency is not bound by *stare decisis*. *State ex rel. Churchill Truck Lines, Inc. v. Public Serv. Comm'n*, 734 S.W.2d 586 (Mo.App.1987). "Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable." *Columbia v. Missouri State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo.App.1980). . . .

See also *State ex rel. General Tel. Co. v. Public Serv. Comm'n*, 537 S.W.2d 655, 661-62 (Mo. App. 1976), where the Western District Court of Appeals stated:

> Insofar as the conclusion in the 1962 cases is concerned, it has no binding effect in a future rate case. A concise statement of the applicable rule is found in 2 Davis, Administration Treatise Section 18.09, 605, 610 (1958), as follows:
>
> "* * * For an equity court to hold a case so as to take such further action as evolving facts may require is familiar judicial practice, and administrative agencies necessarily are empowered to do likewise. When the purpose is one of regulatory action, as distinguished from merely applying law or applying law or policy to past facts, an agency must at all times be free to take such steps as may be proper in the circumstances, irrespective of its past decisions. * * * Even when conditions remain the same, the administrative understanding of those conditions may change, and the agency must be free to act * * *." (Footnotes omitted.)
>
> Clearly the commission in this case was not bound by the action in the 1962 case.

This Commission has both the discretion and the authority to modify or discard any test it has applied in the past. Acceptable reasons to do so include refining or improving the test, addressing a new factual situation and meeting changed circumstances and/or changed views of the Commissioners.

The Staff submits that only to the extent that Staff's proposed guidelines are beyond application to the facts in this case would it be inappropriate for the Commission to adopt them. The Staff is neither suggesting nor asking that the Commission arbitrarily or capriciously engage in a sudden change in its approach to the grant of accounting authority orders. As stated above, the facts in this case are unique in that, unlike any other case where a company has sought an accounting authority order from this Commission, the events that gave rise to the costs were within the control of SJLP.

Although it is the Staff's position that the Commission should not grant SJLP the accounting authority order it seeks, it should not be forgotten that the Staff also opposes SJLP's positions on when amortization should begin and the rate impacts of the amortized amount. SJLP advocates that the costs that it seeks to defer recognizing should be deferred and amortized to match recovery of the costs in a future rate case, i.e., recognition should be deferred and

amortization should begin only when recovery begins pursuant to a future rate case. SJLP, through SJLP witness Stoll, has admitted that while SJLP proposes that rates increase to match the start of the amortization period, only in a "perfect world" would rates decrease to match the end of the amortization period. (Tr. 48, l. 23 to Tr. 49, l. 14). Under SJLP's proposal, absent a second rate case having an order that coincides with the end of the amortization period, real potential exists for SJLP to over-recover the amortization in rates, all other things being equal. This creates potential for SJLP to "game" the ratemaking system. Such gaming is not fair or appropriate to ratepayers. For this reason the Commission should maintain the approach it has consistently used in the past when it has granted companies authority to defer recognition of costs, and require that amortization of the costs in issue here begin immediately.

The SJLP proposes to delay the amortization of the deferral until after any rate moratorium which the Commission may order in the SJLP/UtiliCorp merger case presently pending before the Commission, Case No. EM-2000-292. In that case SJLP and UtiliCorp have proposed a "regulatory plan" that includes a five-year rate moratorium for the merged SJLP. In response to questioning by Chair Lumpe, SJLP, through its witness, Mr. Larry J. Stoll, reaffirmed during the evidentiary hearing SJLP's position that amortization should be delayed until after the full five-year moratorium period expires, if the Commission grants the moratorium. (Tr. 90, ll. 3-22). In other words, SJLP would leave these costs suspended on its books for five years or more, until it has an opportunity to change its rates. SJLP's position flies in the face of statements made by the Commission in prior cases that it is inappropriate to allow deferrals to stay on utility books for extended periods of time. (Revised Rebuttal Testimony of Staff witness Harris, Ex. 11, p. 29, ll. 15-21; Ex. 15 (Commission order in Case No. EO-94-35); Ex. 16 (Commission order in Case No. EO-95-193)). Again, the proper course is to require

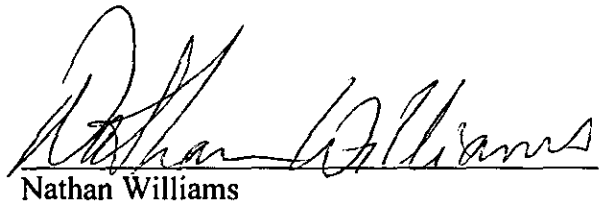
amortization of the costs to begin immediately, if the Commission determines to allow recognition of these costs to be deferred at all.

SJLP, at page 7 of its initial brief, states that this Commission should not address the question of whether the costs SJLP seeks to defer recognizing were the result of circumstances created by SJLP. In particular, as to this issue, SJLP states as follows: "This is not a question the Commission has to decide in this case. Nor should it decide these questions so soon after the incident. Investigations are still on-going." On July 27, 2000, in its order establishing Case No. ES-2001-28 for the purpose of receiving from the Staff an incident report regarding the events giving rise to the costs SJLP seeks authority to defer recognizing here, the Commission ordered the Staff to "file either its final incident report or an interim incident report no later than December 6, 2000." The Staff anticipates filing its final incident report in that case on December 6, 2000.

For the reasons set forth above and in the Staff's initial brief in this case, the Staff urges the Commission to deny SJLP the accounting authority order it seeks here. However, if the Commission determines to grant to SJLP an order authorizing it to book the costs in issue into Account 182.3, the Staff recommends that the Commission require SJLP to begin amortization of those costs immediately upon the effective date of the accounting authority order or, alternatively, that the Commission require SJLP to file a rate case within ninety (90) days of the accounting authority order as a prerequisite to SJLP seeking recovery of any of these costs from customers.

Respectfully submitted,

DANA K. JOYCE
General Counsel



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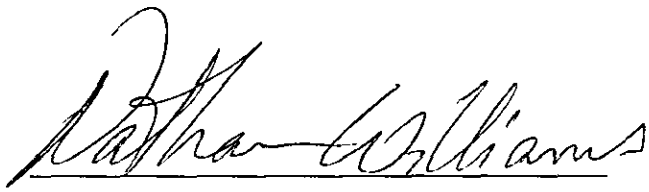
Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 4th day of December, 2000.



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