BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Evergy Metro, Inc. d/b/a Evergy Missouri Metro and Evergy Missouri West, Inc. d/b/a Evergy Missouri West for an Accounting Authority Order Allowing the Companies to Record and Preserve Costs Related to COVID-19 Expenses	))))))	File No. EU-2020-0350

Reply Brief of the Office of the Public Counsel

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I. Introduction

The Office of the Public Counsel (OPC) reserves its reply brief for those points that warrant a response to provide the Commission an accurate review of the record and law. The Commission should not take OPC's decision to remain silent to any particular point as acceptance of or agreement on that point.

II. Reply to Evergy

1. Evergy Attempts to Salvage its Application by Avoiding General Instruction 7 and the Sibley Test.

Evergy Missouri Metro and Evergy Missouri West (collectively Evergy) rests its application for deferral accounting related to impacts from the severe acute respiratory syndrome coronavirus 2 (SARS COV-2) (COVID-19) pandemic on two points. First, COVID-19 as a pandemic is extraordinary and the associated costs should therefore be eligible for accounting authority order (AAO) treatment as other extraordinary items have. Second, the Commission can issue an AAO regardless of past practice of demanding a showing of materiality. Both points are an attempt to slip a bad application past the scrutiny of this Commission's Sibley test standard for AAOs.

This Commission has adopted the Uniform System of Accounts (USOA) by Rule,[1] and USOA General Instruction 7 reserves deferral accounting for extraordinary and material events. [2] The Commission has adopted the USOA's extraordinary standard in its own "Sibley test" to judge deferral accounting requests, and accordingly evaluates extraordinariness based upon the impact

[1] 20 CSR 4240-20.030.
[2] 18 CFR Part 101 (1993).

on the utility in question.[3] Missouri's Western Court of Appeals upheld the reasonableness of that narrow test just this year.[4]

Evergy attempts to have it both ways by arguing that COVID-19 is an extraordinary event for Evergy, while also maintaining that extraordinariness does not matter anyway. Evergy's brief begins with a recounting of the tragic human and economic toll COVID-19 has wrought upon the country and Missouri.[5] Although gripping, Evergy's narration does not speak to whether COVID-19 is extraordinary for Evergy or its finances. A unique storm may strike a town, and all may remark that is was "extraordinary." However, if one side of town is spared, can the neighbor with her house intact say that torrent was extraordinary for her? No. For Evergy's part though, relating its application to the larger impacts COVID-19 has had on everybody at least looks like an attempt at formatting its brief with the extraordinary prescriptions for deferral accounting in USOA Instruction 7. What is interesting though is that Evergy simultaneously says COVID-19 is extraordinary, and that General Instruction 7 should not judge its application.

Rather than disputing OPC witness Robert Schallenberg's calculations as to Evergy's materiality threshold, Evergy spends its time claiming that this Commission "is not constrained by General Instruction 7."[6] Despite the multiple instances this Commission and Missouri Courts have employed Instruction 7 to evaluate AAO requests, Evergy now tries to convince the Commission

[3] *Report and Order on Remand*, WO-2002-273 (Nov. 10, 2004).
[4] *Off. of Pub. Counsel v. Evergy Mo. West, Inc.*, 2020 MO. App. LEXIS 946, 13 (Mo. App. W.D. 2020) ("Despite the unusual nature of the request, the Commission determined that the AAO request was governed by the same standards applied in past cases. The Commission concluded that the retirement of the Sibley plant was an extraordinary event which justified the creation of an AAO to capture Evergy's cost savings for consideration in a future rate case.").
[5] Initial Post-Hearing Brief of Evergy Missouri Metro and Evergy Missouri West, EU-2020-0350 p. 2.
[6] *Id.* at 5.

that Instruction 7 is irrelevant to its request.[7] Perhaps Evergy is making this argument because its financials have performed better in 2020 after the COVID-19 pandemic started than the year prior.[8] Evergy presents, "Darrin Ives, a certified public accountant and Evergy's Vice President of Regulatory Affairs, [who] testified that there is no relationship in the USOA between General Instruction 7 and the establishment of regulatory assets or liabilities."[9] Evergy argues that USOA Definition 31 controls instead.

Definition 31 reads as follows:

> 31. *Regulatory Assets and Liabilities* are assets and liabilities that result from rate actions of regulatory agencies. Regulatory assets and liabilities arise from specific revenues, expenses, gains, or losses that would have been included in net income determination in one period under the general requirements of the Uniform System of Accounts but for it being probable:
> A. that such items will be included in a different period(s) for purposes of developing the rates the utility is authorized to charge for its utility services; or
> B. in the case of regulatory liabilities, that refunds to customers, not provided for in other accounts, will be required.[10]

Restated, Evergy's argument is that its COVID-19 costs qualify for deferral accounting for consideration in its next rate case because if they are in a regulatory asset the Commission can then consider those costs in Evergy's next rate case. This is a circular argument where anything qualifies for AAO treatment so long as Evergy says so, and records it to a regulatory asset.

Evergy's definitional argument fails for two reasons. First, definitions are naturally not operative. Definition 31 does not control when a utility creates a regulatory asset or liability, but rather just defines them. Claiming that Definition 31 supplies some kind of test for AAOs means that any request qualifies for deferral accounting treatment as the definition has no restrictions on

[7] *Contra* Initial Post-Hearing Brief of the Office of the Public Counsel, EU-2020-0350 p. 6-8.
[8] Tr. vol. II, EU-2020-0350 p. 198.
[9] Initial Post-Hearing Brief of Evergy, p. 6.
[10] 18 CFR Part 101.

what can be in a regulatory asset or liability. The definition only says that if the Commission orders it, then it qualifies. Second, Evergy's Definition 31 argument has been tried and failed before. Evergy tried its Definition 31 argument at Missouri's Western Court of Appeals, and the Court disregarded it as "exceedingly perplexing."[11]

Not discouraged by authority, Evergy continues to point out that this Commission uttered four decades ago that the five percent standard "is not case-dispositive."[12] Even if the Commission did say this once, it was forty years ago, and is outweighed by the multiple cases OPC supplies.[13]

The Commission should also appreciate the danger in Evergy's proposition. Evergy is asking this Commission to adopt a deferral accounting standard that abandons any materiality or other objective measure for approving AAOs. OPC bases its arguments in Instruction 7 and the Sibley test precisely because it is the only Court-endorsed decision-making framework for deferral accounting requests. Continued reliance on an objective framework strengthens the public trust in the Commission's decision-making, and reinforces conclusions that the Commission's ultimate decision is reasonable. Departing from Instruction 7 once an application does not allege materiality would undermine that trust, and cast the Commission's reasonableness into significant doubt.

2. Evergy Relies on Unsubstantiated Evidence and Documents Outside the Record.

A foundational issue with Evergy's request for deferral accounting is that it relies on unsubstantiated hearsay and out-of-record documents "When a witness offers the out-of-court statements of another to prove the truth of the matter asserted in the statement, the testimony is hearsay."[14] Without proper foundation or authentication to cure the hearsay, or determine that it

[11] *Kan. City Power & Light Co.'s Request v. Pub. Serv. Comm'n*, 509 S.W.3d 757, 770 (Mo. App. W.D. 2016).
[12] Initial Post-Hearing Brief of Evergy, p. 5.
[13] Initial Post-Hearing Brief of the Office of the Public Counsel, EU-2020-0350 p. 6-8.
[14] *Bynote v. Nat'l Super Mkts.*, 891 S.W.2d 117, 120 (Mo. 1995).

meets an exclusion to the hearsay definition, the Commission cannot rely on it as competent evidence.[15] Every claims that Evergy's controller, and the accounting firms PricewaterhouseCoopers and Deloitte, confirm Ives' opinion that Definition 31 controls the Commission's authorization of AAOs.[16] Evergy leaves its controller unnamed. Evergy also does not name any individuals at PricewaterhouseCoopers or Deloitte. Evergy does not support the claim that these entities agree with Ives on Definition 31 with reports, affidavits, or any ancillary documentation. Instead, Evergy claims that their agreement is simply a "fact" that Ives can rely on as a witness.[17] One cannot cure hearsay by just declaring it is a fact. Evergy is clearly offering the alleged opinions of unnamed individuals to prove the truth of the matter asserted; that Definition 31 controls Evergy's request. This is unsupported hearsay, plain and simple, and the Commission may not rely upon it.

Aside from hearsay, Evergy also buttresses its brief with newfound documents without witness foundation, authentication, or opportunity for cross-examination. Despite having the benefit of pre-filing testimony and an evidentiary hearing, Evergy supplies three "exhibits" as attachments to its initial brief without excuse or request for leave to supplement the record. Ives' testimony at least previously authenticated Exhibit A, and Exhibit B, even with no sponsoring witness, is an apparent Jackson County, MO Health Department Order. Exhibit C however, is a spreadsheet purporting to show COVID-19 accounting treatment across the United States. This is not the referenced orders themselves, but descriptions of orders and actions from certain states, and with no attributed author or creation date to verify the accuracy or credibility of Exhibit C. No witness sponsored Exhibit C, or spoke to its accuracy or completeness. The only way to verify this

[15] *CACH, LLC v. Askew*, 358 S.W.3d 58, 63 (Mo. 2012).
[16] Initial Post-Hearing Brief of Evergy, p. 7.
[17] *Id.*

document would be to dive into each referenced order or action to verify the summary; something Evergy does not attempt to do, and presumably expects the Commission to do so for Evergy. Evergy's spreadsheet appears to be an alteration of materials created by the Edison Electric Institute, but without verification or commentary from Evergy, OPC cannot determine how much input, if any, the Company had on this product. The Commission should disregard Evergy's inflation of its brief with unsupported so-called "exhibits."

3. Evergy's Legal Argument that the Commission cannot Order Conditions through Deferral Accounting is Unpersuasive.

Evergy objects to the conditions suggested by the National Housing Trust (NHT) and OPC on the legal basis that any condition ordered through an AAO without the utility's agreement amounts to an unlawful seizure of that utility's property right.[18] Evergy relies primarily on *City of O'Fallon v. Union Electric Co.* and *State ex rel. Harline v. Pub. Service Commission* for this claim.[19] Both cases are wholly irrelevant to this proceeding and are not comparable to the issues at hand.

Neither *O'Fallon* nor *Harline* entail a Commission order making AAO treatment conditional on important customer protections. The *O'Fallon* Court upheld the Commission's denial of a city's request to compel Union Electric d/b/a Ameren Missouri (Ameren Missouri) to divest itself of lighting equipment.[20] The *Harline* Court affirmed a Commission determination that an additional certificate of convenience and necessity was not necessary to construct a transmission line within a utility's certified territory.[21] A customer relief program in conjunction with the Commission's discretionary deferral accounting is in no way analogous to O'Fallon's demand that

[18] *Id.* at 28-29.
[19] 462 S.W.3d 438 (Mo. App. W.D. 2015); 343 S.W.2d 177 (Mo. App. K.C. 1960).
[20] 462 S.W.3d at 444-46.
[21] 343 S.W.2d at 185.

a utility sell its assets.[22] The *Harline* opinion is also dissimilar to this case, and should only be relied upon for the understanding that the "powers of regulation delegated to the Commission are comprehensive and extend to every conceivable source of corporate malfeasance."[23]

Evergy's legal argument is that the Commission essentially cannot order Evergy to use its property in a manner contrary to what its wants. Think about how far that argument goes. Can the Commission order Evergy's agents and counsel to appear before the Commission and testify? Such an order requires Evergy to expend resources and use property that it may not want to, so presumably not under Evergy's reading of *O'Fallon* and *Harline*. Can the Commission order Evergy to provide electricity service at a rate less than what Evergy wants? Obviously yes, as ratemaking is within the Commission's province, but not according to Evergy's legal argument against conditions.[24] Can the Commission order a company to adopt a particular energy efficiency program in order for a portfolio to be approved? If Evergy believes not, then it relented for whatever reason when the Commission did just that last year.[25]

If Evergy is correct, and this Commission cannot impose conditions through an AAO, then it would be uniquely impotent amongst state public utility commissions. Evergy's Exhibit C refers to Connecticut's Public Utility Regulatory Authority (PURA) issuing a disconnection moratorium alongside deferral accounting treatment.[26] A review of the docket referenced in Exhibit C reveals that the Connecticut PURA also ordered certain payment plans for customers due to COVID-19.[27] The PURA's Order does not indicate that its power is due to a unique feature of Connecticut law,

[22] *See* Mo. Rev. Stat. § 393.140(4) (1967).
[23] 343 S.W.2d at 182.
[24] *Contra* Mo. Rev. Stat. § 393.130.1 (2002).
[25] Tr. vol. III, EU-2020-0305, p. 328-29.
[26] Initial Post-Hearing Brief of Evergy, Ex. C.
[27] 2020 CONN. PUC LEXIS 574, *7-10 (Conn. D.P.U.C. April 29, 2020).

nor do Connecticut's statutes specifically empower PURA on this point. The lack of restrictive language against the Connecticut Commission's order indicates that its issuance of conditions through an AAO is a product of its general regulatory powers.[28] Exhibit C also refers to an Arkansas order simultaneously granting deferral accounting treatment and ordering a disconnection moratorium.[29] This is the same order supplied as Exhibit 206 in this proceeding.[30] To order both deferral accounting and a disconnection moratorium, the Arkansas Commission cited only to a general ratemaking statute that makes no explicit demarcation between accounting or other powers.[31] Evergy would have this Commission believe that it is uniquely facile, and cannot exercise the same general powers as the other commissions it presents in Exhibit C. There is nothing in Missouri statute that demands this unique result. It should be clear that it is not a usurpation of Evergy's authority to manage its own assets to make AAO treatment conditional on a customer relief program, bill-credit, or other measure. The Commission's authority to grant or withhold AAOs is wholly discretionary, and a proper use of discretion is to withhold AAO treatment if the AAO offered in a stipulation and agreement is unsatisfactory.[32] If the Commission uses its discretion to authorize AAO treatment, but only upon certain conditions, the onus is then upon Evergy to either accept the conditions or forego AAO treatment. Nothing in that discretion compels Evergy to conduct business or its property in any manner, contrary to Evergy's complaints. Such Commission action is also in line with activity in other states. Ameren Missouri also complains that a Commission withholding deferral treatment on conditions is improper, and

[28] *See* Conn. Gen. Stat. § 16-1 et seq.
[29] Initial Post-Hearing Brief of Evergy, Ex. C.
[30] Ex. 206, Order, Ark. Pub. Serv. Comm'n, 20-012-A p. 2.
[31] *Id.* (citing Ark. Code Ann. § 23-2-031 (1947)).
[32] *See* Mo. Rev. Stat. § 393.140(4)

seemingly makes the case that AAOs are an entitlement.[33] For reasons stated below, Ameren Missouri is mistaken.

III. Reply to Ameren Missouri

1. Ameren Missouri Misleads the Commission with a Misreading of Statute

Despite having no real stake in this proceeding, Ameren Missouri filed a brief devoted to convincing the Commission that it does not have the power to authorize OPC or NHT's recommended conditions in conjunction with an AAO order. Ameren Missouri does so by focusing narrowly on the language of Section 393.140, RSMo with a hyper-literal analysis.

Ameren Missouri supposedly looks at the plain text of Section 393.140, but focuses instead on the supposedly meaningful nonexistence of certain language in Section 393.140. Ameren Missouri compares Section 393.140 to other statutes like Sections 393.170, 393.220, 393.250, RSMo, and notes the absence of the phrase, "The commission may by its order impose such condition or conditions as it may deem reasonable and necessary" that exists in the other statutes but not Section 393.140.[34] Ameren Missouri then argues that because the other statutes contain positive phrases about the Commission being able to place conditions in those subject orders, while Section 393.140 does not contain a similar phrase, that the Missouri Legislature necessarily limited the Commission's authority to issue conditions with an AAO by omitting language. Ameren Missouri's argument is that the creation of language in other statutes limits or amends the language in Section 393.140.

Ameren Missouri's analysis noticeably does not include language from Section 386.310, RSMo, whereby the Commission may "require the performance of any other act which the health

[33] Initial Brief of Ameren Missouri, EU-2020-0350 p. 8-10.
[34] *Id.* at 3 -7.

or safety of [a utility's] employees, customers, or the public may demand."[35] Ameren Missouri also neglects to consider Section 393.1400, RSMo, stating that the Commission may authorize continued deferrals of depreciation expense and return, but "shall not be authorized to condition such approval."[36] Ameren Missouri's argument is that, because other statutes positively refer to a power to set conditions, Section 393.140 must include a similar grant of power before the Commission can do so. However and conversely, because Section 393.1400 refers to a negative restriction on the Commission's ability to set conditions, such power is otherwise available unless explicitly limited. If the Commission cannot generally issue or seek conditions for deferral accounting, then why would the Missouri Legislature need to clarify that the Commission does not have the ability in other statutes? The Legislature wrote a negative restriction against the Commission's general condition powers in Section 393.1400, because otherwise it would have been able to set conditions on deferrals under that statute.

The only way for Ameren Missouri's reading to hold is if the other sections of law Ameren Missouri relies upon amend Section 393.140. This is a crucial flaw in Ameren Missouri's logic because the other statutes Ameren Missouri cites to do not amend Section 393.140 explicitly or otherwise. Nothing in the statutes Ameren Missouri relies on says that "the Commission can issue conditions under these sections, and no others," and Missouri law does not permit one statute to amend or alter another statute by implication. "Where the legislature amended a statute, *it must do so explicitly*. 'Amendments by implication are not favored.'"[37] Despite clear case law against

[35] Mo. Rev. Stat. § 386.310.1 (1996).
[36] Mo. Rev. Stat. § 393.1400.5 (2018).
[37] *LeSage v. Dirt Cheat Cigarettes and Beer, Inc.*, 102 S.W.3d 1, 4 (Mo. 2003) (emphasis added) (quoting *Fisher v. Waste Mgmt. of Mo.*, 58 S.W.3d 523, 525 (Mo. 2001); *see also Sours v. State*, 603 S.W.2d 592, 599 (Mo. 1980) ("We note that we are not free to construe the armed criminal action statute as a mere punishment-enhancement statute which amends by implication numerous

amendments by implications, Ameren Missouri claims that the inserted language in Sections 393.170, 393.220, and 393.250 implicitly limits the Commission's authority in Section 393.140. Ameren Missouri is clearly wrong.

Ameren Missouri wishes this Commission to believe that it categorically cannot impose conditions upon utilities in AAO orders merely because Section 393.140 does not so pedantically provide. Apparently, discretionary powers to authorize AAOs do not include discretionary conditions. Ameren Missouri's conclusion does not follow the plain reading of Section 393.140, but a hyper-literal one that holds each legislative grant of power as simultaneous implicit negative restrictions. The language in Missouri statutes generally is to be given its "plain and ordinary meaning."[38] In addition, Commission-related statutes are to be "liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."[39] The Commission in turn has "all powers necessary or proper" to exercise its regulatory jurisdiction.[40] The Commission cannot use a "liberal" construction to depart wholly from statutory text, but nonetheless the Commission-related statutes still receive this treatment to facilitate the Legislature's intent to defer public utility regulation to this Commission.[41]

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felony statutes, because Mo. Const. art. III, s. 28 prohibits the General Assembly from amending statutes without setting forth in full the statutes so amended).

[38] *Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Off. of Pub. Counsel*, 464 S.W.3d 520, 524-25 (Mo. 2015).

[39] *State ex rel. Laundry, Inc. v. Pub. Serv. Comm'n*, 34 S.W.3d 37, 41-43 (Mo. 1931) (quoting *State ex rel. Sedalia v. Pub. Serv. Comm'n*, 204 S.W. 497, 498 (Mo. 1918); *see also State ex rel. Barker v. Kan. City Gas Co.*, 163 S.W.864, 858 (Mo. 1914) (stating same); Mo. Rev. Stat. § 386.610 (1939).

[40] Mo. Rev. Stat. § 386.040 (1939); *see also* Mo. Rev. Stat. § 386. 250(7) (1996) ("To such other and further extent, and to all such other and additional maters and things and in such respects as may herein appear, either expressly or impliedly").

[41] *State ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. 1979) ("Once it is determined that an act is within the commission's authority, of course, these considerations and others become part of the broad discretion accorded the commission to set just and reasonable rates"); *see also State ex rel. Dalton v. Miles Laboratories, Inc.*, 282 S.W.2d

If Ameren Missouri is correct, and the Commission cannot uses its discretion and general ratemaking powers to impose conditions in an AAO order, then numerous existing Commission orders and powers need to be revisited. Ameren Missouri's position boils down to an argument that the Commission cannot exercise a power under statute unless the text specifically and literally authorizes that power. Under Ameren Missouri's theory, the Commission should have had no power to authorize Ameren Missouri's electrification tariff since no statute specifically speaking to electrification tariff programs exists.[42]

Similarly, the Commission had no power last year to approve the special discounted rate for Nucor.[43] Midwest Energy Consumers Group (MECG) challenged the Commission's approval of a special rate on the basis that no authorizing statute for such a special rate existed except for Section 393.355, RSMo for certain steel manufacturers. However, Evergy maintained it was not using Section 393.355, and instead employed more general ratemaking and hearing statutes.[44] Nonetheless, the Commission found that it had the power to grant a special rate outside a general rate case, and without Section 393.355.[45] For Ameren Missouri to be correct now, the Commission must have been wrong then.

Consider also, the Commission's authorization of the splitting of 100% of depreciation expense and return between the plant-in-service accounting (PISA) assets and the renewable energy standard rate adjustment mechanism (RESRAM). Section 393.1400 reads that

564, 573-74 (Mo. 1955) (stating that "the primary rule in statutory construction is to ascertain and give effect to the legislative and that remedial statutes enacted in the interest of the public welfare should be construed with a view to suppression of the mischief sought to be remedied") (citations omitted).

[42] *Contra Report and Order*, ET-2018-0132 (Feb. 6, 2019).

[43] *Contra Report and Order*, EO-2019-0244 (Nov. 13, 2019).

[44] *Id.* at 13.

[45] *Id.* at 13-14.

"notwithstanding any other provision" of Chapter 393, utilities under PISA only recover eighty-five percent of depreciation expense and return through deferrals.[46] OPC argued that the literal language of Section 393.1400, RSMo meant that utilities choosing PISA get only eighty-five percent of depreciation notwithstanding the recovery of 100% of depreciation through the RESRAM. The Commission and Ameren Missouri disagreed, and responded that such a literal reading of Section 393.1400 is improper because nothing in the statute precludes stacking depreciation between two recovery mechanisms.[47] The Appeals Court agreed. The Court found that "nothing in the PISA statute indicates that the eighty-five percent is the cap on accounting for interim depreciation."[48] Likewise, there is nothing in Section 393.140 that says the Commission cannot condition deferral accounting, and the Commission should disregard Ameren Missouri's argument that the absence of language now precludes Commission action.

V. Conclusion

The Commission should deny Evergy's requested COVID-19 related AAO. The Commission has established that the USOA Instruction 7 guides its decision making for AAO requests, and accordingly expects applicants to demonstrate extraordinariness and materiality. Evergy's application does not meet the Commission's expectations, but instead asks that the Commission disregard past practice in favor of a self-fulfilling standard. Evergy also opposes NHT and OPC's suggested customer protections. They do so not on merit, but on a narrow reading of statute and case law that effectively shutters much of this Commission's practice if accepted. This Commission should disregard Evergy's categorical assertions of extraordinary nature and legal

[46] Mo. Rev. Stat § 393.1400.2.
[47] *In re App. of Union Elec. Co. v. Pub. Serv. Comm'n*, 591 S.W.3d 478, 484 (Mo. App. W.D. 2019).
[48] *Id.* at 486.

consequence, and deny Evergy's requested AAO as reflected in the non-unanimous stipulation and agreement.

WHEREFORE, the OPC offers its post-hearing reply brief.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 14th Day of December, 2020, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall