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

SIERRA CLUB'S INITIAL BRIEF

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Sierra Club hereby submits its Initial Brief pursuant to the Commission's October 28, 2020 Order Setting Hearing Date and Resuming Procedural Schedule. Sierra Club respectfully requests that the Commission issue findings of fact and conclusions of law that, at a minimum, mirror the Non-Unanimous Stipulation and Agreement, including paragraphs 16–18.The consumer protection provisions contained within paragraphs 16-18 are necessary to support Missourians as they navigate the unprecedented pandemic. There is competent and substantial evidence to support the Stipulation's provisions as fair, equitable, and in the public interest, and the Commission has the authority to issue an order mirroring the Stipulation in its entirety. Further, Sierra Club urges the Commission to adopt consumer protection provisions that strengthen the Stipulation's paragraphs 16-18 by incorporating some or all of the consumer protection provisions proposed by National Housing Trust witness Roger Colton in his rebuttal testimony.

I. Procedural History of the Proceeding

On May 6, 2020, Evergy Missouri Metro and Evergy Missouri West (collectively "Evergy" or the "Company") filed its Application for an Accounting Authority Order ("AAO") "to accumulate and defer to a regulatory asset for consideration of recovery in future rate case proceedings before the Missouri Public Service Commission ('Commission') all extraordinary costs and financial impacts incurred as a result of the coronavirus disease ('COVID-19') pandemic, plus associated carrying costs."[1] Specifically, in its initial Application, Evergy sought to:

> identify, track, document, accumulate, and defer in a regulatory asset from March 1, 2020 forward regarding: (1) its actual reasonable and prudently incurred costs related to the COVID-19 pandemic, including but not limited to new or incremental

[1] Application of Evergy Metro, Inc. and Evergy Missouri West, Inc. for Accounting Authority Order Related to COVID-19 Costs and Financial Impacts [hereafter "Application"] at 1.

> operating and maintenance expense related to protecting employees and customers and plan for and communicate about impacts of the pandemic, increased bad debt expense to the extent they exceed levels included in the cost of service, costs related to preparing for and any actual sequestration of employees, and costs related to new assistance programs implemented to aid customers with payment of electric bills during the pandemic; (2) lost revenues related to the COVID-19 pandemic; (3) less costs avoided related to COVID-19; and 4) carrying costs.[2]

On May 5, 2020, the Commission directed notice and established an intervention deadline. The Commission subsequently granted intervention to Midwest Energy Consumers ("MECG"), Missouri Industrial Energy Consumers ("MIEC"), Missouri American Water Company, Spire Missouri, Union Electric Company d/b/a Ameren Missouri, Sierra Club, National Housing Trust ("NHT"), and Renew Missouri.

On September 28, 2020, the Commission suspended the procedural schedule and continued the hearing. On October 8, 2020, Evergy, the Staff of the Missouri Public Service Commission ("Staff"), MIEC, MECG, and Sierra Club (collectively referred to as the "Signatories") filed a Non-Unanimous Stipulation and Agreement (the "Stipulation").[3] The Stipulation noted that Missouri American Water Company, Spire Missouri, and Ameren Missouri did not object to the Stipulation. On October 9, 2020, the Commission ordered that any objections to the Non-Unanimous Stipulation and Agreement must be filed by October 15, 2020. The Office of the Public Counsel ("OPC") and National Housing Trust timely objected to the Non-Unanimous Stipulation and Agreement. On November 12 and November 13, 2020, the Commission held an evidentiary hearing.

[2] Application at 12-13, ¶36.
[3] Ex. 1, Non-Unanimous Stipulation and Agreement.

II. The Commission Has the Authority to Issue a Written Order Containing Findings of Fact and Conclusions of Law that Mirror the Provisions of a Non-Unanimous Stipulation so Long as They are Supported by Competent and Substantial Evidence.

The Commission has the authority to approve a non-unanimous stipulation so long as it abides by its own regulations, the Missouri Administrative Procedure Act, the Public Service Commission Law, and the State Constitution.

Commission regulations contemplate that parties may file a stipulation and agreement as a proposed resolution to a contested case.[4] Further, the Commission "may resolve all or any part of a contested case on the basis of a stipulation and agreement."[5] Pursuant to 20 CSR 4240-2.115(2)(D), a non-unanimous stipulation to which a timely objection has been filed becomes a non-binding position of the signatory parties to the stipulated position. As a result, all issues remain for determination after hearing.[6]

Missouri statutes dictate the governance of hearings. The Public Service Commission Law provides the Commission with discretion in determining the rules related to its hearings,[7] but the Commission must also satisfy other statutory requirements.[8] For example, certain parties, including the Office of Public Counsel, "shall be entitled to be heard and to introduce evidence,"[9] and the Commission's conclusions must be in writing.[10] Moreover, the Missouri Administrative Procedure Act outlines a number of requirements related to contested cases.[11]

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[4] 20 CSR 4240-2.115(1)(A).
[5] 20 CSR 4240-2.115(1)(B); *see also* § 536.060 RSMo. ("Contested cases . . . may be informally resolved by consent agreement or agreed settlement or may be resolved by stipulation, consent order, or default, or by agreed settlement where such settlement is permitted by law.").
[6] 20 CSR 4240-2.115(2)(D).
[7] § 386.410 RSMo.
[8] *State ex rel. Fischer v. Pub. Serv. Comm'n of Mo.*, 645 S.W.2d 39 (W.D. Mo. 1982).
[9] § 386.420(1) RSMo.
[10] § 386.420(2) RSMo.
[11] *See generally,* RSMo. Title 36, Chapter 536.

Specifically, "[e]very decision and order in a contested case shall be in writing, and . . . shall include . . . findings of fact and conclusions of law."[12] Finally, in order to withstand judicial review, the Commission's findings must be lawful (authorized by statute) and reasonable (supported by "competent and substantial evidence upon the whole record").[13]

As noted above, a non-unanimous stipulation and agreement was filed in this proceeding on October 8, 2020. OPC and NHT timely filed objections to the agreement on October 15, 2020, and a two-day evidentiary hearing ensued on November 12, 2020. Evidence was presented via pre-filed testimony and at the evidentiary hearing, which constitutes the record in this case. As discussed below, there exists competent and substantial evidence upon the whole record to support the Stipulation. The Commission can effectively approve the Stipulation by producing a written order containing findings of fact and conclusions of law that mirror the Stipulation's provisions.

III. The Commission Has the Authority to Create an Accounting Authority Order under Extraordinary Circumstances and when the Costs Associated with the Event are Material.

Commission Rule 4 CSR 240-20.030 requires electric corporations to keep all accounts in conformity with the Uniform System of Accounts as enacted by the Federal Energy Regulatory Commission.[14] The Uniform System of Accounts provides, with few exceptions, that net income shall reflect all items in the same reporting period. A "regulatory asset" is an exception to this timing requirement and is governed by Uniform System of Accounts General Instruction 7, which states:

[12] § 536.090 RSMo.
[13] Mo. Const. art. V, § 18; *see also State ex rel. Office of the Pub. Counsel v. Pub. Serv. Comm'n of Mo.*, 938 S.W.2d 339, 341 (W.D. Mo. 1997) (internal citations omitted).
[14] 4 CSR 240-20.030.

> Those items related to the effects of events and transactions which have occurred during the current period and which are of unusual nature and infrequent occurrence shall be considered extraordinary items. Accordingly, they will be events and transactions of significant effect which are abnormal and significantly different from the ordinary and typical activities of the company, and which would not reasonably be expected to recur in the foreseeable future. (In determining significance, items should be considered individually and not in the aggregate. However, the effects of a series of related transactions arising from a single specific and identifiable event or plan of action should be considered in the aggregate. To be considered as extraordinary under the above guidelines an item should be more than approximately 5 percent of income, computed before extraordinary items. Commission approval must be obtained to treat an item of less than 5 percent as extraordinary.[15]

Thus, while the Commission has the regulatory authority to grant utilities permission to create an AAO, "which allows the utility to defer and capitalize certain expenses until the time it files its next rate case,"[16] it only allows the deferral of the financial effects associated with extraordinary events.[17] Specifically, the Commission has held that use of deferral accounting should be "limited" to situations in which the event is "unusual and unique, and not recurring." "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."[18] Accounting referrals "tend to unreasonably

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[15] Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act, 18 C.F.R. Part 101, General Instruction 7 (emphasis added); *see also* Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act, 18 C.F.R. Part 101, Paragraph 31 (A), which defines the term "regulatory asset" as: 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."

[16] *State ex rel. Aquila, Inc. v. Mo. Pub. Serv. Comm'n*, 326 S.W.3d 20, 27 (W.D. Mo. 2010) (quoting *Mo. Gas Energy v. Mo. Pub. Serv. Comm'n*, 978 S.W.2d 434, 436 (W.D. Mo. 1998)).

[17] 18 C.F.R. 101 (General Instruction 7).

[18] *State ex rel. Pub. Counsel v. Mo. Pub. Serv. Comm'n*, 858 S.W.2d 806, 811 (W.D. Mo. 1993) (emphasis added).

skew ratemaking results, and dull the incentives a utility has to operate efficiently and productively under the rate regulation approach employed in Missouri."[19]

The Commission has adopted certain criteria for granting an accounting authority order: (1) the costs pertain to an event that is extraordinary, unusual and unique, and not recurring; and (2) the costs associated with the event are material.[20] The Commission has defined the extraordinary standard as an event that is "unusual, infrequent, not foreseeably recurring, activities abnormal and significantly different from the ordinary and typical)."[21] The benchmark used by the Commission to measure materiality of a cost proposed for accounting authority treatment is whether the cost in question is at least 5% of the utility's net income.[22]

"AAOs are not a guarantee of an ultimate recovery of a certain amount by the utility."[23] The AAO "simply allows for certain costs to be separately accounted for possible future recovery in a future ratemaking proceeding."[24]

IV. The Commission Should Not Create an Accounting Authority Order for Lost/Unearned Revenue or for Any Catch-All Unidentified Costs, but the Commission Could Create an Accounting Authority Order for Costs Directly Related to the COVID-19 Pandemic and Earned but Not Collected Revenues.

Evergy requested authorization from the Commission to create an AAO for eight different types of costs or lost revenue, which fall into four categories: lost or unearned revenue because of volumetric sale changes associated with the pandemic (Issue 3.f); a catch-all request

[19] *In re Matter of Kan. City Power & Light v. Mo. Pub. Serv. Comm'n*, 509 S.W.3d 757, 769 (W.D. Mo. 2016).
[20] *Id*.
[21] *Report and Order*, File No. ER-2012-0174, at 31 (Jan. 9, 2013).
[22] *In re Matter of Kan. City Power & Light v. Mo. Pub. Serv. Comm'n*, 509 S.W.3d at 769.
[23] *State ex rel. Aquila, Inc. v. Mo. Pub. Serv. Comm'n*, 326 S.W.3d at 27 (quoting *Mo. Gas Energy v. Pub. Serv. Comm'n*, 978 S.W.2d 434).
[24] *State ex rel. Office of Public Counsel v. Mo. Pub. Serv. Comm'n*, 301 S.W.3d 556, 570 (W.D. Mo. 2009).

for any other costs or expenses (Issue 3.h); costs directly related to the COVID-19 pandemic (Issues 3.b, 3.d, 3.e) and; revenues that Evergy earned but didn't collect because of the pandemic (Issues 3.a and 3.c). The Commission should deny Evergy's request to create an AAO for lost or unearned revenue and for the catch-all request to defer unidentified costs. The Commission could approve Evergy's request to create an AAO for direct expenses related to the pandemic and for earned but not collected revenues. Collectively, this is exactly what the Stipulation's provisions provide.

A. The Commission Should Not Create an Accounting Authority Order for Lost or Unearned Revenue (Issue 3.f).

Evergy's Application, as filed, requested the authority to create a deferred regulatory asset for "lost revenues related to the COVID-19 pandemic."[25] Essentially, Evergy is seeking the authority to charge customers for power the utility never generated and customers never used so that its bottom line is not impacted by the pandemic. The Commission should deny Evergy's request to accumulate and defer lost revenue for many reasons, including that the Commission only has to guarantee cost recovery and the opportunity to earn a fair rate of return, not actual anticipated profits; under the regulatory compact in Missouri, the risk of lost revenue rests with utility investors; the Uniform System of Accounts does not allow for the creation of a regulatory asset for sales that never occurred as they would never have been included in a net income determination; and the balance of equities means that customers should not shoulder an obligation to pay for service they did not receive so that Evergy, a monopoly utility, can realize its anticipated profits.

[25] Application at 12-13, ¶36.

i. *Utilities Are Not Guaranteed Revenues—Only the Opportunity to Recover Their Costs and A Fair Return.*

The purpose of regulation is to ensure utilities recover their costs and have the reasonable opportunity to earn a fair rate to return—not to guarantee utilities make a profit or receive certain revenues. The rate-making process of setting just and reasonable rates involves a balancing of the investor and the consumer interests. The Commission has the responsibility of balancing the right of the utility's investors to recover costs and the opportunity to earn fair rate of return against the right of the public that it pay no more than the reasonable rates for the utility's services. While the rates allowed can never be so low as to be confiscatory, within this limit, if the rightful expectations of the investor are not compatible with those of the consuming public, it is the public which must prevail.

The U.S. Supreme Court has long held that it is not the role of regulators to insulate a regulated entity from market forces. In *Market Street Railway Co. v. Railroad Commission of California*, 324 U.S. 548 (1945), a street railway company challenged the validity of state commission order that reduced its rates. The U.S. Supreme Court found that this reduction did not violate the Constitution, holding: "The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces."[26]

[26] 324 U.S. at 567; *see also Pub. Serv. Comm'n of Mont. v. Great N. Utils. Co.*, 289 U.S. 130, 135 (1933) (due process clause safeguards against taking private property for public service without just compensation, but does not assure public utilities right under all circumstances to return on value of their property); *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603, (1944) ("regulation does not insure that the business shall produce net revenues"); *Fed. Power Comm'n v. Nat. Gas Pipeline Co*., 315 U.S. 575, 590 (1942) (noting that the "hazard that the property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated, business"); *Jersey Cent. Power & Light v. FERC*, 810 F2d 1168, 1181 (D.C. Cir. 1987) ("[A] company that is unable to survive without exploitative rates has no entitlement to such rates.")

While Evergy may have anticipated earning higher revenues from commercial and industrial customers before COVID-19 hit, the Commission only has to guarantee cost recovery and the opportunity to earn a fair rate of return, not actual anticipated profits. Since the Commission does not need to guarantee profits and expectations of the investor are not compatible with those of the consuming public interest in only paying for used power, it is the public which must prevail here.

ii. *Under the Regulatory Compact in Missouri, Risk of Lost Revenue Rests with Utility Investors.*

As Evergy receives compensation for business risk through rates, including its return on equity, allocating responsibility for lost profits to ratepayers would remove all risk to the utility and violate Missouri's regulatory compact. The Commission should thus deny Evergy's request to create a regulatory asset for lost revenue.

In File No. GU-2011-0392, Missouri Gas Energy ("MGE") sought permission from the Commission to defer lost revenues that were caused by a tornado that struck Joplin, Missouri. MGE's request indicated that it had experienced a reduction in sales from customers that were unable to take gas service from MGE due to the widespread damage that was caused by the tornado. The Commission in that case denied MGE's request to defer the lost revenue. The Commission stated:

> The Company's claim is different. Ungenerated revenue never has existed, never does exist, and never will exist. Revenue not generated, from service not provided represents no exchange of value. There is neither revenue nor cost to record, in the current period nor in any other. The Company showed no instance when service not provided resulted in recording any revenue or cost, lost or generated, on a deferred or current basis. That is because the Company cannot have an item of profit or loss when it provides no service, whether the cause of no service is ordinary or extraordinary. An AAO only determines the period for recording an item but the Company seeks an AAO to create the item itself by layering fiction upon fiction.

> To issue an AAO for ungenerated revenue would create a phantom loss, and an unearned windfall, for the Company. Therefore, the Commission will deny the AAO as to ungenerated revenue.[27]

Similarly, in File No. ER-2014-0258, when sales volumes dropped precipitously as a result of the major ice storm and resulting damage to the Noranda plant, the Commission found that the risk of lost sales rested solely with the utility's investors:

> When Ameren Missouri chose to provide service to a customer the size of Noranda, it understood that the profits it could earn from the business relationship came with a substantial risk. The risk that Noranda's production would fall and that it would be unable to sell as much electricity as it anticipated was a risk the company's shareholders, who benefit from the profits earned by serving Noranda, should bear. Ratepayers are not the insurers of Ameren Missouri profits and should not have to bear the risk that those profits are not as great as anticipated because of a drop in production at Noranda. To now alter the consequences of that drop in production would be to retroactively change the allocation of risk approved by the Commission for the fuel adjustment clause that was in effect at the time.[28]

The Commission has specifically determined that it is not in the public interest to compensate utilities for a reduction in sales resulting from the weather, a lost customer, or conservation.[29] When sales increase, such as residential customer sales during COVID-19 or a hot summer, the utility enjoys the additional revenues. A utility's customers are not entitled to a

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[27] Report and Order, *In the Matter of the Application of Southern Union Company for the Issuance of an Accounting Authority Order Relating to its Natural Gas Operations and for a Contingent Waiver of the Notice Requirement of 4 CSR 240-4.020(2)*, File No. GU-2011-0392, (Jan. 25, 2012); *see also* Ex. 100, Bolin Rebuttal Test. at 10.

[28] Report and Order, *In Re: Union Electric Company d/b/a Ameren Missouri's Tariff to Increase Its Revenue for Electric Service*, Mo. Pub. Serv. Comm'n, File No. ER-2014-0258,at 41-43 (May 12, 2015) (emphasis added).

[29] Ex. 500, Roberto Rebuttal Test. at 18; *see also* § 386.266.3 RSMo.; Amended Report and Order, Conclusions of Law at 57, ¶ Q, *In Re: The Empire District Electric Company's Request for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in its Missouri Service Area*, Mo. Pub. Serv. Comm'n, File No. ER-2019-0374, (July 23, 2020); Amended Report and Order, Findings of Fact at 56-57, ¶146, , Mo. Pub. Serv. Comm'n File No. ER-2019-0374, *In Re: The Empire District Electric Company's Request for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in its Missouri Service Area* (July 23, 2020).

refund or rate reduction in this circumstance. When utility sales decrease, such as commercial and industrial sales during COVID-19 or a general economic downturn, the utilities experience reduced revenues but are not entitled to receive additional revenue. "[T]he revenue levels from a particular customer or group of customers should not be guaranteed in whole or in part to a utility through use of AAOs or any other kind of regulatory mechanism. A customer's usage of utility service may fluctuate significantly, or even end permanently for many reasons. A utility should be presumed to be at risk for deviations in a customer's usage level compared to the level of sales from that customer previously assumed in setting rates, whether that customer is a large industrial customer or a typical residential customer."[30]

Other states recognize that the risk of lost revenue, even from COVID-19, rests with the utility investors. The Indiana Utility Regulatory Commission denied a request to include lost revenues associated with the COVID-19 pandemic in Cause No. 45380:

> Under the regulatory compact, at a base level, utilities are obligated to provide safe, reliable service and customers are obligated to pay just and reasonable rates for any such service they receive. The balance of this Order seeks to work toward allowing customers to meet their obligation while providing utilities the reasonable relief they need to help such customers do so. However, asking customers to go beyond their obligation and pay for service they did not receive is beyond reasonable utility relief based on the facts before us. A utility's customers are not the guarantors of a utility earning its authorized return. Instead, utilities are given the opportunity to recover their costs and a fair rate of return, which includes a certain level of risk attributable to variable sales. The approvals herein are intended to support the revenue recovery by utilities for the service they have provided pursuant to their approved rate designs by supporting a customer's ability to eventually pay for services received. We decline to move beyond this recovery based upon the facts presented.[31]

[30] Ex. 100, Bolin Rebuttal Test. at 9:16-20-10:1-2.
[31] *Phase 1 and Interim Emergency Order of the Commission*, Ind. Util. Regulatory Comm'n Cause No. 45377 / 45380, at 9 (June 29, 2020), available at: https://iurc.portal.in.gov/legal-case-details/?id=197c5aad-9a93-ea11-a811-001dd8018921.

The return on equity ("ROE") authorized for Evergy was established within the context that utility investors are allocated the risk of variable sales.[32] Since investors, not customers, earn the return on capital, investors must bear corresponding risk. If the Commission were to allow Evergy to continue to earn its ROE and engage in selective ratemaking to top off anticipated profits when revenues fall short, then shareholders would face no risk. Such one-sided treatment is improper.

iii. *The Commission Should Deny Evergy's Request for Authority to Defer, as a Regulatory Asset, Because Regulatory Assets are Allowed Only for Incurred Costs, Not Lost and Unearned Revenue.*

Unearned income does not qualify as a regulatory asset under the Uniform System of Accounts. While Evergy makes much in its application of the extraordinary nature of the COVID-19 pandemic, the question of "extraordinary" only goes to whether the timing of an accounting claim can be moved to another reporting period.[33] Evergy never addresses the threshold issue under the Uniform System of Accounts, which is whether unearned revenue is a recordable accounting item.[34] Unlike the claims Evergy has made for "its actual reasonable and prudently incurred costs related to the COVID-19 pandemic," selling less electricity than expected for a few months to commercial and industrial customers cannot be construed to be "specific revenues, expenses, gains, or losses that would have been included in net income determination" under the Uniform System of Accounts because sales that never occurred would never have been included in a net income determination.[35] Consequently, the Commission

[32] *See* Ex. 500, Roberto Rebuttal Test. at 19.
[33] Ex. 500, Roberto Rebuttal Test. at 14.
[34] *Id*.
[35] *Id*. at 14-15; *see also* Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act, 18 C.F.R. Part 101, Paragraph 31 (A).

cannot create a regulatory asset for revenue unearned because disappointing sales do not qualify for treatment as a regulatory asset under the governing accounting rules.

iv. *Evergy Has Not Made a Prima Facie Showing Necessary to Demonstrate Extraordinary Relief is Appropriate.*

The Commission should deny Evergy's request because it has not provided sufficient, complete, or compelling evidence that temporarily reduced industrial and commercial sales constituted a significant financial event with material impacts and for which the balance of equity between the utility investors and its customers requires the utility to receive extraordinary relief.

In the normal course of utility regulation, utilities do not have the opportunity to seek relief for a "single issue"—single issue ratemaking occurs when a utility's rates are altered on the basis of only one of numerous factors that are considered when determining the revenue requirements of a regulated utility. In "extraordinary" circumstances, the Commission has considered extraordinary relief. In Missouri, the Commission has established two factors for granting extraordinary treatment: (1) the costs pertain to an event that is extraordinary, unusual and unique, and not recurring; and (2) the costs associated with the event are material.[36]

Evergy has not provided legally sufficient evidence of the materiality of the financial event related to unearned revenue. Evergy offers that business contractions and closures within its service territory as a result of the pandemic "have reduced Evergy's revenues substantially and will continue to do so for an unknown period of time."[37] Evergy reports that total retail load was down for April and May.[38] However, Evergy has made no effort to quantify the impact of

[36] *Id*.
[37] Application at 4, ¶12.
[38] *See* Ex. 7, Ives Direct Test. at 10.

disappointing industrial and commercial sales on its ability to recover its fixed costs. It has not acknowledged or attempted to quantify the contribution to fixed costs that commercial and industrial customers make each month through demand charges or customer charges regardless of the volume of energy they consume. While Evergy does acknowledge that it enjoyed residential sales higher than anticipated, it does not acknowledge or attempt to quantify the over-contribution residential customers are making to fixed costs. Such evidence is insufficient for "extraordinary treatment."

Evergy has made no claim of net financial harm related to lost or unearned revenue to demonstrate the significance of the impact (materiality), as required by Missouri law.[39] Reduced revenue does not equal reduced income. Evergy must demonstrate that the reduced revenue also reduced its income; and that such a reduction in income was significant. "The COVID-19 pandemic can be judged an extraordinary event but Evergy has not claimed, let alone quantified, the significance of the event to its financial health, as required by the Uniform System of Accounts."[40]

There is reason to doubt whether the temporary decline in volumetric sales to industrial and commercial customers significantly impacted the Company in a material way. Evergy reported to its investors that its financial performance for the second quarter of this year was even better than last year's second quarter.[41] This is likely because while there was a temporary decline in industrial and commercial sales, there was an increase in residential sales.[42] Moreover,

[39] Ex. 500, Roberto Rebuttal Test. at 15; *see also In re Matter of Kan. City Power & Light v. Mo. Pub. Serv. Comm'n*, 509 S.W.3d at 769.
[40] Ex. 500, Roberto Rebuttal Test. at 15.
[41] *Id*. at 5; *see also* "Evergy Announces 2020 Second Quarter Results," Evergy News Release (Aug. 5, 2020), available at: https://investors.evergy.com/static-files/f46132b2-aa40-4932-9b46-9c0f8532008a.
[42] Ex. 100, Bolin Rebuttal Test. at 12.

Evergy noted during its August earnings call that the "commercial and industrial usage was only temporarily down in April and May and is already improving."[43] Evergy has simply failed to meet its burden that extraordinary relief is appropriate.

v. *The Commission Should Deny Evergy's Request to Recoup Lost and Unearned Income Because It Has a Public Benefit Obligation.*

The Commission should deny Evergy's request to establish a regulatory asset for unearned and lost revenue because Evergy has a public benefit obligation, which requires that it can and should do better than seek to be insured for earnings disappointment by its suffering customers.[44] Examples of good utility practice in the face of COVID-19 abound in other jurisdictions.[45] Sierra Club witness Cheryl Roberto, a former commissioner of the Public Utilities Commission of Ohio, found the following examples of companies and/or regulatory agencies that have advanced solutions that go beyond the nearly universal shutoff protections and waiver of fees to ameliorate hardships for customers and community:

- In New York, National Grid has suspended implementation of its authorized rate increase in light of the economic burden of the COVID-19 pandemic.[46]
- In Kentucky, the Commission noted that jurisdictional utilities would be permitted to seek approval to offer reduced rate or free electric service to customers.[47]
- In Minnesota, the Commission urged utilities to identify investments that could be made to support the economic recovery from the pandemic. The Commission promulgated a set of criteria for these investments, requiring, among other things,

[43] *Id.*
[44] Ex. 500, Roberto Reb. Test. at 25.
[45] *Id.* at 26.
[46] *Id.*; *see also* Order Postponing Approved Electric and Gas Delivery Rate Increases and Updated Reduction to the Low Income Discount Credit and Temporarily Waiving Certain Tariff Fees, N.Y. Pub. Serv. Comm'n, Cases 17-E-0238, 17-G-0239, 16-G-0058, 16-G-0059, 14-M-0565 (March 25, 2020)..
[47] Ex. 500, Roberto Rebuttal Test. at 26; *see also* Order, Ky. Pub. Serv. Comm'n, Case No. 2020-00085 (March 6, 2020).

that they provide "significant utility system benefits" and "create jobs or otherwise assist in economic recovery" for the state.[48]

- The Texas Public Utility Commission established a COVID-19 Electricity Relief Program which implements a tariff rider to cover short-term costs. The rider acts as an interest-free loan between ERCOT and each Transmission and Distribution Utility that will be paid back at the end of the program. Funds are then directed towards qualified residential customers for assistance with bill payment.[49]

- Other electric utilities are experiencing a similar reduction in revenue resulting from electric load decreases in commercial and industrial customer classes, but they have simply opted not to request relief related to load and revenue declines.[50]

As discussed in detail below, Missourians are hurting. The Commission should help Evergy meet its public obligations by denying its request to record and eventually recoup unearned and lost revenue so that its profit margin does not decrease.

B. The Commission Should Not Create an Accounting Authority Order for the Catch-All Request for Any Costs or Expenses (Issue 3.h).

Evergy's initial application sought to track "other costs incurred related to the COVID-19 pandemic that Evergy has not yet identified or anticipated."[51] The Commission cannot approve this request as they are undefined costs and it thus impossible to verify if such costs are a recordable accounting item under the Uniform System of Accounts.[52] In addition, since these

[48] Ex. 500, Roberto Rebuttal Test. at 26; *see also* Order Approving Accounting Request and Taking Other Action Related to COVID-19 Pandemic, Minn. Pub. Utils. Comm'n, Docket No. E,G-999/CI-20-425, Docket Not. E,G-999/M-20-427 (May 22, 2020).
[49] Ex. 500, Roberto Rebuttal Test. at 26; *see also* Order Related to COVID-19 Electricity Relief Program. Project No. 50664, Item 107, *Pub. Util. Comm'n of Tex.*, (March, 26, 2020).
[50] Ex. 500, Roberto Rebuttal Test. at 26; *see also* Comments of DTE Electric Company and DTE Gas Company on Utility Accounting, *In Re: Commission's own motion to review its response to novel coronavirus (COVID-19)*, Mich. Pub. Serv. Comm'n, Case No. U-20757, at 4 (April 3, 2020); Consumers Energy Company's Comments On Utility Accounting Issues Resulting From COVID-19, *In Re: Commission's own motion to review its response to novel coronavirus (COVID-19)*, Mich. Pub. Serv. Comm'n, Case No. U-20757, at 4-5 (April 3, 2020).
[51] Application at 6, ¶ 18.
[52] Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act, 18 C.F.R. Part 101, Paragraph 31 (A).

costs are unidentified, Evergy has not made a prima facie showing necessary to demonstrate that extraordinary relief is appropriate and that the costs associated with the event are material.[53] The Commission should deny Evergy's request to track and defer these undefined other costs that are not yet identified or anticipated.

C. The Commission Could Create an Accounting Authority Order for Costs Directly Related to the COVID-19 Pandemic (Issues 3.b, 3.d, and 3.e) and for Revenues that Evergy Earned but Didn't Collect because of the Pandemic (Issues 3.a and 3.c).

Evergy requested permission to accumulate and defer to a regulatory asset costs directly related to the COVID-19 pandemic, such as operating and maintenance expense related to protecting employees and customers such as additional cleaning of facilities and vehicles, personal protective equipment, technology upgrades to enable remote work, and employee sequestration preparation costs and employee sequestration costs. Evergy also applied to create an AAO for earned but not collected revenue because of the pandemic such as costs related to any assistance programs implemented to aid customers, waived fee revenues up to the amount included in rates related to waived late payment fees and waived reconnection fees, and increased bad debt. The majority of parties either supported Evergy's request for these costs and earned but not collected revenues or took no position on the requests.[54] These requests are starkly different than Evergy's request to track and defer unearned and lost revenue —the Uniform System of Accounts allows utilities to create an AAO for its actual reasonable and prudently incurred costs that would otherwise be charged to expense.[55] Second, allowing Evergy to defer actual costs and actually earned but not collected revenue is aligned with the regulatory

[53] *Id*.
[54] Ex. 9, Ives Surrebuttal Test. at 5 (OPC was the only party to oppose the AAO for these items.)
[55] Ex. 500, Roberto Rebuttal Test. at 14-15.

compact in Missouri, as opposed to being in violation of the compact.[56] Finally, allowing Evergy to defer these items does not raise the same balance of equity issues and does not conflict with the public benefit obligations that utilities must meet. It is for these reasons that Sierra Club did not oppose the request to create an AAO for costs directly related to the COVID-19 pandemic and for earned by not collected revenue.

V. The Commission Should Issue an Order Containing Findings of Fact and Conclusions of Law that, at a Minimum, Mirror the Non-Unanimous Stipulation's Provisions Because they are Fair, Equitable, and in the Public Interest.

Sierra Club strongly encourages the Commission to issue findings of fact that, at a minimum, adopt each of the Stipulation's provisions as a fair and equitable resolution of the issues in this case. In order to adopt each of these provisions, competent and substantial evidence must exist in the record. As discussed throughout this brief and the briefs of the other Signatories, each of the Stipulation's provisions are supported by substantial evidence.

In its initial application, Evergy requested authorization from the Commission to create an AAO for eight different types of costs or lost revenue, which fall into four categories: lost or unearned revenue because of volumetric sale changes associated with the pandemic (Issue 3.f); a catch-all request for any other costs or expenses (Issue 3.h); costs directly related to the COVID-19 pandemic (Issues 3.b, 3.d, 3.e) and; revenues that Evergy earned but didn't collect because of the pandemic (Issues 3.a and 3.c). Under the Stipulation, Evergy has explicitly agreed that it will not defer lost or unearned revenues (Issue 3.f), the most controversial request in Evergy's application that was universally opposed by all parties in this proceeding.[57] In addition, Evergy

[56] Report and Order, *In the Matter of the Application of Southern Union Company for the Issuance of an Accounting Authority Order Relating to its Natural Gas Operations and for a Contingent Waiver of the Notice Requirement of 4 CSR 240-4.020(2)*, File No. GU-2011-0392, (Jan. 25, 2012); *see also* Ex. 100, Bolin Rebuttal Test. at 10.
[57] Ex. 1, Non-Unanimous Stipulation at ¶ 6.

has foregone its catch-all request for any other costs or expenses (Issue 3.h), which were not adequately supported by Evergy with record evidence.[58]

The Stipulation allows Evergy to create an AAO for costs directly related to the COVID-19 pandemic (operating and maintenance expense related to protecting employees and customers, such as additional cleaning of facilities and vehicles, personal protective equipment, technology upgrades to enable remote work, and employee sequestration preparation costs and employee sequestration costs) and revenues that Evergy earned but did not collect because of the pandemic (costs related to any assistance programs implemented to aid customers, waived fee revenues up to the amount included in rates related to waived late payment fees and waived reconnection fees, and increased bad debt).[59] The majority of parties either supported Evergy's request for these items or took no position on these requests.[60] As discussed above, these direct expenses and earned but uncollected revenues do not suffer from the same problems as the request for lost and unearned revenue—the Uniform System of Accounts allows utilities to create an AAO for these types of costs and earned but not collected revenues; allowing deferral of these items comports with the regulatory compact in Missouri; does not raise the same balance of equity issues; and does not conflict with the public benefit obligations that utilities must meet.

Moreover, the Stipulation strikes a balance because while it allows Evergy to create an AAO for costs directly related to the COVID-19 pandemic and earned but not collected revenues, Evergy must also track and net these costs against savings that have resulted from the pandemic, including travel expenses, training expenses, office supplies, utility service provided to facilities leased or owned by the Company, staffing reductions, reduced employee

[58] Ex. 1, Non-Unanimous Stipulation.
[59] *Id.* at ¶ 2.
[60] Ex. 9, Ives Surrebuttal Test. at 5.

compensation and benefits due to the COVID-19 pandemic, and any income tax benefits from taxable net operating losses that are carried back to previous tax years per the 2020 Coronavirus Aid, Relief and Economic Security Act.[61] Finally, the Stipulation contains a number of consumer protection provisions, discussed in detail below, that provide assistance to allow customers to safely handle the pandemic and regain their financial footing. Evergy has voluntarily agreed to these provisions and voluntarily agreed that it will not seek to recover in rates the financial assistance provision in paragraph 18. These counter-balancing provisions help ensure that the AAO does not "unreasonably skew ratemaking results,"[62] and Sierra Club respectfully requests that the Commission adopt the Stipulation's provisions because they fairly and equitably resolve the issues in this case.

VI. The Commission Has the Authority to Attach Conditions to an Accounting Authority Order.

The Commission's authority to attach conditions to an accounting authority order is similar to its authority to approve a non-unanimous stipulation and agreement, as described in Section II, above. In short, the Commission must abide by its own regulations, the Missouri Administrative Procedure Act, the Public Service Commission Law, and the State Constitution.

The Commission has "broad and comprehensive" regulatory power.[63] The breadth of those comprehensive regulatory powers is defined by statute.[64] One limitation is that the

[61] Ex. 1, Non-Unanimous Stipulation at ¶ 7.
[62] *In re Matter of Kan. City Power & Light v. Mo. Pub. Serv. Comm'n*, 509 S.W.3d at 769.
[63] *In the Matter of the Application of KCP&L Greater Mo. Operations Co.*, 515 S.W.3d 745, 758 (W.D. Mo. 2016) (citing *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24, 34-35 (W.D. Mo. 2005).
[64] *State ex rel. Util. Consumers' Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. 1979) ("[T]he Public Service Commission's powers are limited to those conferred by the above statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted.").

Commission may not impede the utility's "business decisions."[65] Commission precedent establishes that its broad discretion to issue AAOs (discussed above) subject to conditions that the Commission determines are in the public interest does not run afoul of its inability to impede the utility's "business decisions." For example, in File No. GU-2020-0376, the Commission approved an AAO for Spire Missouri that included provisions for an arrearage-matching program with $1 million of investor money and $1 million re-directed form other customer-supported programs.[66] Similarly, in File No. WU-2020-0417, the Commission approved an AAO for Missouri American Water which included provisions that contained additional money to fund its bill credit program.[67] The Commission has also approved other AAOs with conditions that it deemed necessary for the public interest to order to approve an AAO.[68]

As discussed below, there is competent and substantial evidence to support the commonsense consumer protection provisions in the Stipulation.[69] The Commission should thus, at a minimum, issue an order mirroring the Stipulation's paragraphs 16, 17, and 18; but Sierra Club urges the Commission to strongly consider the consumer protection provisions described in Roger Colton's rebuttal testimony and decide whether it is necessary to include additional provisions to serve the public interest.

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[65] *Mo. ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 288-89 (U.S. 1923).
[66] Order Approving Amended Unanimous Stipulation and Agreement, *In the Matter of Spire Mo. Inc.'s d/b/a Spire Verified Application for an Accounting Authority Order Related to COVID-19 Impacts*, File No. GU-2020-0376 (Oct. 21, 2020). The Commission in this proceeding took official notice of File No. GU-2020-0376. Tr. Vol. III, at 319:11-15.
[67] Order, File No. WU-2020-0417, (Oct. 28, 2020).
[68] Report and Order, WO-2002-273, at30-32 (Dec. 10, 2002) (The Commission approved an AAO for MAWC but imposed a different amortization period on the AAO then was originally requested.).
[69] *See* Ex. 500, Roberto Rebuttal Test. at 26 (Sierra Club witness Roberto provides examples of other Commissions and regulatory agencies that have adopted solutions that go beyond the nearly universal shutoff protections and waiver of fees to ameliorate hardships for customers and community.)

VII. The Commission Should, at a Minimum, Issue an Order Mirroring the Stipulation Paragraphs 16, 17, and 18; Sierra Club Suggests that an Order that Does Not Include those Consumer Protection Provisions Would Not Serve the Public Interest.

A. Missouri is Hurting; the Commission's Order Should Incorporate the Stipulation's Consumer Protection Provisions (Paragraphs 16, 17, and 18).

Evergy utility customers are facing an unprecedented pandemic. Over 305,000 Missourians have tested positive for the coronavirus, with over 4,000 of them losing their lives. African American and other Missourians of color have been particularly impacted by the virus. The financial cliff that persons living paycheck-to-paycheck avoided prior to the COVID-19 pandemic is now unavoidable, with utility, rent, and other bills coming due. School and childcare closures, job furloughs, permanent job losses, and COVID-19-related health issues are just some of the crises low-income families, in particular, are experiencing.[70]

The fallout from this pandemic is far from over. Missouri is in the midst of a surge in cases. In the past seven days, there have been 19,791 new cases (about 2,800 new cases a day), 75 new deaths, a positivity rate of 20.3%, and 2,651 new hospitalizations due to COVID-19.[71]

The widespread impacts of this pandemic have amplified existing financial hardships and exacerbated the tough conditions that have long plagued Missouri's impoverished families and communities of color. Black Missourians are suffering a deadly disproportionate impact from COVID-19. Black individuals represent 21% of all Missouri COVID-19 cases and represent 33% of the state's total COVID-19 deaths.[72] In contrast, as of July 1, 2019, Black individuals represent only 11.8% of the state's total population.[73] "Not only is a disproportionate percentage

[70] *See generally* Ex. 1000, Colton Rebuttal Test. at 7-22.
[71] *See* Sierra Club's Position on Remote Hearing, File No. EU-2020-0350 (Sept. 15, 2020); *see also* https://showmestrong.mo.gov/data/public-health/ for updated COVID-19 statistics.
[72] Ex. 1000, Colton Rebuttal Test. at 20.
[73] *Id*. at 20-21.

of Missouri's Black population getting sick with COVID-19, … a disproportionate share of Missouri's Black population is also dying from COVID-19."[74] .

It is within this context of suffering across Missouri that the Commission should view whether to include paragraphs 16, 17, and 18 from the Stipulation. We urge the Commission to rise to meet the challenges at hand, and issuing an order containing the Stipulation's consumer protection provisions would help enable Missourians to rebound from the financial fallout of this pandemic while also maintaining access to utility services essential to slowing the spread of the disease and protecting public health. Moreover, strengthening the Stipulation's consumer protection provisions by adopting some or all of NHT witness Roger Colton's suggestions in his rebuttal testimony[75] would help remedy some of the fundamental inequities that have exacerbated the impact of this pandemic on low-income households and communities of color.

Utility services are always essential, but even more so now. Indeed, recent research has found that housing security policies reduce Covid-19 infection rates.[76] The nation is grappling with a pandemic, the spread of which can be slowed by routine handwashing and social distancing. To prevent the accelerated spread of the disease, many people are now working from home, attending school online, and generally socially distancing from each other. The ability to remain safely and comfortably in one's own home during this pandemic should not be determined by one's financial condition during this emergency. As this crisis exposes cracks in

[74] *Id*. at 21.
[75] *See generally* Ex. 1000, Colton Rebuttal Test.
[76] Jowers, K., Timmins, C., Bhavsar, N., "Policy in the Pandemic: Housing Security Policies Reduce U.S. COVID-19 Infection Rates" (June. 29, 2020), available at: https://nicholasinstitute.duke.edu/articles/policy-pandemic-housing-security-policies-reduce-us-covid-19-infection-rates; *see also* Ex. 1000, Colton Rebuttal Test at 15-16 discussing Missouri housing insecurity problem.

our social and economic systems,[77] it is incumbent upon us to protect the most vulnerable populations while also advancing our vision for a healthy and safe future with access to clean water and energy for all.

The reality is that this mix of public health and financial impact on so many Missourians will likely increase residential utility customer arrearages and their ability to pay utility bills.[78] Paragraphs 16, 17, and 18 provide much needed relief. In the Stipulation, Evergy agrees to continue its current practice of waiving late payment fees and not undertaking full credit external reporting of its customers for the duration of the approved AAO for pandemic-related incremental costs and cost reductions. Moreover, Evergy agrees in the Stipulation to waive re-connect fees (other than for uncollectibles expense as provided in paragraph 8) from the date the Stipulation is approved through the end of AAO. Next, Evergy agrees in the Stipulation to evaluate extending its current elongated payment plan offerings—the Company currently offers twelve-month payment plans to residential and small business customers through December 31, 2020, and March 31, 2021, respectively, and to evaluate offering additional customer assistance programs after December 31, 2021. Finally, Evergy agrees in the Stipulation to offer financial assistance to struggling customers to help them recover from the pandemic. Specifically, Evergy will contribute $2.2 million to help agencies, communities, and customers, including: up to $1,000,000 to Dollar-Aide, Project Deserve and other programs that assist customers with energy bill payments; $400,000 in Emergency Grants to help non-profit agencies on the front lines that have remained open and are delivering essential services; and $800,000 in grants to non-profit agencies for Evergy's Hometown Economic Recovery Program that will help build back our

[77] *Id*. at 7-22.
[78] *See* Evidentiary Hearing Testimony of OPC witness Dr. Geoff Marke, Tr. Vol. III, at 288-290; *see also* Ex. 1000, Colton Rebuttal Test. at 12-17.

local economies by supporting small business and entrepreneurial efforts, business attraction and retention, and workforce training and development. Access to essential service is vital to public health and safety at all times, but particularly during a global pandemic, and the Stipulation's provisions help ensure more customers maintain access to these services. The adoption of these customer protections is a reasonable outcome,[79] and Sierra Club urges the Commission to, at a minimum, issue an order mirroring the Stipulation's paragraphs 16, 17, and 18. Sierra Club further urges the Commission to strongly consider the consumer protection provisions described in Roger Colton's rebuttal testimony.

B. Sierra Club Suggests that an Order that Does Not Include the Consumer Protection Provisions that Mirror Provisions 16, 17, and 18 from the Non-Unanimous Stipulation Would Not Serve the Public Interest.

As described above, the Stipulation's consumer protection provisions are critical to ensure that Missourians are able to navigate the pandemic's uncertainties. While Evergy and the Commission can and should do more to assist Missourians in this time of crisis, paragraphs 16, 17, and 18 in the Stipulation are a reasonable interim step in the right direction. The Commission has the authority to include these provisions in the Stipulation, as demonstrated in the recent Spire AAO docket. The Stipulation without its critical consumer protection provisions would be unfortunate, but it would still include Evergy's agreement not to defer lost or unearned revenues. For this reason, and for this reason alone, Sierra Club would likely not oppose an order without consumer protection provisions.

[79] Evidentiary hearing testimony of Evergy witness Chuck Caisley, Tr. Vol. II, at 84:13-16; *see also* evidentiary hearing testimony of Staff witness Natelle Dietrich, Tr. Vol II, at 227-229 (supporting Paragraphs 16 and 18 as a reasonable outcome).

VIII. Conclusion

For the foregoing reasons, Sierra Club respectfully requests that the Commission issue an order containing findings of fact and conclusions of law that, at a minimum, mirror the Stipulation in its entirety. Sierra Club further urges the Commission to consider strengthening the Stipulation's consumer protection provisions by incorporating additional consumer protection provisions noted by NHT witness Roger Colton.

Respectfully submitted,

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Dated: December 4, 2020

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document was filed in EFIS on this 4th day of December, 2020, with notice of the same being sent to all counsel of record.

/s/ Kristin Henry
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