BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Office of the Public Counsel and Midwest Energy Consumers Group,	)	
Complainants,	)	Case No. EC-2019-0200
v.	)	
KCP&L Greater Missouri Operations Company,	)	
Respondent.	)	

REPLY OF KCP&L GREATER MISSOURI OPERATIONS COMPANY
TO RESPONSE TO MOTION TO DISMISS

KCP&L Greater Missouri Operations Company ("GMO" or "Company"), pursuant to Missouri Public Service Commission ("Commission" or "PSC") Rules 4 CSR 240-2.070(7) and 240-2.080(13), replies to the Response of the Office of the Public Counsel ("OPC") and Midwest Energy Consumers Group ("MECG") (collectively, "Complainants") to the Company's Motion to Dismiss:

The heated rhetoric of the Response overlooks the context in which the Petition, deemed a Complaint by the Commission, must be considered. GMO's 2018 general rate case was brought to set rates that reflected the federal Tax Cuts and Jobs Act of 2017 tax reductions which took effect January 1, 2018, as well as to reflect more current investment and costs in rates and give the Company an opportunity to achieve a reasonable rate of return. The stipulations approved by the PSC reduced GMO's rates by $24 million, a 3.2% decrease. See Order Approving Stipulations & Agreements at 1-2, No. ER-2018-0146 (Oct. 31, 2018). Consistent with GMO's election to make plant-in-service deferrals under Section 393.1400, those rates have now been frozen for three years.

Considering these events and the Complaint's failure to comply with the requirements of Section 386.390.1,[1] the relief sought by OPC and MECG should be denied, and the Complaint dismissed.

A. The Complaint Fails to State a Violation of Any Law, Rule, Tariff, Order or Decision of the Commission

The Complainants' insistence that they filed a petition seeking an accounting authority order ("AAO") does not change the fact that a complaint is now before the Commission, and that it fails to meet the jurisdictional requirements allowing for its adjudication. For this reason, the Complaint must be dismissed.

The general rules governing when a complaint may be filed before the Commission are set forth in Section 386.390, as well as the Commission's rule on complaints, 4 CSR 240-2.070. Under Section 386.390.1, a complaint may only be made by "setting forth any act or thing done or omitted to be done … in violation, or claimed to be in violation, of any provision of law subject to the commission's authority, of any rule promulgated by the commission, of any utility tariff, or of any order or decision of the commission." The Commission's rule contains a similar requirement that a complaint must allege a "violation of any tariff, statute, rule, order, or decision within the commission's jurisdiction." See 4 CSR 240-2.070(1). The Complainants have not made any such allegations, and as such have not met the requisite elements for a complaint to be brought under this statute, nor for that matter any other.

Complainants agree, noting in their Response that the Commission reviews a complaint "to determine whether the facts alleged meet the elements of a recognized cause of action." Resp. at 4, quoting Gettings v. Farr, 41 S.W.3d 539 (Mo. App. E.D. 2001). Despite the Response's

[1] All statutory references are to the Missouri Revised Statues (2016), as amended.

contortions, Complainants have not identified a cause of action that is rooted in the violation of any provision of law, rule, tariff, or order of the Commission.

Instead, Complainants fabricate a "cause of action" from the statute establishing the Commission's supervisory authority over a utility's accounting methods. Citing to Sections 393.140(4) and (8), Complainants claim that the Commission is allowed "to grant an Order to defer costs or savings for potential consideration in a future rate case." Resp. at 4–5. This reading of the statute is, at best, only partly correct. Section 393.140(4) gives the Commission "discretion" to issue an accounting order. Nowhere does the statute purport to create a cause of action against a utility or grant the Commission jurisdiction to hear a complaint.

Complainants do not cite to any authority to support their claim that the Commission's failure to exercise its discretion creates a cause of action against a utility. They cannot because there is none. Instead, their Response misconstrues the holding in State ex rel. Ozark Border Electric Coop. v. PSC, 924 S.W.2d 597 (Mo. App. W.D. 1996) ("Ozark"), to conclude that the Commission has jurisdiction to hear a complaint under Section 393.140. See Resp. at 6–7. Complainants argue that Ozark did not limit the Commission's jurisdiction to only complaints brought in accord with Section 386.390. Although true, this observation fails to support any finding of jurisdiction for the Complaint in this proceeding.

While Ozark considered two alternate statutes that give the Commission complaint jurisdiction, the case does not advance the Complainants' position that any statute creates jurisdiction so long as it deals with the PSC's regulatory authority. The Court of Appeals in Ozark analyzed Section 394.312.7 which, like Section 386.390, contains explicit language giving the Commission "jurisdiction to entertain and hear complaints involving any commission-approved

territorial agreement." Nothing in Section 393.140(4) or (8) grants any type of complaint jurisdiction.

Complainants' citation to Staff of Mo. PSC v. Consolidated Pub. Water Supply Dist. C-1, 474 S.W.3d 643 (Mo. App. W.D. 2015) ("District C-1"), also provides no support. The Court of Appeals simply held that neither Section 386.390 nor any other provision of law created jurisdiction for the Staff of the Commission to file a complaint against a municipal corporation. Id. at 655. District C-1 followed the holding in Ozark which limited PSC complaint jurisdiction to what is provided in the statutes. Id. As the Court of Appeals held in those cases, no jurisdiction exists to hear a complaint that is not tied to a cause of action that is explicitly identified and created by statute.

B. The Retirement of the Sibley Station is not an Unusual or Extraordinary Event that Justifies an AAO

The Response fails to advance any justification to support its contention that the planned retirement of the Sibley units was an "extraordinary event" that justifies an AAO. Instead, Complainants only argue that GMO's position is "absurd" because it would mean "no plant retirements would be unusual or extraordinary." See Resp. at 8. This unfounded assertion is not responsive to the clear authority and logic supporting GMO's position.

Where an electric utility has intended for years to retire a generating unit, has made that intention known to the Commission and the public, and has eventually retired the plant consistent with those plans, no "unusual or extraordinary" event has occurred that justifies an AAO. This conclusion is not the result of "policy arguments," but simply common sense.

To support its position, GMO cited the recent decision of the Wisconsin Public Service Commission that denied a similar request to defer savings arising from a retired power plant. The Wisconsin Commission concluded public utilities "routinely retire generating units between rate

cases," noting that the petitioners had failed to cite "any Commission decision where deferral accounting treatment has been authorized for the costs or any net savings associated with such retirements." See Order at 3-4, In re Application Requesting Wis. Elec. Power Co. to Defer Net Savings Arising from Voluntary and Premature Retirement of Pleasant Prairie Power Plant, No. 6630-AF-100 (June 6, 2018). Complainants had no response to this compelling decision, choosing instead to ignore its persuasive reasoning.

The Wisconsin Commission's order applied very similar factors to those used by the Uniform System of Accounts ("USOA") in determining that the retirement of Wisconsin Electric's Pleasant Prairie power plant was not an event so extraordinary or unusual as to require deferral accounting. Compare id. with Gen'l Instr. 7 ("Extraordinary Items"), USOA, 18 C.F.R. Part 101. It is telling that the Complainants have cited not one decision by a state or federal regulatory commission where a third-party successfully imposed an AAO or similar measure upon an electric public utility.

GMO's decision to retire the Sibley units was neither "unusual," "abnormal," or "significantly different" from the regular activities that a public utility undertakes. The retirement of the Sibley units was thoroughly analyzed and reviewed in the course of GMO's integrated resource plan filings and was the result of GMO's exercise of its management prerogative to operate its assets as the Company believes is consistent with economic trends, financial prudence, and the long-term benefit of its customers and investors.

The Response wrongly characterizes GMO as taking historically inconsistent positions on this issue. In fact, GMO's treatment of the Sibley retirements follow the same logic and authority the Commission has relied on considering requests for AAOs. The Commission's policy is to reserve the use of such deferral accounting for expenses that are abnormal, unusual, significant,

and beyond a utility's control. See Motion to Dismiss at 9–11. In particular, the Commission's decision regarding AAO requests related to long-term Southwest Power Pool transmission upgrades declared that such "planned" projects "are part of the ordinary and normal costs of providing electric service," even if such costs were expected to increase at the significant rate of 16% per year through 2022. In re Application of KCP&L and GMO for an Accounting Authority Order, Report & Order at 7-10, No. EU-2014-0077 (July 30, 2014). GMO's retirement decisions were carried out as a result of similar long-term planning efforts that the PSC has found to be part of the "ordinary and normal" process of providing electric service.

Complainants nonetheless argue this logic, "even if structurally sound," must somehow be ignored because of the "duplicitous positions" GMO undertook in its 2018 rate case. See Resp. at 10. OPC and MECG refer to statements that there was some uncertainty regarding the precise date when the Sibley units would be retired. As Mr. Ives explained in testimony that the Complainants attached to their Response, the Sibley units and others were properly included in the historical test year and the true-up period because they remained fully operational. See Ives Rebuttal at 2-4, Ex. 137, attached to Complainants' Response. Moreover, GMO's plan to retire the Sibley units could have caused them not to be retired in order to address "operational" exigencies that could "not [be] presently foreseen" at that time. Id. at 4. As such, there was no lawful basis to include in rates any costs or savings resulting from future retirements. Cf. State ex rel. Utility Consumers' Council of Mo., Inc. v. PSC, 585 S.W.2d 41, 56-58 (Mo. en banc 1979) (statute did not authorize recovery of future fuel costs "in advance" of being incurred).

GMO regarded the dates of Sibley's retirements as "uncertain" during its testimony because they had not yet happened, and thus were not known and measurable for purposes of fixing rates. But the test for when an event is "extraordinary" is not predicated on the fact it did not occur

in the test year or true-up period. Where, as here, the decision is the result of the normal and predictable course of the Company's operation, it is not unusual or unexpected. The retirement of the Sibley units was known, predictable, planned, and ended up occurring on schedule. It was not an extraordinary event under the USOA definitions and the prior decisions of this Commission.

C. The Complaint is an Unlawful Collateral Attack on the Commission's Orders Approving GMO's Tariffs

The First Stipulation in GMO's 2018 rate case addressed depreciation expense relating to the retirement of the Sibley units, in addition to the propriety of any future AAOs relating to the retirement of the Sibley units. This stipulation was approved by the Commission via its final orders setting GMO's rates. The Complaint's attempt to seek an AAO for Sibley revenues, despite the fact that the First Stipulation only permitted parties to propose AAOs regarding "other costs associated" with the "GMO retirements," is an unlawful collateral attack on the Commission's final order in violation of Section 386.550.

Section 15 of the First Stipulation explicitly addressed how to treat Sibley depreciation expense amounts, as well as accumulated depreciation. See Motion to Dismiss at 12-13. Complainants' argument that the retirements occurred "well after the true-up date" is immaterial on this point. See Resp. at 13. The Commission's final order set rates and provided for what types of future AAOs could be proposed, specifically allowing for only "the recovery of any other costs associated" with the Sibley and other retirements. See Order Approving Stipulations & Agreements at 1-2, In re KCP&L Greater Mo. Operations Co.'s Request for Authority To Implement a General Rate Increase, No. ER-2018-0146 (Oct. 31, 2018), cited in Motion to Dismiss at 13–14. Complainants now seek a "do-over" on this issue, and incorrectly assert that the Sibley retirements are now an "extraordinary event" to justify their collateral attack. The issue related to the deferral of depreciation expense was agreed upon by certain parties, including MECG, and the

non-unanimous First Stipulation became unanimous upon the failure of OPC and any other party to object.

Nonetheless, Complainants make the perplexing argument that the Stipulation is not "unanimous" under Rule 4 CSR 2.115(2), despite the lack of any objection. See Resp. at 16. The Commission's rule at 4 CSR 2.115(2)(B) clearly states that "[i]f no party timely objects to a nonunanimous stipulation and agreement, the commission may treat the nonunanimous stipulation and agreement as a unanimous stipulation and agreement." Complainants somehow read this to take the position that a "unanimous" stipulation applies to some but not to others. However, that is not unanimity.

If OPC didn't wish to be bound by the First Stipulation, it had the opportunity to object and make the stipulation "nonunanimous" as provided in Rule 4 CSR 2.115(2)(D). It did not. Indeed, Section 22 of the First Stipulation states that OPC "authorized" the signatories "to represent" that OPC did "not oppose Commission approval of this Stipulation." As a result, OPC is now bound by the First Stipulation and its language limiting future AAO proposals to "other costs" associated with the Sibley and other plant retirements, not to revenues.

D. Conclusion

The Company respectfully requests that the Commission rule upon the Motion to Dismiss prior to May 23, 2019 (the date the parties have proposed for GMO's rebuttal testimony), and that it not take the motion with the case. If the Commission wishes further explanation regarding any particular argument, the Company encourages the scheduling of an oral argument.

Because the Complaint fails to allege a violation of any law, rule, tariff or order of the Commission, as required by Section 386.390.1, this case cannot proceed. Moreover, the long-planned requirement of the Sibley generating units does not rise to the level of an "unusual" or

"extraordinary" event that justifies the establishment of a regulatory liability pursuant to an AAO. In light of the rate reductions ordered by the Commission pursuant to the settlements approved in GMO's 2018 rate case and the 3-year rate freeze now in effect under Section 393.1655.2, there is simply no good reason to permit this case to go forward.

WHEREFORE, Respondent KCP&L Greater Missouri Operations Company asks that the Complaint be dismissed for failure to state a claim upon which relief can be granted.

/s/ Robert J. Hack

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered, emailed or mailed, postage prepaid, to all parties of record this 4th day of March 2019.

/s/ Robert J. Hack

Attorney for KCP&L Greater Missouri Operations Company