BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

INITIAL BRIEF OF THE

MIDWEST ENERGY CONSUMERS GROUP

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1. OVERVIEW

On January 2, 2019, MECG and the Office of the Public Counsel filed a Petition seeking the deferral of savings associated with the recent retirement of the Sibley generating station. As the record indicates, the rates resulting from GMO's recently completed rate case include all aspects of costs associated with owning, maintaining and operating the Sibley units. Among other things, current rates reflect the costs associated with return on investment, depreciation, O&M costs and property taxes. Less than a month after the Commission issued its order in that rate case, GMO suddenly announced the retirement of the Sibley unit.[1] Thus, given that most of these costs suddenly ceased to exist, GMO immediately began to experience windfall profits.

As this Brief details, the Commission has historically allowed for the deferral of costs associated with extraordinary events.[2] Based upon this standard, the Commission has deferred costs associated with both the construction and the renovation of power plants. Through this petition, MECG asserts that, just as the construction and renovation of a power plant have been found to be extraordinary, the retirement of a generating plant is also an extraordinary event which justifies the deferral of associated cost savings for consideration in a future rate case. As the evidence indicates, GMO has not retired a generating unit in over 30 years. As such, GMO's retirement of a generating station meets the criteria for the extraordinary standard. Specifically,

[1] While the Sibley unit failed on September 5, 2018, GMO did not immediately announce its retirement. Rather, GMO conveniently waited until the case had been resolved to inform the parties that Sibley was being retired. Specifically, the Commission issued its *Order Approving Stipulations and Agreements* in Case No. ER-2018-0146 on October 31, 2018. GMO announced the retirement of Sibley on November 20, 2018. While not critical to the finding that the retirement of Sibley is extraordinary, GMO failed to inform either the parties or the Commission during the pendency of that case that Sibley had failed.

[2] The Commission is undoubtedly familiar with the terms Accounting Authority Order ("AAO") as well as trackers. Both of these mechanisms utilize the authority to defer costs / savings from one period for recovery in a future rate case. Thus, in this Position Statement, MECG's request for the Commission to issue an Accounting Authority Order ("AAO") is a request for the Commission to utilize deferral accounting. The terms are interchangeable in this regard. The fact that an AAO and a tracker both are technical names for the same deferral treatment has been recognized by Missouri courts. *In re: KCPL*. 509 S.W.3d 757 (Mo.App 2017).

the retirement is "unusual", "infrequent", "not foreseeably recurring", "abnormal" and an activity that is "significantly different from the ordinary and typical."

Importantly, MECG simply asks that the Commission defer the savings associated with the retirement of the Sibley units. The deferral of such savings allows the Commission to consider all financial aspects of the units' retirement including both the deferred savings as well as the undepreciated investment. Absent such a deferral, there is a significant concern that while GMO may seek to recover the undepreciated investment, retroactive ratemaking may preclude consideration of the Sibley savings. Moreover, it is important to recognize that MECG does not seek any ratemaking decisions at this point in time. Rather, the Commission may simply defer the cost savings, and make all ratemaking decisions regarding treatment of such cost savings in the next rate case.

MECG provided unrebutted evidence that electric rates in Missouri have skyrocketed in recent years. Specifically, while the national average electric rate has increased 31.7% since 2006, the Missouri average electric rate has increased 67.9%.[3] Rather than simply allow GMO to keep the entirety of the Sibley cost savings, the deferral of the Sibley savings provides the Commission with another opportunity in the next rate case, to address the uncompetitive nature of GMO electric rates.

[3] Exhibit 2, Meyer Surrebuttal, page 3.

ISSUES

ISSUE I: Does the retirement of Sibley Units 1, 2, and 3 and common plant constitute an extraordinary event as interpreted by the Commission justifying the imposition of an AAO or other deferral mechanism to record a Regulatory Liability under the Uniform System of Accounts ("USoA") in connection with GMO's retirement of Sibley Units 1, 2 and 3 and common plant?

MECG POSITION: Yes.

2. THE DEVELOPMENT OF THE "EXTRAORDINARY" STANDARD

At 4 CSR 240-20.030, the Commission adopted the Uniform System of Accounts ("USoA") as enacted by the Federal Energy Regulatory Commission.[4] In general, the USoA creates a presumption that all current period profits and losses shall be recorded in the current period. "It is the intent that net income shall reflect all items of profit and loss during the period. . ."[5] That said, however, the USoA provides for the deferral of profits and losses associated with extraordinary events.[6] The USoA provides guidance as to what type of events can be considered "extraordinary."

> 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***. 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.[7]

The Commission has steadfastly maintained its use of the extraordinary standard expressed in the Uniform System of Accounts. Specifically, the Commission has held that use of

[4] See, Case No. EX-93-237.
[5] 18 C.F.R. Ch. 1 (General Instruction 7) (see Exhibit 4).
[6] *Id.*
[7] *Id.* (emphasis added

deferral accounting should be "limited" to situations in which the event is "unusual and unique, and not recurring."

> Under historical test year ratemaking, costs are rarely considered from earlier than the test year to determine what is a reasonable revenue requirement for the future. Deferral of costs from one period to a subsequent rate case causes this consideration and should be allowed only on a limited basis. ***This limited basis is when events occur during a period which are extraordinary, unusual and unique, and not recurring***.[8]

While the Court of Appeals has approved the use of deferral accounting, it has limited its use only in situations in which an event is extraordinary. "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."[9]

Since establishing its extraordinary standard,[10] the Commission has provided greater definition as to what qualities an event must demonstrate in order to be considered extraordinary. Recently, the Commission concluded that the extraordinary standard focused on whether the event is "unusual, infrequent, not foreseeably recurring, activities abnormal and significantly different from the ordinary and typical)."[11]

The practical effect of a utility deferring costs from one period for recovery in a subsequent rate case is beneficial to utility shareholders and detrimental to ratepayers. Specifically, since a cost is deferred, it is not recognized in the current period. Therefore, current earnings are inflated. On the other hand, when the deferred cost is recovered in a future case,

[8] *Report and Order*, Case No. EO-91-358, issued December 20, 1991, 1 Mo.P.S.C. 3d, 200, 205 (emphasis added).
[9] *State ex rel. Public Counsel v. Public Service Commission*, 858 S.W.2d 806, 811 (Mo.App. 1993).
[10] The Missouri Court of Appeals has approved the Commission's use of deferral accounting limited to situations of an extraordinary event. "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." *State ex rel. Office of the Public Counsel v. Public Service Commission*, 858 S.W.2d 806, 811 (Mo.App. 1993).
[11] *Report and Order*, Case No. ER-2012-0174, issued January 9, 2013, at page 31.

rates are increased. Thus, "the AAO works to the benefit of the utility shareholders by increasing current profits as well as future rates."[12]

An AAO in this case (i.e., deferring savings instead of costs), would work in a similar, but opposite manner. Instead of benefitting the utility shareholders, as previous AAOs have done, this AAO would work to the benefit of the utility ratepayers.

> An AAO [in this case]. . . would work to the benefit of ratepayers by deferring savings resulting from an extraordinary event. In this instance, while KCPL-GMO is no longer incurring these now fictional costs, the KCPL-GMO retail customers nevertheless continue to pay rates which include the costs for the retired Sibley units that are no longer providing utility service. Therefore, the requested AAO seeks to capture the cost savings and defer them in a regulatory liability for consideration in a future rate case.[13]

More than any other utility, GMO and its sister company KCPL have taken advantageous of the Commission generosity in issuing AAO deferral requests. For instance, for KCPL-GMO alone, the Commission has made a finding that an event is extraordinary and allowed the deferral of costs associated with the enactment of the Missouri renewable energy standard[14]; the construction of a generating facility[15], the renovation of a generating facility[16]; ice storms[17]; floods[18]; and the installation of AM / FM mapping software.[19] Now, where an extraordinary event triggers significant savings, however, GMO suddenly opposes deferral accounting and seeks to maintain the savings solely for the benefit of its shareholders.

[12] Meyer Direct, page 5.
[13] *Id.*
[14] Case No. EU-2012-0131.
[15] Case No. EU-2011-0034.
[16] Case No. EO-91-358.
[17] Case No. EO-95-193.
[18] Case No. EO-94-35.
[19] Case No. EO-91-247. Similarly, for KCPL, the Commission has authorized the deferral of costs associated with a flood (Case No. EU-2012-0130); renewable energy standard costs (Case No. EU-2012-0131); an ice storm (Case No. EU-2002-1048); storms (EO-97-224)

3. THE RETIREMENT OF SIBLEY IS EXTRAORDINARY

As indicated, the Commission has previously held that an event is extraordinary if it is "unusual", "infrequent", "not foreseeably recurring", "abnormal" and "significantly different from the ordinary and typical." Based upon such criteria, the extraordinary nature of the retirement of the Sibley generating unit is undeniable. Specifically, GMO has not retired a generating station in over 30 years.[20] Thus, GMO's retirement of a generating unit is unusual and infrequent. Given that the Sibley units have operated for approximately 50 years and only been retired this one single time, this retirement is significantly different from the ordinary and typical. Indeed, if the Commission has found that the renovation of a generating station is extraordinary,[21] even though a renovation can occur several times during a unit's operating life, certainly the retirement of the unit, which can only occur once, is all the more extraordinary.

The extraordinary nature of the Sibley retirement is also demonstrated by the magnitude of the costs involved as well.[22] For instance, while GMO reported only $30,998,133 of retirements in 2016 and $26,834,314 in 2017, retirements suddenly **increased 1,713%** to $486,451,128 in 2018. As GMO points out, this extraordinary increase in retirements was driven by the retirement of $470,686,028 associated with the retirement of the Sibley units.[23]

Finally, the extraordinary nature of the Sibley retirement is exhibited by the manner in which GMO reported the retirement in its annual reports to the Federal Energy Regulatory Commission and the Missouri Commission. Specifically, in its FERC Form 1 annual reports, GMO reports its retirements to plant in service. Typically, as reflected in both its 2016 and 2017

[20] Meyer Direct, page 9.
[21] See, Case No. EO-90-114 and EO-91-358.
[22] In its decision in EO-91-358, the Commission expressly pointed out that the "size" of an event is a focus in determining whether an event is "unique." *Report and* Order, Case No. EO-91-358, issued December 20, 1991, 1 Mo.P.S.C. 3d, 200, 205 ("primary focus is on the uniqueness of the event, either through its occurrence or its size").
[23] Exhibit 9.

annual reports, GMO quantifies the retirements, but provides no explanation of the quantification.[24] In 2018, however, given the extraordinary nature of the Sibley retirement, GMO took the unusual step of providing a footnote to describe the event that resulted in the plant retirements.[25]

4. THE SAVINGS ASSOCIATED WITH THE RETIREMENT OF SIBLEY ARE MATERIAL

In addition to its requirement that an event be "extraordinary", the Uniform System of Accounts also suggests that the impact of the event also be "material" prior to authorizing deferral accounting. Specifically, General Instruction 7 of the Uniform System of Accounts provides that "[t]o be considered as extraordinary under the above guidelines, an item should be more than approximately 5 percent of income."[26]

Based upon this portion of the Uniform System of Accounts, the Commission has occasionally required a showing regarding the materiality of the extraordinary event.

> The issue of whether the event has a material or substantial effect on a utility's earnings is also important, but not a primary concern. The company, under the USOA, is required to seek Commission approval if the costs to be deferred are less than five percent of the company's income computed before the extraordinary event. This five percent standard is thus relevant to materiality and whether the event is extraordinary but is not case-dispositive.[27]

Given that the Commission has occasionally engaged in such an inquiry, MECG provided evidence regarding the cost savings associated with the retirement of Sibley. Specifically, Mr. Meyer states that GMO's net income from the recently completed rate case was "$108.4 million."[28] Recognizing that "depreciation expense and rate of return on the Sibley units totals approximately $29.7 million", Mr. Meyer asserts that the savings associated with the

[24] See, Exhibits 7 and 8.
[25] See, Exhibit 9 ("Sibley Generating Units 1,2,3 and Common were retired from service on November 13, 2018").
[26] Exhibit 4.
[27] *Report and Order*, Case No. EO-91-358, issued December 20, 1991, 1 Mo.P.S.C. 3d, 200, 206.
[28] Exhibit 1, Meyer Direct, page 14.

retirement of the Sibley units "is significantly greater than 5% of [GMO's] reported net income."[29]

Importantly, Mr. Meyer's quantification of savings is not meant to be exhaustive, but is simply meant for purposes of meeting the Commission's materiality standard.

> It is important to recognize that MECG is asking that the Commission order a deferral of all cost savings associated with the retirement of the Sibley units and not a deferral of a specific dollar amount. Thus, there will be other cost components, not included in my materiality calculation, that should be deferred. For instance, I have not included property taxes, O&M costs, and other rate base components. All of those cost savings should be deferred for consideration in the next GMO rate case. ***My calculation is very conservative and only for purposes of showing that the deferred amount will exceed the Commission's historical materiality standard***.[30]

OPC Witness Schallenberg agrees with Mr. Meyer. In fact, Mr. Schallenberg asserts that the savings associated with the retirement of the Sibley units exceeds the five percent threshold "by a wide margin."[31]

In its opening statement, Staff concedes the materiality of the savings amount. There, Staff counsel admitted, "[t]here's no argument in this case that the savings revenues associated with the Sibley retirement meet the second prong and ***are material***."[32]

Recognizing that Mr. Schallenberg suggests that the Sibley savings exceeds the five percent threshold "by a wide margin" and Staff concedes that there is "no argument. . . that the savings. . . are material", it is not surprising that GMO never rebutted the materiality of the savings associated with the Sibley retirement. For this reason, the materiality prong is easily satisfied.

[29] Exhibit 1, Meyer Direct, page 14.
[30] *Id.* at pages 14-15 (emphasis added).
[31] Exhibit 5, Schallenberg Direct, page 10.
[32] Tr. 61 (emphasis added).

5. THE DEFERRAL OF SAVINGS ASSOCIATED WITH THE RETIREMENT OF SIBLEY IS APPROPRIATE

In its rebuttal testimony, GMO alleged that the deferral of savings was "inappropriate."[33] Noticeably, GMO failed to provide any legal citations or Commission cases to support such a bold assertion. While GMO seeks to preserve deferral accounting of costs for the benefit of shareholders, it seeks to eliminate the deferral of savings that would work for the benefit of ratepayers. Effectively, GMO wants to reduce deferral accounting to a "heads GMO wins; tails ratepayers lose" proposition. Contrary to GMO's unsupported assertion that deferral of savings is "inappropriate", the Uniform System of Accounts and Commission cases clearly provide for both the deferral of costs as well as the deferral of savings.

As indicated, General Instruction 7 of the Uniform System of Accounts provides the basis for utilization of deferral accounting for extraordinary items. Contrary to GMO's current assertion, that instruction extends deferral accounting to both "items of profit and loss."[34] Clearly then, the Uniform System of Accounts recognizes that deferral of savings associated with the retirement of the Sibley units is appropriate.

Staff agrees. In its testimony in Case No. EU-2015-0094, Staff concluded that "extraordinary events can lead to a financial benefit [savings] to a utility as well as to a financial detriment [costs]. Consistent treatment of both financial benefits and detriments is appropriate when considering deferrals."[35] Furthermore, in a data request response in this case, Staff acknowledged that the "deferral of savings associated with extraordinary events may be appropriate."[36]

[33] Exhibit 22, Klote Rebuttal, page 4 ("The AAO requested by OPC and MECG is inappropriate.").
[34] Exhibit 4.
[35] Exhibit 2, Meyer Surrebuttal, page 4 (citing to Oligschlaeger Direct, Case No. EU-2015-0094).
[36] Exhibit 19, page 2.

In fact, the Commission also agrees that the deferral of savings associated with an extraordinary event is appropriate. In a recent decision in Case No. ER-2018-0366, the Commission addressed whether it was appropriate to defer the savings associated with the passage of the 2018 Tax Cut and Jobs Act. There, the Commission held that the deferral of such savings was "appropriate."

> Witnesses for Empire, Staff and Public Counsel all agreed the passage of the federal tax cut act meets the Commission's standards for issuance of an accounting authority order in that it is unusual, unique, non-recurring and material. . . . Even if Section 393.137.3 does not apply to Empire, it would still be ***appropriate*** for the Commission to exercise its authority to order Empire to establish an AAO for that period.[37]

Clearly then, the Commission should not be concerned with GMO's unsubstantiated assertion that the deferral of savings is "inappropriate." The Uniform System of Accounts, the Staff and previous Commission decisions all recognize that deferral accounting is equally "appropriate" for savings as well as costs.

6. THE SCOPE OF THE MECG DEFERRAL REQUEST

Recognizing that the Uniform System of Accounts and previous Commission orders authorize deferral treatment of savings associated with an extraordinary event such as the retirement of the Sibley units, MECG requests that the Commission order the deferral of "all cost savings associated with the retirement of the Sibley units".[38] Such savings should include the "operating and maintenance costs, property taxes, depreciation, and return on the investment."[39]

Such a deferral is beneficial to the Commission's ultimate decision regarding whether GMO should be allowed to recover any of the undepreciated investment remaining in the Sibley units.

[37] *Report and Order*, Case No. ER-2018-0366, issued August 5, 2018, pages 18 and 22.
[38] Exhibit 1, Meyer Direct, page 14.
[39] Exhibit 2, Meyer Surrebuttal, page 5.

> MECG believes that instead of treating one piece of the pie (the undepreciated investment), the Commission should be in a position to address the ratemaking treatment for all aspects of the Sibley retirement decision. Specifically, by deferring the savings associated with the retirement of Sibley until a future rate case, the Commission may consider both the cost side of the equation (the undepreciated investment) as well as the savings side of the equation (the return, O&M and other cost savings). It would be fundamentally inequitable for the Commission to allow KCPL-GMO to game the system such that it is allowed to keep all the savings and then also seek to recover the entirety of the undepreciated investment.[40]

Importantly, MECG is only seeking the deferral of such savings in this case and, consistent with previous Commission decisions, is not seeking a decision regarding the ultimate ratemaking treatment for such deferred amounts.[41] As it has done with other accounting authority orders, the Commission simply orders the deferral of the savings in this case. Any decision regarding whether the savings will ultimately inure to the benefit of shareholders or ratepayers will be made in the next GMO rate case at which such ratemaking decisions will be at issue.

ISSUE II: If the Commission determines that an AAO or other deferral accounting mechanism should be ordered in connection with GMO's retirement of Sibley Units 1, 2 and 3 and common plant, how should amounts to be recorded to the Regulatory Liability be quantified?[42]

MECG POSITION: The quantification of deferred savings should be addressed in a separate proceeding or a later phase of this proceeding after the Commission orders the requested deferral.

[40] Exhibit 1, Meyer Direct, pages 2-3.
[41] *Id.* at page 3.
[42] Similarly, at the conclusion of the evidentiary hearing, the Regulatory Law Judge asked the parties to address "how they believe the Commission should handle the question of establishing a baseline that we discussed at the beginning of the hearing, give me suggestions on how you think it should be handled." Tr. 408-409.

7. QUANTIFICATION OF SAVINGS SHOULD OCCUR AFTER THE COMMISSION HAS DETERMINED WHETHER THE RETIREMENT OF SIBLEY IS EXTRAORDINARY

Immediately prior to the start of the evidentiary hearing in this matter, the Commission issued its *Notice Informing the Parties of Particular Questions at the Evidentiary Hearing*. In general, that Commission inquiry sought to address the method by which cost savings associated with the Sibley retirement should be quantified.

At the start of the evidentiary hearing, GMO objected "to the requests made in the notice issued on August 5th, that the parties should be prepared, based on the cost-of-service calculations from GMO's most recent rate case, to provide the expected revenues and recurring expenses to operate Sibley."[43] GMO asserted that the issue regarding the quantification of savings was untimely and analogized the Commission's attempt to quantify savings at this stage of the proceeding to a "trial judge in a civil lawsuit asking the defendant to quantify damages for the jury before liability has been established."[44] Given this, GMO concluded that the Commission's immediate inquiry should be limited to a Commission determination as to "whether Sibley's retirement is extraordinary."[45]

Ultimately, MECG agrees with GMO's suggestion that the current inquiry be limited solely to a determination of whether the retirement of Sibley is an extraordinary event and that the determination of savings associated with that extraordinary event be addressed at a later date. In its response to GMO's objection, MECG pointed out that it does not object to GMO's "suggestion that we focus on the element in this case, that being extraordinary here. And if the

[43] Tr. 4.
[44] Tr. 5.
[45] Tr. 6.

Commission at some point in time in the future, after they find that it's extraordinary, wants to inquire as to what is the savings, what are the costs, that type of thing, I think they can do that."[46]

Therefore, in response to the Commission's inquiry and as suggested in MECG's testimony, MECG suggests that the Commission limit its immediate inquiry to whether the retirement of Sibley is an extraordinary event. In its order requiring the deferral of savings, the Commission could create a follow-up case or a separate phase of this case for the purpose of addressing the method by which the deferred savings should be quantified. This quantification should start simply with the Commission directing parties "to quantify savings associated with the retirement of the Sibley units."[47] In the event that there is a disagreement regarding the quantification of savings, a procedural schedule could be established for the purpose of allowing the Commission to hear the various positions of the parties and making a decision regarding the manner in which the quantification of savings should occur.

8. CONCLUSION

As demonstrated, the Uniform System of Accounts and previous Commission decisions clearly allow for the deferral of savings that arise out of an extraordinary event. In determining whether an event is extraordinary, the Commission has looked at whether the event is "unusual", "infrequent", "not foreseeably recurring", "abnormal" and an activity that is "significantly different from the ordinary and typical." Recognizing that GMO has not retired a generating station in over 30 years, it certainly qualifies as an "extraordinary" event and the savings associated with that event should be deferred for consideration in a future rate case.

MECG also asserts that a finding that the retirement of Sibley is "extraordinary" is also appropriate for equitable reasons. Specifically, the Commission has repeatedly authorized GMO

[46] Tr. 8.
[47] Exhibit 2, Meyer Surrebuttal, page 12.

to utilize deferral accounting for numerous events including the construction and the renovation of power plants. Certainly, if the construction and renovation of power plants are extraordinary, then the retirement of a generating plant is also extraordinary. Absent such a finding, the Commission is sending the clear signal that deferral accounting is appropriate for the deferral of costs for the benefit of shareholders, but the deferral of savings for the benefit of ratepayers is inappropriate. Such an implicit finding clearly fails to comply with the Commission's duty to fairly balance the interests between the utility and its ratepayers. For all these reasons, MECG urges the Commission to find that the retirement of Sibley is an extraordinary event and order the deferral of all savings associated with that extraordinary event.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.

____/s/ David Woodsmall_____
David L. Woodsmall

Dated: August 29, 2019