BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

PUBLIC COUNSEL'S INITIAL POST-HEARING BRIEF

Respectfully submitted,

Caleb Hall, Mo. Bar No. 68112
Senior Counsel

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COMES NOW the Office of the Public Counsel (OPC or Public Counsel), by and through counsel, and for its Initial Post-Hearing Brief states as follows:

I. Introduction

The OPC and Midwest Energy Consumers Group (MECG) (collectively Petitioners) initiated this case as a solution to a problem; that problem being KCP&L Greater Missouri Operations (GMO or Company) deciding to strand an immense generation asset when its rates had just been set with the understanding that the asset would be used to serve its customers. The generation asset in question is the Sibley Station, composed of three generating units and common plant. All together, the Sibley units were an approximately 460 MW facility, with Sibley unit 3 composing about 360 MW of that total.[1] The Sibley units then accounted for at least a third of GMO's capacity.[2] The Sibley units are not generating any power or off-system sales for their customers, but GMO's customers are generating a return for the Company based upon the now

[1] Exhibit 14, *Surrebuttal Testimony of Geoff Marke*, EC-2019-0200 GM-2 (July 7, 2019).
[2] *Petition for an Accounting Order*, EC-2019-0200 Schedule JAR-3 p. 8 (Dec. 28, 2018).

non-existent expenses related to operating and owning the Sibley units as well as the associated return. GMO's customers have also been forced to forgo the off-system sales GMO enjoyed by selling excess energy from Sibley into the Southwest Power Pool (SPP) market. This problem of customers paying for fictional costs related to a retired plant without a full accounting of the over-recovery GMO is now enjoying, relative to a scenario where the Sibley units would be running, can be corrected through deferral accounting. As a correction, deferral accounting will preserve a record of the fictional costs GMO customers are paying for a future rate case.

This Public Service Commission (Commission) has approved the use of deferral accounting in the context of accounting authority orders (AAO) to track significant and unique expenses for potential future recovery by a utility. Deferral accounting is justified in this case to transparently track customers' fictional plant contributions because GMO's retirement of the Sibley units was material and extraordinary. Sibley's retirement was extraordinary because of the unique circumstances particular to Sibley, because customers are continuing to pay fictional plant costs without full credit while GMO is also seeking recovery of retirement costs, and because of GMO's reluctance to have its rates accurately reflect Sibley's impending retirement during its last rate case. Once approved, an accounting order can record GMO's own estimated costs and revenues associated with the Sibley units and common plant from GMO's last rate case to a regulatory liability.

II. Legal Standard

The burden of proof always falls upon the movant attempting to demonstrate the truth of a claim.[3] The MECG and OPC initiated this case as a petition under subdivisions (4) and (8) of

[3] *Clapper v. Lakin*, 123 S.W.2d 27, 33 (Mo. banc 1938).

Section 393.140, RSMo.[4] Subdivision (8) of the aforementioned statute enables a party to petition the Commission to exercise its authority to "prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited."[5] Accordingly, this Commission is empowered to order the accounting of certain items upon a finding that the requested accounting is justified.

The Uniform System of Accounts (USoA) provides utilities with instructions on when it is appropriate to account for events that are not otherwise reflected by a utility's existing rates. This Commission has in turn adopted the USoA by Rule.[6] The General Instructions for the USoA explains that an electrical utility's income should reflect profits and losses during the test period of the most recent general rate case, and that those:

> "[I]tems 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*. …To be considered as extraordinary under the above guidelines, an item should be more than approximately 5 percent of income, computed before extraordinary items..."[7]

Electric utilities may then be directed to account for the associated values of "extraordinary items" in the Uniform System of Accounts number 254, which is specifically designated for regulatory

[4] All statutory citations are to the 2018 versions provided by the Revisor of Statutes unless otherwise noted.
[5] Mo. Rev. Stat. § 393.140(8).
[6] 204 CSR 4240-20.030.
[7] 18 CFR Part 101 (1993) (emphasis added).

liabilities.[8] Such recording of extraordinary items is not retroactive ratemaking, and thus may be authorized outside of a general rate case proceeding.[9] This Commission has accordingly adapted the language of the USoA to create its own "Sibley test" to judge deferral accounting requests in Missouri.[10] This Commission adopted the "Sibley test" moniker due to the progenitor case in controversy being one as to whether the costs incurred to retrofit and extend the life of the same Sibley units in question were extraordinary and material. At the time, the Commission found those expenses qualified for an AAO.[11]

Like the USoA, the Commission's Sibley test supports AAO and other deferral accounting requests for events that are extraordinary and nonrecurring as well as material.[12] Whether or not any particular event is extraordinary or material is to be judged on a "case-by-case basis" analyzing the specific circumstances of the event in question.[13]

III. Argument

A. The retirement of Sibley Units 1, 2, and 3 and common plant constitutes 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.

An accounting order for the costs and revenues associated with the fictional costs GMO's customers are paying for the now retired Sibley Station is warranted because GMO's retirement

[8] *Id.*
[9] *State ex rel. Mo Gas Energy v. Pub. Serv. Comm'n*, 210 S.W.3d 330, 335-36 (Mo. App. W.D. 2006).
[10] Exhibit 14, GM-5 (citing *Report and Order on Remand*, WO-2002-273 (Nov. 10, 2004)).
[11] *Id.*; *State ex rel. Mo. Off. of Pub. Counsel v. Pub. Serv. Comm'n*, 858 S.W.2d 806, 808-09 (Mo. App. W.D. 1993).
[12] Exhibit 14, GM-5.
[13] *Id.*

of Sibley was material and extraordinary. There is no debate as to materiality. Extraordinariness is found in the particular circumstances of Sibley, as customers are continuing to pay for a fictional plant without full credit while GMO is also seeking recovery of retirement costs, and GMO's aversion to incorporating the Sibley retirement within the ratemaking process of its last rate case.

a. It is Unanimously Agreed that Retiring the Sibley Units Constituted a Material Event

There is no question that GMO retiring the Sibley units and common plant was a material event. The USoA, and in turn this Commission, judges material under an objective lenses of whether the event constitutes at least five percent of the utility's income.[14] OPC witness Robert Schallenberg demonstrates in his direct testimony that this five percent threshold was met. He estimates that the total impact to GMO's income is at least $39,242,550 based on non-labor operations and maintenance expense, labor costs, depreciation expense, and increasing fuel expenses.[15] This estimate was derived from the Staff of the Public Service Commission's (Staff) Accounting schedules and GMO's own numbers from GMO's 2018 rate case.[16] The impact from Sibley is likely far greater though due to Mr. Schallenberg's preliminary estimate not including changes to Sibley's tax status, fuel inventories, cash working capital, and deferred income taxes.[17]

In 2016, GMO's reported income was just under $61 million, and in 2017, GMO reported a loss.[18] Regardless of the income number one chooses, dividing the $39 million Sibley figure by five percent shows that GMO's income would need to exceed nearly $785 million for Sibley's

[14] 18 CFR Part 101; *see also* 204 CSR 4240-20.030.
[15] Exhibit 5, *Direct Testimony of Robert E. Schallenberg*, EC-2019-0200 p.11 (Apr. 23, 2019).
[16] *Id.* RES-D-3.
[17] *Id.* at 11 fn 2.
[18] *Id.* at 12.

retirement to not be material. Since GMO's income is nowhere near this last figure, Sibley's retirement clearly crosses the five percent materiality threshold.

In response to Mr. Schallenberg's estimates, as well as those of MECG witness Greg Meyer, GMO brought forth several witnesses to argue that Mr. Schallenberg and Mr. Meyer had both overestimated the impact of Sibley's retirement, but ultimately did not argue that the materiality prong of the Sibley test is not satisfied. GMO witness Ronald Klote disputed Schallenberg's labor cost, operations and maintenance expense, and depreciation calculations, as well as whether or not GMO will experience any change in tax payments due to retiring Sibley, but at no point does he argue that retiring Sibley was immaterial.[19] Likewise, GMO witness John Spanos devotes his testimony to discussing his calculation of the Sibley Station's net book value, but his number of over $145 million more than meets the materiality portion of the Sibley test.[20]

As for Staff, its witness Mark Oligschlaeger also agrees that retiring Sibley reaches the materiality threshold. He testifies that although "OPC, MECG and GMO differ in their estimates of [unrecovered net plant balance], all of these amounts are material in nature."[21] Staff's counsel herself stated, "There's no argument in this case that the savings associated with the Sibley retirement meet the second prong and are material."[22] Therefore, the only question of the Sibley test remaining for the Commission is whether retiring Sibley was extraordinary.

b. Retiring the Sibley Units was Extraordinary because the Sibley Units are Different Relative to Other Units

[19] *See generally* Exhibit 22, *Rebuttal Testimony of Ronald A. Klote*, EC-2019-0200 (May 23, 2019).
[20] Exhibit 21, *Rebuttal Testimony of John J. Spanos*, EC-2019-0200 p. 3 (May 23, 2019).
[21] Exhibit 17, *Cross-Rebuttal Testimony of Mark L. Oligschlaeger*, EC-2019-0200 p. 7 (Jun. 6, 2019).
[22] Transcript of Proceedings, Evidentiary Hearing, EC-2019-0200 p. 61.

GMO choosing to retire the Sibley Station was extraordinary for several reasons, but particularly because of Sibley's differences relative to other units. Recall that the USoA frames extraordinariness as being "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."[23] This standard is to be applied on a case-by-case basis, specific to the experiences of the particular utility in question.[24]

This Commission should first consider that retiring Sibley was such an atypical event relative to GMO's normal and ordinary activities because before retiring Sibley, GMO had not shuttered a generating facility in over thirty years.[25] In fact, as OPC witness Dr. Geoff Marke notes, GMO's decision was so momentous that it felt the need to mark the occasion with two press releases beforehand.[26] By their function, press releases are not used for normal, usual, recurring, or ordinary events. Therefore, by issuing press releases in January 20, 2015, and June 2, 2017, GMO implicitly agreed that retiring Sibley was unique, unusual, and out of the ordinary; extraordinary even.[27]

Retiring the Sibley units is made all the more extraordinary by the retirement occurring over twenty years early. As Mr. Schallenberg explains, the depreciation rates for the Sibley unit 3 were set based upon a 2040 retirement date.[28] In fact, in all integrated resource planning (IRP) filings before 2017, GMO believed that retiring Sibley could not be considered in the IRP process due to it being beyond the twenty year planning perspective.[29] Sibley's retirement being projected so far out is of course not surprising because, as Mr. Schallenberg testified at the evidentiary

[23] 18 CFR Part 101 (emphasis added).
[24] Exhibit 14, GM-5.
[25] Exhibit 5, p. 4; Transcript of Proceedings, Evidentiary Hearing, EC-2019-0200 p. 139.
[26] Exhibit 14, *Surrebuttal Testimony of Geoff Marke*, EC-2019-0200 p. 8 (July 7, 2019).
[27] *See* Exhibit 24, *Corrected Testimony of Darrin R. Ives*, Ec-2019-0200 DRI-2 & DRI-3 (May 23, 2019).
[28] Exhibit 5, p. 13.
[29] *Id.* at 14.

hearing, GMO had just sunk a monumental amount of resources in 2009 to retrofit the facility for environmental compliance purposes.[30] At that time, GMO clearly thought that it was better use of ratepayer dollars to continue investing in Sibley rather than retire it and shift investments towards other generation resources. The Company's perspective only suddenly changed with its 2017 IRP filing and companion press releases.[31]

Prematurely retiring such a large percentage of a utility's baseload generation twenty years early is shocking and beyond the norm by itself. Counsel for both GMO and Staff, when questioned by this Commission, were unable to think of any other instance where GMO retired a generating plant twenty years earlier than what would be expected based on its remaining useful life.[32] Even Staff's witness Mr. Oligschlaeger is at a loss to note any other generating plant that a utility retired two decades before the expiration of its useful life.[33] However, this accelerated retirement is made all the more extraordinary by GMO being the only Missouri utility with growing load and customer base.[34] A utility that is growing in energy demands suddenly shuttering 460 MW of baseload generation, at least a third of GMO's readily available capacity, is unusual. It is especially unusual if customers are to continually pay for a fictional plant without full recognition.

Sibley's different nature is apparently clear to GMO as well, as the Company specifically delineated and defined the retirement costs related to Sibley when reporting to the Federal Energy Regulatory Commission (FERC), but not for other recent retirement costs when reporting general plant retirements.[35] Unlike in previous years when GMO simply reported the total dollar amount

[30] Transcript of Proceedings, Evidentiary Hearing, EC-2019-0200 p. 176-77.
[31] The 2017 IRP only selects Sibley unit 3 to be retired based on a modeling presumption that GMO and Kansas City Power & Light (KCPL) are the same utility. However, GMO and KCPL act as two entities before this Commission. Exhibit 14, p. 13.
[32] Transcript of Proceedings, Evidentiary Hearing, EC-2019-0200 p. 63 & 91.
[33] *Id. at*. 340.
[34] *See Id. at 175 & 203.*
[35] *See* Exhibits 7, 8, & 9; *see also* Transcript of Proceedings, Evidentiary Hearing, EC-2019-0200 p. 158-60.

of non-generation and generation plant retired, in 2018, GMO took the effort to specifically identify how much of the retirement amount was attributable to Sibley.[36] One would not need to make this effort if retiring the Sibley units was functionally the same as retiring any other piece of utility equipment or generation unit at the end of its useful life.

It is because Sibley is different, and played such a key part in GMO's energy repertoire, that it is not at all surprising that OPC did not previously argue extraordinariness when GMO retired the Ralph Green and Edmond Street facilities in the 1980s or the Montrose units last year.[37] As Dr. Marke explained at the evidentiary hearing, "Sibley is categorically different. The impact, the overall size."[38]

GMO's counsel points to OPC not seeking an accounting order for the impending retirement of the Lake Road Plant as some kind of inconsistency, but fails to appreciate the case-by-case differences between Sibley and Lake Road.[39] Staff's counsel also followed the same logic that Petitioners should presumably be seeking accounting orders for the Montrose or Lake Road retirements when questioning GMO witness Ron Klote, and Mr. Klote responded to Staff counsel that he believed that those retirements are the same as Sibley simply because "all three of those are what you would call generating plant retirements."[40] But, Mr. Klote's conclusion is only possible if one approaches the extraordinary standard with a categorical lens of whether retirements themselves are extraordinary as opposed to following the USoA's General Instructions and the Sibley test's case-by-case contextual analysis.

[36] *See* Exhibit 9.
[37] *Contra* Transcript of Proceedings, Evidentiary Hearing, EC-2019-0200 p. 77-79.
[38] Transcript of Proceedings, Evidentiary Hearing, EC-2019-0200 p. 254.
[39] *Id.* at 78.
[40] *Id.* at 367

Consider also that, as Mr. Schallenberg identified, other retirements such as Montrose were able to be readily accounted for in subsequent rate cases, and thus that retirement is made less extraordinary.[41] In the case of Sibley though, not only did GMO retire Sibley during a pending rate case and refused to have rates reflect that retirement,[42] GMO has now placed itself in a situation where base rates cannot be reset for over two years due to its election of plant-in-service accounting.[43] This election was voluntarily made after Petitioners initiated this case, and yet GMO now claims that its self-imposed state makes an accounting order unfair.[44]

c. Retiring the Sibley Units was Extraordinary because GMO is Seeking Recovery of Retiring the Sibley Facility While Simultaneously Charging Customers as if the Facility is Operational

There is no question that GMO's customers are paying for rates as if the Sibley units are providing them with service. The signatories to the non-unanimous stipulation and agreement from GMO's prior rate case including GMO and Staff agreed "that the rates established in [ER-2018-0146] include O&M associated with the Sibley units."[45] Staff's counsel even readily explained at the evidentiary hearing for this case that "GMO's rates currently include costs related to Sibley,"[46] and GMO's counsel admitted that its customers are currently paying rates that were set as if Sibley would remain operational.[47] Thus there is a "discrepancy" between the rates customers are paying and the actually incurred expenses those rates were set to support.[48]

[41] *Id.* at 198.
[42] When questioned by Staff counsel, GMO witness Darrin Ives readily explains that GMO officially recorded the plant as retired on November 13, 2018, before the completion of its rate case. When questioned by MECG counsel, Mr. Ives explains that he would not have supported an isolated adjustment during its last rate case to account for the Sibley retirement even if that argument had been raised. *Id.* at 378-81.
[43] Exhibit 24, p. 26.
[44] *Id.*
[45] *Non-Unanimous Stipulation and Agreement*, ER-2018-0146 (Sept. 19, 2018).
[46] Transcript of Proceedings, Evidentiary Hearing, EC-2019-0200 p. 60.
[47] *Id.* at 95.
[48] *Id.* at 198.

The condition of GMO's customers paying for a fictional plant is extraordinary enough, but doing so while the Company concurrently intends to charge customers for retiring the plant compounds the extraordinary nature. As OPC witness Mr. Schallenberg testifies in direct, GMO has represented to the Securities and Exchange Commission that it has a $160 million regulatory asset for Sibley's retirement costs.[49] Per GMO's own accounting practices under the Generally Accepted Accounting Principles (GAAP), GMO made this asset because it believes those costs are "probable of recovery from future revenues."[50] GMO also maintained that it sees recovery as "likely" in response to OPC's data requests.[51] That is to say, GMO's creation of the regulatory asset evidences GMO's intent to seek recovery before this Commission, and the Company's belief that such recovery is likely.

Due to the aforementioned Stipulation and Agreement, GMO is obligated to record the depreciation related to Sibley's premature retirement to a regulatory liability in the event of a premature retirement.[52] However, GMO is not otherwise crediting its customers for the other Sibley related costs and revenues as it intends to further charge its customers for retiring the facility. To charge customers on the front end for a fictional plant, while hitting them on the back end for retiring the plant without a total consideration of the fictional costs they are supporting is extraordinary. As the Commission characterized it, this looks like "double dipping."[53]

[49] Exhibit 5, p. 6-8.
[50] *Id.*
[51] Exhibit 6, Schedule RES-S-1, DR 1019.
[52] *Non-Unanimous Stipulation and Agreement*, ER-2018-0146.
[53] Transcript of Proceedings, Evidentiary Hearing, EC-2019-0200 p. 96.

d. Retiring the Sibley Units was Extraordinary because of GMO's Resistance to Having the Retirement Reflected in Rates

In addition to the already sufficient grounds to see GMO's decision to retire the Sibley units as extraordinary, this Commission can also consider the unique and unusual circumstances of GMO's resistance to having its rates accurately reflect Sibley's retirement. This consideration requires a brief review of GMO's positions and actions in its prior rate case.

Before GMO even filed its rate case, it considered the timing of the case related to its prior announcements that the Sibley units were to be retired. Recall that in June of 2017, GMO issued a press release announcing that GMO would retire all of the Sibley units by the end of 2018.[54] GMO then told Staff in Mid-August of 2017, that the Company would not include the "announced power plant retirements" within its proposed test year because they were to "occur after [the] June 2018 true-up cutoff."[55] GMO then initiated its rate case on January 30, 2018. Due to the preannounced retirement of Sibley, OPC sought to have it excluded from GMO's cost of service calculations for ratemaking purposes. However, GMO then portrayed Sibley's retirement as an uncertainty throughout the rate case.

Despite clearly signaling to the world that Sibley was going down, first voiced in July of 2018, Mr. Ives testified in rebuttal that OPC's understanding that Sibley would be retired by the end of 2018 as a mere "assumption."[56] He notably did not couch his position as Sibley's eventual retirement being certain within 2018 but merely outside of the test year of GMO's last rate case. Instead, he described the retired event as an assumed event with no certainty as to its occurrence. Mr. Ives continued this refrain in his surrebuttal testimony in September. Then he testified that the

[54] Exhibit 24, DRI-3.
[55] Exhibit 6, *Surrebuttal Testimony of Robert E. Schallenberg*, EC-2019-0200 RES-S-1 (July 7, 2019).
[56] Transcript of Proceedings, Evidentiary Hearing, EC-2019-0200 p. 388 (quoting *Rebuttal Testimony of Darrin R. Ives*, ER-2018-0146 p. 2 (July 27, 2018)).

"OPC's proposed disallowance of costs related to these plants which have not yet occurred and *if they do* would occur months after the end of the true-up period."[57] Once again he portrayed Sibley's retirement not as a given that parties can rely upon, but as an unknown event that could not even occur at all.

After the surrebuttal stage of the rate case, the parties entered settlement discussions. Settlements were eventually agreed to with the position that GMO retiring the Sibley units was an uncertainty, and therefore GMO's resulting rates support the operation of and return on the Sibley units.[58] The Commission then held an on-the-record presentation on October 3, 2018, for the parties to support their stipulations and agreements. GMO supported all of its prior testimony, and moved to have it admitted as evidence, at this on-the-record presentation as well.[59] This Commission then approved the stipulations and agreements setting GMO's rates on October 31, 2018, and the tariffs implementing those rates became effective on December 6, 2018.[60]

However, GMO's internal discussions do not match its positions in the rate case. During the pendency of the rate case, Sibley unit 3 experienced a forced outage due to a mechanical failure on September 5, 2018, which caused the Sibley Station to cease generating electricity.[61] Nearly a month later Duane Anstaett, Vice President of Evergy's Generation Operations, emailed Company leadership on October 2, 2018, including Mr. Ives, to tell them:

> "This email is to let the Evergy officer team know *the direction being taken* following a turbine trip due to vibration on Sibley Unit 3. Following a comprehensive evaluation of options we have determined the safest and most economical solution is to cease burning coal at the station and to remove the remaining coal currently on the ground to Iatan."[62]

On that same day, Mr. Anstaett also told Mr. Ives:

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[57] *Id.* at 389 (quoting *Surrebuttal Testimony of Darrin R. Ives*, ER-2018-0146 p. 14-15) (emphasis added)
[58] *See Non-Unanimous Stipulation and Agreement*, ER-2018-0146 (Sept. 19, 2018).
[59] Transcript of Proceedings, On-the-record Presentation, ER-2018-0146 p. 251.
[60] *Order Approving Stipulations and Agreements*, ER-2018-0146 (Oct. 31, 2018); *Order Approving Tariffs*, ER-2018-0146 (Nov. 26, 2018).
[61] Transcript of Proceedings, Evidentiary Hearing, EC-2019-0200 p. 377.
[62] Exhibit 6, RES-S-1 p 75 (emphasis added); *see also* Exhibit 26.

> "It is our intention to cease burning coal and move to decommissioning activities. Upon receipt of this email Robert Hollingsworth will contact Eric Peterson to notify SPP and will contact Randy Adams at Local 412."[63]

These emails demonstrate that less than one month after the initial filing of surrebuttal testimony by GMO arguing that the Sibley retirement may not even happen, a decision had already been made. By early October, both SPP and the local labor union were notified that Sibley's retirement was certain, but Mr. Ives' testimony did not reflect that reality.[64] In fact, Mr. Ives was expressly told one day prior to the on-the-record presentation that GMO was definitely going to retire the Sibley units, but did not bring this up at the presentation.[65] During the rate case, the OPC did not have knowledge of these communications.

Despite ample time and opportunity to change his testimony, Mr. Ives failed to do so, maintaining his description of the Sibley retirement as an "assumption" before the Commission approved both the rate case stipulations and associated tariffs, even after being told in early October that Sibley was being effectively treated as retired.[66] Three months passed from the time of the forced outage to the completion of GMO's rate case, two months from Mr. Anstaett's emails and GMO's new rates becoming effective, and still Mr. Ives' represented to the OPC, other parties, and the Commission that Sibley's retirement was an assumption.

Even at the evidentiary hearing for this case, Mr. Ives continues to maintain that GMO was still considering options regarding Sibley but had not yet "come to a final decision" as late into the year as November 1, 2018, when the Company apprised OPC and Staff of the forced outage situation.[67] The idea that GMO was still weighing options in November is in direct conflict with

[63] Exhibit 6, RES-S-1 p 76.
[64] *Id.*
[65] *Compare id. with* Transcript of Proceedings, On-the-record Presentation, ER-2018-0146.
[66] Transcript of Proceedings, Evidentiary Hearing, EC-2019-0200 p. 395-96.
[67] *Id.* at 378.

the internal October emails. Mr. Ives also claims in this case that GMO "made the decision . . . on November 13 to officially retire Sibley at that time rather than make repairs and move forward" in response to Sibley's September forced outage.[68] However, the only way to grant this statement any credibility is to relent to Mr. Ives semantic game that it was not truly "officially" retired despite not generating power, SPP being told it was going down, and having the union workforce being told that Sibley's retirement is certain.

Bear in mind that even if GMO truly did not know that Sibley would be retired until the November 13, 2018, date, that date was still before GMO's new rates went into effect. GMO had every opportunity to proactively respond then and attempt to credit customers or at least track their contributions related to Sibley's expenses and return. Instead, GMO is now enjoying the benefits of saying nothing previously, and now returns to the position of its 2017 press release that Sibley's retirement was known. As GMO's counsel most recently told the Commission at the evidentiary hearing, "All the parties at the time of the rate case were certainly aware that the retirement of Sibley was . . . pending in 2017."[69] Except, GMO's position now ignores Mr. Ives' maintenance of "ifs" and "assumptions" when describing Sibley's retirement during the prior rate case, and how those positions resulted in GMO's customers paying for fictional plant costs.

This pattern of changing positions is extraordinary. It is extraordinary to announce a plant retirement, claim that retirement is an assumption during the subsequent rate case, and then actually retire that same plant during the pending rate case. Staff witness Mr. Oligschlaeger, despite his years before the Commission, does not know of any prior instance were a generating unit was retired "immediately after the conclusion of a rate case."[70] The timing of Sibley's

[68] *Id.* at 378.
[69] *Id.* at 76.
[70] *Id.* at 342.

retirement is thus extraordinary by itself, and GMO's intransigence in representing when or if the Sibley units will be retired further compounds the unique and unusual circumstances surrounding the retirement.

e. Preliminary Arguments to the Contrary are Unconvincing

Although traditionally reserved for the reply brief, this initial brief is nonetheless an opportune time to highlight the shortcomings of GMO's arguments that retiring Sibley does not justify an accounting order. GMO's position in rebuttal testimony is that Petitioner's accounting order petition should be denied because, as briefly paraphrased, 1) retirements themselves are not extraordinary, 2) GMO planned the retirement of Sibley and planned events cannot be extraordinary, and 3) even if an accounting order is justified, it cannot be practically imposed due to the supposed non-existence of a baseline. These positions are all related to the extraordinariness prong of the Sibley test because, as previously discussed, GMO's testimony on materiality is ultimately limited to only quibbling over numbers, while not disputing that retiring Sibley constitutes a material event.[71]

The main pitfall of GMO arguing that retiring the Sibley units was not extraordinary because retirements themselves are not extraordinary, is that such an analysis is not rooted in the USoA or the Commission's Sibley test. The USoA advises that "extraordinary" is determined by looking at the event in relation to the normal experiences of the company in question, and not the industry at large,[72] and this Commission's adoption of that standard employs a case-by-case consideration of the particular event in question rather than a macroscale view of the event.[73] GMO

[71] Since neither GMO witness Ronald Klote and John Spanos ultimately dispute that GMO retiring Sibley was a material event, their testimony may essentially be disregarded when deciding whether or not the requested accounting order is warranted.
[72] 18 CFR Part 101.
[73] Exhibit 14, GM-5.

witness Christopher Rogers on the other hand, argues that Sibley's retirement is not extraordinary because of a national trend of increased retirements.[74] By self-selecting a review that is "national in scope" rather than review the facts particular to the Sibley units, Mr. Rogers is simply missing the point.[75] Also, one could just as easily use Mr. Rogers' own data set, as Dr. Marke does, to show how unique retiring Sibley is within GMO's transmission footprint because "in the 50-year history of Mr. Rogers' SNL data there have been only two power plants that were larger in size than Sibley 3" in SPP.[76] GMO witness Mr. Ives similarly argues that since utilities retire assets regularly, such activity is thus normal and therefore he categorically excludes retirements from extraordinary consideration.[77] This categorical approach is simply not the review employed by the USoA, the Sibley test, or even Staff.

As Staff counsel correctly told the Commission "it is possible for the retirement of a generating unit to meet the extraordinary standard."[78] Staff's witness Mr. Oligschlaeger himself employs a "case-by-case" analysis of each event to determine whether an event is extraordinary.[79] Rather than employ categorical considerations such as "are ice storms themselves extraordinary," a proper application of the Sibley test requires questioning whether "the particular facts and circumstances surrounding this ice storm make the event extraordinary."[80] As Mr. Oligschlaeger advises, this Commission should not follow GMO's reasoning that retirements are categorically not extraordinary, but rather undertake a case-by-case consideration and see "what makes this particular event extraordinary."[81] A case-by-case analysis of GMO retiring Sibley should then

[74] Exhibit 20, *Rebuttal Testimony of Christopher R. Rogers*, EC-2019-0200 p. 8 (May 23, 2019).
[75] *Id.* at 5.
[76] Exhibit 14, p. 10.
[77] Exhibit 24, p. 10.
[78] Transcript of Proceedings, Evidentiary Hearing, EC-2019-0200 p. 62.
[79] *Id.* at 327.
[80] *Id.*
[81] *Id.* at 328.

accordingly consider Sibley being retired two decades early, during a pending rate case, while GMO maintained that the retirement may not occur, and that the end result is GMO's customers simultaneously paying for a fictional plant and retirement costs.

Furthermore, when questioned by OPC about his past support of deferral accounting of property tax payments at the evidentiary hearing, Staff witness Mr. Oligschlaeger explained that even typical and ordinary costs to a utility can be extraordinary when coupled with "highly unusual circumstances." [82] As he testified in GR-2009-0355, an abrupt change in circumstances such as "the initial imposition of this [property] tax by the state of Kansas is an event that is unusual in nature and abnormal."[83] He also testified in EU-2015-0094 that "the abrupt termination of these payments after KCPL incurred these [nuclear energy disposal] costs for close to 30 years to be unusual, unique, and non-recurring, and hence extraordinary."[84] Since Mr. Oligschlaeger also admits that retiring Sibley represents an abrupt change in GMO's financial circumstances, both his own logic, and that of the Sibley test, conclude that retiring Sibley was extraordinary.[85]

GMO's next argument as to why retiring Sibley was not extraordinary is that the event was planned, and that planned events cannot be extraordinary. Putting aside the inconsistency of arguing an event is planned after arguing it is an assumption, GMO's second contrary position also fails to follow the USoA or Sibley test. Neither disqualify planned events from consideration as extraordinary. As even Staff witness Mr. Oligschlaeger testified at the hearing, even an event that a utility has control over, such as a planned event, can be extraordinary.[86]

[82] *Id.* at 328-29 (discussing GR-2009-0355).
[83] *Id.* at 154-59 (quoting *Rebuttal Testimony of Mark L. Oligschlaeger*, GR-2009-0355 p. 6 (Sept. 28, 2009)).
[84] *Id.* p. 331-32 (quoting *Direct Testimony of Mark L. Oligschlaeger*, EU-2015-0094 p. 8 (Oct. 9, 2014)).
[85] *See Id.*
[86] *Id.* at 335.

Consider also that GMO's counsel also stated that GMO's retirement of Sibley was ultimately "a function of a forced outage that occurred."[87] GMO witness Mr. Ives also testified that the Sibley units stopped producing electricity due to a forced outage as the "result of a turbine vibration that the unit went [offline]."[88] Unlike numerous other forced outages that the Sibley units had experienced in the past, this September outage is apparently the only one that led the Company to consider retiring the units.[89] "Forced outages," by their nature, are not planned events, but rather exigent circumstances that befell electric utilities. Mr. Oligschlaeger also stated in both filed and live testimony that a "retirement associated with an event that was extraordinary, maybe a natural disaster or an explosion or something that caused a retirement decision, then it is possible that the retirement impacts should be considered for deferral treatment."[90] Therefore, not only was the retirement not truly "planned" because it occurred in response to an unplanned outage, but the outage should qualify under Mr. Oligschlaeger's extraordinary standard as an "explosion or something that caused a retirement decision."

GMO's final preliminary argument against an accounting order is that even if this Commission so orders GMO to account for the fictional plant customers are supporting, GMO practically cannot comply. For the reasons stated below, this argument also fails.

[87] *Id.* at 76.
[88] *Id.* at 377.
[89] *See Id.* at 386-87 (Mr. Ives testifies that the Sibley units had experienced numerous other forced outages in the past, and he testifies on page 377 that after the forced outage GMO supposedly weighed its options as to retiring Sibley, unlike with other forced outages where the Sibley units were returned to service. Mr. Ives testifies that the forced outage was "not what spurred" GMO to retire Sibley, but this is in direct conflict with the words of his counsel).
[90] *Id.* at 348; Exhibit

B. 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, the amounts to be recorded to the Regulatory Liability should be quantified using the costs and revenues that GMO estimated for Sibley in its last rate case.

Before discussing how a baseline can be determined, it should be initially noted that the question of how the revenues and costs attributable to Sibley are to be recorded is separate from whether such recording is justified. As Staff's own witness answered in response to questioning, it has not been this Commission's practice to require a complete identification of every cent that accounting order applicants may seek during the request for accounting itself.[91] That being said, a baseline for costs and revenues attributable to the Sibley units does exist, and can be divined simply by returning to what GMO filed in its last rate case. If the Commission so desires, the following estimates can be addressed in a separate proceeding or later phase of this proceeding following an order approving the requested accounting order.

OPC witness Mr. Schallenberg explains that GMO's actual estimated costs to operate the Sibley facility were not contested in GMO's last rate case.[92] GMO was even able to supply the operations and maintenance expense for the Sibley Station during this case's discovery process.[93] Staff used GMO's numbers when developing its cost of service study to determine GMO's operating expense needs. OPC did not dispute the numbers themselves, but rather argued that those costs attributable to the Sibley Station should simply be removed since those costs would no longer be incurred once GMO retired Sibley. To reiterate, there was no dispute as to the veracity of GMO's calculated expenses related to the Sibley plant, only whether it was appropriate to include

[91] *Id.* at 337-38.
[92] *Id.* at 180.
[93] Exhibit 5, RES-D-3 p. 40.

them when calculating rates. Therefore, less than a year ago, there were agreed upon baseline numbers that can reasonably be relied upon now given how recently they were calculated. One would only need to supplement the rate case expense data with GMO's authorized return and the number of customer accounts, otherwise called billing determinants, GMO is charging in order to begin accounting for fictional plant costs.

However, even without the cost of service study numbers, GMO is still able to calculate how much of its income is attributable to the Sibley Station. As OPC witness Schallenberg identified using GMO's own FERC Form 1's, the Company has already been able to isolate approximately $471 million of its $486,451,128 in retirements are attributable to Sibley.[94] Those numbers are only examples of all of the delineations GMO made in its most recent FERC Form 1 between its general expenses and revenues, and those linked to the Sibley plant. GMO's most recent FERC Form 1 calculations were performed on April 18, 2019, seven months after the Sibley units stopped producing any power.[95] If GMO was able to calculate those numbers then, it most certainly can do it again.

However, without an actual accounting order, the explanatory value of these calculations is time limited. As Staff witness Mr. Oligschlaeger has previously warned the Commission, failure to "order the deferral at this time, the Commission's power to direct any specific ratemaking treatment for a significant portion of the current and ongoing over-recovery in rates by KCPL of the DOE funding amount will be permanently lost."[96] When Mr. Oligschlaeger so cautioned the Commission he was supporting deferral accounting for KCPL's over-collection in rates of money for Department of Energy (DOE) fees that abruptly no longer had to be paid due to a lawsuit. The

[94] Transcript of Proceedings, Evidentiary Hearing, EC-2019-0200 p. 154-59.
[95] *See* Exhibit 9.
[96] Transcript of Proceedings, Evidentiary Hearing, EC-2019-0200 p. 333-34 (quoting *Direct Testimony of Mark L. Oligschlaeger*, EU-2015-0094 p. 10 (Oct. 9, 2014)).

situations of customers paying for nonexistent DOE fees and the fictional Sibley asset are directly comparable, and so Mr. Oligschlaeger's recommendation that deferral accounting be ordered promptly should be heeded. Otherwise the accuracy of current data, as well as estimations as how much fictional plants customers have contributed already, may degrade due to the passages of time. Issuing an accounting order now also forecloses any future "retroactive ratemaking" arguments that GMO may employ otherwise as Mr. Schallenberg has suggested.[97]

V. Conclusion

Deferral accounting in the form of an accounting order is warranted so that the fictional costs paid by GMO's customers to support a retired plant may be transparently tracked for the benefit of this Commission in a future proceeding. Ordering deferral accounting now is a solution for GMO's customers continuing to pay for a massive baseload generation facility despite it being abruptly shuttered. An accounting order is not retroactive ratemaking, and does not take any actual dollars out of GMO's revenue streams. Rather, an accounting order merely recognizes that retiring the Sibley units was extraordinary and material, and deserves future consideration. Retiring the Sibley Station was material in terms of its impact far exceeding five percent of GMO's income. The retirement was extraordinary because of the unique nature of the Sibley units, because GMO intends to seek recovery of retirement costs from customers without fully crediting the fictional costs and real returns they are currently supporting, and because of how GMO opposed accounting for the Sibley retirement in its rate case.

WHEREFORE, the OPC presents its Initial Post-Hearing Brief presenting its case as to the extraordinary and material nature of GMO's retirement of the Sibley units, and requests that

[97] *Id.* at 200.

the Commission accordingly order GMO to undertake deferral accounting of the revenue and return on the Sibley units currently collected in rates for non-fuel operations and maintenance expense, associated taxes including accumulated deferred income taxes, and all other costs associated with Sibley units 1, 2, 3, and common plant.

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

/s/ Caleb Hall
Caleb Hall, #68112
Senior Counsel
200 Madison Street, Suite 650
Jefferson City, MO 65102
P: (573) 751-4857
F: (573) 751-5562
Caleb.hall@ded.mo.gov

Attorneys for the Office of the Public Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 29th day of August, 2019, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall