BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

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

COME NOW the Office of the Public Counsel (OPC or Public Counsel), and the Midwest Energy Consumers Group (MECG), (Collectively "the Petitioners") by and through their respective counsel, and for their Response to the Motion to Dismiss of KCP&L Greater Missouri Operation Company's (GMO) respectfully state as follows:

1. On December 28, 2018, the OPC and MECG filed their **Petition** with the Missouri Public Service Commission (Commission) in Case No. EU-2019-0197. The Petition beseeches the Commission to issue an accounting order requiring GMO to defer to a regulatory liability the revenues and costs associated with the recent retirement of the Sibley generation units.

2. Upon its own volition and without any motion on point, the Commission summarily closed the EU-2019-0197 docket on January 2, 2019, and treated the Petitioner's filing as a complaint. "The Commission is treating that Petition as a complaint against GMO."[1]

3. GMO then filed its Answer to the OPC and MECG's Petition on February 1, 2019. GMO raised eight affirmative defenses in its Answer.

[1] See, *Notice of Complaint*, Case No. EC-2019-0200, issued January 2, 2019.

4. Of those eight, GMO only employed three in its Motion to Dismiss filed later on February 5, 2019. The three prongs of GMO's argument are: (1) the Petitioners do not state a claim upon which relief can be granted because Petitioners fail to state a violation necessary for a complaint, (2) the retirement of the Sibley generation units is not unusual or extraordinary, and (3) the Petitioners are attempting a collateral attack on the Commission's orders resolving the recent GMO rate case. Fortunately, the three legged stool constructed by GMO is incapable of supporting weight. The Petitioners now respond to each argument in the Motion to Dismiss in kind.

A. Introduction

As an initial matter, it is important to highlight the hypocrisy underlying GMO's Answer and its Motion to Dismiss. While GMO and its sister company Kansas City Power & Light Company (KCPL) have tried harder than any other utility in recent years to get the Commission to extend the reach of its deferral authority, it is apparent that GMO and KCPL only want this deferral authority used when it benefits shareholders and disadvantages customers. In several recent cases, GMO and KCPL have asked the Commission to establish a regulatory asset for the deferral of costs that will increase their rates and inflate their profits.[2] When faced, however, with a consumers' request that the Commission create a regulatory liability for the deferral of savings arising from an "extraordinary" event, GMO claims that the Commission is powerless to grant the customers' request. As the Company pontificates, "[m]oreover, there is no legal basis for the Commission to use an AAO to create a regulatory liability on the books of a public utility…"[3] GMO and KCPL's attitude towards deferral accounting is that it can only create a heads, the shareholders win, and tails, the customers lose, ratemaking situation.

[2] In fact, while suffering from some of the highest rates in the Midwest, GMO and KCPL have repeatedly asked the Commission to defer costs even when those costs do not arise from an "extraordinary" event.
[3] See, *Motion to Dismiss the Complaint of the Office of the Public Counsel and Midwest Energy Consumers Group and Suggestions in Support*, EC-2019-0200 p. 2 (Feb. 5, 2019)

GMO's inconsistent position regarding deferral accounting is not limited to its claim that the Commission may not create a regulatory liability. Rather, as discussed more fully *infra*, the hypocrisy also appears in its newfound belief that deferral accounting constitutes a "collateral attack" on the Commission's order in GMO's previous rate case. Specifically, as addressed at pages 12 through 15 of its Motion to Dismiss, GMO asserts that Petitioners are estopped from seeking a Commission order deferring the savings associated the retirement of the Sibley generating units because such a request represents a collateral attack on the settlement and Commission order resolving GMO's rate case in ER-2018-0146.[4] As Petitioners point out, however, the true-up date in that case was June 30, 2018. Recognizing that the Sibley units were not retired until December 31, 2018, the impact of that retirement occurred six months outside of the true-up period. Therefore, while there were suggestions that Sibley might be retired, GMO withheld any definitive announcement until well after the case was completed.

Consider also that GMO, and its sister company KCPL, have routinely sought, without concerns of "collateral attack," deferral accounting for events occurring after the true-up period of a general rate case. On at least 23 occasions in the last 29 years, GMO[5] and KCPL have asked the Commission to authorize deferral accounting without ever raising the argument that the use of such accounting constitutes a collateral attack on the Commission's order in the previous rate case.

B. Legal Standard

It is initially important to realize that Missouri courts hold that "[t]he defendant ***bears the burden*** of establishing that the elements pled by the plaintiff fail to state a cause of action."[6]

[4] "Although these orders are now final, the Complaint's attempt to litigate these issues constitutes a collateral attack that must be dismissed." (*Motion to Dismiss*, page 14).

[5] References to GMO in this context include its predecessor companies Missouri Public Service and St. Joseph Light & Power.

[6] *Weicht v. Suburban Newspapers*, 32 S.W.3d 592 (Mo.App. E.D. 2000) (citing to *Saidawi v. Giovanni's Little Place, Inc.*, 987 S.W.2d 501, 504 (Mo.App. E.D. 1999) (emphasis added)).

Placing this heavy burden on GMO is appropriate when one realizes that "as a matter of policy Missouri law favors the disposition of cases on their merit when possible."[7]

A Motion to Dismiss for failing to state a claim "is solely a test of the adequacy of the plaintiff's petition."[8] In reviewing a Motion to Dismiss, the Commission simply "review[s] the petition to determine whether the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. If the allegations invoke principles of substantive law entitling plaintiff to relief, the petition should not be dismissed."[9] In reviewing the sufficiency of the Petition, the Commission "must treat all facts alleged in the petition as true and construe all allegations most favorable to the plaintiff."[10]

Recognizing that a Motion to Dismiss is a test of the sufficiency of the Petition, Missouri Courts do not consider arguments and evidence such as those now raised by GMO. "Whether there is failure to state a claim upon which relief can be granted is determined by examination of petition, ***not by evidence.***"[11]

In this case, Petitioners cite to a recognized cause of action. Missouri courts have held that, in instances of "extraordinary" events, Sections 393.140(4)[12] and (8), RSMo[13] allow the

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[7] *Myers v. Moreno*, 564 S.W.2d 83 (Mo.App. 1978) (citing to *Human Development Corporation v. Wefel*, 527 S.W2d 652, 655 (Mo.App. 1975)).
[8] *Gettings v.* Farr, 41 S.W.3d 539 (Mo.App. E.D. 2001) (citing to Murphy *v. AA Mathews, A Division of CRS Group Engineers, Inc.,* 841 S.W.2d 671, 672 (Mo. banc 1992)).
[9] *Id.* (citing to *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993) and *Industrial Testing Labs Inc. v. Thermal Science, Inc.*, 953 S.W.2d 144,146 (Mo.App 1997)). See also, *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462 (Mo. banc 2001).
[10] *Otte v. City of Ste. Genevieve* 945 S.W.2d 676 (Mo.App. E.D. 1996).
[11] *Killian Const. Co. v. Jack D. Bell & Associates*, 865 S.W.2d 889 (Mo.App. S.D. 1993) (citing to *Inman v. Reorganized School Dis. No. II*, 814 S.W.2d 671 (Mo.App. 1991) (emphasis added).
[12] "The Commission shall . . . have power, in its discretion, to prescribe uniform methods of keeping accounts, records and books, to be observed by . . . electrical corporations." At 4 CSR 240-20.030, the Commission has adopted the Uniform System of Accounts for electric utilities which provides for the use of deferral accounting for "extraordinary" events.
[13] "The Commission shall . . . have power to examine the accounts, books, contracts, records, documents and papers of any such corporation or person, and have power, after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited."

Commission to grant an Order to defer costs or savings for potential consideration in a future rate case.[14] Furthermore, Petitioners allege facts establishing that the retirement of a power plant is an "extraordinary" event, much like the construction or renovation of power plants, events that the courts have already held to be "extraordinary". Given that Petitioners reference a recognized cause of action and have alleged facts that invoke the Commission's exercise of that authority, the Commission must deny GMO's Motion to Dismiss.

C. <u>The Petitioners Initial Filing is Not a Complaint</u>

GMO's Motion to Dismiss ironically fails to properly address Petitioner's claims because it repeatedly mischaracterizes the OPC and MECG Petition for an Accounting Order as a complaint. GMO is correct that complaints must normally assert an act 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."[15] However, GMO's view of the Petitioners' filing as a complaint is misplaced because the Petitioners filed a petition pursuant to the Commission's authority to "prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited" under Section 393.140, RSMo. At no point did Petitioners use the word "complaint" or any variant thereof in their Petition. Rather, Petitioners employed precisely the same method as the Staff of the Public Service Commission (Staff) previously in EU-2015-0094 as well as that utilized repeatedly by Missouri electric utilities.[16] Although the Commission may not have ordered an

[14] See, *Office of Public Counsel v. Public Service Commission*, 858 S.W.2d 806 (Mo. App. W.D. 1993).
[15] Section 386.390, RSMo (2018).
[16] GMO in EU-2011-0034; Kansas City Power & Light Company (KCPL) in EU-2014-0255, EU-2012-0130, EU-2004-0294, and EU-2002-1048; GMO and KCPL in EU-2014-0077, EU-2012-0131, EU-2010-0194, and EU-2006-0560; Union Electric d/b/a Ameren Missouri in EU-2012-0027 and EU-2008-0141; The Empire District Electric Company in EU-2011-0387; and Aquila, Inc. in EU-2008-0233, EU-2005-0041, and EU-2002-1053.

AAO or accounting order in each of the aforementioned cases, at no point was the initial petition by either Staff or a public utility treated as a complaint under Section 386.390, RSMo.

D. Even Treated as a Complaint, it is Not Proper to Dismiss Petitioner's Filing

Assuming arguendo that Petitioner's filing is indeed a complaint against GMO, it still alleges a proper foundation for a complaint, and it is not proper for the Commission to dismiss Petitioner's filing. GMO focuses on the language of subsection 1 of Section 386.390 stating that a complaint is 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." GMO also cites *State ex rel. Ozark Border Electric Coop. v. Public Service Commission* for the proposition that the Commission lacks the jurisdiction to hear complaints without an allegation of a violated law, rule, or order.[17] GMO then concludes that the Commission should dismiss Petitioners' claim, because it does not allege a violation of law.

However, GMO's rationale fails for two reasons: a hyper-fixation on Section 386.390 and a misreading of *Ozark Border*. *Ozark Border* does not stand for the axiom that complainants must make their case under Section 386.390. Rather, Section 386.390 is the general complaint statute, with other jurisdictional means to hear a complaint being possible. The *Ozark Border* Court noted that the Commission's Order in question did not "assimilate the requirements of 386.390" with another statute at issue.[18] Instead, the Commission "considered two alternative means by which the Commission could have jurisdiction over the complaint."[19] The Court ultimately dismissed Ozark Border's complaint, but only because the Court:

[17] *Motion to Dismiss*, *p. 5*(citing 924 S.W.2d 597, 599-600 (Mo. App. W.D. 1996)).
[18] *Ozark Border Elec. Coop.*, 924 S.W.2d at 599.
[19] *Id.* at 600.

> "underscor[ed] the limited nature of the Commission's statutory authority under Section 247.172. *Ozark Border* agreed that the Commission can only hear complaints pursuant to section 394.312.6 about Commission-approved territorial agreements, and even then, only if the complaint alleges a change in circumstances that calls into question whether the approved agreement remains in the public interest."[20]

Restated, the Court recognized that multiple, alternatively viable jurisdictional options exist for complaints beyond the general complaint statute when other statutes are in play. "If the complaint had met the requirements of either statute the Commission would have reviewed the agreement [at issue]."[21] Therefore, Petitioners' filing survives as a complaint founded on another statute: Section 393.140.

As mentioned, Section 393.140 details the Commission's general regulatory powers. The Petitioners initial filing invoked the Commissions powers under subdivision (4) and (8) of Section 393.140 to prescribe accounting methods for electrical corporations and to which accounts certain sums should be logged, respectively. Clearly, the Commission has jurisdiction to hear Petitioner's "Complaint" as an exercise of these two cited subdivisions just as the Commission has historically addressed.

E. Sibley Generation Units' Retirement Must be Considered an Unusual or Extraordinary Event When Evaluating a Motion to Dismiss

Accounting orders are justified for events of an "unusual nature and infrequent occurrence," and of "significant effect". In this context, significance is determined by the event in question constituting at least five percent of the public utility's income.[22] In an effort to avoid a finding that the retirement of Sibley is extraordinary, GMO asserts that the retirement of "*any generating plant* is consistent with and typical of the ordinary and usual management activities of

[20] *Staff of the Mo. Pub. Serv. Comm'n v. Consol. Pub. Water Supply Dist. C-1*, 474 S.W.3d 643, 655 (Mo. App. W.D. 2015).
[21] *Ozark Border*, 924 S.W.2d at 600.
[22] 18 CFR Part 101 (1993).

any electric public utility." Given this, GMO asserts that the retirement of the Sibley units is not unusual or extraordinary.[23] GMO's position is absurd in that, under this definition, no plant retirements would ever be unusual or extraordinary.

Regardless, it is inappropriate for the Commission to consider factual disputes, such as GMO's current suggestion that the Sibley retirement is not extraordinary, in the context of a Motion to Dismiss. Rather, as pointed out *supra*, a Motion to Dismiss simply reviews the adequacy of the Petition and all facts alleged in that Petition must be treated as true. Therefore, GMO cannot prevail on a Motion to Dismiss simply by disputing facts such as the extraordinary nature of the retirement of a generating unit. In this case, Petitioners have alleged, with affidavits, that the retirement of the Sibley units is extraordinary. For purposes of reviewing the Motion to Dismiss then, the Commission must accept that the Sibley units' retirement is extraordinary. In light of the presumed extraordinary nature of this retirement, the Commission's only determination under a Motion to Dismiss, is whether Petitioners have plead an appropriate cause of action.

GMO next provides three policy arguments for why an accounting order for the retirement of the Sibley units is inappropriate. None is persuasive.

A. GMO Invokes Precedential Consistency in Line with its Personal History

GMO's first policy argument for denying the extraordinary nature of retiring the Sibley units is based upon an improper application of a Commission decision in a previous GMO accounting authority order case. GMO cites to a 2014 Commission Order denying its request for an AAO for transmission costs on the basis that such costs are "normal, ordinary and recurring".[24] Unlike these recurring transmission costs, retiring the Sibley units is by its nature not normal, ordinary, or recurring. Retiring generation units that constitute a third of a utility's capacity is

[23] *Motion to Dismiss* p. 7 (emphasis added).
[24] *Motion to Dismiss* p. 8 (quoting *Report and Order*, ER-2014-0370 (Sept. 2, 2015).

abnormal. It also is not recurring. Barring significant changes in circumstances, GMO has signaled no interest in reviving the Sibley units. The nature of Petitioners request is simply different from the referenced GMO AAO petitions.

B. GMO Accuses Administrative Overreach

GMO's second policy argument is that an accounting order would be an overreach by the Commission. GMO argues that an accounting order violates the legal principle that the Commission cannot "dictate the manner in which the company shall conduct its business."[25] GMO's reliance on *Bonacker* is merely a mischaracterization of Petitioners' request and ordered deferral accounting generally. Petitioners are not asking that the Commission dictate the terms upon which GMO must operate. GMO's decision to retire the Sibley units is not affected by the Commission's decision on Petitioners' requested accounting order. Rather, the accounting order simply requires GMO to defer moneys it is already collecting or expending regarding the Sibley units for consideration in a future rate case. GMO is free to exercise its managerial discretion to retire the Sibley units. If GMO sees an AAO as a prohibited intrusion into the Company's business operations, then GMO must conversely believe that the Commission's prior disapproval of the Company's requested AAOs to be an impermissible invasion since GMO did not get to account for accounts in the manner as it wished.[26] That conclusion is clearly wrong.

C. GMO Claims that Petitioners Knew that the Sibley Units were to be Retired

GMO concludes its argument that the Sibley retirements are not unusual, extraordinary, or significant by arguing GMO has planned these retirements, and that all parties were apprised of their retirement long before it occurred.[27] GMO's syllogism appears to be that an event cannot be

[25] *Motion to Dismiss* p. 9 (quoting *State ex rel. Pub. Serv. Comm'n v. Bonacker*, 906 S.W.3d 896, 899 (Mo. App. S.D. 1995).
[26] *E.g., Report and Order*, EU-2014-0077 (July 30, 2014).
[27] *See Motion to Dismiss* p. 12.

"unusual" or "significant" simply if GMO foretells it. Even if that logic is structurally sound, GMO cannot enjoy it given the duplicitous positions it took in the recent rate case.

In its Motion to Dismiss, GMO relies upon two of its own press releases, with the latter "confirm[ing] on June 2, 2017 that [GMO] would retire all Sibley units by December 31, 2018.[28] Both press releases contain broad disclaimers about how "forward-looking statements" are subject to numerous factors and may not actually come to fruition.[29] Despite the uncertainty reserved in these announcements, OPC accepted GMO's disclosure that the Sibley units would be retired, and consequentially argued in GMO's latest rate case that the Commission treat Sibley units as retired for ratemaking purposes because the retirements were known and measureable.[30] GMO responded by repeatedly and vociferously denying the certainty of the Sibley units' retirement.

Speaking on behalf of GMO, KCPL's Vice President of Regulatory Affairs, Darrin Ives, responded to the OPC's position:

> "OPC's proposals regarding certain generating units of KCP&L and GMO are based on *assumptions* that these plants will be retired by year-end 2018…"[31]

Note how OPC was responding to GMO's own press releases from the year prior, but by the summer of 2018 GMO was clearly stating that any conclusion that GMO was going to retire the Sibley units was a mere "assumption." Mr. Ives repeated himself in the same rebuttal testimony:

> "The out-of-period adjustments proposed by OPC are neither known nor measurable."[32]

Restated, GMO claimed that the Commission should not adjust its rate base because it was unknown when or if GMO would actually retire the Sibley units. Mr. Ives continued:

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[28] *Id.* at 2.
[29] Exhibits A & B, *Id.*
[30] Schedules JAR-2, JAR-3, & JAR-4, *Petition for an Accounting Order.*
[31] Exhibit 137, *Rebuttal Testimony of Darrin R. Ives*, ER-2018-0146 (July 27, 2018) (emphasis added).
[32] *Id.*

> "KCP&L and GMO submit that the depreciation and O&M should be included in the rate case consistent with the use of an historical test year with true-up period for determining revenue requirements. While the companies have announced plans to retire the identified generating units, whether the units will actually be retired in 2018 (Montrose units 2 and 3; Sibley units 1 through 3; and common) and 2019 (Lake Road unit 4/6) can necessarily only be known for certain when each retirement has actually happened. *Moreover, it is possible that these units will not be retired within the planned time frames for operational reasons that are not presently foreseen.*"[33]

Again, Mr. Ives maintained that GMO did not actually know when the Sibley units would be retired:

> "As discussed above, the planned unit retirements are necessarily not known and measurable as they have not occurred."[34]

GMO continued this "not known and measurable" refrain in Mr. Ives' surrebuttal testimony:

> "OPC's proposal to disallow cost recovery for future events which have not yet occurred violates the known and measureable standard consistently applied by this Commission to determine whether ratemaking adjustments are appropriate for a particular event or cost of service item."[35]

Consider also that other parties adopted GMO's representations that the Sibley units did not have a definite retirement date. Staff witness Stephen Moilanen stated in his rebuttal testimony:

> "Staff disagrees with OPC's recommendation to omit depreciation expense for these items [the Sibley units] because the planned retirements fall outside the test year, and are just that - planned, not certain."[36]

If indeed the retirement of the Sibley units was certain, and not just a nebulous plan, then GMO had the opportunity during its rate case to correct both Staff's misconception. Staff witness Karen Lyons also declared that:

> "The actual retirement dates for KCPL's Montrose units and GMO's Sibley units are not yet known."[37]

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[33] *Id.* (emphasis added).
[34] *Id.*
[35] Exhibit 138, *Surrebuttal Testimony of Darrin R. Ives*, ER-2018-0146 (Sept. 4, 2018).
[36] Exhibit 211, *Rebuttal Testimony of Stephen Moilanen*, ER-2018-0146 (July 27, 2018).
[37] Exhibit 209, *Rebuttal Testimony of Karen Lyons*, ER-2018-0146 (ER-2018-0146).

Staff witness Keith Majors went so far as to clearly say he did not rely upon the 2018 retirement dates from GMO's press releases, but rather understood that:

> "The Montrose and Sibley plants are scheduled to retire *no later than 2020*. Staff has included the net investment and all operations and maintenance expense related to these plants in KCPL's and GMO's costs of service."[38]

GMO did nothing to indicate that either Lyon's or Major's assertions were incorrect. Instead, GMO emphasized multiple times to the Commission and other parties to its rate case that, despite the previous press releases, the retirement of the Sibley units was speculative. By doing so GMO led the Parties to include net investment and operations and maintenance for the Sibley units within the determination of GMO's cost of service. This discrepancy between what GMO argued in the rate case, and what GMO now argues, is shocking.

Consider also that GMO's Motion to Dismiss relies upon the Commission's cautioning words that deferral accounting can "dull the incentives a utility has to operate efficiently and productively."[39] Petitioners submit that dismissing their request for an accounting order dulls the incentives a utility has to submit its resource planning honestly to the Commission. If GMO is able to claim a plant may not shut down during its rate case, and then immediately thereafter claim that it always intended to shut down the plant, then a moral hazard exists whereby a public utility will always seek to inflate its rates artificially with soon to be non-existent costs. No public utility should have the privilege of being able to doublespeak before the Commission or Missouri's consumers. The Commission can correct this hazard now by approving the authority order Petitioners are requesting.

F. <u>The Petition is not a Collateral Attack Upon any Prior Commission Order</u>

[38] Exhibit 210, *Rebuttal Testimony of Keith Majors*, ER-2018-0146 (ER-2018-0146).

[39] *Motion to Dismiss* p. 8 (quoting *Report and Order*, ER-2014-0370 (Sept. 2, 2015).

Seeking an accounting order for the deferral of revenues and return on Sibley unit investments collected in rates does not collaterally attack any prior Commission order. GMO portrays the settlement and disposition of GMO's latest rate case, ER-2018-0146, as a full litigation of the accounting for the Sibley units. The pitfalls of GMO's portrayal are the nature of an accounting order and Petitioners' request, and a misreading of a Commission approved Stipulation.

A. The Nature of an Accounting Order and Petitioners' Request

The Commission's order approving the revenue requirement in GMO's most recent rate case was based upon costs, revenues and investments as of June 30, 2018. As GMO readily admits, the retirement of Sibley did not occur until December 31, 2018. Therefore, just as KCPL and GMO have repeatedly done in the past, Petitioners seek an order to account for extraordinary events occurring outside of the true-up from that previous rate case. Had Petitioners sought a "do-over" for events that occurred prior to the true-up, then such an action may constitute a collateral attack. Instead, the extraordinary event at issue occurred well after the true-up date.

Additionally, Petitioners' requested accounting order does not collaterally or even directly attack any prior orders. If the Commission were to grant Petitioners' request, GMO's rates would be unaffected. GMO's customers would see no change due to the Commission granting Petitioners' filing. Instead, GMO would merely need to adjust its internal accounting of costs and revenues to set rates accurately in the future. Petitioners note that Staff endorsed a similar accounting for the depreciation on the Sibley units in GMO's latest rate case.[40] Moreover, given

[40] Exhibit 211, *Rebuttal Testimony of Stephen Moilanen*, ER-2018-0146 ("Staff agrees that it is appropriate to document the difference between the depreciation expense booked to reserve and depreciation expense included in rates for the Sibley, Montrose, and Lake Road units. Staff has no position regarding what course of action to take in regards to this difference in future rate cases. In Staffs opinion, it is prudent for this value to be recorded. Staff can review this information in future rate cases when developing a position regarding adjustments to depreciation reserve").

the Commission's refusal to make ratemaking decisions in the context of an accounting order, there is no assurance that the deferral of these savings will even impact GMO rates in future cases. Finally, GMO's recent insistence that deferral accounting is improper is also particularly inconsistent with its repeated, previous requests for AAOs. One should wonder why GMO sees an accounting order requested by other parties to be a collateral attack upon a Commission order, but not its own AAO petitions.

B. GMO Misreads a Commission Approved Stipulation

GMO misreads a Commission approved stipulation to reach its desired result. GMO's latest rate case was resolved through four separate stipulations. The first stipulation settled revenue requirement matters including the accounting for the Sibley units.[41] A relevant portion of the First Stipulation language reads that:

> "GMO will create a regulatory liability to capture the amount of depreciation expense included in GMO's revenue requirement beginning when each of the following units is retired and depreciation expense is no longer recorded on GMO's books:
>
> Sibley units 1, 2, and 3, including common plant, and Lake Road unit 4/6.
>
> The depreciation amounts will accumulate in the regulatory liability account until new customer rates are established in a subsequent rate case. At that time, the regulatory liability account will be closed into accumulated depreciation. Additionally, the closing of this regulatory liability into accumulated depreciation will be reflected in rates that are established in that rate case.
>
> *The Signatories* agree that the rates established in this case include O&M associated with the Sibley units.
>
> This Stipulation does not preclude *any Signatory* from proposing an accounting authority order ("AAO"), or any other ratemaking treatment, for the recovery of any other costs associated with the KCP&L and GMO retirements listed above. This Stipulation does not preclude any party from opposing an AAO, or any other ratemaking treatment, for the recovery of any other costs associated with the KCP&L and GMO retirements of the units listed above."[42]

[41] *Order Approving Stipulations*, ER-2018-0146 (Nov. 10, 2018).
[42] *Non-Unanimous Stipulation and Agreement*, ER-2018-0146 (Sept. 19, 2018) (emphasis added).

Of the Petitioners, MECG was a signatory. OPC was not, but OPC did not oppose this language either. GMO argues that the quoted stipulation provision above:

> "[P]rovided that any signatory may propose an AAO 'for the recovery of any other costs associated with the . . . GMO retirements' at Sibley. However, there was no preservation of rights regarding an AAO related to any revenues and return on investments associated with the Sibley Station."[43]

GMO further invokes Commission Rule 4 CSR 2.115(2) to claim that the OPC is "bound by the terms of the First Stipulation." Therefore, GMO's argument is essentially that the limitations within the First Stipulation tie both the OPC and MECG, and that any rights not explicitly preserved are waived. GMO's reading is faulty for three reasons.

First, the terms of the First Stipulation quoted above are restrictive, not proscriptive. The First Stipulation binds certain actions of the parties and signatories, but it does not control over those actions where the Stipulation is silent. Paragraph 25 of the Stipulation clearly states, "[e]xcept as specified herein, the Signatories to this Stipulation shall not be prejudiced, bound by, or in any way affected by the terms of this Stipulation."[44] Meaning that the Stipulation only controls where the document specifies. GMO reads the Stipulation in the reverse, that the parties and signatories only have powers as provided in the Stipulation. GMO may wish to rethink that logic lest it occur to GMO that it lacks the authority to act in any manner not explicitly addressed by its Stipulations, including the retirement of the Sibley Station when its rates "include O&M associated with the Sibley units."[45]

Secondly, GMO fixates on some language while ignoring other pertinent provisions. The Section on GMO's accounting practices following the retirement of certain units is specific as to depreciation, but no other associated value. Thereafter, the Stipulation provides that it "does not

[43] *Motion to Dismiss* p. 13 (citations omitted).
[44] *Non-Unanimous Stipulation and Agreement*.
[45] *Id.*

preclude any *Signatory* from proposing an accounting authority order ("AAO"), or *any other ratemaking treatment*, for the recovery of *any other costs* associated with the KCP&L and GMO retirements listed above."[46] Assuming that GMO is correct that the OPC's silence as to the First Stipulation reins it in, the OPC is still not a "Signatory." The OPC is merely a "party" to the prior rate case. Therefore, the OPC may simply ignore the quoted exception. As for MECG, even as a Signatory it is empowered to seek an accounting order now for costs, revenues, and returns on investments because the Stipulation's exception specifically allows for "any other ratemaking treatment" and "any other costs" including those paid by GMO's customers.[47] GMO fixates on the term "revenues" not being expressly scripted, but neglects that the term "costs" is not specifically limited to those within GMO's viewpoint versus its customers.[48] Thus, GMO's fixation on the trees of "revenues" and "costs" neglects the forest.

Third, GMO misapplies Commission Rule regarding settlements when reading the Stipulation. Commission Rule 4 CSR 2.115(2) provides that a party failing to timely object to a filed non-unanimous stipulation thereby waives its right to a hearing. The Commission may then treat a non-unanimous stipulation as unanimous, but that treatment does not necessarily oblige a non-signatory to the terms of a stipulation. The Rule is silent as to how to treat a non-objecting party after the Commission deems a non-unanimous stipulation to be unanimous. Instead, one must return to the adopted stipulation and correctly read it to gauge how the OPC and MECG's general powers are specifically limited. Doing so reveals that Petitioners are free to seek "any other ratemaking treatment" following the sudden shutdown of the Sibley Station despite GMO's repeated representations that it might remain in service.[49]

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[46] *Non-Unanimous Stipulation and Agreement*, (emphasis added).
[47] *Id.*
[48] *Motion to Dismiss* p. 15.
[49] *Non-Unanimous Stipulation and Agreement*.

G. Conclusion

Contrary to GMO's current assertions, Petitioners' state a claim upon which relief can be granted. Based upon Petitioners' assertion that the retirement of the Sibley units is extraordinary, an assertion that the Commission must accept as true for purposes of reviewing a Motion to Dismiss, the Commission is fully empowered to issue an accounting order under Section 393.140. GMO's Motion to Dismiss misapplies the applicable legal standard, and misconstrues Petitioners' filing as a complaint and as a collateral attack on a prior Commission order. GMO's arguments also fail to consider that Petitioners' claim may rightfully proceed as a complaint, and undervalue the unusual and extraordinary nature of the Sibley units' retirement. GMO's inconsistent positions and doublespeak as to the retirement of the Sibley Station further substantiate the grounds for an accounting order.

WHEREFORE, the Petitioners reply to GMO's Motion to Dismiss, and move that GMO's Motion to Dismiss be itself disregarded by the Commission.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 22nd Day of February, 2019, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall