



CIVIL PROCEDURE FORM NO. 8-A(2)

IN THE _____ JUDICIAL CIRCUIT, _____ COUNTY, MISSOURI

Judge or Division:	Circuit Court Case Number: GO-2016-0332 and GO-2016-0333		FILED <i>DS</i> OCT 17 2018 1:09 PM Missouri Public Service Commission (Date File Stamp)
Plaintiff/Petitioner: The Office of the Public Counsel	Appellate Number:	<input type="checkbox"/> Filing as an Indigent	
	Date of Judgment/Decree/Order: (ATTACH A COPY) Issued: September 20, 2018 Effective: October 1, 2018	Court Reporter:	
vs.	Date Post Trial Motion Filed: September 29, 2018	<input type="checkbox"/> Sound Recording Equipment	
Defendant/Respondent: The Missouri Public Service Commission	Date Ruled Upon: October 17, 2018	The Record on Appeal will consist of: ____ Legal File only or <input checked="" type="checkbox"/> Legal File and Transcript	

Notice of Appeal to Missouri Court of Appeals - Civil

District: Western Eastern Southern


Notice is given that The Office of the Public Counsel appeals from the judgment/decree/order entered in this action on September 20, 2018 (date).

Appellant's Name (If multiple, list all or attach additional pages) Marc Poston, Acting Division Director – Office of the Public Counsel	Respondent's Name (If multiple, list all or attach additional pages) Ryan A. Silvey, Chairman – Missouri Public Service Commission
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Appellant's Attorney/Bar Number (If multiple, list all or attach additional pages) Marc Poston, Mo. Bar # 45722	Respondent's Attorney/Bar Number (If multiple, list all or attach additional pages) Shelley Brueggemann, Mo. Bar # 52173
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Brief Description of Case (May be completed on a separate page) Application of Laclede Gas Company, Inc. (n/k/a Spire Missouri, Inc.) to Change its Infrastructure System Replacement Surcharge in its Missouri Gas Energy and Laclede Gas Service Territories.	
Issues Expected To Be Raised On Appeal (May be completed on a separate page. Appellant is not bound by this list.) The Public Service Commission's misapplication of the law in determining the amount of revenue that Laclede Gas Company, Inc. (n/k/a Spire Missouri, Inc.) improperly collected through its subsidiaries Laclede Gas Company (n/k/a Spire East) and Missouri Gas Energy (n/k/a Spire West) and the Public Service Commission's misapplication of the law in determining that it is incapable of refunding the revenue Laclede Gas Company, Inc. (n/k/a Spire Missouri, Inc.) improperly collected from its customers.	
Signature of Attorney or Appellant 	Date 10/17/18

Certificate of Service on Persons other than Registered Users of the Missouri eFiling System

I certify that on October 17, 2018 (date), a copy of the foregoing was sent to the following by facsimile, hand-delivery, electronic mail or U.S. mail postage prepaid to their last known addresses.

The Missouri Public Service Commission


Appellant or Attorney for Appellant

Directions to Clerk

Transmit a copy of the notice of appeal and all attached documents to the clerk of the Court of Appeals and to any person other than registered users of the eFiling system in a manner prescribed by Rule 43.01. Clerk shall then fill in the memorandum below. See Rule 81.08(i). Forward the docket fee to the Department of Revenue as required by statute.

Memorandum of the Clerk

I have this day served a copy of this notice by regular mail registered mail certified mail facsimile transmission to each of the following persons at the address stated below. If served by facsimile, include the time and date of transmission and the telephone number to which the document was transmitted.

I have transmitted a copy of the notice of appeal to the clerk of the Court of Appeals, Western District.

Docket fee in the amount of \$70.00 was received by this clerk on 10/17/2018 (date) which will be disbursed as required by statute.

No docket fee was received because:

a docket fee is not required by law under Rule 100.02(b) (cite specific statute or other authority).

a motion to prosecute the appeal in forma pauperis was received on _____ (date) and was granted on _____ (date).

10/17/2018
Date

Debbie Steck
Clerk

Additional Parties and Attorneys

List every party involved in the case not listed on page 1, indicate the position of the party in the circuit court (e.g. plaintiff, defendant, intervenor) and in the Court of Appeals (e.g. appellant or respondent) and the name of the attorney of record, if any, for each party. Attach additional pages to identify all parties and attorneys if necessary.

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LIST OF PARTIES TO THE COMMISSION PROCEEDINGS

(As required by § 386.510 RSMo)

The following parties participated in Public Service Commission Case Numbers GO-2016-0332 and GO-2016-0333.

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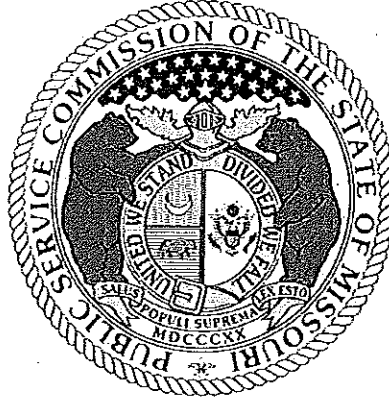
STATEMENT OF THE ISSUES

(As required by § 386.510 RSMo)

Appellant Public Counsel will raise the following issue on appeal:

The Office of the Public Counsel challenges the lawfulness and reasonableness of the Public Service Commission's September 20, 2018 *Report and Order on Remand* for failing to require Laclede Gas Company, Inc.'s (k/n/a Spire Missouri Inc.) to return to customers certain costs improperly recovered through the Infrastructure System Replacement Surcharges of its two operating units (Missouri Gas Energy and Laclede Gas Service).

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



In the Matter of the Application of Laclede Gas)
Company to Change its Infrastructure System) File No. GO-2016-0332
Replacement Surcharge in its Missouri Gas)
Energy Service Territory)

In the Matter of the Application of Laclede Gas)
Company to Change its Infrastructure System) File No. GO-2016-0333
Replacement Surcharge in its Laclede Gas)
Service Territory)

REPORT AND ORDER ON REMAND

Issue Date: September 20, 2018

Effective Date: October 1, 2018

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of Laclede Gas)
Company to Change its Infrastructure System) File No. GO-2016-0332
Replacement Surcharge in its Missouri Gas)
Energy Service Territory)

In the Matter of the Application of Laclede Gas)
Company to Change its Infrastructure System) File No. GO-2016-0333
Replacement Surcharge in its Laclede Gas)
Service Territory)

APPEARANCES

Appearing for **SPIRE MISSOURI, INC.:**

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Rick Zucker, Zucker Law LLC, 423 (R) South Main St., St. Charles, Missouri,
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Appearing for **OFFICE OF THE PUBLIC COUNSEL:**

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Appearing for the **STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:**

Jeffrey A. Keevil, Deputy Staff Counsel, Mark Johnson, Senior Counsel, and
Whitney Payne, Associate Counsel, PO Box 360, 200 Madison Street,
Jefferson City, Missouri 65102.

SENIOR REGULATORY LAW JUDGE: Michael Bushmann

REPORT AND ORDER ON REMAND

I. Procedural History

On September 30, 2016, Laclede Gas Company filed applications and petitions with the Missouri Public Service Commission (“Commission”) to change its Infrastructure System Replacement Surcharge (“ISRS”) in its Missouri Gas Energy and Laclede Gas Service territories (collectively, “Spire Missouri”)¹. Spire Missouri requested an adjustment to its ISRS rate schedule to recover costs incurred in connection with infrastructure system replacements made during the period March 1, 2016 through October 31, 2016. The Office of the Public Counsel (“OPC”) filed a motion requesting that the Commission reject the petition or schedule an evidentiary hearing. The Commission held an evidentiary hearing on January 3, 2017 (“1st hearing”).

On January 18, 2017, the Commission issued a Report and Order permitting Spire Missouri to file new tariffs to recover certain ISRS revenues, including plastic pipe replacements. That Report and Order is attached hereto as Attachment A. OPC appealed the Report and Order to the Missouri Western District Court of Appeals (WD80544), challenging the Commission's decision that certain plastic pipe replacements were eligible ISRS costs.

On November 21, 2017, the Court of Appeals issued an opinion (WD80544) which held that recovery of costs for replacement of plastic components that are not worn out or in a deteriorated condition is not available under ISRS. The Court reversed the Commission's Report and Order “as it relates to the inclusion of the replacement costs of the plastic components in the ISRS rate schedules, and the case is remanded for further

¹ The company subsequently underwent a corporate reorganization and changed its name to Spire Missouri, Inc. with East and West service territories.

proceedings consistent with this opinion”.² The Court’s opinion is attached hereto as Attachment B. On March 7, 2018, the Court of Appeals issued the mandate in the appeal after the Supreme Court of Missouri denied transfer.

In compliance with the Court of Appeals’ opinion remanding these cases back to the Commission for further proceedings, the Commission conducted oral arguments and an evidentiary hearing to receive additional evidence.³ In total, the Commission admitted the testimony of ten witnesses and 29 exhibits into evidence and took official notice of several documents. Post-hearing briefs were filed on September 6, 2018, and the case was deemed submitted for the Commission’s decision on that date when the Commission closed the record.⁴

II. Findings of Fact

Any finding of fact for which it appears that the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.

1. Laclede Gas Company changed its name to Spire Missouri, Inc. on August 30, 2017. Spire Missouri is an investor-owned gas utility providing retail gas service to large portions of Missouri through its two operating units or divisions, Spire Missouri East (f/k/a Laclede Gas Company) and Spire Missouri West (f/k/a Missouri Gas Energy).⁵

² *Matter of Application of Laclede Gas Co. to Change Its Infrastructure Sys. Replacement Surcharge in Its Missouri Gas Energy Serv. Territory v. Office of Pub. Counsel*, 539 S.W.3d 835, 841 (Mo. App. 2017), *reh’g and/or transfer denied* (Dec. 14, 2017), *transfer denied* (Mar. 6, 2018).

³ Transcript (“Tr.”), Volume 3.

⁴ “The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument.” Commission Rule 4 CSR 240-2.150(1).

⁵ Amended Report and Order, *In the Matter of the Laclede Gas Company’s Request to Increase Its Revenues for Gas Service*, issued March 7, 2018, File No. GR-2017-0215, p. 5, 11.

2. Spire Missouri is a “gas corporation” and a “public utility”, as each of those phrases is defined in Section 386.020, RSMo 2016.

3. The Office of the Public Counsel (“OPC”) “may represent and protect the interests of the public in any proceeding before or appeal from the public service commission.”⁶ OPC “shall have discretion to represent or refrain from representing the public in any proceeding.”⁷ OPC did participate in this matter.

4. The Staff of the Missouri Public Service Commission (“Staff”) is a party in all Commission investigations, contested cases and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.⁸

5. An ISRS is a statutorily authorized rate adjustment mechanism tool utilized by eligible gas corporations to recover the cost of certain infrastructure replacements by establishing and updating a surcharge on a customer’s bill.⁹ A qualifying gas corporation files an ISRS petition with the Commission seeking authority to recover the depreciation expense and return associated with eligible net plant additions, as well as amounts associated with property taxes for those additions, outside of a general rate case.¹⁰

6. Staff performs an ISRS audit when a petition to change an ISRS is filed.¹¹ By statute, Staff may file a report of its audit within 60 days from the time an ISRS petition is filed.¹²

⁶ Section 386.710(2), RSMo 2016; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

⁷ Section 386.710(3), RSMo 2016; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

⁸ Commission Rules 4 CSR 240-2.010(10) and (21) and 2.040(1).

⁹ Staff Ex. 6 (1st hearing), Oligschlaeger Rebuttal, p. 3.

¹⁰ *Id.*

¹¹ Staff Ex. 3 (1st hearing), Sommerer Direct, Schedule DMS-d2.

¹² Section 393.1015.2(2), RSMo 2016.

7. On September 30, 2016, Spire Missouri filed applications and petitions (“Petitions”) seeking an adjustment to its ISRS rate schedule for its East and West service territories to recover costs incurred in connection with eligible infrastructure system replacements made during the period March 1, 2016 through October 31, 2016.¹³

8. Spire Missouri attached supporting documentation to its Petitions for the plant additions completed since the last approved ISRS change. This included documentation identifying the type of addition, utility account, work order description, month of completion, addition amount, depreciation rate, accumulated depreciation, and depreciation expense.¹⁴ The company also provided estimates of capital expenditures for projects completed through October 2016¹⁵, which were subsequently replaced with updated actual cost information and provided to Staff and OPC.¹⁶

9. Spire Missouri also attached tables to its Petitions identifying the state or federal safety requirement, with a citation to a state statute or Commission rule, mandating each work order.¹⁷

10. The Commission conducted an evidentiary hearing on January 3, 2017, and the Commission issued its Report and Order on January 18, 2017, concluding that the plastic pipe was an integral component of the worn out and deteriorated cast iron and steel pipe, so Spire Missouri could recover the cost of replacing the plastic pipe.¹⁸

11. OPC filed a notice of appeal, challenging the Commission’s decision that certain plastic pipe replacements were eligible ISRS costs.

¹³ Laclede Ex. 4 and 5 (1st hearing), p. 2.

¹⁴ Laclede Ex. 4 and 5 (1st hearing), Appendix A and B.

¹⁵ *Id.*

¹⁶ Staff Ex. 2 (1st hearing), Schedule JKG-d1, p. 4.

¹⁷ Laclede Ex. 4 and 5 (1st hearing), Appendix C.

¹⁸ Report and Order, File Nos. GO-2016-0332 and GO-2016-0333, p. 20.

12. In its briefs on appeal, OPC requested three times that the Court of Appeals remand the case back to the Commission with instructions to approve temporary rate adjustments designed to flow through to Spire Missouri's customers the excess amounts that were collected by Spire Missouri, plus interest, pursuant to Section 386.520.2(2), RSMo.¹⁹

13. The Missouri Western District Court of Appeals issued an opinion (WD80544) on November 21, 2017, which held that recovery of costs for replacement of plastic components that are not worn out or in a deteriorated condition is not available under ISRS. The Court reversed the Commission's Report and Order "as it relates to the inclusion of the replacement costs of the plastic components in the ISRS rate schedules, and the case is remanded for further proceedings consistent with this opinion".²⁰ The Court's order did not include instructions regarding a temporary rate adjustment. Spire Missouri and the Commission applied for rehearing and transfer to the Supreme Court, which were denied, and the Court of Appeals issued its mandate on March 7, 2018.

14. On December 13, 2017, several parties in Spire Missouri's then-pending general rate cases, GR-2017-0215 and GR-2017-0216 ("rate cases") filed a Partial Stipulation and Agreement to resolve certain issues, including ISRS. The entire text of the ISRS section states "As required by Commission rules, the Company's current ISRS shall be reset to zero upon the effective date of new rates in this proceeding. Plant in service

¹⁹ Commission Ex. A, Initial Brief of the Office of the Public Counsel, p. 5-6, 36-37; Commission Ex. B, Reply Brief of the Office of the Public Counsel, p. 27.

²⁰ *Matter of Application of Laclede Gas Co. to Change Its Infrastructure Sys. Replacement Surcharge in Its Missouri Gas Energy Serv. Territory v. Office of Pub. Counsel*, 539 S.W.3d 835, 841 (Mo. App. 2017), *reh'g and/or transfer denied* (Dec. 14, 2017), *transfer denied* (Mar. 6, 2018).

additions for inclusion in a future ISRS shall be limited to additions subsequent to September 30, 2017.”²¹

15. On March 7, 2018, the Commission issued an Amended Report and Order in the rate cases stating that the Partial Stipulation and Agreement was not objected to, so it became unanimous. The Commission approved the partial stipulation and ordered the parties to comply with those terms. The Amended Report and Order was ordered to become effective on March 17, 2018.²²

16. On April 19, 2018, new rates for Spire Missouri became effective in the rate cases, which incorporated into base rates eligible costs previously reflected in Spire Missouri’s ISRS.²³ The existing ISRS was reset to zero.²⁴

17. After these cases were remanded, Spire Missouri provided all work order authorizations for projects totaling over \$25,000, except for open blanket work orders. A blanket work order is a work order related to ongoing projects that will not close in a certain period of time.²⁵

18. Staff reviewed all of the work order authorizations provided by the company to determine the feet of main and service lines replaced and retired by the type of pipe (plastic, cast iron, steel, etc.). Staff applied the actual individual plastic main and services line percentages to the work order cost to determine the value of the replacement of plastic pipe for the work order. Staff did not remove any amounts for work orders that were

²¹ Partial Stipulation and Agreement, *In the Matter of Laclede Gas Company's Request to Increase Its Revenues for Gas Service*, GR-2017-0215, and *In the Matter of Laclede Gas Company d/b/a Missouri Gas Energy's Request to Increase Its Revenues for Gas Service*, GR-2017-0216, p. 6.

²² Amended Report and Order, *In the Matter of Laclede Gas Company's Request to Increase Its Revenues for Gas Service*, GR-2017-0215, and *In the Matter of Laclede Gas Company d/b/a Missouri Gas Energy's Request to Increase Its Revenues for Gas Service*, GR-2017-0216, March 7, 2018.

²³ Order Approving Tariff in Compliance with Commission Order, *In the Matter of Laclede Gas Company's Request to Increase Its Revenues for Gas Service*, GR-2017-0215, and *In the Matter of Laclede Gas Company d/b/a Missouri Gas Energy's Request to Increase Its Revenues for Gas Service*, GR-2017-0216, issued April 4, 2018.

²⁴ Section 393.1015.6, RSMo 2016.

²⁵ Ex. 101, Bolin Direct, p. 3-4.

associated with relocations required by a governmental authority, encapsulation work orders, and meter and regulator replacement work orders.²⁶

19. For work order authorizations that Spire Missouri did not provide, i.e., those less than \$25,000 and blanket work orders, Staff calculated an average of plastic mains and service lines replaced for the work order authorizations that had actual information provided and applied that percentage to work order authorizations that were not provided.²⁷

20. Using this methodology to calculate the replacement costs for plastic pipes, Staff determined that Spire Missouri collected ineligible replacement costs through its ISRS in the amounts of \$827,159 for Spire Missouri West and \$2,283,628 for Spire Missouri East.²⁸

21. In evaluating Spire Missouri's work orders, Staff did not consider any cost savings resulting from Spire Missouri's replacement program. Staff only looked at the percentage of plastic pipe replaced.²⁹

22. Staff's witnesses provided credible testimony on the correct methodology for determining the costs of ineligible plastic pipe replacements, and Staff's evidence on this issue was the best evidence presented at the hearing. OPC also presented evidence of the replacement costs for plastic pipes, but Staff's calculations were based on more work orders and are more accurate.³⁰

23. Some of the plastic pipes that Spire Missouri replaced or retired in place are not worn out or in a deteriorated condition.³¹ Spire Missouri did not conduct a review to

²⁶ Ex. 101, Bolin Direct, p. 4.

²⁷ Ex. 101, Bolin Direct, p. 4.

²⁸ Ex. 101, Bolin Direct, Schedule KKB-d8.

²⁹ Tr. Vol. 3, p. 451.

³⁰ Tr. Vol. 3, p. 452.

³¹ Tr. Vol. 3, p. 368.

determine if that plastic pipe was worn out or deteriorated before replacing it.³² The polyethylene plastic pipe that Spire Missouri uses should last indefinitely.³³

24. Spire Missouri's work order authorization sheets did not explain if a main or service line being replaced was worn out or deteriorated.³⁴

25. Spire Missouri did not provide sufficient information for Staff to determine whether any plastic pipe being replaced was incidental to and required to be replaced in conjunction with the replacement of other worn out or deteriorated components.³⁵

26. Spire Missouri has not attempted to calculate the amount of plastic pipe replaced that was worn out or in a deteriorated condition.³⁶

27. Spire Missouri presented an analysis of ten work orders purporting to show that in nine of those work orders the company reduced, rather than increased, its replacement costs by retiring plastic facilities where it was not operationally or economically feasible to reuse them.³⁷

III. Conclusions of Law and Discussion

Spire Missouri is a "gas corporation" and "public utility" as those terms are defined by Section 386.020, RSMo 2016.³⁸ Spire Missouri is subject to the Commission's jurisdiction, supervision, control, and regulation as provided in Chapters 386 and 393, RSMo. The Commission has the authority under Sections 393.1009 through 393.1015, RSMo, to consider and approve ISRS requests such as the one proposed in the Petitions. Since

³² Tr. Vol. 3, p. 369.

³³ Tr. Vol. 3, p. 375.

³⁴ Tr. Vol. 3, p. 449.

³⁵ Tr. Vol. 3, p. 466.

³⁶ Tr. Vol. 3, p. 483.

³⁷ Ex. 3, Hoferlin Direct, p. 3-5, Schedule CRH-D1.

³⁸ Unless otherwise stated, all statutory citations are to the Revised Statutes of Missouri, as codified in the year 2016.

Spire Missouri brought the Petitions, it bears the burden of proof.³⁹ The burden of proof is the preponderance of the evidence standard.⁴⁰ In order to meet this standard, Spire Missouri must convince the Commission it is “more likely than not” that its allegations are true.⁴¹ Section 393.1015.2(4), RSMo, states that “[i]f the commission finds that a petition complies with the requirements of sections 393.1009 to 393.1015, the commission shall enter an order authorizing the corporation to impose an ISRS that is sufficient to recover appropriate pretax revenue, as determined by the commission pursuant to the provisions of sections 393.1009 to 393.1015”.

The issues for determination in this remand proceeding are 1) what costs, if any, were recovered through Spire Missouri East and West's 2016 ISRS for the replacement of ineligible plastic components not in a worn out or in a deteriorated condition, and 2) whether Spire Missouri should be required to refund any of those costs?

Ineligible expenses

Section 393.1012.1, RSMo, provides that a gas corporation may petition the Commission to change its ISRS rate schedule to recover costs for “eligible infrastructure system replacements”, which is defined in Section 393.1009(3), RSMo.⁴² In order to be

³⁹ “The burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue”. *Clapper v. Lakin*, 343 Mo. 710, 723, 123 S.W.2d 27, 33 (1938).

⁴⁰ *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996).

⁴¹ *Holl v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez*, 936 S.W.2d at 109 -111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

⁴² “Eligible infrastructure system replacements”, gas utility plant projects that:

- (a) Do not increase revenues by directly connecting the infrastructure replacement to new customers;
- (b) Are in service and used and useful;
- (c) Were not included in the gas corporation's rate base in its most recent general rate case; and
- (d) Replace or extend the useful life of an existing infrastructure.

eligible, the project must meet the definition of a “gas utility plant project” in Section 393.1009(5), RSMo.⁴³

The issue presented in these cases is whether certain plastic main and service line replacements installed by Spire Missouri are eligible for ISRS recovery. Spire Missouri’s position is that it should be able to collect all of the ISRS charges it requested in the Petitions, since all the projects and work orders included are ISRS-eligible. Staff and OPC recommend that the Commission issue an order that excludes all plastic pipe replacements from the amounts Spire Missouri is permitted to recover, although they differ somewhat on the method for calculating those ineligible expenses.

In its review of the Commission’s previous Report and Order, the Missouri Western District Court of Appeals stated that Section 393.1009(5)(a) “sets forth two requirements for component replacements to be eligible for cost recovery under ISRS: (1) the replaced components must be installed to comply with state or federal safety requirements and (2) the existing facilities being replaced must be worn out or in a deteriorated condition.”⁴⁴ The Court found that there was no evidence of a state or federal safety requirement that mandated the replacement of plastic mains and service lines, and that Spire Missouri’s “plastic mains and service lines were not in a worn out or deteriorated condition”.⁴⁵ The

⁴³ “Gas utility plant projects” may consist only of the following:

(a) Mains, valves, service lines, regulator stations, vaults, and other pipeline system components installed to comply with state or federal safety requirements as replacements for existing facilities that have worn out or are in deteriorated condition;

(b) Main relining projects, service line insertion projects, joint encapsulation projects, and other similar projects extending the useful life or enhancing the integrity of pipeline system components undertaken to comply with state or federal safety requirements; and

(c) Facilities relocations required due to construction or improvement of a highway, road, street, public way, or other public work by or on behalf of the United States, this state, a political subdivision of this state, or another entity having the power of eminent domain provided that the costs related to such projects have not been reimbursed to the gas corporation.

⁴⁴ *Matter of Application of Laclede Gas Co. to Change Its Infrastructure Sys. Replacement Surcharge in Its Missouri Gas Energy Serv. Territory v. Office of Pub. Counsel*, 539 S.W.3d 835, 839 (Mo. Ct. App. 2017), *reh’g and/or transfer denied* (Dec. 14, 2017), *transfer denied* (Mar. 6, 2018)

⁴⁵ *Id.* at p. 839-840.

Court concluded "that recovery of the costs for replacement of plastic components that are not worn out or in a deteriorated condition is not available under ISRS", so the Commission's Report and Order was reversed and "remanded for further proceedings consistent with this opinion".⁴⁶

After conducting a hearing on remand to take further evidence, that evidence showed that Spire Missouri's plastic pipe replacements were not worn out or deteriorated. The polyethylene plastic pipe that Spire Missouri uses should last indefinitely, but Spire Missouri did not conduct a review to determine if that plastic pipe was worn out or deteriorated before replacing it. Spire Missouri's work order authorization sheets did not explain if a main or service line being replaced was worn out or deteriorated, and the company made no attempt to calculate the amount of plastic pipe replaced that was worn out or in a deteriorated condition. In addition, Spire Missouri did not provide sufficient information to determine whether any plastic pipe being replaced was incidental to and required to be replaced in conjunction with the replacement of other worn out or deteriorated components.

Spire Missouri argues that no adjustment to the company's ISRS charges should be made in connection with plastic pipe replacements because those replacements resulted in no incremental increase in ISRS costs, but instead decreased them. Thus, there are no ineligible costs to exclude. In support of this argument, Spire Missouri presented an analysis of ten work orders purporting to show that in nine of those work orders the company reduced, rather than increased, its replacement costs by retiring plastic facilities where it was not operationally or economically feasible to reuse them. Spire Missouri asks the Commission to extrapolate from those nine work orders and reach a similar result in the

⁴⁶ *Id.* at p. 841.

hundreds of work orders that Spire Missouri did not analyze. However, Spire Missouri's analysis is based on far too few work orders for such a conclusion to be reasonable. Spire also argues that no adjustment to its ISRS revenues or costs is appropriate under ratemaking and cost allocation principles. This argument improperly intermixes the issue of prudence, which is determined in a general rate proceeding, with eligibility, which is the appropriate determination in an ISRS proceeding. So, Spire Missouri's arguments regarding prudence, cost avoidance, and economic efficiency are irrelevant to the Commission's conclusion in these cases.

In the future, if Spire Missouri wishes to renew its argument that plastic pipe replacements result in no cost or a decreased cost of ISRS, it should submit supporting evidence to be considered, such as, but not limited to, a separate cost analysis for each project claimed, evidence that each patch was worn out or deteriorated, or evidence regarding the argument that any plastic pipe replaced was incidental to and required to be replaced in conjunction with the replacement of other worn out or deteriorated components.

Here, Staff provided the best evidence of a methodology to calculate the costs of those ineligible plastic pipe replacements. Staff reviewed all of the work order authorizations provided by the company to determine the feet of main and service lines replaced and retired by the type of pipe, and then applied the actual individual plastic main and services line percentages to the work order cost to determine the value of the replacement of plastic pipe for the work order.

Based on Staff's adjustments to exclude the ineligible costs related to plastic pipe replacements, Spire Missouri collected ineligible replacement costs through its ISRS in the amounts of \$827,159 for Spire Missouri West and \$2,283,628 for Spire Missouri East.

Refunds

In general, the Commission does not have the authority to issue an order requiring a pecuniary reparation or refund.⁴⁷ The Commission lacks authority to retroactively correct rates or take into account overpayments when fashioning prospective rates.⁴⁸ If the Commission were to determine that a refund of ISRS costs is appropriate, it would need specific statutory authority to order those refunds. Two potential sources of authority for refunds of ISRS revenues are the ISRS statutes relating to gas utilities, Sections 393.1009-393.1015, and the general statute regarding temporary rate adjustments following the appeal of a Commission order establishing new rates or charges, Section 386.520.2.

In the ISRS statutes, refunds are authorized in two provisions of Section 393.1015.⁴⁹ Subsection 5 of that statute allows annual adjustments of ISRS charges after a reconciliation process to recover or refund the difference between ISRS revenues actually collected and appropriate ISRS revenues as ordered by the Commission. Subsection 8 permits the Commission to offset a utility's future ISRS revenues to account for any eligible ISRS costs previously included in an ISRS that were disallowed during a general rate proceeding. None of these situations are similar to the current situation, where the Commission is being asked to determine if ISRS costs should be classified as ineligible after those costs were already considered in a general rate case and found to be prudent. Section 393.1015 does not provide a specific legal basis for refunds in the cases now before the Commission.

In addition, the ISRS statutes do not allow superseded ISRS tariffs to be corrected retroactively after a general rate case includes those infrastructure costs in base rates. In a

⁴⁷ *DeMaranville v. Fee Fee Trunk Sewer, Inc.*, 573 S.W.2d 674, 676 (Mo. App. 1978); *State ex rel. & to Use of Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044 (Mo. 1943).

⁴⁸ *State ex rel. City of Joplin v. Pub. Serv. Comm'n of State of Mo.*, 186 S.W.3d 290, 297 (Mo. App. 2005).

⁴⁹ See also Section 393.1012.1, RSMo.

recent Missouri Supreme Court case involving Missouri-American Water Company⁵⁰, the court stated:

Under section 393.1000(3), when a utility company seeks to recover costs of an infrastructure system replacement project by a surcharge, those costs cannot also be recovered as part of the company's general base rate. After the company has its next general rate case, however, those costs must be incorporated in the utility's base rate and can no longer provide the basis for a surcharge. § 393.1006.6(1). The surcharge then must be reset to zero.

That is what has occurred here. After the surcharge that is the subject of this proceeding was approved, and while that approval was on appeal, MAWC filed for and was granted a general base rate increase that included the infrastructure costs that had been the subject of the surcharge at issue here. At that point, the amounts that were previously part of the disputed surcharges were included in the new base rate.

This appeal involves only Public Counsel's challenge to the surcharge. Because the costs that formed the basis of the disputed surcharge have been incorporated into MAWC's base rate, the base rate supersedes the surcharge. The surcharge has been reset to zero, and superseded tariffs cannot be corrected retroactively.⁵¹ (emphasis added)

Applying the reasoning of the Court to the cases now before the Commission, the Spire ISRS tariffs that the Commission previously approved were no longer effective when those ISRS costs were incorporated into base rates and reset to zero during Spire's most recent general rate case pursuant to Section 393.1015.6(1). The tariffs approved as part of that general rate case are now effective and supersede the ISRS surcharge from those previous ISRS cases. Even where the Commission now determines that some of those prior costs were improperly classified as ISRS-eligible, after a general rate case the Commission cannot correct those previous tariffs retroactively by applying a refund prospectively in future ISRS cases.⁵²

⁵⁰ The statutes governing ISRS for water utilities, Sections 393.1000-393.1006, are substantially similar to the ISRS statutes for gas utilities for purposes of the issue being discussed here.

⁵¹ *Matter of Missouri-Am. Water Co.*, 516 S.W.3d 823, 828 (Mo. 2017), *transfer denied* (May 30, 2017), *reh'g denied* (May 30, 2017).

⁵² This determination should not be considered as a restriction to the normal reconciliation process required in Section 393.1015, subsections 5 and 6.

Section 386.520, RSMo, does not provide an independent legal basis for ordering a refund of any ISRS surcharges in these cases. Subsection 2(2) of that statute says that in the event a court determines that a Commission order was improperly decided on an issue affecting rates, then the Commission "shall be instructed on remand to approve temporary rate adjustments" to return to customers any excess amounts that had been collected by the utility, plus interest. However, the opinion of the Court of Appeals did not include such a specific instruction, even though OPC had requested such an instruction three times in its briefs before the Court. Since the Court of Appeals did not include that instruction in its opinion, it did not invoke the statutory provisions of Section 386.520 to grant the Commission the authority to order such a refund.

The Commission concludes that it does not have the statutory authority to order a refund of any ineligible costs for plastic pipe replacements from Spire Missouri's previous ISRS cases.

IV. Decision

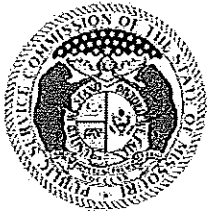
In making this decision, the Commission has considered the positions and arguments of all of the parties. After applying the facts to the law to reach its conclusions, the Commission concludes that the substantial and competent evidence in the record supports the conclusion that Spire Missouri has not met, by a preponderance of the evidence, its burden of proof to demonstrate that the portion of work orders described in the Petitions and supporting documentation relating to the replacement of plastic pipe components comply with the requirements of Sections 393.1009 to 393.1015, RSMo. Although those plastic pipe replacement costs are ineligible for ISRS cost recovery, the Commission also concludes it does not have the statutory authority to order a refund of those costs.

Since the Commission is issuing orders in related Spire Missouri ISRS cases concurrently with these cases, the Commission will, consistent with those other orders, make this order effective on October 1, 2018.

THE COMMISSION ORDERS THAT:

1. In compliance with the opinion of the Missouri Western District Court Appeals, the Commission has determined that Spire Missouri, Inc.'s Petitions in these cases included ineligible costs related to the replacement of plastic pipe components, and that the Commission lacks statutory authority to refund those ineligible costs. As a result of its conclusions in these cases, the Commission will take no further action.

2. This order shall become effective on October 1, 2018.



BY THE COMMISSION

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Silvey, Chm., Kenney, Hall, and
Coleman, CC., concur.
Rupp, C., dissents.

Bushmann, Senior Regulatory Law Judge

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of)
Laclede Gas Company to Change its)
Infrastructure System Replacement) File No. GO-2016-0332
Surcharge in its Missouri Gas Energy)
Service Territory)

In the Matter of the Application of)
Laclede Gas Company to Change its)
Infrastructure System Replacement) File No. GO-2016-0333
Surcharge in its Laclede Gas Service)
Territory)

APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel ("OPC") and for its *Application for Rehearing* of the Public Service Commission's ("Commission") September 20, 2018 *Report and Order on Remand* ("Order") in the above styled cases, states as follows:

Pursuant to RSMo. section 386.500,¹ the OPC seeks rehearing of the Commission's Order because the Order is unlawful, unjust, and/or unreasonable. Specifically, the Order is unlawful, unjust, and/or unreasonable in that it misapplies the law in determining the amount of revenue that Spire Missouri Inc. ("Spire") improperly collected through its subsidiaries Laclede Gas Company (n/k/a Spire East) and Missouri Gas Energy (n/k/a Spire West) and misapplies the law by determining that the Commission is incapable of refunding the revenue Spire improperly collected from its customers.

¹ All references are to the Revised Statutes of Missouri (2016) unless otherwise noted.

I. The Commission erred in determining the amount of revenue that Spire improperly collected through its subsidiaries Laclede Gas Company (n/k/a Spire East) and Missouri Gas Energy (n/k/a Spire West).

In determining the amount of revenue that Spire improperly collected, the Commission's Order considers exclusively the amounts collected to cover the replacement of ineligible plastic pipes. Based on its analysis, the Commission's Order determines that "Spire Missouri collected ineligible replacement costs through its ISRS in the amounts of \$827,159 for Spire Missouri West and \$2,283,628 for Spire Missouri East."² While the OPC acknowledges that these figures represent a proper determination of the "ineligible costs related to *plastic pipe replacements*,"³ the OPC maintains that this quantity does not represent the full amount of revenue that Spire improperly collected.

Section 393.1005.2 provides the procedural mechanism for Commission approval of a utility's application for an ISRS. In particular, subsection (4) states:

If the commission finds that a petition complies with the requirements of sections 393.1009 to 393.1015, the commission *shall* enter an order authorizing the corporation to impose an ISRS that is sufficient to recover appropriate pretax revenue, as determined by the commission pursuant to the provisions of sections 393.1009 to 393.1015.

(emphasis added).

This subsection does not, however, state what the Commission should do if the utility's petition does *not* comply with the requirements of sections 393.1009 to 393.1015. Nor can this information be found anywhere else in sections 393.1009 to 393.1015. The only logical conclusion, therefore, is that if the utility's petition *does not* comply with the requirements of sections 393.1009 to 393.1015, the commission shall *not* enter an order authorizing the

² EFIS, GO-2016-0332 & GO-2016-0333, Report and Order on Remand, pg. 13.

³ *Id.* (emphasis added).

utility to impose an ISRS. The statute also states that “[n]o other revenue requirement or ratemaking issues may be examined in consideration of the petition or associated proposed rate schedules filed pursuant to the provisions of sections 393.1009 to 393.1015.” When read together, these two statutory provisions make clear that if a utility’s ISRS application fails to follow the statutory requirements of sections 393.1009 to 393.1015, it cannot be saved by Commission modifications and must instead be dismissed.

In this case, the Western District has already determined that Spire’s application did not comply with the requirements of sections 393.1009 to 393.1015 due to the fact that Spire inappropriately included ineligible plastic components that were not worn out or in a deteriorated condition. Consequently, the Commission should not have issued an order approving Spire’s request for an ISRS and *all* of the revenue collected by Spire under its invalid ISRS should be considered improperly collected.

II. The Commission erred by determining that it is incapable of refunding the revenues Spire improperly collected.

In its Order, the Commission concludes “that it does not have the statutory authority to order a refund of any ineligible costs for plastic pipe replacements from Spire Missouri’s previous ISRS cases.”⁴ This conclusion is unlawful, unjust, and/or unreasonable because section 386.520.2 provides the Commission with the statutory authority to order temporary rate adjustments so as to effectuate the refund of over-collections following the remand of a Commission’s previous order.

Section 386.520.2(1) states:

In the event a final and unappealable judicial decision determines that a commission order or decision unlawfully or unreasonably decided an issue or issues in a manner affecting rates, then the court shall instruct the commission to provide temporary rate adjustments and, if new rates and charges have not

⁴ EFIS, GO-2016-0332 & GO-2016-0333, Report and Order on Remand, pg. 16.

been approved by the commission before the judicial decision becomes final and unappealable, prospective rate adjustments. Such adjustments shall be calculated based on the record evidence in the proceeding under review and the information contained in the reconciliation and billing determinants provided by the commission under subsection 4 of section 386.420 and in accordance with the procedures set forth in subdivisions (2) to (5) of this subsection;

Section 386.520.2(2) states:

If the effect of the unlawful or unreasonable commission decision issued on or after July 1, 2011, was to increase the public utility's rates and charges in excess of what the public utility would have received had the commission not erred or to decrease the public utility's rates and charges in a lesser amount than would have occurred had the commission not erred, then the commission shall be instructed on remand to approve temporary rate adjustments designed to flow through to the public utility's then-existing customers the excess amounts that were collected by the utility plus interest at the higher of the prime bank lending rate minus two percentage points or zero. Such amounts shall be calculated for the period commencing with the date the rate increase or decrease took effect until the earlier of the date when new rates and charges consistent with the court's opinion became effective or when new rates or charges otherwise approved by the commission as a result of a general rate case filing or complaint became effective. Such amounts shall then be reflected as a rate adjustment over a like period of time. The commission shall issue its order on remand within sixty days unless the commission determines that additional time is necessary to properly calculate the temporary or any prospective rate adjustment, in which case the commission shall issue its order within one hundred * twenty days;

In these cases, the Western District reversed the Commission's prior decision "as it related to the inclusion of the replacement cost of the plastic components in the ISRS rate schedules" and remanded the case "for further proceedings consistent with this opinion."⁵ This decision falls squarely within the criteria of section 386.520.2(1), which applies when "a final and unappealable judicial decision determines that a commission order or decision unlawfully or unreasonably decided an issue or issues in a manner affecting rates[.]"⁶ Section

⁵ *Public Serv. Comm'n v. Office of Public Counsel (In re Laclede Gas Co.)*, 539 S.W.3d 835, 841 (Mo. App. W.D. 2017).

⁶ The decision of the Western District became final and unappealable following the Missouri Supreme Court's denial of transfer issued on March 6, 2018. *Laclede Gas Co. v. Office of Pub. Counsel*, No. SC96868, 2018 Mo. LEXIS 85, at *1 (Mar. 6, 2018). Further, the Western

386.520.2(2) also clearly applies because Spire was collecting money in excess of what was actually authorized under the ISRS statutes, so its rates and charges were “in excess of what the public utility would have received had the [C]ommission not erred.” Therefore, section 386.520.2 not only grants the Commission the authority to issue a refund to Spire’s customers in the form of temporary rate adjustments, it also mandates the Commission do so.

Despite the undisputable application of section 386.520, the Order nevertheless finds that because “the opinion of the Court of Appeals did not include [explicit instruction to approve temporary rate adjustments], even though OPC had requested such an instruction three times in its briefs before the Court,” the Court of Appeal’s opinion does not grant the Commission authority to issues refunds.⁷ This conclusion is plainly erroneous, as the statutorily mandated instruction required by section 386.520 is obviously implicit in the Appellate Court’s remand of the case. Specifically, the Appellate Court’s generally stated remand of the case was for “further proceedings *consistent with this opinion*.”⁸ This language clearly implies that the Commission was to comply with the statutory requirements of section 386.520, which were triggered by the issuance of the opinion.

For the Commission to conclude that the Western District did not implicitly provide the required instruction necessarily requires it to: (1) assume the court of appeals ordered a pointless remand of the case, (2) assume that the Court of appeals willfully and purposefully violated the law, and (3) ignore its own prior precedent which has already been found acceptable by the appellate courts. With regard to this first point, it should be immediately apparent that the Court of Appeals remanded the Commission’s original order with the

District’s decision clearly affects rates as it explicitly ordered the reversal of the approved rate schedules as they applied to the inclusion of plastic components.

⁷ EFIS, GO-2016-0332 & GO-2016-0333, Report and Order on Remand, pg. 16.

⁸ *In re Laclede Gas Co.*, 539 S.W.3d at 841.

expectation that doing so might actually effect the outcome of the case. After all, if the Court did *not* intend for its decision to have any possible practical effect on the present case, then it would simply have reversed the Commission's decision without ordering a remand for further proceedings. Yet the logic of the Order compels the opposite conclusion and assumes that the Western District remanded the case without any effective purpose thereby implying the Court was actively wasting judicial resources. The OPC obviously rejects such a determination and recommends the Commission should as well.

In a similar vein, the Commission should not assume that the Court decided to willfully and purposefully violate the law in issuing its opinion, which is the only possible conclusion based on the current Order. As the Commission itself points out, section 386.520 states that "the court *shall* instruct the commission to provide temporary rate adjustments" with the purpose of refunding to ratepayers the amount a utility over-collected, plus interest.⁹ The Supreme Court has previously stated, "[s]hall' means 'shall[,]'" and the term "unambiguously indicates a command or mandate."¹⁰ "To suggest any other meaning is to ignore the plain language of the statute."¹¹ Based on this, the only legal conclusion that may be drawn is that section 386.520 "commanded" or "mandated" the Court to issue the necessary instructions. This, in turn, gives rise to only two possible interpretations of the Appellate Court's opinion: (a) the court adhered to its statutory mandate by implicitly instructing the Commission as required by section 386.520 through its broad "consistent with this opinion language" or (b) the court ignored its statutory mandate thus violating the requirements of section 386.520.

⁹ See EFIS, GO-2016-0332 & GO-2016-0333, Report and Order on Remand, pg. 16 (emphasis added).

¹⁰ *Frye v. Levy*, 440 S.W.3d 405, 408 (Mo. Banc 2014).

¹¹ *Id.*

Given these two options, the OPC obviously adopts the first interpretation as it chooses to operate under the assumption that the Western District followed the law in reaching its conclusion. The Commission's Order meanwhile assumes that the Court did not instruct the Commission to issue refunds and, therefore, necessarily adopts the second reading, *i.e.* that the Court of Appeal's violated the law. Moreover, the Commission correctly points out that the OPC brought the existence of section 386.520 to the Court's attention multiple times, therefore ensuring that the Court's failure to include explicit instructions was not the product of an accident or mistake.¹² Thus, the Commission is clearly assuming not only that the Court of Appeals violated the law, but that it did so intentionally. The OPC again adamantly argues this Commission should not assume, as its current Order does, that the Western District Court of Appeals purposefully chose not to follow a clear statutory mandate in issuing its Opinion. Instead, the OPC urges the Commission to adopt the OPC's position and conclude that the court did follow the law by implicitly instructing refunds through its broad "consistent with this opinion" language.

The OPC also notes that adopting its position would bring the Order into alignment with the Commission's prior precedent, which the current Order ignores. Specifically, the OPC points to *AG Processing, Inc.* case, which arose from a complaint filed by an industrial steam customer against Kansas City Power and Light ("KCP&L").¹³ The customer alleged imprudent management of the utility's fuel hedging program and the Commission initially agreed and ordered a refund of the net cost of operating the hedging program.¹⁴ On appeal, however, the Western District found the Commission had "erred by shifting the burden of

¹² EFIS, GO-2016-0332 & GO-2016-0333, Report and Order on Remand, pg. 16.

¹³ *AG Processing, Inc. v. KCP&L Greater Mo. Operations Co.*, 432 S.W.3d 226, 227 (Mo. App. W.D. 2014).

¹⁴ *Id.*

proof to KCP&L and by ordering KCP&L to pay customer refunds because it failed to meet that burden.”¹⁵ The court accordingly “reversed the Commission's September 28, 2011 report and order and remanded the cause ‘for further consideration under the appropriate burden of proof.’”¹⁶

Despite the opinion using this broad remand language, on remand the Commission nevertheless “found that it needed to make a temporary rate adjustment under Section 386.520.2(3).”¹⁷ Specifically recognizing the applicability of the statute:

[t]he Commission relied upon Section 386.520.2(3)'s provision that, if an unlawful or unreasonable decision of the Commission results in a decrease in the public utility's rates and charges in a greater amount than what would have occurred had the Commission not erred, the Commission shall be instructed on remand to approve temporary rate adjustments designed to allow the utility to recover from its customers the amounts it should have collected plus interest.¹⁸

This case thus demonstrates not only that the Commission has previously issued temporary rate adjustments under section 386.520 based on a remand that exclusively used broad “consistent with this opinion” language, but that the Court of Appeals has found such actions by the Commission reasonable.

Unfortunately, the current Order ignores this prior precedent of both the Commission and the Court of Appeals without any explanation. The OPC steadfastly asserts that the Commission should not flippantly abandon its own precedent, but rather, should reach the

¹⁵ *Id.* at 228.

¹⁶ *Id.* The quoted language is actually the last line of the analysis section. The conclusion reads as follows: “The Commission's Report and Order is reversed, and the cause is remanded for further consideration consistent with this opinion.” *Ag Processing Inc. v. KCP&L Greater Mo. Operations Co.*, 385 S.W.3d 511, 516 (Mo. App. W.D. 2012). This language is almost identical to that used by the same court in the present case.

¹⁷ *AG Processing, Inc.*, 432 S.W.3d at 228.

¹⁸ *Id.* at 228-29.

same conclusion that it previously reached in *AG Processing*, which has already been tacitly accepted by the Court of Appeals.

Based on the forgoing reasons, the Commission should abandon the position taken in its current Order that suggests it is incapable of refunding the revenue Spire improperly collected because it was not explicitly instructed to do so, which is clearly unlawful, unjust, and/or unreasonable.

The Order also makes reference to the Supreme Court's *Missouri-American Water Company* case, which it relies upon to determine that the Commission cannot retroactively correct previously issued tariffs that have been superseded by the subsequent tariffs issued during Spire's most recent general rate case when its ISRS costs were incorporated into base rates.¹⁹ Based on the context of the segment of the Order in which this discussion is found, it is unclear the extent to which the Commission is relying on this proposition to find that it lacks the statutory authority to issue refunds under section 386.520. Nevertheless, the OPC will address this proposition out of an abundance of caution.

Neither the Commission's inability to retroactively correct previously issued and then superseded tariffs, the fact that Spire's ISRS costs were incorporated into base rates during Spire's subsequent general rate case, nor any other reasoning applied in the Supreme Court's *Missouri-American Water Company* case precludes the Commission from establishing temporary rates under section 386.520 to effectuate a refund of the money the Commission has already found Spire improperly collected.

To begin with, the OPC is *not* requesting the modification of Spire's prior ISRS tariffs. This is because modification of these tariffs is obviously unnecessary given the Court of

¹⁹ EFIS, GO-2016-0332 & GO-2016-0333, Report and Order on Remand, pg. 14-15; see *Mo. Pub. Serv. Comm'n v. Office of the Pub. Counsel (In re Mo.-Am. Water Co.)*, 516 S.W.3d 823 (Mo. banc 2017).

Appeals struck down the Commission's order approving such tariffs "as it relates to the inclusion of the replacement costs of the plastic components *in the ISRS rate schedules*["²⁰ Because the Court's opinion rendered the Commission's order approving Spire's ISRS tariffs invalid, the only thing that the OPC is requesting (and hence the only question before the Commission) is the refund of the money Spire improperly collected based on those invalid tariffs. Moreover, the Western District found Spire's tariffs invalid *before* the Commission approved new rates for Spire in GR-2017-0215 and GR-2017-0216. For the commission to find that it cannot provide refunds for money collected under invalid tariffs because it cannot modify the invalid tariffs is clearly unlawful, unjust, and/or unreasonable.

Equally unlawful, unjust, and/or unreasonable is the Order's reliance on the fact that the Spire ISRS was reset to zero during its next general rate case when ISRS costs were incorporated into rate base. This reset mechanism would only effect the collection of revenue moving forward in time. It would not (and, in fact, could not) have retroactively validated the revenue that Spire collected prior to its general rate case under the terms of its invalid ISRS tariff.²¹ Because it is only the revenue Spire collected under the terms of the invalid ISRS tariff *prior* to its last general rate case that the OPC seeks refunded, the resetting of Spire's

²⁰ *PSC v. Office of Public Counsel (In re Laclede Gas Co.)*, 539 S.W.3d 835, 841 (Mo. App. W.D. 2017) (emphasis added).

²¹ In particular, Spire collected revenue equal to the original cost of the newly added plant (less accumulated depreciation and deferred income taxes) multiplied by Spire's average weighted cost of capital plus money related to depreciation expenses, income taxes, and property taxes. See RSMo. § 393.1009(1)-(7). Had Spire not received an ISRS, this revenue would not have been recoverable. Instead, Spire would have had to wait until it filed its next rate case to collect any revenue on the newly installed plant and, even then, would only be able to collect depreciation expenses, taxes, and return on the plant that accumulated moving *forward* in time. Moreover, the amount Spire could collect going forward could only be determined *after* it accounted for any depreciation that occurred prior to the rate case. This means that, absent an ISRS, Spire would *never* have been able to collect the revenue that it collected prior to its next general rate case and hence the fact that Spire's ISRS reset to zero during the next general rate case had absolutely no effect on the amount of revenue Spire collected under its invalid ISRS.

ISRS during the last general rate case is immaterial and in no way inhibits the Commission's ability to issue a refund.

Finally, there is nothing else in the reasoning applied in the Supreme Court's *Missouri-American Water Company* case that would otherwise preclude the Commission from issuing a refund in these cases. The Supreme Court's *Missouri-American Water Company* case primarily concerned the issue of mootness which occurs when "the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy."²²

In the *Missouri-American Water Company* case, the question presented for decision was whether the ISRS tariff approved by the Commission was valid and the judgment sought by the OPC was a determination that it was invalid.²³ The Supreme Court decided the case was moot because the ISRS tariff had already been superseded by the general rate case tariffs meaning that, even if the Court agreed with OPC, changing the old ISRS tariff would have no effect.²⁴ However, as previously pointed out, the current case is materially different from the *Missouri-American Water Company* case because the Western District has already determined the invalidity of Spire's ISRS tariffs, which means that the only remaining issue before the Commission is how to effect the refund of the money Spire collected as a result of these invalid tariffs. As such, nothing in the Supreme Court's *Missouri-American Water Company* case should be read to preclude the Commission from issuing the OPC's requested refunds.

²² *State ex rel. Praxair, Inc. v. PSC*, 328 S.W.3d 329, 334 (Mo. App. W.D. 2010) (quoting *Mo. Pub. Serv. Comm'n v. Mo. Interstate Gas, LLC*, 266 S.W.3d 881, 885 (Mo. App. W.D. 2008)); see *In re Mo.-Am. Water Co.*, 516 S.W.3d 823.

²³ *In re Mo.-Am. Water Co.*, 516 S.W.3d at 826.

²⁴ *Id.* at 828.

As one final thought, the OPC notes that any suggestion by the Order that Spire's intervening general rate case impedes the Commission's ability to issue a refund inherently contradicts the plain language of section 386.520. The statute specifically states that any excess collections made by a utility as the result of an erroneous ruling by the Commission will be "calculated for the period commencing with the date the rate increase or decrease took effect until the earlier of the date when new rates and charges consistent with the court's opinion became effective *or when new rates or charges otherwise approved by the [C]ommission as a result of a general rate case filing or complaint became effective.*" This language means that the statute explicitly anticipates a situation where, as is the case here, a period of over-collection by a utility ended because of an intervening rate case, yet the statute still requires a refund of any money improperly collected prior to that general rate case. Consequently, should the Order be read to suggest the Spire's intervening case prevents the Commission from issuing a refund it would render this portion of section 386.520 meaningless, thus violating one of the primary canons of statutory interpretation.²⁵

For all the reasons herein stated, the Order's conclusion that the Commission is incapable of refunding the revenues it acknowledges Spire improperly collected is unlawful, unjust, and/or unreasonable.

"WHEREFORE, the Office of the Public Counsel respectfully requests a rehearing of the Commission's September 20, 2018 *Report and Order on Remand* pursuant to the authority of RSMo section 386.500.

²⁵ See *Dev. Corp. v. Urgent Care Assocs.*, 429 S.W.3d 487, 496 (Mo. App. W.D. 2014) (courts "must presume that the legislature does not enact meaningless provisions or intend absurd results.").

