

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

In the Matter of the Application of Spire)
Missouri Inc. to Establish an Infrastructure)
System Replacement Surcharge in its Spire) **File No. GO-2018-0309**
Missouri East Service Territory)

In the Matter of the Application of Spire)
Missouri Inc. to Establish an Infrastructure)
System Replacement Surcharge in its Spire) **File No. GO-2018-0310**
Missouri West Service Territory)

SPIRE MISSOURI INC.’S RESPONSE TO OPC’S POSITION STATEMENT

COMES NOW Spire Missouri Inc., on behalf of itself and its two operating units, Spire East and Spire West (“Spire” or “Company”), and submits this Response to the Position Statement filed in the referenced cases (the “2018 Cases”) by the Office of Public Counsel (“OPC”). In support thereof, Spire states as follows:

1. On page 2 of its April 15, 2020 Order in the 2018 Cases, the Commission directed the parties to file a proposal or position for how to determine the cost incurred to replace cast iron and bare steel mains and service lines not shown to be worn out or deteriorated. OPC, Staff and Spire all filed position statements on April 22.

2. OPC’s position statement argued that (i) the Commission must follow the specific mandate of the Court, and (ii) the Commission must read the mandate in a way that denies Spire any opportunity to show the extent to which cast iron and bare steel are worn out or deteriorated. OPC is wrong on both counts.

Courts Do Not Tell the Commission How to Make Orders

3. The procedure provided for judicial review in §386.510 RSMo. is exclusive and

jurisdictional.¹ Section 386.510 states:

“Upon the submission of the case to the court of appeals, the court of appeals shall render its opinion either affirming or setting aside, in whole or in part, the order or decision of the commission under review. In case the order or decision is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order or render a new decision based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action.”

Thus, with respect to Commission orders, the court of appeals may only (i) affirm or set them aside (i.e. reverse), in whole or part; (ii) remand with instructions to receive evidence, if reversed because the Commission failed to receive properly proffered evidence; and (iii) remand any cause reversed for further action.² Section 386.520 also allows the Court to order rate adjustments, but nothing in that section permits the Court to tell the Commission how to determine those rate adjustments. In fact, the Western District Court was clear that §386.520.2(1) “does not prohibit the PSC from conducting further evidentiary proceedings to determine the rate adjustments that may be required to provide customers with monetary relief.”³

4. In summary, the courts themselves have found that the specific appeal provisions of the Public Service Commission Law, Section 386, do not afford the courts authority to tell the Commission what orders to make or how to make them. OPC commits plain legal error in arguing that the Western District’s mandate restricts the Commission to just determining the cost to replace cast iron and bare steel, and does not permit the Commission to take evidence on whether and to

¹ *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm’n*, 120 S.W. 3d 732 (Mo banc. 2003)

² *Grain Line Express Clean Belt, LLC v. Pub. Serv. Comm’n*, 2018 WL 1055858, p. 5, fn 5 (Mo. Ct. App. E.D. 2018), stating that “according to Section 386.510, we may only either affirm or set aside, in whole or in part, orders or decisions of the Commission. This court ‘has no authority to direct the Commission what order to make.’” Citing *State ex rel. GTE North, Inc. v. Mo. Pub. Serv. Comm’n.*, 835 S. W. 2d 356, 362 (Mo. App. W.D. 1992)

³ *Re: Spire Missouri Inc.*, 593 S.W.3d 582, 593, 599, fn9 (Mo. Ct. App. W.D. 2019)

what extent cast iron and bare steel are worn out or deteriorated.

OPC Mischaracterizes the Court's Mandate

5. Even if the Court could issue a specific mandate telling the Commission how to make its orders, OPC has mischaracterized the language in that mandate. OPC advised the Commission that there is “no need for almost any additional evidence.” (OPC Statement, p. 4) In other words, OPC favors the taking of additional evidence only so far as it concerns the cost to replace cast iron and bare steel, and not where it concerns whether cast iron or bare steel is worn out or deteriorated. OPC believes the Commission need only calculate the cost to replace cast iron and bare steel, and then order Spire to refund the corresponding revenues.

6. OPC reads the Court's mandate as if it remanded the case "for the sole purpose of removing the cost incurred to replace cast iron and bare steel mains and service lines..." That is not what the mandate or the Court's November 19, 2020 Opinion says. Rather, the case was remanded "for the sole purpose of removing the cost incurred to replace cast iron and bare steel **not shown to be worn out or deteriorated...**"⁴ OPC's position ignores the bolded language as if it didn't exist. This bolded language, as well as a reading of the Opinion in its entirety, shows the Court intentionally did not set the evidentiary standard but instead left the Commission a mandate to determine what evidence it needs to show whether cast iron or bare steel is worn out or deteriorated.

7. It is clear that the Court does not believe that Spire should refund ISRS revenues for cast iron and bare steel facilities that were worn out or deteriorated. It does not say when or how that showing should occur; as discussed above, that determination is left to the Commission.

⁴ *Re: Spire Missouri Inc.*, 593 S.W.3d 546, 555 (Mo. Ct. App. W.D. 2019), emphasis added.

**The Court’s Mandate Should Not be Interpreted
in a Way that Unlawfully Denies Spire Due Process**

8. OPC’s position statement was heavily invested in preventing Spire from having an opportunity to prove whether its cast iron and bare steel is worn out or deteriorated. OPC portrays such an opportunity as giving Spire a “second bite at the apple.” (OPC Position Statement, p. 10) However, as demonstrated in great detail in Spire’s April 22 Position Statement, Spire has yet to receive a first bite at the apple. For years, the parties had appropriately treated cast iron and bare steel replaced pursuant to the Commission’s 1989 safety rules as worn out or deteriorated and ISRS-eligible. Consistent with this longstanding practice, OPC had also informed the Western District Court, in briefs filed as recently as June and September of 2017, that the ISRS itself was enacted in direct response to the cast iron and bare steel safety programs.⁵ When OPC suddenly decided in the 2018 ISRS cases that Spire should be required to prove that its cast iron and bare steel facilities are worn out or in deteriorated condition, OPC did not notify Spire of that claim at the time recommendations were due on August 6, 2018, nor even 10 days later on August 16 when responses to recommendations were due. Nor did OPC notify Spire of its claim in its August 22 direct testimony, or in the August 23 Issues List. Accordingly, Spire had no timely notice that the worn or deteriorated nature of cast iron and bare steel was an issue in the 2018 Cases so that it could submit responsive evidence.

9. Although OPC attempted to prevail on the cast iron and bare steel issue with these last minute maneuvers, it still lost the issue in the 2018 Cases, because the Commission knew that the old cast iron and bare steel in Spire’s service territory were by their very nature deteriorated,

⁵ Page 6 of OPC’s Reply Brief in Case WD80544, filed September 22, 2017, included a heading entitled **“Safe Plastic Does Not Qualify as Unsafe Cast Iron.”**

as the Commission had singled out the safety risks of cast iron and bare steel in its rules nearly 30 years earlier. The Commission also knew, as did OPC, that the cast iron and bare steel programs were the primary drivers of the ISRS Statute, making it superfluous and wasteful to expend resources to re-prove that these materials were worn out or deteriorated.

10. After losing the issue in the 2018 Cases, OPC appealed that issue to the Western District, which denied Spire the right to participate in OPC's appeal. While the Court knew that it had denied Spire the right to defend itself on appeal, it is unclear whether the Court knew that Spire had also been effectively denied the right to participate in front of the Commission.

11. Regardless, if the Court knew the facts, one would have to believe that the Court would support Spire's Constitutional right to due process; that is, to be apprised of the claims and issues in the case, and to have a full and fair opportunity for a hearing to litigate those claims. OPC's position erroneously assumes that the Court would issue an order that would deprive Spire of its basic Constitutional rights. It is not reasonable to assume that a Court would order the Commission to interpret a mandate in a way that would so egregiously violate a party's due process rights.

The Law of the Case and Collateral Estoppel Favor Spire, not OPC

12. OPC cites the doctrine of the "Law of the Case" to argue that the Commission should not permit Spire to provide evidence that its cast iron and bare steel is worn out or deteriorated. (OPC Statement, pp. 8-11) Under the law of the case doctrine, a previous holding in a case generally precludes relitigation of the issue on remand or subsequent appeal.⁶ The

⁶ *Tubbs v. BNSF Railway Co., Inc.*, 562 S.W. 3d 323, 333 (Mo. Ct. App. W.D. 2018)

doctrine governs successive adjudications involving the same issues and facts.⁷ However, the law of the case does not apply where the issues or evidence are substantially different from those vital to the earlier adjudication.⁸ The law of the case also does not apply where there has been a mistake, or where the application would be manifestly unjust to a party.⁹

13. Since the issue of whether cast iron or bare steel was worn out or deteriorated was not an issue timely raised in the 2018 Cases, Spire had no reason to believe it needed to provide evidence on the issue. Therefore, the issues and evidence before the Commission in the 2018 Cases are different than the issue on remand, which is whether cast iron and bare steel is worn out or in deteriorated condition.

14. There is simply a dearth of evidence in the 2018 Cases from which the Commission could determine the extent to which cast iron and bare steel are worn out or deteriorated. This lack of evidence is not the fault of Spire. It is entirely due to the manner in which OPC approached the issue. Denying Spire an opportunity to produce evidence on whether its cast iron and bare steel is worn out or deteriorated would be manifestly unjust since Spire had no reasonable opportunity to produce evidence on the matter.

15. OPC also argues collateral estoppel by virtue of issue preclusion. If issue preclusion applied at all here, it should apply against OPC. Since OPC was the only party in the 2018 Cases who knew that it wished to litigate whether cast iron and bare steel were worn out or deteriorated, OPC was also the only party with the opportunity to produce evidence of the amount of cast iron and bare steel not shown to be worn out or deteriorated. OPC failed to produce this evidence, and now wants to relitigate this issue and get a second bite at the apple. While the

⁷ *State ex rel. Alma Tel. Co.*, 40 S.W. 3d 381, 388 (Mo. App. W.D. 2001)

⁸ *Id.*

⁹ *In re Estate of Corbin*, 166 S.W. 3d 102, 106 (Mo. Ct. App. W.D. 2005)

Commission is unlikely to deny OPC this second chance, due process dictates that Spire should be permitted a first chance to produce evidence on cast iron and bare steel.

More Evidence on Cast Iron and Bare Steel has Already Been Provided Since the 2018 Cases

16. For the reasons discussed above, the justification for taking additional evidence is compelling and the arguments for not doing so baseless. Moreover, much of the evidence necessary to actually address the worn out or deteriorated condition issue has already been provided, considered and transformed into specific findings in the two sets of ISRS cases that followed the 2018 Cases – cases in which the Commission reaffirmed its finding that Spire’s cast iron and bare steel facilities are worn out or in deteriorated condition.¹⁰

17. As detailed in Spire’s April 22, 2020 Position Statement, this evidence and the associated findings include, among other things: (1) a better understanding of the disjunctive nature of the worn out OR in deteriorated condition requirement, where the latter term encompasses a more lenient standard for eligibility;¹¹ (2) additional evidence regarding the pace at which bare steel deteriorates, including an acknowledgement by OPC’s own witness that bare steel begins to corrode (i.e. deteriorate) immediately after installation; (3) additional expert testimony regarding the deteriorated and problematic nature of cast iron and bare steel facilities, including testimony from the former manager of the Commission’s safety staff who had over 35 years of experience on managing the risks posed by facilities;¹² (4) physical evidence regarding the condition of the Company’s cast iron and bare steel facilities, including physical samples as

¹⁰ See the Commission’s May 3, 2019 Report and Order in Case Nos GO-2019-0115 and 0116 and its October 30, 2019 Report in Order in Case Nos. GO-2019-0356 and 0357 (Together, the “2019 Cases”).

¹¹ See Tr. 140, line 8, to Tr. 141, line 14, Case Nos. GO-2019-0356-57. Under its commonly used definition, deteriorated simply means something that has become “inferior in quality or value” compared to its original state. See Merriam Webster On-line dictionary <https://www.merriam-webster.com/dictionary/deteriorate>

¹²See Exhibit 6, Case Nos. GO-2019-0356 and 0357.

well as pictures¹³ of some of the cast iron and bare steel facilities replaced by the Company, together with expert testimony verifying that such samples are consistent with the pipe conditions of other facilities being replaced by the Company on other ISRS projects; (5) additional evidence relating to leak experience on bare steel and cast iron facilities showing that they have a propensity to leak at rates 10 to 60 times greater than plastic pipe;¹⁴ and (6) additional evidence of the nationwide consensus regarding the need to replace cast iron and bare steel facilities because of their problematic condition.

18. In addition to receiving new evidence, the Commission should not hesitate to include the record and its Report and Order from both of the 2019 Cases into the record of the 2018 Cases. All of the parties to the 2018 Cases were also parties to the 2019 Cases, and all had an opportunity to present evidence, cross examine witnesses and submit briefs on the worn out or deteriorated condition issue. Given these considerations, there is no valid reason for the Commission to ignore its subsequent consideration of this issue based on a record that, unlike the record in the 2018 Cases, actually notified the Company of OPC's claim that the Company had not shown that such facilities were in a worn out or deteriorated condition.

19. Given its ability to take administrative notice of its own orders and records¹⁵), such action would be appropriate under virtually all circumstances given the commonality of the parties. But it is especially appropriate given the inter-related nature of ISRS proceedings that take place between a general rate case proceeding. As the Western District Court of Appeals observed in its

¹³ See e.g Ex 5, Schedule CRH-5, Case Nos. GO-2019-0356-0357.

¹⁴ See Ex. 5, page 14, Case Nos. GO-2019-0356 and 0357.

¹⁵ See §536.070(6) RSMo.; *Moore v. Missouri Dental Bd.*, 311 S.W.3d 298, 305 (Mo. Ct. App. 2010).

opinion in *In the Matter of the Application of Laclede Gas Company d/b/a Missouri Gas Energy, for Approval to Change its Infrastructure System Replacement Surcharge*,¹⁶

While the statutes sometimes distinguish between “an ISRS” and “changes” to an ISRS, the phrase “an ISRS” also is used in a manner that refers to the initial ISRS and all changes thereto as a *single entity*. Section 393.1012.1, for example, sets limits on the “total annualized revenues” of “an ISRS.”¹² These limits on the “total annualized revenues” clearly refer to the aggregate amounts of the *initial* ISRS and all subsequent changes thereto. Thus, the term “an ISRS” as used in this portion of 393.1012.1 clearly refers to the *initial* ISRS and all changes thereto as a *single entity*.

This usage indicates that “an ISRS” begins to exist when the first ISRS rate is approved, that there is only ever one ISRS at a time, and that subsequent changes are simply incorporated into that single ISRS. This is consistent with the Commission’s order and is reinforced by the Staff’s reference to Laclede’s “total ISRS revenue requirement” as “a composite amount” of this rate increase, plus the initial ISRS and the three previous changes to it. Moreover, the ISRS statutes never refer to more than one ISRS, and, no matter how many times the ISRS is changed between rate cases, there is only one ISRS rate for each customer class and the ISRS surcharge is recovered via a single rate element on the customer’s bill. *See* 4 CSR 240–3.265.¹³ The “inconsistencies” that Public Counsel identifies are resolved by the fact that there is *only ever one ISRS at a time*, and the references to “an ISRS” that Public Counsel points to refer to the whole of that one ISRS. (*emphasis original, footnotes omitted*).

20. Since the 2018 Cases and the 2019 Cases are all part of the same single ISRS entity, there is absolutely no justification for the Commission to ignore what it has done and concluded in these more recent phases of the single ISRS that has been in effect since the Company’s last general rate case proceeding. To the contrary, it would be inconsistent with informed ratemaking, the due process rights of the Company and a proper interpretation of how the ISRS works, to exclude such evidence and findings when determining what action it should take in these remand proceedings.

WHEREFORE Spire Missouri Inc. respectfully requests that the Commission accept this

¹⁶ 417 S.W.3d 815, 823-24 (Mo.App. W.D. 2014)

Response and direct the parties to provide evidence that will allow the Commission to determine the extent to which cast iron and bare steel is worn out or in a deteriorated condition, and the cost, if any, in the 2018 Cases to replace cast iron and bare steel that was not worn out or deteriorated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 27th day of April, 2020.

/s/ Goldie T. Bockstruck