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 Surcharge in its Missouri Gas Energy Service Territory	)))))	**File No. GO-2016-0332**
In the Matter of the Application of Laclede Gas Company to Change its Infrastructure System Replacement Surcharge in its Laclede Gas Service Territory	)))))	**File No. GO-2016-0333**

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

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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.

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[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

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[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 Compa*ny 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 Compa*ny 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 Compa*ny case that would otherwise preclude the Commission from issuing a refund in these cases. The Supreme Court's *Missouri-American Water Compa*ny 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 Compa*ny 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 Compa*ny 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 Compa*ny case should be read to preclude the Commission from issuing the OPC's requested refunds.

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[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 on 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.").

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this 29th day of September, 2018.

/s/ John Clizer