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 Missouri East Service Territory	))))))	Case No. GO-2018-0309
In the Matter of the Application of Spire Missouri Inc. to Establish an Infrastructure System Replacement Surcharge in its Spire Missouri West Service Territory	))))))	Case No. GO-2018-0310

THE MISSOURI OFFICE OF THE PUBLIC COUNSEL'S STATEMENT OF POSITIONS

COMES NOW the Office of the Public Counsel ("OPC") and for its *Statement of Positions*, states as follows:

Issue 1: What is the amount of refund, if any, due to ratepayers for replacement of cast iron and bare steel mains and service lines not shown to be worn out or deteriorated?

OPC's Position: The refund amount should be $5,367,021 for Spire East and $10,152,221 for Spire West in accordance with the Commission Staff's recommendation. *Staff's Direct Report with Appendices*, pgs. 3 – 4; *Rebuttal Testimony of John A. Robinett*, pg. 3.

Issue 2: By what method should any refund be returned to ratepayers?

OPC's Position: The refund should be returned to ratepayers in accordance with the statutory requirements of RSMo. § 386.520(2)2:

> 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;

The OPC also does not oppose the one-time bill credit proposed by Staff. *Staff's Direct Report with Appendices*, pgs. 3 – 4.

<u>Issue 3:</u> Does due process require the consideration of the additional evidence submitted by the Company to demonstrate the condition of its cast iron and bare steel facilities?

<u>OPC's Position:</u> This is not a proper issue. The Commission has already been asked to rule on this issue twice and has twice determined correctly that the answer is no. Nevertheless, if the OPC is to respond to this issue a third time, then the answer is still no.

"Due process" simply means providing such process as a party is due. In the case of a utility seeking to increase its rates (and who thus bears the burden of proof) due process means simply being permitted to provide evidence on every element of

its claim. Spire received due process because it was given not just one but many different opportunities to present evidence related to the condition of its cast iron and bare steel facilities. Spire had the opportunity to present evidence related to the condition of its cast iron and bare steel facilities as part of its initial application. It did not. Spire had the opportunity to present evidence related to the condition of its cast iron and bare steel facilities as part of direct testimony. It did not. Spire had the opportunity to present evidence related to the condition of its cast iron and bare steel facilities during the live rebuttal testimony portion of the evidentiary hearing held on September 27, 2018. It did not. Spire could have sought to present evidence related to the condition of its cast iron and bare steel facilities in a motion for a late filed exhibit. It did not. Spire could have even simply withdrawn and re-filed its ISRS application in order to provide evidence related to the condition of its cast iron and bare steel facilities. It did not. Why? Because Spire did not believe it needed to.

OPC's exhibit 206 lays out clearly the whole problem with this case. That exhibit shows data requests that the OPC sent to Spire on July 11, 2018. One of the data requests specifically asked Spire to "provide any and all documentation demonstrating the pipe being replaced is in a worn out or deteriorated condition." The Company responded with an objection that stated:

> This request is also overly broad and unduly burdensome because it seeks any and all documentation on all of the pipe being replaced. Notwithstanding this objection, Spire states that, other than relocations, most of the replacements were performed as part of Commission mandated replacement programs. This is precisely the type of work contemplated by the ISRS Statute. **We have long held that the pipes subject to these mandates are by definition worn out or in deteriorated condition.**

This is the reason why Spire did not present evidence related to the condition of its cast iron and bare steel facilities. It was because Spire did not believe presenting such evidence was necessary, not because it did not get the opportunity to do so. This very fact was acknowledged by the Western District on appeal:

> During discovery, the OPC asked Spire for "any and all documentation demonstrating the pipe being replaced is in a worn out or deteriorated condition." Spire responded with an objection which stated, in part, that "most of the replacements were performed as part of Commission mandated replacement programs. This is precisely the type of work contemplated by the ISRS Statute. We have long held that the pipes subject to these mandates are by definition worn out or in [a] deteriorated condition." Spire seems to believe that it does not need to present evidence that the pipes it replaces are worn out or deteriorated because it considers any pipe subject to a state or federal replacement requirement to be by definition worn out or deteriorated. Missouri courts have found otherwise.

Spire Mo. Inc. v. Office of Pub. Counsel, 593 S.W.3d 546, 554 (Mo. App. WD 2019). Spire is now attempting to engage in revisionist history by claiming it was somehow denied the right to present evidence, but nothing could be further from the truth. Spire knew or should have known what the elements necessary to recover costs under an ISRS were. Spire made the conscious decision not to present evidence because they did not believe they were required to, not because they were not permitted to. This was a legal error committed by the Company. Spire has now erected this false "due process" claim in an effort to undo that prior legal error, but there is no legal basis for stating that due process requires giving an applicant a second chance to rectify their own mistakes. A petitioner who was never denied the opportunity to present evidence to meet their burden of proof but who subsequently fails to meet that burden

has not suffered any due process violation when they are denied a second bite at the proverbial apple. *See Am. Eagle Waste Indus. LLC v. St. Louis Cty.*, 379 S.W.3d 813, 825 (Mo. banc 2012) ("This Court declines to consider anew this issue that the parties fully litigated to a final judgment three and a half years ago. County cannot have multiple bites at the apple in attempting to determine this issue favorably."); *Empire Dist. Elec. Co. v. Coverdell*, 588 S.W.3d 225, 240 (Mo. App. S.D. 2019) ("Coverdell cannot have multiple bites at the apple in attempting to determine this issue favorably. Because Coverdell's claim of error amounts to nothing more than an expression of disagreement with appellate determinations that are the law of the case, his point is without merit." (internal citations omitted)); *Bradley v. State*, 554 S.W.3d 440, 452 (Mo. App. W.D. 2018) ("'[T]he decision of a court is the law of the case for all points presented and decided, *as well as for matters that arose prior to the first adjudication and might have been raised but were not*.' Nothing precluded Bradley from presenting evidence in support of his contention regarding Schlegel's representation at the first trial. He is not now entitled to a second bite of the proverbial apple." (quoting *Walton v. City of Berkeley*, 223 S.W.3d 126, 129 (Mo. banc 2007)); *Heineman v. Heineman*, 845 S.W.2d 37, 40 (Mo. App. W.D. 1992) ("To allow husband to now come before this court and raise an issue which should have been raised in the prior appeal would allow him to have a second bite of the apple contrary to the well established 'law of the case' doctrine.").

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission accept this *Statement of Positions* and rule in the OPC's favor on all issues presented herein.

Respectfully submitted,
OFFICE OF THE PUBLIC COUNSEL

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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 twenty-first day of May, 2020.

/s/ John Clizer