

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

In the Matter of the Application of Spire Missouri)
Inc. to Change its Infrastructure System) **Case No. GO-2019-0115**
Replacement Surcharge in its Spire Missouri)
East Service Territory)

In the Matter of the Application of Spire Missouri)
Inc. to Change its Infrastructure System) **Case No. GO-2019-0116**
Replacement Surcharge in its Spire Missouri)
West Service Territory)

**STAFF’S REPLY TO SPIRE MISSOURI’S RESPONSE TO
STAFF’S MOTION TO DISMISS A PORTION OF
SPIRE MISSOURI’S ISRS REQUEST**

COMES NOW the Staff of the Missouri Public Service Commission and for its *Reply to Spire Missouri’s Response in Opposition to Staff’s Motion to Dismiss a Portion of its ISRS Request*, and states as follows:

1. On March 20, 2019, Staff moved in each case to dismiss from Spire’s applications certain transactions that have been previously submitted for ISRS recovery and denied and which are now part of a pending appeal of that denial, noting that, as a general rule, upon filing of a notice of appeal, a trial court loses almost all jurisdiction over a case. ***Reynolds v. Reynolds***, 109 S.W.3d 258, 269–71 (Mo. App., W.D. 2003); ***State ex rel. Stickelber v. Nixon***, 54 S.W.3d 219, 223 (Mo. App., W.D. 2001); ***State ex rel. Steinmeyer v. Coburn***, 671 S.W.2d 366, 371 (Mo. App., W.D. 1984). The remaining jurisdiction of a trial court is sharply constrained, with few exceptions. ***Stickelber, supra***, p. 223. For example, a trial court retains the ability to exercise functions of a purely ministerial or executive nature. *Id.* Statutes or Supreme Court Rules also convey authority to take up particular motions or applications for relief. *Id.* at 371–72. Among these, for example, is the authority to correct a clerical error by an

order *nunc pro tunc*. **Reynold**, *supra*, p. 268. Beyond such exceptions, the trial court is not permitted to exercise functions of a judicial character. **Stickelber**, *supra*, p. 372. These latter functions are those which entail “the exercise of judgment and discretion whereas ministerial functions invoke no such discretion.” *Id.*

2. Spire responded to Staff’s motions on March 22, 2019. In its *Response*, Spire first characterizes Staff’s *Motion* as “inappropriate,” stating, “[s]ince these preliminary factors ... have remained unchanged throughout this entire period, Staff’s last-minute assertion of these legal claims is, at a minimum, extremely prejudicial to the Company.”¹ In fact, an objection to jurisdiction can be raised at any time, even for the first time on appeal. **State Tax Commission v. Administrative Hearing Commission**, 641 S.W.2d 69, 72 (Mo. banc 1982). Additionally, since jurisdiction cannot be conferred by waiver or consent, Staff not raising the objection sooner doesn’t matter. *Id.* If the Commission lacks jurisdiction over the transactions in question – and it does lack jurisdiction over those transactions – then it can do nothing but dismiss.

3. Spire next raises five reasons to deny Staff’s motion, none of which cures the underlying issue of lack of jurisdiction:

a. The Company asserts that Staff “erroneously characterizes the Company’s inclusion of those prior transactions in its ISRS filing[.]”² Spire explains that it is not seeking either reconsideration or renewal of its previous application but is rather *implementing* the Commission’s decision.³ This sort of play on words is pointless. Jurisdiction over ISRS recovery of these transactions now lies with

¹ *Spire’s Response*, p. 2

² *Id.*

³ *Id.*, pp. 3 & 4 at ¶ 6.

the Court of Appeals until the appeal is complete. For that reason, the Commission simply cannot consider them for ISRS recovery on any theory.

b. Equally unavailing is Spire's statement that "Staff's Motion is completely barren of any reference to the ISRS Statute,"⁴ perhaps because that statute is silent with respect to this issue. Staff is not arguing that these are not the sort of transactions that may be eligible for ISRS recovery, but is simply pointing out that these particular transactions are not presently available for Commission consideration since they are now before the Court of Appeals.

c. Spire further asserts that "Staff's Motion also fails to discuss or even acknowledge the long line of court and Commission cases that have dealt with the interplay between judicial review proceedings and this Commission's exercise of its ratemaking powers[.]"⁵ Spire then points to several cases in which the Commission rebased the ISRS in a general rate proceeding despite the pendency of appeals involving some of the included transactions.⁶ Staff agrees that the Commission could, were this a general rate case, rebase Spire's ISRS and thus moot Spire's appeal of its last ISRS case.⁷ But that is not the situation here. The situation here is (a) Spire sought ISRS recognition for certain transactions; (b) the Commission denied the application; (c) Spire appealed that denial; and, while the

⁴ *Id.*, p. 4.

⁵ *Id.*, p. 6.

⁶ *Id.*, ¶¶ 13 & 14, pp. 6 & 7.

⁷ Why is that? Because a general rate case recognizes all of a utility's capital expenditures, whether ISRS eligible or not. The ISRS merely allows early recognition, between general rate cases, and thus incentivizes infrastructure investment. Once the general rate case comes around, the denial of ISRS recognition is necessarily mooted because there is no further remedy available.

appeal is pending, Spire is again seeking ISRS recognition for the same transactions. There is no rebasing involved and no general rate case involved.

d. Spire further states, “Staff’s Motion to prevent any consideration of these investments is also unnecessarily punitive to the Company.”⁸ The Commission either has jurisdiction or it does not. Staff’s motion has not affected the Commission’s jurisdiction one way or the other. Staff’s motion simply raises the issue. The principle of law cited by Staff is a long-standing one. Staff didn’t create it, the appellate courts did. Spire actually states, “Staff’s actions under these circumstances seem to be little more than an effort to discourage the Company’s right to judicial review.”⁹

e. As a finale, Spire argues, “granting the Staff’s Motion would be inconsistent with those analogous principles that have traditionally governed whether to grant a motion to dismiss.”¹⁰ Staff does not dispute any of the legal principles or authorities referenced by Spire in ¶ 20 of its *Response*, but none of them cure the fundamental problem of jurisdiction.

WHEREFORE, having fully replied to the Applicants’ *Response*, Staff urges the Commission to grant its *Motions to Dismiss*, filed herein on March 20, 2019.

⁸ *Spire’s Response*, p. 9.

⁹ *Id.*

¹⁰ *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served, by hand delivery, electronic mail, or First Class United States Mail, postage prepaid, to all parties of record on the Service List maintained for this case by the Data Center of the Missouri Public Service Commission, on this 25th day of March, 2019.

/s/ Kevin A. Thompson