

**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
POSITION STATEMENT AND PROPOSAL FOR PROCEEDING ON REMAND**

COMES NOW Spire Missouri Inc., on behalf of itself and its two operating units, Spire East and Spire West (“Spire” or “Company”), and pursuant to the Commission’s April 15, 2020 order (the “April 15 Order”) in the above captioned cases (the “2018 Cases”), submits this Position Statement and Proposal for Proceeding on Remand. In support thereof, Spire states as follows:

1. On November 19, 2019, the Western District Court of Appeals reversed the Commission’s September 20, 2018 Order in the 2018 Cases to the extent it allowed ISRS recovery for cast iron and bare steel mains and service lines not shown to be worn out or deteriorated.¹ The Court noted the lack of evidence in the record on whether cast iron and bare steel were worn out or deteriorated. The Court did not enunciate what evidence would be sufficient; that decision is left to the expertise of the Commission.²

2. Page 2 of the April 15 Order notes that the Commission has not previously determined the cost incurred to replace cast iron and bare steel mains and service lines not shown

¹ *Re: Spire Missouri Inc.*, 593 S.W.3d 546, 555 (Mo. Ct. App. W.D. 2019)

² *Id.* at 554.

to be worn out or deteriorated. The Commission therefore directed the parties to file a proposal or position for how that information should be determined. The April 15 Order continued:

“That proposal shall state whether there is a need for additional evidence in the 2018 Cases. If a party believes additional evidence is needed, the party shall state why the current record is insufficient and if a live hearing is necessary to receive the additional evidence.” (April 15 Order, p. 2)

3. Spire’s position is that the Commission cannot determine from the record in the 2018 Cases (the “2018 Record”) the extent to which cast iron and bare steel is not worn out or deteriorated, nor can it determine the cost to replace any such non-worn out or deteriorated pipes. As a result, there is a need for additional evidence showing whether, and to what extent, cast iron and bare steel facilities are worn out or deteriorated, and to the extent such facilities are not worn out or deteriorated, what costs were incurred to replace them. Spire will address below why the 2018 Record is insufficient and why a live hearing is necessary, in part, to receive additional evidence.

4. The 2018 Record is insufficient because Spire had no reason to provide evidence in the 2018 Cases regarding the condition of cast iron and bare steel. Spire had no reason to provide such evidence because the condition of cast iron and bare steel was not an issue at the time testimony was provided in the 2018 Cases, nor during the 20 Spire West ISRS cases and 22 Spire East ISRS cases that preceded the 2018 Cases. Spire was not aware that the OPC had an issue with the sufficiency of evidence pertaining to the condition of its cast iron and bare steel replacements in the 2018 Cases until OPC filed its position statement, a mere three days before the evidentiary hearing.

Spire’s cast iron and bare steel replacement programs and the ISRS – Pre-2018

5. The following summarizes Spire’s cast iron and bare steel replacement programs

vis-à-vis ISRS cases prior to 2018.

- A. Following gas explosions in the late 1980s, the PSC passed rules (now 20 CSR 4240-40.030(15)) requiring replacement or remediation of cast iron and bare steel mains.
- B. In 2003, the Missouri legislature enacted the ISRS Statute to acknowledge the costly nature of safety replacement work, and to encourage such work by providing more timely recovery of such costs. At the time the ISRS Statute was passed, Spire was already replacing cast iron and bare steel pursuant to the Commission's safety replacement rules.
- C. From 2004-2016, no party to Spire's ISRS cases questioned the worn out or deteriorated nature of the cast iron and bare steel associated with the Company's replacement programs.
- D. In 2016, OPC questioned the ISRS-eligibility of replacing *plastic* as part of the strategic cast iron and bare steel safety replacement program. OPC did not challenge the replacement of the cast iron or bare steel itself. OPC noted Spire's strategic decision to replace sections of pipe that were not worn out or deteriorated (e.g. plastic) at the same time it replaced pipe that was worn out or deteriorated (e.g. cast iron). OPC criticized Spire for not removing the costs incurred to replace the plastic that was not worn out or deteriorated. OPC argued that the "ISRS statutes do not allow replacement costs due to a company's strategic decision to replace eligible and ineligible pipe at the same time."³

³ Case Nos. GO-2016-0332 and 0333, *OPC Position Statement*, pp. 10-11, filed December 28, 2016

E. In 2017, in the appeal of the Commission’s decision in Spire’s favor on the plastics issue, OPC (through its Counsel, Marc Poston) acknowledged in both its initial and reply briefs to the Court that the ISRS was enacted in response to the high cost of the cast iron and bare steel safety replacement programs, and that the safety replacement programs are effectively a “safe harbor” of ISRS work. *This is a direct acknowledgment of the ISRS-eligibility of cast iron and bare steel replacements, and the longstanding understanding that these materials are considered to be worn out or deteriorated.*

Spire’s cast iron and bare steel replacement programs and the ISRS – 2018

6. The following summarizes the events that took place in 2018.
 - A. On March 7, 2018, the Court remanded the 2016 Cases to the Commission to determine the issue of the cost to replace plastic. At OPC’s insistence, the parties agreed to argue the matter based on the original record, and the Commission so ordered. Briefs were filed in June and July 2018, and the Commission heard an oral argument on August 9, 2018. Meanwhile, Spire filed its applications in the 2018 Cases in June 2018.
 - B. On August 6, 2018, Staff filed its recommendation in the 2018 Cases proposing that certain safety replacement costs be allocated to plastic. On August 16, Spire opposed Staff’s recommendation and requested a hearing. OPC filed no recommendation on August 6, nor a response by August 16.
 - C. At its August 15, 2018 Agenda meeting on the 2016 remand cases, the Commission issued an order determining that it needed more evidence on the cost to replace

plastic that was not worn out or deteriorated. On August 17, the Commission issued an order requiring written testimony to be filed three business days later, on August 22, not only in the 2016 and 2017 Cases, but also in the new 2018 case. The three cases were combined because they had a common issue – the cost to replace ISRS-ineligible plastic. The cost to replace cast iron and bare steel was not an issue in the 2016 or 2017 Cases, nor was it an issue in the 2018 Cases. The August 17 Order scheduled a hearing in all three pairs of ISRS cases for August 27.

- D. The August 22 testimony from all parties in the 2018 Cases focused on the plastics issue. In fact, Spire witness Glenn Buck testified that no party in the case disputed that cast iron and steel were worn out or deteriorated, which stands as evidence of the fact that Spire was unaware of OPC’s position on cast iron and bare steel.⁴ An issues list was filed on August 23. The portion of the issues list applicable to 2018 was generic, i.e. whether Spire’s filing was compliant with the ISRS Statute, and what costs should Spire be permitted to collect in its 2018 ISRS filing. It was not until OPC filed its position statement on August 24, 2018, just three days before the evidentiary hearing, that OPC indicated its belief that Spire had not provided sufficient evidence to support its cast iron and bare steel as worn out or deteriorated. By then it was far too late for Spire to develop evidence on an issue that conflicted with 14 years of clear understanding that the safety replacement programs under Rule 40.030(15) were unquestionably inherent parts of the ISRS.
- E. OPC saw no need to provide any testimony on August 22 on whether cast iron and bare steel were worn out or deteriorated. Rather, OPC’s view was that since Spire

⁴ Direct Testimony of Glenn W. Buck, dated August 22, 2018. See also *Re: Spire Missouri Inc.*, 593 S.W.3d 546, 552 (Mo. Ct. App. W.D. 2019)

bore the burden of proof, OPC could simply make the legal argument that Spire had failed to carry its burden to show that cast iron and bare steel was worn out or deteriorated. Accordingly, OPC's September 6, 2018 brief addressed the issue, noting that Spire carried the burden of production and had failed to show that cast iron and bare steel was worn out or deteriorated. (OPC Brief, pp. 26-27). OPC scoffed at Spire's position that cast iron and bare steel is by definition worn out and deteriorated (due to their age and the requirement that they be repaired or replaced). OPC stated that "[c]ontrary to Spire's inexplicable interpretation of the statute and case law, the company actually does have to prove that the pipes that it is replacing are (worn out or deteriorated)...to be eligible for ISRS recovery. Unfortunately for Spire...it has refused to perform testing on any of the pipe it abandoned." (*Id.*, p. 27). Consistent with typical ISRS schedules, there was no reply brief.

F. Spire's "inexplicable interpretation" of the statute and case law was the same interpretation held by the Commission and the Staff, and by OPC itself from 2004 until late August 2018. As fundamentally unfair as that ambush was, and with as little evidence as there was in the record, Spire believed that the Commission would recognize the legal reality that costs incurred to replace cast iron and bare steel were ISRS-eligible, and would honor the agreement that had been in place between Spire, the Staff, OPC and the Commission for more than a decade. In fact, as stated above, OPC had even told the Western District Court in 2017 that the ISRS was precisely designed to recover the cost to replace cast iron and bare steel, stating:

"As the 'replacement' surcharge title indicates, the ISRS was enacted mainly in response to significant cost increases incurred by gas utilities complying with the PSC's 1994 (sic) replacement program rules. 4 CSR 240-40.030(15). These rules mandated the systematic inspection,

replacement and/or repair of all steel service lines...all cast iron...and all unprotected steel...(fn: Mo. reg., Vol. 14, No. 23, p. 1582 (December 1, 1989))."⁵

G. The PSC appropriately denied OPC's argument in its September 20, 2018 order in the 2018 Cases, and found that Spire could recover the cost to replace cast iron and bare steel. OPC appealed the decision, and Spire intervened to participate in that appeal, as was its right. However, the Court inexplicably denied Spire the right to intervene,⁶ and then further shocked the Company and the Commission by finding in favor of OPC. The Court declined to defer to the Commission's expertise on the worn out or deteriorated nature of cast iron and bare steel that had been singled out for replacement 30 years before.

7. The bottom line in this whole affair is that, after 14 years of assumed ISRS-eligibility of cast iron and bare steel, Spire had absolutely no reason to believe that it needed to prove the ISRS-eligibility of materials that were the *raison d'être* of the ISRS Statute, and that Spire was replacing pursuant to a Commission-imposed replacement program. The 2016, 2017 and 2018 Cases were combined for hearing in a very short time frame because the common issue of the cost to replace plastic was the overriding issue in these cases. Spire had no reason to believe the August 22 testimony filed in the 2016, 2017 and 2018 ISRS cases pertained to anything outside of the cost to replace plastic deemed ISRS-ineligible by the Western District.

8. Under the circumstances, no party focused on whether cast iron and bare steel were worn out or deteriorated in the 2018 Cases, so the evidence submitted was not geared towards

⁵ Case No. WD80544; OPC Initial Brief dated June 29, 2017, p. 7. OPC repeated this position in its Reply Brief filed September 22, 2017, at pages 6-10.

⁶ Case No. WD 82302; March 22, 2019 Order Denying Appellant's Joint Motion to Change the Status of the Parties

providing the Commission with a record from which to decide on whether and to what extent cast iron and bare steel were not shown to be ISRS-eligible, much less the cost to replace them. As a result, additional evidence is needed that is not currently in the 2018 Record. The Commission is clearly entitled to conduct further evidentiary proceedings to determine appropriate rate adjustments.⁷

9. Further, the Commission is not precluded from hearing evidence on whether cast iron and bare steel are worn out or deteriorated, because Spire did not have a full and fair opportunity to try this issue.⁸ As detailed above, due to the approach taken by OPC from 2004-2018, including specific representations to tribunals during that period that cast iron and bare steel replacements were covered by the ISRS, and due to OPC's failure to file a recommendation on August 6, 2018, Spire was denied its due process rights to receive notice of the claims being made against it, and a full and fair opportunity to litigate those claims.

10. Notice of the issues to be tried, and an opportunity to be heard on them, are the cornerstones of due process in America. The Commission acknowledged this principle when OPC tried to improperly expand the issues list in a complaint against Laclede Gas Company (now Spire Missouri). The Commission stated: "The question of the definition of the issues is important because Laclede has a due process right to fair notice of the allegations made against it so it can defend itself against the complaint."⁹

⁷ *Re: Spire Missouri Inc.*, 593 S.W.3d 582, 593, 599, fn9 (Mo. Ct. App. W.D. 2019)

⁸ *Mo. Landowners' Alliance vs. PSC*, 593 S.W. 3d 632, 640, fn9 (Mo. Ct. App. E.D. 2019), citing *Sexton v Jenkins & Assocs., Inc.* 152 S.W.3d 270, 273 (Mo. banc 2004)

⁹ *Mo. Pub. Serv. Comm'n Staff v. Laclede Gas Co.*, Case No. GC-2011-0098, Order Adopting Revised Issue Number One, dated July 22, 2011, citing *State ex rel. Mo. Pipeline Co. v. Mo. Pub. Serv. Comm'n*, 307 S.W.3d 162, 174 (Mo. App. W.D. 2009)

11. As the Western District Court of Appeals observed in *State ex rel. Fischer v. Public Service Comm'n of Missouri*,¹⁰ due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play.¹¹ One component of this due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner.¹² These essential attributes were entirely lacking in the 2018 ISRS Cases with respect to whether cast iron and bare steel were worn out or in deteriorated condition. Not only was Spire not notified of OPC's radical change of position until it was far too late to marshal and present additional evidence, but it is clear from the very existence of this remand proceeding that OPC did nothing in the 2018 ISRS case to quantify the value of any adjustment relating to such an issue. Normally that would require rejection of a party's proposed adjustment.¹³

12. In the 2018 ISRS case, of course, OPC presented *nothing* in its testimony alleging that the Company's cast iron or bare steel facilities were not in a worn out or deteriorated condition, let alone any quantification of its adjustment. If OPC is to be permitted to finally complete its "case-in-chief" in this remand proceeding, then the Company should be given the same opportunity. Now that OPC is being given a "second bite of the apple" to seek

¹⁰ 645 S.W.2d 39 (Mo.App. W.D. 1982)

¹¹ *Fischer, supra*, at 43, *Tonkin v. Jackson County Merit System Commission*, 599 S.W.2d 25, 32–33[7] (Mo.App.1980) and *Jones v. State Department of Public Health and Welfare*, 354 S.W.2d 37, 39–40[2] (Mo.App.1962)

¹² *Fischer, supra*, at 43, *Merry Heart Nursing and Convalescent Home, Inc. v. Dougherty*, 131 N.J. Super. 412, 330 A.2d 370, 373–374[7] (1974).

¹³ In *Re: Kansas City Power & Light Company's Request to Implement a General Rate Increase*, 509 S.W.3d 757, 772 (Mo. App. W.D. 2016), the Court affirmed the Commission's rejection of a utility's request to recover certain expenses because the request was not made until its surrebuttal testimony. The Court found that such a result was appropriate because, under the Commission's rules, parties are required to include in their *direct* testimony "all testimony and exhibits asserting and explaining that party's entire case-in-chief." (see 20 CSR 4240-2.130(7)(A)) As the Court observed, "[t]hese procedures are important due to the highly technical nature of the issues presented at the hearing, in that it affords other parties a reasonable opportunity to provide evidence in response. Therefore, supplementing direct testimony is generally not allowed."

such a quantification, rudimentary elements of fair play require that Spire be afforded its first bite in the form of a full, fair and meaningful hearing on whether cast iron and bare steel is worn out or deteriorated.

13. Having been ambushed by OPC before the Commission in the 2018 Cases, Spire was then denied the right to even argue the issue before the Court in 2019. The time has come for Spire to finally have its “day in court” in this remand hearing.

Information on Cast Iron and Bare Steel after 2018

14. Despite having prevailed on the issue in the 2018 Cases, Spire began presenting evidence on the worn out or deteriorated nature of cast iron and bare steel in the 2019 ISRS Cases. The Commission has considered this evidence in continuing to reaffirm its finding that Spire’s cast iron and bare steel facilities are worn out or in deteriorated condition.¹⁴ This additional information was not before the Western District Court of Appeals when it issued its opinion in the 2018 Cases.

15. However, the 2020 ISRS Cases were the first ISRS cases Spire filed after the Court’s astonishing decision that, 30 years after the Commission called out cast iron and bare steel for universal replacement, Spire must again prove that cast iron and bare steel are worn out or deteriorated, and thus ISRS-eligible. Spire was preparing to provide evidence on cast iron and bare steel in the 2020 Cases, and can be ready in the next few weeks to provide similar evidence pertaining to the 2018 Cases.

16. Spire anticipates that the additional evidence will include, but not be limited to, the following:

¹⁴ 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.

- A. *A better understanding of “worn out OR in deteriorated condition.”*¹⁵ The propensity of bare steel to corrode and cast iron to become brittle and break, combined with the length of time the Company’s facilities have been in the ground, strongly suggest that they are in the kind of “deteriorated” condition that makes them eligible for ISRS inclusion.
- B. *Additional evidence regarding the pace at which bare steel deteriorates.* In Spire’ most recent ISRS hearing, OPC’s engineering expert acknowledged that bare steel begins to corrode – i.e. deteriorate – from the moment it is put in the ground. Spire has retained a metallurgist who can provide a more scientifically robust and detailed explanation of this natural deterioration process and the pace at which it occurs.
- C. *Expert testimony regarding the condition of the Company’s cast iron and bare steel facilities:* In addition to Spire’s engineering witnesses who have personally observed the deteriorated condition of the Company’s facilities, Spire intends to provide evidence from Robert Leonberger, who has over 35 years of experience on these issues, and was the longtime manager of the Commission’s pipeline safety staff. Mr. Leonberger testified in the most recent 2019 ISRS Cases.¹⁶
- D. *New physical evidence regarding the condition of the Company’s cast iron and bare steel facilities:* Since the 2018 ISRS cases, Spire has also presented new physical evidence regarding the worn out or deteriorated condition of its cast iron

¹⁵ 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>

¹⁶See Exhibit 6, Case Nos. GO-2019-0356-57.

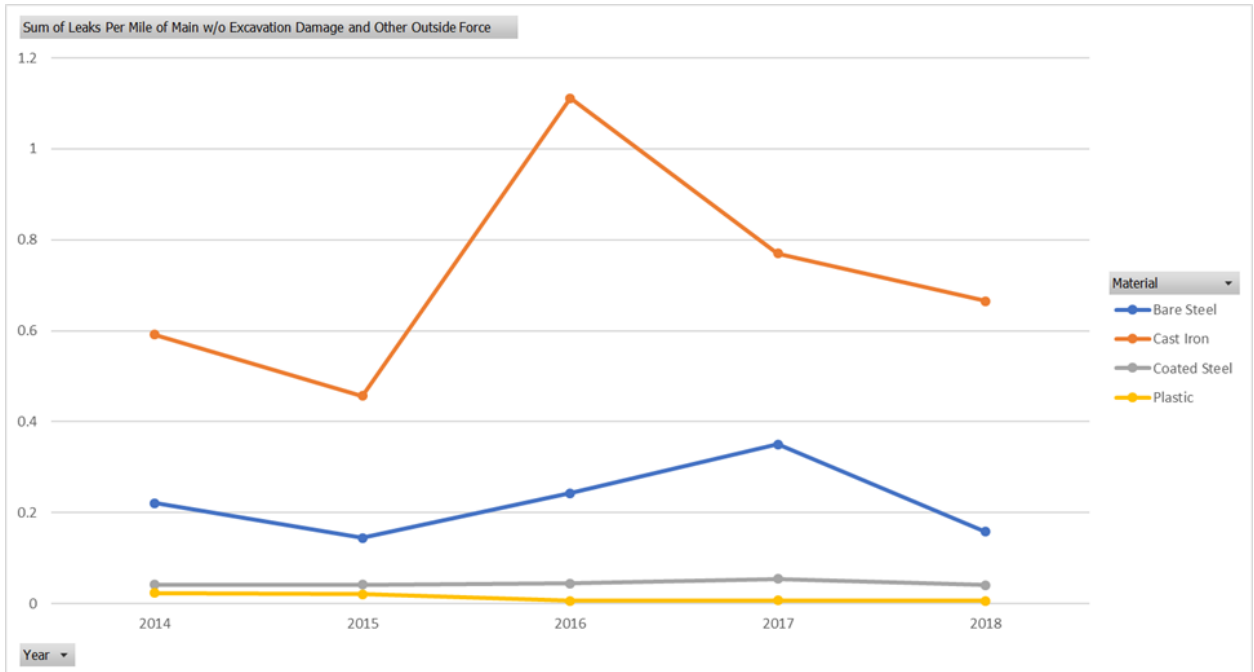
and bare steel facilities. Among other information, this evidence has consisted of physical samples as well as pictures¹⁷ of some of the cast iron and bare steel facilities replaced or bypassed by the Company in the course of its replacement programs, together with expert testimony verifying that such samples are consistent with the pipe conditions of other facilities being replaced by the Company on other ISRS projects. This kind of physical evidence will be further supplemented in this case by additional samples of replaced pipes, accompanied by new expert testimony that will attest to the representative nature of those pipes in demonstrating the worn out or deteriorated condition of cast iron and bare steel.

E. *New evidence relating to leak experience on bare steel and cast iron facilities:*

Expert evidence from Spire Chief Engineer Craig Hoeflerlin in the July 2019 ISRS cases provided more robust leak information.¹⁸ This information further demonstrated the worn out or deteriorated nature of the Company's facilities, as evidenced by the below graph.

¹⁷ See e.g Ex 5, Schedule CRH-5, Case Nos. GO-2019-0356-0357.

¹⁸ See Ex. 5, page 14, Case Nos. GO-2019-0356 and 0357.



The fact that bare steel pipe is 10 to 20 times more likely, and cast iron more than 60 times more likely, to leak than plastic pipe is a compelling indicator of their deteriorated condition. Such information may very well have led the Western District Court to a different conclusion had the Company had an opportunity to present such information in the 2018 ISRS case and argue it on appeal.

F. *New evidence of the nationwide consensus regarding the need to replace cast iron and bare steel facilities because of their problematic condition:* In connection with the plastics issue in the 2018 ISRS cases, the Company provided evidence of the strong consensus among federal and state safety officials regarding the problematic nature of cast iron and bare steel facilities and the need to replace them on an accelerated basis. However, Spire’s expert metallurgist will provide new evidence that, since 2005, Spire has been replacing (or removing from service) its bare steel facilities at a rate that is about 5.7% less than the national average while it has been replacing its cast iron facilities at a rate that is about 1%

more than the national average. What this means is that hundreds of utilities and dozens of regulators throughout the country have, respectively, invested and approved the investment of billions of dollars in capital to eliminate these problematic facilities. These extraordinary expenditures are further proof of the problematic nature of these deteriorated facilities and the threat they pose to public safety.

G. *New depreciation evidence that substantiates the worn out or deteriorated condition of the Company's facilities*: Spire and the Commission have repeatedly noted the advanced age of the cast iron and bare steel facilities being replaced by the Company as one (but not the only) factor supporting a determination that they are worn out or in a deteriorated condition. In its Opinion in the 2018 ISRS cases, the Court discounted this evidence by focusing on a very small percentage of facilities being replaced that were “only” 50 to 62 years old. The Company will provide additional depreciation testimony that will show that even this small group of cherry-picked facilities had already exhausted most of their estimated useful lives and can therefore be reasonably deemed to be in a deteriorated condition compared to their original state.

WHEREFORE Spire Missouri Inc. respectfully requests that the Commission accept this Position Statement 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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ATTORNEYS FOR SPIRE MISSOURI INC.

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 22nd day of April, 2020.

/s/ Goldie T. Bockstruck