

**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 MOTION FOR RECONSIDERATION
AND REQUEST FOR ORAL ARGUMENT**

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 20 CSR 4240-2.160 of the Commission’s Rules of Practice and Procedure, submits this Motion for Reconsideration of the Commission’s *Order Setting a Procedural Schedule Including a Limited Hearing on Remand* issued in the above-captioned cases on April 29, 2020 (the “April 29 Order”) and Request for Oral Argument. In support thereof, Spire respectfully states as follows:

MOTION FOR RECONSIDERATION

1. The Western District Court of Appeals’ November 19, 2019 Opinion and March 18, 2020 mandate instructed the Commission to remove “. . . the cost incurred to replace cast iron and bare steel mains and service lines not shown to be worn out or deteriorated . . .” Like OPC before it, the Commission misreads the mandate to say something different than what its plain wording conveys. OPC did so by reading out of the mandate the words “not shown to be worn out or deteriorated”, making it seem that the Court simply instructed the Commission to remove all of the Company’s cast iron and bare steel replacement costs without regard to their condition. The

Court could have said that, of course, but did not.

2. For its part, the Commission – in its rephrasing of the mandate in the Order – inserts the words “that were” before the words “not shown to be worn out or deteriorated” to make it appear that the required showing relates back to what was done or not done in the first phase of 2018 ISRS cases, rather than the showing that can and should be made in this remand proceeding. Again, if the Court had intended such a result it too could have inserted the words “that were” before “worn out or deteriorated”, but did not.

3. This reading is plainly incorrect, and especially inappropriate given the violence it does to one of the most profound tenets of American justice, namely, the principle that no one should be deprived of their life, liberty or property without due process of law. As enshrined in both the Fifth and Fourteenth Amendments of the United States Constitution, as well as Article 1, Section 10 of the Missouri Constitution, this bedrock principle of American justice requires at a minimum that any person or entity impacted by the actions of an administrative agency like this Commission receive reasonable notice of the claims being made against it and an opportunity to litigate such claims in a full and meaningful hearing.

4. Over the years, this Commission has erected an impressive architecture of procedural rules, regulations and order provisions over the years to ensure that this fundamental goal can be achieved. Among other measures, it requires that parties formally state the specific relief they are requesting from the Commission and serve those requests on other interested parties. It requires that parties set forth their entire case in chief at the time their direct testimony is filed so other parties will know what contentions they need to address and can file responsive testimony. It permits parties to exercise vigorous discovery in the form of data requests, depositions, subpoenas, and other discovery vehicles so they can ferret out the factual and policy basis for the

contentions being made in that testimony. And once these procedural rights are exercised, it provides the opportunity for a hearing so that the claims and contentions of other parties can be tested through cross examination.

5. The OPC made a mockery of these procedural safeguards in the 2018 ISRS cases. Prior to 2018, OPC had explicitly endorsed the understanding that the ISRS mechanism was specifically designed to permit recovery of the very cast iron and bare steel replacement program costs at issue here – an understanding that had been reflected in each and every ISRS filing made over the past 15 years. Spire reasonably relied on this understanding. And all parties believed that the Commission’s determination nearly three decades ago that such facilities were inherently problematic and needed to be replaced (and the Western District Court of Appeals affirmation of that determination) meant something.¹

6. Nevertheless, if OPC had a change of heart and wanted to disavow its prior representations regarding the ISRS eligibility of these replacement costs it was free to do so, but only so long as it pursued its new position in a manner that respected the due process rights of other parties and satisfied the procedural requirements that the Commission has established to safeguard those rights. That most assuredly did not happen in the 2018 ISRS cases.

7. OPC’s *first* failure to comply with a Commission-mandated notification requirement occurred on August 17, 2018, when it filed its late response to Staff’s ISRS recommendation. In that response, OPC gave no inkling of any new position that the worn out or deteriorated condition of the Company’s cast iron and bare steel facilities was in question or needed to be re-proven. Since the Staff had included cast iron and bare steel replacement costs in its recommended revenue requirements for Spire East and West, and the Commission had

¹ *City of Springfield v. Public Service Com’n*, 812 S.W. 827, 831 (Mo. App. W.D. 1991)

specifically directed the parties to file responses to those recommendations, OPC should have notified Spire and the other parties of its position regarding the potential ineligibility of such costs at that time. It did not.

8. OPC's *second* failure to provide a Commission-required notification of its position occurred at the time it filed its direct testimony on August 22, 2018. Under the Commission's rules, a party is required to include in such a direct filing: ". . . all testimony and exhibits asserting and explaining that party's entire case-in-chief."² Nowhere in that testimony did OPC even mention the Company's cast iron and bare steel facilities, let alone assert that they had not been shown to be in a worn out or deteriorated condition. To the contrary, by focusing almost exclusively on the issue of whether costs incurred by the Company to replace *plastic* facilities were eligible for ISRS inclusion, OPC's two pieces of testimony gave the distinct impression that, consistent with its past practice over the last 15 years, it had no issue at all with the Company's recovery of cast iron and bare steel replacement costs.

9. OPC's *third* failure to comply with a Commission-mandated notice requirement occurred just a few days later when it failed to specify the condition of cast iron and bare steel facilities and their eligibility for inclusion in the ISRS as an issue to be litigated as part of the required Issues List. In fact, when it came to the issue of what costs should be recovered by the Company in its 2018 ISRS case, OPC cited only the testimony of OPC witness Robert Schallenberg, which consisted of only one question and answer on the subject:

Q. What is OPC's position related to Spire Missouri East's and Spire Missouri West's ISRS applications in Case Nos. GO-2018-0309 and GO-2018-0310?

A. OPC's position is that these filings are also not compliant with the statutory ISRS requirements. I note that Spire has once again included costs for

² 20 CSR 4240-2.130 (7)(A)

replacement of *plastic components that are not worn out or in deteriorated condition*. Therefore, the Commission should find Spire's filings non-compliant, reject the application, and order the applicants to exclude the non-compliant elements in future applications. (*emphasis supplied*).

10. Again, if OPC had wanted to affirmatively *conceal* the fact that it intended to make the condition of the Company's cast iron and bare steel facilities an issue it could not have authored a more misleading document. Notably, the Commission's August 17, 2018 Procedural Order in these cases warned the parties that "[t]he Commission will view any issue not contained in this list of issues as uncontested and not requiring resolution by the Commission." Apparently, OPC did not consider this admonishment to be a barrier to its untimely maneuver on the cast iron/bare steel issue.

11. Finally, after these multiple evasions of the Commission's procedural notice requirements, OPC finally mentioned the matter at issue in this remand proceeding when it filed its Position Statement at around 4:30 pm on Friday, August 24, 2018 – a mere one business *hour* prior to the commencement of the evidentiary hearing the following Monday.³ And even here, OPC wrapped its Position Statement around the plastics issue, limiting its assertions regarding the

³In this very case, the Commission denied the Company's request to place its compliance tariffs in effect less than ten-days after they were approved based on its reading of *State ex rel. Office of the Public Counsel v. Public Service Commission*, 409 S.W.3d 522, 529 (Mo. App. 2013), in which OPC had successfully challenged a Commission decision giving OPC only a few hours to file an Application for Rehearing. See October 3, 2018 *Order Denying Motion for Reconsideration*. In denying the Company's request, the Commission cited with approval the following language from that decision: "any shortening of the date on which PSC orders will become effective to less than ten days is presumptively unreasonable and, if challenged, would require the PSC to demonstrate that the circumstances surrounding the case are so extraordinary as to clearly warrant further encroachment on the time provided to the parties in which to exercise their right to apply for rehearing and/or appeal and that the time allowed was reasonably sufficient." *Id* at 529. Needless to say, it is simply not possible to reconcile within the confines of the same case a determination that parties must be given at least *ten days* to review compliance tariffs and submit an application for rehearing with a determination that it was somehow appropriate for the Company to be given only *one business hour* to review and prepare its response to OPC's new found position on the eligibility of cast iron and bare steel replacement cost.

condition of the Company's cast iron/bare steel facilities to a single, throw-away sentence that did not even mention those facilities by name.⁴

12. By ignoring the Commission's explicit notice requirements time and time again and then belatedly submitting an amorphous and extremely truncated description of its "position" when it was too late to do anything about it, OPC deprived Spire and Staff of nearly all of their due process rights guaranteed by the Constitution and the Commission's own rules. The Company had no opportunity to conduct any kind of discovery to probe the basis for OPC's position or why it suddenly changed its position on the ISRS eligibility of these costs after so many years of supporting their inclusion in the ISRS. Nor was Spire able to probe how OPC defines worn out or in deteriorated condition, when and how it believes those criteria are satisfied, or why it believed the Commission's safety rules and the universal recommendation of federal and state safety officials that such facilities should be replaced on an accelerated basis was not sufficient evidence of the problematic and deteriorated nature of these facilities. Spire was also deprived of its due process rights to prepare responsive testimony, schedules and exhibits to address and rebut whatever answers or assertions OPC might have provided to the discovery the Company was never given an opportunity to pursue. Nor did the Company have an opportunity to conduct meaningful cross-examination given the absence of any discovery answers and the untimely, abbreviated and extremely vague nature of OPC's assertion regarding the condition of the Company's "other pipes."

13. This is not the way the process is supposed to work. Indeed, it is the antithesis of the full and fair hearing that even the rudimentary elements of due process require. As the Western

⁴OPC's statement consisted of the following: "In addition, Spire provided no competent evidence to show that any of the pipes that it seeks compensation for are worn out in a deteriorated condition."

District Court of Appeals observed in *State ex rel. Fischer v. Public Service Comm'n of Missouri*,⁵ due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play.⁶ 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.⁷ Given the circumstances described above, it is simply not plausible to conclude that these essential prerequisites were satisfied on the issue of whether the Company's cast iron and bare steel facilities are worn out or in a deteriorated condition.

14. Moreover, Spire respectfully submits that these indispensable components of any fair system of justice cannot be jettisoned by pretending that this issue has already been litigated (it hasn't) nor by simply observing that Spire has the burden of proof in an ISRS proceeding. None of these considerations justify the kind of egregious deprivation of the Company's due process rights that occurred here.

15. Fortunately, this clear deprivation of critical due process rights can still be cured by the Commission. It can do so by reconsidering its April 29 Order and permitting the Company to submit the kind of evidence that it could and would have provided earlier in these cases had OPC played by the rules and been upfront about its position on the issue now under consideration in this proceeding. Because the Western District Court of Appeals inexplicably denied Spire the opportunity to be a Respondent in OPC's appeal of this issue, the Company does not believe the Court had a completely informed understanding of the devious way in which OPC raised this issue

⁵ 645 S.W.2d 39 (Mo. App. W.D. 1982)

⁶ *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)

⁷ *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).

at the Commission or how OPC's approach operated to deprive Spire of its due process rights. Armed with this knowledge and its own familiarity with due process principles, Spire does not believe the Court would insist on the Commission interpreting the Court's mandate in a way that perpetuated rather than remedied the very real and substantial due process deprivations already suffered by the Company. The Court knows that at some stage in this proceeding, Spire should be afforded a meaningful opportunity to address and rebut the claims that have been made by OPC regarding the condition of the Company's cast iron and bare steel, and that time is now. Reconsideration of the Commission's Order would also have the hugely palliative effect of advising parties that they cannot treat the Commission's procedural rules with the utter disregard shown by OPC in this case and then expect the Commission to become complicit in protecting their ill-gotten gains when the opportunity to do justice presents itself.

16. Finally, it is important to recognize that it is the Commission, and not the courts, that has the expertise, experience and statutory responsibility to evaluate and make informed judgments on highly technical issues such as when utility facilities have deteriorated to the point where in keeping with safe and adequate service, it is in the best interest of customers and the public safety that they be replaced. While the Commission must take action that is consistent with the guidance provided by the Western District Court of Appeals, it should not surrender its long-standing institutional role to decide such matters by applying an overly deferential interpretation of the Court's mandate.

17. For all of these reasons, Spire requests that the Commission reconsider its April 29 Order in these cases and permit Spire and other parties to introduce whatever relevant evidence they believe is appropriate, specifically including evidence on whether the cast iron and bare steel Spire replaced is worn out or in deteriorated condition.

REQUEST FOR ORAL ARGUMENT

18. Given the unique nature of the issues raised by the April 29 Order's evidentiary ruling, and its potential impact on public safety, jobs in Missouri, infrastructure investment in the state, the Company, and the Commission's regulatory authority, Spire believes it would be helpful to schedule an oral argument to address the issues raised by that ruling and answer any questions the Commission might have. Spire would accordingly request that the Commission schedule an oral argument on this matter.

WHEREFORE Spire Missouri Inc. respectfully requests that the Commission grant this Motion for Reconsideration consistent with the recommendations set forth herein and schedule an Oral Argument, if needed, for the purpose of addressing the evidentiary issues raised by the Commission's April 29 Order in these cases.

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 7th day of May, 2020.

/s/ Goldie T. Bockstruck