BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Verified Application and Petition of Liberty Energy (Midstates) Corp. d/b/a Liberty Utilities to Change Its Infrastructure System Replacement Surcharge	)))))	Case No. GO-2014-0006

INITIAL BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

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PUBLIC COUNSEL'S POST-HEARING BRIEF

In accordance with its statutory authority to represent ratepayers before the Missouri Public Service Commission, the Office of the Public Counsel (OPC) urges the Commission to issue an order that: (1) Rejects the Infrastructure System Replacement Surcharge (ISRS) Petition filed by Liberty Energy (Midstates) Corp. d/b/a Liberty Utilities (Liberty) because it does not comply with 4 CSR 240-3.265(20) in that it did not include all required documentation; (2) Denies the relief requested in the Petition because it violates § 393.1009 RSMo in that Liberty's Petition, if approved, would allow Liberty to raise ISRS rates to recover expenses that are not authorized by the statute; or (3) Rejects the ISRS Petition because § 393.1012.2 RSMo prohibits the Commission from approving an ISRS rate increase for any gas corporation that has not had a general rate case proceeding decided or dismissed within the last three years.

The parties identified two issues for resolution. The first asks the Commission, "*Should the Commission approve an incremental ISRS revenue requirement for Liberty Utilities in this case?*" OPC's answer to this question is "no," for the reasons explained below. The second issue asks what amounts should be included in the ISRS. OPC's

position on this issue is that no amounts should be included in the ISRS because the Petition must be rejected or denied.

1. Background

The Commission's authority to approve ISRS rate increases is found in §§ 393.1009, 393.1012, and 393.1015 RSMo (collectively "ISRS statutes"). The ISRS statutes allow gas companies to petition the Commission twice per year for the authority to increase rates through a surcharge, which allows the utility to begin recovering expenses incurred for certain infrastructure system replacements without needing to file a general rate case. The Commission's ISRS rule, 4 CSR 240-3.265, requires gas utilities to file specific supporting documentation with their ISRS petitions to enable the Commission, its Staff, and OPC to review the proposed rate increase for compliance with the ISRS statutes. The ISRS expenses and charges are again reviewed during the gas company's next rate case, when the ISRS charges are either disallowed or rolled into the gas company's base utility service rates. § 393.1015 RSMo.

Legislation authorizing an ISRS was necessary because the law otherwise prohibits single-issue rate increases without the benefit of a general rate case where all books and records are reviewed.[1] Increasing rates outside the context of a general rate case increases the chance that a utility will over-earn because of the possibility that the utility is currently earning revenues that are more than sufficient to cover its expenses and

[1] §393.270.4 RSMo.; *Office of the Public Counsel, et al v. Public Service Commission, et al.,* 397 S.W.3d 441 (Mo.App. W.D. 2012), citing *Midwest Gas Users Ass'n . Public Service Commission,* 976 S.W.2d 470 (Mo.App. W.D. 1998).

allow for a reasonable return for the company.[2] For this reason, the Legislature adopted a statute that allows only a narrow few categories of infrastructure investments to be included in an ISRS. Specifically, the ISRS statutes allow gas companies to include in the ISRS: (1) the costs of complying with a state or federal law or regulation requiring the company to replace "worn out" or "deteriorated" mains, valves, service lines, regulator stations, vaults and other pipeline system components; (2) the costs of main relining, line insertion, encapsulation and similar projects extending the useful life or enhancing the integrity of the pipeline; and (3) the costs of facility relocations mandated by government, such as relocations caused by highway construction projects. § 393.1009(5) RSMo.

On July 2, 2013, Liberty filed its petition with the Commission seeking to increase its ISRS rate. Liberty's Petition included Appendix A, Schedule 1, titled "Eligible Replacements" that lists all expenses that Liberty seeks to begin recovering through the ISRS. Appendix A is a 14-page spreadsheet that includes approximately 643 separate line-item investment amounts.[3] Liberty's Application does not include, as required for each project, "the specific requirements being satisfied by the infrastructure replacement" as required by 4 CSR 240-3.265(20)(K), or "the statute, commission order, rule, or regulation, if any, requiring the project" as required by 4 CSR 240-3.265(20)(L). Because Liberty failed to include this required information, OPC sent Data Request No. 1 to Liberty on July 17, 2013 to identify the basis used by Liberty for determining whether

[2] *Id.*

[3] Although Liberty's spreadsheet included 643 separate line-items tied to a particular project, each project includes multiple jobs, which makes the number of individual investments over 643.

the investments meet the statutory ISRS criteria.[4] OPC selected fifty (50) entries from the project list Liberty provided with its Application and asked Liberty to provide all work orders for the fifty, and to "identify the safety requirement or relocation being complied with and explain how the expenditure was made to comply with the safety requirement or relocation."[5] Liberty's response was due August 6, 2013, but Liberty did not respond until August 16, 2013 with an incomplete response, that was later supplemented on September 5, 2013.[6] OPC sent additional data requests to Liberty, however, on September 9, 2013, after OPC filed its motion to reject the Petition, OPC received an email from Liberty stating, "At this juncture since we are in a formal proceeding we will not be providing further informal clarifications or discussions at this time."[7] It was not until Liberty's Direct Testimony filing on Day 80 of the 120-day process that Liberty identified the category of expense and the state or federal requirement information that the ISRS rule required Liberty to file on Day 1.

2. <u>Petition Not in Compliance with 4 CSR 240-3.265(20)</u>

a. The Petition Did Not Identify the Qualifying Category of Expense

Rule 4 CSR 240-3.265(20) establishes the "minimum" filing requirements for ISRS petitions that seek "to establish, change or reconcile an ISRS." More specifically, subsection (20)(K) requires gas companies to file with their ISRS petitions a breakdown of the ISRS eligible costs identifying which of the project categories apply and the

[4] OPC Exhibit No. 1, Direct Testimony of Ted Robertson, pp. 4-5.

[5] *Id.*

[6] *Id.*

[7] *Id.* at p. 14.

specific requirements being satisfied by the infrastructure replacement for each. Subsection (20)(K) states:

> (K) For each project for which recovery is sought, the net original cost of the infrastructure system replacements..., the amount of related ISRS costs that are eligible for recovery during the period in which the ISRS will be in effect, and a breakdown of those costs identifying which of the following project categories apply and the specific requirements being satisfied by the infrastructure replacements for each. [emphasis added].

This requires petitioners to identify which category of expense qualifies *each* infrastructure investment for ISRS recovery.

Liberty's Petition did not identify which specific category of expense qualifies each infrastructure investment. Instead, the Petition grouped *all* expenses under the following "replacement" headings regardless of whether each expense was for a replacement or something else. Liberty's spreadsheet headings were: "Main Replacements, Service Replacements, Meter and House Regulator Replacements, and Measurement and Regulator Station Equipment Replacements."[8] There was no reference in Liberty's Petition to the three (3) categories identified by § 393.1009(5) RSMo, or to the further break down of those three (3) into the eight (8) categories identified by 4 CSR 240-3.265(20)(K)1 through (20)(K)8. Based on Liberty's headings in its Petition, one would assume it is Liberty's position that all eligible expenses qualify as a replacement under § 393.1009(5)(a), with no expenses qualifying under § 393.1009(5)(a) or (5)(c). However, when Liberty filed its Direct Testimony in this case, it included a spreadsheet

[8] Verified Application and Petition of Liberty Utilities To Change Its Infrastructure System Replacement Surcharge and Tariff, July 2, 2013.

that cited to the statutory category of eligible expense, which claims 393.1009(5)(b) as the qualifying reason for most of the 643 different investments.[9]

Liberty's Petition did not enable OPC, the Staff, or the Commission to determine the *true* basis for Liberty's assertion that each expense qualifies. Moreover, it was not until Liberty filed its Direct Testimony that Liberty provided the missing information. This prohibited OPC from having a reasonable opportunity to challenge or verify the basis for each project. Accordingly, Liberty's Petition is not in compliance with the Commission rules and should be rejected.

b. The Petition Did Not Identify Any Government Mandate

Liberty's Petition also failed to identify the statute, order, rule or regulation that required Liberty to incur each infrastructure investment expense. Commission rule 4 CSR 240-3.265(20)(L) requires ISRS petitions to include the following:

> (L) <u>For each project for which recovery is sought, the statute, commission order, rule, or regulation, if any, requiring the project</u>; a description of the project; the location of the project; what portions of the project are completed, used and useful; what portions of the project are still to be completed; and the beginning and planned end date of the project.[10]

This rule requirement is consistent with the § 393.1009(5) RSMo statutory requirement that limits ISRS eligibility to infrastructure investments that are: 1) installed <u>to comply with</u> state or federal safety requirements as replacements for worn or deteriorated facilities (§ 393.1009(5)(a)); 2) undertaken <u>to comply with</u> state or federal safety requirements that require projects such as main relining, service line insertion, joint encapsulation, or similar projects (§ 393.1009(5)(b)); or 3) facility relocations

[9] Liberty Exhibit No. 1, Direct Testimony of David Swain, Schedule DS-3.

[10] Emphasis added.

required by a political subdivision (§393.1009(5)(c)). The rule required Liberty to identify the specific government-mandate or law compelling each investment.

Liberty's Petition did not include a single reference to any requirement that compelled Liberty to incur any infrastructure investments, and therefore the Petition violated 4 CSR 240-3.265(20)(L). This failure is also a violation of 4 CSR 240-3.265(20)(K) because it too requires Liberty to identify the legal requirement being satisfied by each investment when it requires petitioners to provide "the specific requirements being satisfied by the infrastructure replacements for each" project. Since Liberty did not identify the requirement it was complying with for each project, Liberty's Petition is not in compliance with 4 CSR 240-3.265(20)(K) and (L) and should be rejected. If rejected, Liberty should be given the option of refiling the Petition with the required documentation, which would reset the 120-day window.

c. Importance of Submitting Required Information with the Petition

The importance of these required documents was explained by the Commission in its 2004 Order of Rulemaking adopting the ISRS rules. Copies of the Order of Rulemaking were provided to Commissioners during the evidentiary hearing. In response to criticisms of the amount of information required to be filed with each petition, the Commission stated the following:

> The rules does ask for a significant amount of information, all of this information is either directly required for the ISRS petition review itself or for the prudency reviews that are specifically authorized by the statutes. The statutory time frames for staff and OPC analysis of the petitions and developing recommendations and the commission's issuance of an Order require the level of detail outlined in this rule. The statute does not permit sufficient time to allow for a thorough review of the petition, development of data requests, a twenty (20)-day turnaround on responses, analysis of these initial data request responses, a potential second round of data requests, another twenty (20)-day turnaround on responses, a staff recommendation,

> testimony rounds, hearings and a commission decision. The data requirements outlined in the rule will significantly simplify this process by notifying the natural gas utility what information will be required in the petition when it is filed. This up-front submittal requirement will significantly reduce the number of data requests sent to the natural gas utilities with a twenty (20)-day turnaround and hopefully reduce confusion between the parties regarding what information is needed. Outlining these requirements in the rule will also result in each of the natural gas utilities being notified up front as to what information will be required when they file their petition.[11]

Here the Commission recognized that the short timeframe required by the ISRS statutes to approve or deny an ISRS petition could be problematic for parties seeking to verify that the claimed expenses are eligible for the ISRS. For this reason, the Commission's rule requires specific detailed documentation, and a gas company's failure to provide such documentation harms OPC's ability to analyze the infrastructure expenses for compliance with the statute, for the same reasons identified by the Commission in its Order of Rulemaking - without this information up front, there is simply not enough time for a thorough review of the petition. OPC now finds itself in the very position the Commission attempted to protect against – there is not enough time for OPC to engage in the discovery it needs to verify compliance with the ISRS statute. This problem was caused by Liberty's incomplete petition.

d. OPC Response to Liberty and Staff Arguments

Liberty's first response to OPC's argument is to argue that the Petition is consistent with prior petitions. This argument was repeated by Liberty and the Staff throughout the evidentiary hearing. However, past rule violations are no excuse for current or future rule violations. Even Liberty's State President, Mr. David Swain,

[11] *Missouri Register*, Vol. 29, No. 8, April 15, 2004, p. 665.

testified that Liberty has the "primary responsibility" for ensuring that its petition complies with Commission rules.[12]

Liberty argues that the Commission has not required such level of detail in the thirty (30) plus ISRS petitions filed with the Commission since the ISRS statute was enacted.[13] An analogy to put this argument into perspective is to consider a Missouri driver speeding at 90 mph in a 70 mph zone once a day for thirty (30) consecutive days. On the 31st day the driver is ticketed for speeding, and his excuse to the highway patrolman is that he had broken the speed limit for the past thirty days without a ticket and therefore deserves leniency. Each Commission rule serves a unique public protection purpose and must be followed regardless of whether or not past violations had been challenged. To hold otherwise will undermine the Commission's rules and the Commission's authority in general.

Regarding the requirement to identify the category of expense, Liberty witness Mr. Mark Caudill agrees that ISRS petitions are required by 4 CSR 240-3.265(20)(K) to include the category of qualifying expenses.[14] He claims this requirement was satisfied by the headings Liberty used in the spreadsheet of investments filed with its Petition. This argument does not withstand scrutiny because each heading refers only to different types of facility "replacements," and replacements are authorized only by §

[12] Tr. 42.

[13] Tr. 17.

[14] Tr. 59.

393.1009(5)(a) and not by § 393.1009(5)(b), which Liberty now claims is the qualifying category of expense for the majority of its investments.[15]

Regarding the 4 CSR 240-3.265(20)(L) requirement to identify the law or regulation requiring each investment, Mr. Caudill acknowledged that one could conclude that the rule required Liberty to identify the requirement being satisfied for each investment.[16] This admission is followed by his argument that the rule can also be read to reach an *opposite* conclusion.[17] The basis of this argument is the term "if any" that appears in 4 CSR 240-3.265(20)(L) where it requires petitions to include for each project, "the statute, commission order, rule, or regulation, <u>if any</u>, requiring the project."[18] The basis of his argument is that "[t]he "if any" language suggests that a project may not have a citation to a particular statute, commission order, rule or regulation."[19] Mr. Caudill argues that a citation to a particular legal requirement is not necessary for required investments that are not required by a statute, order, rule or regulation. The obvious problem with this argument is that Liberty is now claiming that *all* infrastructure investments were made to comply with a subsection of Commission Rule 4 CSR 240-40.030.[20] Under Mr. Caudill's rationale, the "if any" language would not apply because Liberty claims the government mandate for each investment comes from a Commission

[15] Liberty Exhibit No. 1, Direct Testimony of David Swain, Schedule DS-3.

[16] Liberty Exhibit No. 2, Direct Testimony of Mark Caudill, p. 12.

[17] *Id.*

[18] *Id.* Emphasis added.

[19] *Id.*

[20] Liberty Exhibit No. 1, Direct Testimony of David Swain, Schedule DS-3.

rule and can be identified, and therefore Mr. Caudill's testimony supports the conclusion that Liberty's Petition was required to identify the rule that applies to *each* expenditure.

An argument made by the Staff during opening statements essentially questions the lawfulness of the Commission's ISRS rule when Staff argues that the rules do not need to be followed by Liberty because the rules require documents that the statute does not require.[21] This argument misinterprets the authority and purpose of the rules, and essentially asserts that the Commission lacks the authority to adopt additional documentation requirements beyond what is contained in the statute. A Commission rule is valid and enforceable unless it is unreasonable and plainly inconsistent with the statute under which it was promulgated.[22] Section 393.1015.11 RSMo authorizes the Commission to adopt rules that are "consistent with, and do not delay the implementation of, the provisions of Sections 393.1009 to 393.1015." The ISRS rule's documentation requirements are entirely consistent with the ISRS statute because the rules provide the detail that is not provided in the statute regarding what "supporting documentation regarding the calculation of the proposed ISRS" is to be filed. § 393.1015.1(1) RSMo. Section 393.1015.2(4) RSMo requires the Commission to determine whether the petition complies with the ISRS statutes, and it is up to the Commission to determine what "supporting documentation" will enable the Commission to find that the statute has been complied with. This is why the Legislature gave the Commission specific rulemaking authority. The ISRS rules provide the specific documents and information that the Commission already determined are necessary to make a finding of compliance.

[21] Tr. 24.

[22] *Cooper v. Holden*, 189 S.W.3d 614 (Mo.App. W.D. 2006).

If the required documents are not filed, a Commission order rejecting the petition is entirely consistent with the Commission's § 393.1015.2(4) RSMo duty to determine whether the gas company has complied with the ISRS statute. The rule establishes the minimum documentation requirements that a gas company is to follow before the company can meet its burden of proving compliance with the statute. Administrative agencies are bound by the terms of the rules promulgated by them.[23]

The Commissioners that adopted the ISRS rule reached the conclusion that to prove compliance with the statute the gas company must identify with its petition the qualifying category of expense and state or federal requirement being complied with. There is no evidence in the record of this case to explain why prior petitions did not include the required information, nor is there any rational basis for concluding that the information required by (20)(K) and (20)(L) is unnecessary for ensuring compliance with these important elements of the statute. There is, however, a rational basis for concluding that consumers are better protected from unlawful ISRS rates when the petitioner abides by the rule requiring the petitioner to demonstrate with its petition that each investment complies with the ISRS statute.

3. Rate Increase Not Authorized by § 393.1009(5) RSMo

The second outcome OPC seeks is an order denying the Petition because Liberty seeks to recover amounts through its ISRS rate that are not authorized by § 393.1009(5) RSMo. All rates charged by Liberty, including ISRS rates, must be just and reasonable and no more than allowed by law. § 393.130 RSMo.

[23] *Berry v. Moorman Mfg. Co.*, 675 S.W.2d 131 (Mo.App. W.D. 1984).

a. Damages Caused by Third-Party Contractors is Not Eligible

The ISRS statute allows gas companies to include in the ISRS only the three (3) following categories of infrastructure investments.

> (a) Mains, valves, service lines, regulator stations, vaults, and other pipeline system components **installed to comply with state or federal safety requirements as replacements for existing facilities that have worn out or are in deteriorated condition**;
>
> (b) Main **relining projects**, service line **insertion projects**, joint **encapsulation projects**, and other **similar projects** extending the useful life or enhancing the integrity of pipeline system components undertaken to comply with state or federal safety requirements; and
>
> (c) Facilities relocation required due to construction or improvement of a highway, road, street, public way, or other public work by or on behalf of the United States, this state, a political subdivision of this state, or another entity having the power of eminent domain provided that the costs related to such projects have not been reimbursed to the gas corporation.[24]

The key components of the first category require the investments to be: (1) a replacement (as opposed to something less than a complete replacement of the particular main, service line, etc.), and (2) it must be replacing a worn out or deteriorated piece of infrastructure. Accordingly, the only ISRS eligible replacements are those that replace infrastructure that has become worn or deteriorated through time and usage. This does not include infrastructure that is being replaced because it was accidentally or negligently damaged by Liberty or a third-party, such as when a digger accidentally strikes a main. Liberty's witness Mr. David Swain testified that Liberty's ISRS Petition seeks to include in the ISRS a number of infrastructure investments caused by third-party damage to a Liberty facility.[25] This alone is reason enough to deny the Petition because Liberty seeks

[24] Section 393.1009(5) RSMo. Emphasis added.

[25] Tr. 41-42.

to include infrastructure investments incurred as a result of damaged infrastructure as opposed to infrastructure that is worn out or deteriorated. Approval of Liberty's ISRS would authorize Liberty to include amounts in the ISRS for damage repair that are not authorized by §393.1009(5) RSMo.

b. Leak Patches are Not Eligible Expenses

A patch or fitting placed onto a main or service line to stop a leak is not a "replacement" since the infrastructure is being repaired and not replaced. Therefore no leak patch or fitting can qualify for ISRS under § 393.1009(5)(a) since that subsection authorizes only complete replacements. A patch or fitting attached to repair a leak also does not qualify for ISRS under § 393.1009(5)(b) because expenses qualifying under this category must be part of a larger project aimed at main relining, service line insertions, or joint encapsulation. Not *all* projects that extend the useful life or enhance the integrity of the system qualify, as Liberty suggests – only projects similar to the three (3) listed projects qualify. All three are projects that are not aimed at repairing a specific leak, rather, they are part of a larger project aimed at enhancing the integrity and life of the system through a more extensive enhancement than a simple leak repair.

Liberty's witness Mr. David Swain testified that Liberty included infrastructure repair jobs, such as applying a repair fitting to stop a leak, in the ISRS amount.[26] His testimony is corroborated by the large number of project descriptions in his Schedule DS-3 that describe the project as a leak repair. As stated above, these leak repair expenses are not eligible under either § 393.1009(5)(a) or (5)(b), and approval of Liberty's ISRS

[26] Tr. 41.

would authorize Liberty to include amounts in the ISRS for leak patches that are not authorized by §393.1009(5) RSMo.

The Staff's witness, Ms. Roberta Grissom, testified that not all leak repair jobs should be capitalized and included in the ISRS. When questioned about normal accounting procedures regarding leak repairs, Ms. Grissom testified, "Well, if it's a simple wrapping of a pipe or something like that, yes, I would categorize that as maintenance expense and something that should not be capitalized."[27] Ms. Grissom also testified that in the sample of thirty-six (36) work orders that she reviewed, all involved a pipe replacement.[28] However, Mr. Swain testified that all leak repairs are capitalized and included in the ISRS.[29] But according to Staff's accounting witness, capitalizing leak repairs is not a normal accounting procedure unless there is a capital improvement such as a main replacement.[30] Had the Staff reviewed more than thirty-six work orders and discovered that Liberty capitalizes all leak repairs, it is likely that the Staff's recommendation would seek to remove these ineligible investments.

It should be noted that there is no evidence in this case that supports a conclusion that any other gas utility has been allowed to include the same type of investments that Liberty seeks to include in its ISRS, such as leak repairs and third-party damage. In fact, there is no evidence in the record at all regarding any other gas company's ISRS. Even if there was evidence of what has been included in past ISRS rates for other gas utilities,

[27] Tr. 80.

[28] Tr. 74-75.

[29] Tr. 45-46.

[30] *Id.*

those cases are not binding on the Commission, whereas the ISRS statute and ISRS rules *are* binding on the Commission.

c. Investments Not Properly Categorized

The Direct Testimony of Liberty witness Mr. David Swain includes a list of all 643 investments Liberty seeks to include in its ISRS.[31] Schedule DS-3 to Mr. Swain's testimony includes what Liberty claims is the qualifying category of expense (§ 393.1009(5)(a), (5)(b), or (5)(c)) for each investment, and the law the company was complying with when it incurred the expense. The first thing that stands out from Schedule DS-3 is the significantly large number of investments where Liberty claims the expense qualifies under *both* § 393.1009(5)(a) and (5)(b). For example, for the thirty-one (31) investments made under Liberty's heading "Additions – Main Replacements, West Division," twenty-three (23) (which amounts to seventy-four percent (74%)), claim both § 393.1009(5)(a) and (5)(b) as the category that qualifies the expense for ISRS.[32] This raises the question, "How can an investment be *both* a main replacement and a main relining or similar project?" If the main is being replaced, there is no need to reline the main, and if the main is being relined, there is no need to replace it. An investment should not qualify under both statutory subsections since either project negates the need for the other. Accordingly, every investment where Liberty claims both statutory subsections qualify the expense for ISRS, which is a significant portion, Liberty has not satisfied its burden of identifying the precise qualifying category since both cannot apply. It appears Liberty simply listed both statutory subsections as a "catch-all."

[31] Liberty Exhibit No. 1, Direct Testimony of David Swain, Schedule DS-3.

[32] *Id.*

d. The Cited Rules Did Not Cause Liberty to Incur Eligible Expenses

Liberty's Direct Testimony tried to satisfy its documentation obligations under 4 CSR 240-3.265(20)(K) and (L) by including citations to requirements that Liberty alleges caused it to incur each infrastructure expense. Liberty does not cite to any main replacement program, or main relining project, or similar program or project. Instead, Liberty cites only to the Commission's safety rules.

The Direct Testimony of Liberty witness Mr. David Swain identified the following subsections of 4 CSR 240-40.030 as the requirements that Liberty claims caused all expenditures to be eligible for ISRS:

4 CSR 240-40.030(7)	General Construction Requirements for Transmission Lines and Mains
4 CSR 240-40.030(8)	Customer Meters, Service Regulators, and Service Lines
4 CSR 240-40.030(9)	Requirements for Corrosion Control
4 CSR 240-40.030(13)	Maintenance
4 CSR 240-40.030(14)	Gas Leaks
4 CSR 240-40.030(15)	Replacement Programs

An analysis of these five subsections shows that these rules do not mandate the type of investments contemplated by the ISRS statute. Liberty's Direct Testimony provided no explanation as to why it believes each of these rule subsections caused Liberty to incur eligible ISRS expenses. The only clue regarding Liberty's rationale comes from Liberty's September 19, 2013 response opposing OPC's motion to reject, wherein Liberty points to 4 CSR 240-40.030(13)(B)(2) for authority, where it states, "Each segment of pipeline that becomes unsafe must be replaced, repaired or removed."

Liberty's argument is not persuasive because this requirement alone does not qualify any investment for ISRS purposes. Each investment must qualify under § 393.1009(5)(a), (b), or (c) RSMo, and (5)(a), allowing only replacements for "worn out or deteriorated" facilities, not damaged facilities, and not work that is something short of a total replacement. Whereas (5)(b) allows only projects that are similar to main relining projects. It is likely that Liberty's rationale as to why the other rule subsections qualify expenses for ISRS purposes are similar to Liberty's rational for subsection (13) – apparently Liberty believes that requiring the company to invest in infrastructure automatically qualifies those expenses for ISRS. This is an erroneous interpretation of the law, and it demonstrates that a significant portion of the claimed ISRS investments are ineligible for ISRS recovery.

e. Liberty Included All Investments Except Growth Items

During cross-examination, Liberty witness Mr. David Swain was asked to list all infrastructure investments that are *not* eligible for ISRS recovery. Mr. Swain's initial response was to allege that Liberty added all infrastructure expenses to the ISRS so long the facilities were used and useful, except those associated with growth.[33] Mr. Swain could not initially identify any other type of investment that is ineligible.[34] It is clear from this line of questioning that Liberty's approach has been to consider all infrastructure investments to be ISRS eligible unless the investment is tied to growth. This practice ignores the fact that the ISRS statute narrowly defines the type of

[33] Tr. 37-38. Liberty also included growth items, however, those items were discovered and removed by the Staff auditor Ms. Roberta Grissom. Tr. 82.

[34] *Id.*

infrastructure investments that are eligible under § 393.1009(5)(a) and (5)(b). It appears that Liberty believes § 393.1009(5)(a) authorizes recovery of all non-growth replacements, which ignores the qualifier that each replacement must be to replace facilities that are worn out or deteriorated. Likewise, it appears that Liberty believes § 393.1009(5)(b) authorizes Liberty to include all non-growth system enhancements into the ISRS,[35] which ignores the qualifier that each enhancement must be similar to a main relining project, service line insertion project, or joint encapsulation project. With this understanding of Liberty's practices, each and every investment should be suspect. This is corroborated by the fact that Liberty did not provide the category and rule requirement citations with its Petition, and it took a considerable amount of time for Liberty to provide that information,[36] which suggests that Liberty had not previously checked any expense to verify that it qualified. Instead, Liberty simply included everything that was non-growth related, and then had to scramble to provide after-the-fact support for including each expense in the ISRS.

OPC believes Liberty has likely incurred eligible ISRS expenses during the relevant period and that the ISRS statute authorizes the Commission to grant Liberty an ISRS rate increase for those investments. But there is no way to discern from Liberty's evidence which investments are legitimately eligible, and which investments are ineligible. Ratepayers would be best served by an order that denies the Petition and

[35] Tr. 45.

[36] Liberty did not provide the required information for all investments until it filed its Direct Testimony on September 20, 2013, Day 80 of a 120-day process.

directs Liberty to clean-up its filing with a better explanation of which category applies to each expense, with specificity as to *how* that category applies.

f. Additional Problems Identified by OPC Witness Robertson

The Direct Testimony of OPC witness Mr. Ted Robertson, OPC's Chief Utility Accountant, identifies a number of issues with Liberty's Petition that deserve further investigation and review:

1. Mr. Robertson takes issue with the fact that Liberty could not provide documentation in sufficient detail to support the costs assigned to work performed by Liberty employees.[37]
2. Mr. Robertson testified that the manner in which Liberty assigns costs for property tax coding purposes is inaccurate because it improperly assigns costs on a pro-rata basis when Liberty could be tracking and identifying actual costs.[38]
3. Mr. Robertson found an error with how Liberty calculated accrued depreciation expense on new additions and retirements in that Liberty failed to calculate depreciation for all months that the plant is in service.[39] This error could cause the total depreciation reserve balance to be understated, and the total ISRS rate base overstated.[40]

[37] OPC Exhibit No. 1, Direct Testimony of Ted Robertson, pp. 6-10.

[38] *Id.* at p. 11.

[39] *Id.* at p. 12.

[40] *Id.*

4. Mr. Robertson discovered that Liberty accrued depreciation through September 2013 for new additional and retirements, but for the deferred tax offset, Liberty used calculations as of May 2013.[41] This creates a mismatch that affects the ISRS rate base.[42]

5. Mr. Robertson testified that Liberty erred in calculating the annual depreciation expense because it did not include an offset for associated deferred taxes.[43]

An order rejecting or denying the Petition will enable OPC to have an additional opportunity to further explore these issues and correct these errors. In the short time that OPC and Staff have analyzed Liberty's Petition and supporting documentation, ineligible investments worth $34,734, and a double-counted expense worth $74,997, have been discovered and eliminated.[44] An additional 120-days to consider a re-filed Liberty application will give OPC, Staff and Liberty an additional opportunity to further refine the eligible investments and exclude ineligible expenses.

4. <u>No Authority to Approve ISRS > 3 Years Since Rate Case</u>

OPC also urges the Commission to reject the ISRS Petition because § 393.1012.2 RSMo prohibits the Commission from approving an ISRS rate increase for any gas corporation that has not had a general rate case proceeding decided or dismissed within the last three years. Liberty's last rate case was decided by the Commission on August

[41] *Id.*

[42] *Id.*

[43] *Id.* p. 13.

[44] Liberty Exhibit No. 1, Direct Testimony of David Swain, p. 12.

18, 2010, and the tariffs implementing the rate increase became effective on September 1, 2010.[45] Therefore the Commission lacks the statutory authority to grant the relief requested in Liberty's ISRS Petition because more than three years has passed since Liberty's last rate case. Section 393.1012.2 RSMo states:

> The commission shall not approve an ISRS for any gas corporation that has not had a general rate proceeding decided or dismissed by issuance of a commission order within the past three years, unless the gas corporation has filed for or is the subject of a new general rate proceeding.

The Commission recently addressed this same issue in Missouri Gas Energy's (MGE) most recent ISRS petition in Case Number GO-2013-0391. In that case the issue before the Commission was whether the term "an ISRS" in the above quote limits the application of the 3-year limitation to when an ISRS is first established, or whether it prohibits the Commission from approving any ISRS rate increase more than three years since the company's last rate case.

In its Order resolving the MGE case, the Commission interpreted the § 393.1012.2 RSMo 3-year limitation on petitions for "an ISRS" to apply only to when the Commission first approves an ISRS rate increase, and not to subsequent ISRS rate increases. The Order relied entirely upon § 393.1012.1 RSMo, which refers separately to "an ISRS" and "future changes thereto", to conclude that "this language makes it clear that "an ISRS" is different than "future changes." The Order further concluded that

[45] *In the Matter of Atmos Energy Corporation's Tariff Revision Designed to Implement a General Rate Increase for Natural Gas Service in the Missouri Service Area of the Company*, Case No. GR-2010-0192, Order Approving Stipulation and Agreement, issued August 18, 2010, and Order Approving Tariff Fillings in Compliance with Commission Order, issued August 20, 2010.

OPC's "argument would require the Commission to ignore these clear differences and treat "an ISRS" and subsequent changes to it as the same thing."

To avoid what the Commission concludes would be "ignoring" a sentence in the statue, the Order overlooked multiple instances where the ISRS statutes use the term "an ISRS" to refer to both *establishing* and ISRS and *future changes* to the ISRS. Such a reading can be found in §§ 393.1012.1, 393.1012.3, 393.1015.1(1), 393.1015.1(2), 393.1015.1(4), 393.1015.5(2), 393.1015.6(1), 393.1015.6(2) and 393.1015.8 RSMo. OPC will not repeat its legal argument here in its entirety. Instead, attached to this brief as Appendix A is a copy of the brief OPC filed with the Court of Appeals addressing this issue. OPC asks the Commission to read the legal analysis in the brief, reconsider the prior analysis from the Order, and issue an order that concludes that the Commission cannot approve Liberty's ISRS Petition because more than three years has passed since its last rate case.

5. OPC Response to Additional Arguments

This section addresses the general criticisms of Public Counsel's attempts to hold Liberty accountable to the requirements of the ISRS statute and the ISRS rule. The first argument that deserves a response is Liberty's argument that requiring compliance with the ISRS rules would lead to "regulatory uncertainty."[46] However, there should be no uncertainty if the Commission orders companies to file the documents and information required by the rule. At that point, all gas utilities should be well aware of what they are expected to file since it is clearly explained in the rule, and there will be no uncertainty.

[46] Tr. 6.

Both Liberty and the Commission's Staff wrongly allege that the purpose of the ISRS statute was to "encourage" utilities to make investments in safety.[47] This is an erroneous interpretation because each investment expense that is eligible for recovery under the ISRS is the result of a statute, order, rule or regulation *requiring* the gas utility to make the investment. §393.1009(5) RSMo. It is not an optional investment, it is a mandated investment, and therefore, no encouraging is necessary. The purpose of the ISRS statute is to help the utility recover its investment costs quicker and avoid regulatory lag in regards to certain mandated safety investments made between rate cases. The statute in no way encourages safety investments beyond what is already required because only the required investments can be recovered through the ISRS.

6. Conclusion

Liberty has the burden of proving that the expenditures it seeks to recover through the ISRS comply with the law. § 393.150.2 RSMo. Liberty has failed to meet that burden because it did not file all required documentation, and because many of the investments it seeks to include in the ISRS are ineligible. Moreover, the Commission lacks the authority to approve the Petition because more than three years has passed since Liberty's last rate case decision. For these reasons, OPC urges the Commission to reject the Petition or deny the relief requested.

[47] Tr. 8-9, Tr. 21.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 4th day of October 2013:

/s/ Marc Poston

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE EX REL. OFFICE OF THE PUBLIC COUNSEL,	)	
APPELLANT,	)	
vs.	)	**Appeal No. WD76509**
MISSOURI PUBLIC SERVICE COMMISSION,	)	
RESPONDENT.	)	

Appeal from the Missouri Public Service Commission

INITIAL BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

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September 6, 2013

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JURISDICTIONAL STATEMENT

This appeal is a challenge to the Missouri Public Service Commission's ("PSC" or "Commission") Order Approving Change in Infrastructure System Replacement Surcharge, Rejecting Tariff, and Approving New Tariff, issued in Case Number GO-2013-0391, approving a rate increase for Southern Union Company d/b/a Missouri Gas Energy ("MGE").[1] The Court of Appeals has jurisdiction of the appeal pursuant to its general appellate jurisdiction as set forth in Article V, Section 3 of the Missouri Constitution. The issues raised on appeal are not within the exclusive jurisdiction of the Missouri Supreme Court as set forth in Article V, Section 3 of the Missouri Constitution.

STANDARD OF REVIEW

The standard of review applied by Courts reviewing a PSC decision is a two-pronged analysis. First, the Court must determine whether the PSC's decision was lawful. The PSC's order was lawful if it is authorized by statute. In determining this prong of the review, the Court exercises unrestricted, independent judgment and must correct erroneous interpretations of the law. *Friendship Village of South County v. P.S.C,* 907 S.W.2d 339 (Mo. App. 1995). The second step in reviewing a PSC decision is determining whether the PSC's decision was reasonable. *Id.* This is accomplished by

[1] *In the Matter of the Application of Southern Union Company d/b/a Missouri Gas Energy, for Approval to Change its Infrastructure System Replacement Surcharge,* Case Number GO-2013-0391, Order Approving Change in Infrastructure System Replacement Surcharge, Rejecting Tariff, and Approving New Tariff, Issued May 1, 2013.

determining whether the order is supported by competent and substantial evidence on the whole record, and whether the decision was arbitrary, capricious, or constitutes an abuse of the PSC's discretion. *Id.* Issues involving statutory interpretation are issues of law, not fact. *Staley v. Missouri Director of Revenue,* 623 S.W.2d 246 (Mo. 1981). All questions of law involving PSC orders are reviewed de novo. *State ex rel. AG Processing, Inc. v. Public Service Com'n,* 120 S.W.3d 732 (Mo. 2003).

STATEMENT OF FACTS

The PSC is an administrative agency with its principle office located in Jefferson City, Missouri. The PSC has the authority and duty to regulate public utilities, including gas companies under Chapters 386 and 393 of the Revised Statutes of Missouri (RSMo).[2]

The Office of the Public Counsel ("OPC" or "Public Counsel") is an agency of the State of Missouri that represents consumers in all utility proceedings before the PSC and in all appeals of PSC orders. Sections 386.700 RSMo and 386.710 RSMo.

Southern Union Company d/b/a Missouri Gas Energy ("MGE") is a gas company operating in Missouri as a regulated monopoly provider of natural gas service.[3] MGE is a public utility under § 386.020(43) RSMo and gas corporation under § 386.020(18) RSMo.

[2] All statutory references are to Missouri Revised Statutes 2010 unless otherwise noted.

[3] On July 31, 2013, in Case No. GM-2013-0254, the PSC approved the acquisition of MGE by Laclede Gas Company.

On February 8, 2013, MGE filed an Application and Petition to Change its Infrastructure System Replacement Surcharge ("Petition") with the PSC pursuant to Sections 393.1009, 393.1012, and 393.1015 RSMo.[4] The PSC's approval of an Infrastructure System Replacement Surcharge (ISRS) authorizes gas companies to increase rates "to recover certain infrastructure system replacement costs outside of a formal rate case filing."[5] MGE's Petition seeks to recover costs of ISRS-qualifying plant placed in service during the period of June 2012 through December 2012.[6] MGE's proposed ISRS rate increase would generate an additional $1,741,862 of annual revenues.[7]

On February 13, 2013, the PSC suspended the proposed tariff change until June 8, 2013 in order for the PSC to have adequate time to consider MGE's Petition.[8] Also on February 13, 2013, the PSC issued its Order Directing Notice, Directing Filings, and Setting Intervention Date, whereby the PSC directed its Staff to file a recommendation regarding the Petition by April 9, 2013.[9]

[4] Legal File (L.F.) 003.

[5] *Id*.

[6] L.F. 006.

[7] *Id*.

[8] L.F. 054.

[9] L.F. 047.

On April 9, 2013, the PSC Staff recommended that "the Commission approve an incremental revenue requirement of $1,741,740."[10] The Staff Recommendation states that this is MGE's fifth ISRS rate increase since MGE's most recent general rate case.[11] MGE's most recent general rate case was resolved by a PSC Report and Order issued on February 10, 2010 resolving all contested issues.[12] The Staff Recommendation states that if this ISRS rate increase is approved, "MGE's total ISRS revenue requirement will amount to $6,343,452," which is a "composite amount" that "includes $1,741,740 from the instant case, $824,284 from GO-2013-0015, $891,255 from GO-2012-0144, $1,622,349 from GO-2011-0269, and $1,224,824 from GO-2011-0003."[13]

On April 10, 2013, the PSC issued its Order Establishing Time to Respond to Staff's Recommendation and Directing Filing, which questioned whether the PSC has the statutory authority to approve the Petition in light of the statutory restriction limiting the period of time the PSC may approve an ISRS.[14] The PSC stated:

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[10] L.F. 057. The Staff proposed a minor $122 adjustment to reduce the proposed ISRS from $1,741,862 to $1,747,740.

[11] L.F. 062.

[12] L.F. 071; *In the Matter of Missouri Gas Energy and its Tariff Filing to Implement a General Rate Increase for Natural Gas Service,* Case No. GR-2009-0355.

[13] L.F. 058-059.

[14] L.F. 071.

> Subsection 393.1012.2 RSMo Supp. 2012, states that "[t]he commission shall not approve an ISRS for any gas corporation that has not had a general rate proceeding decided or dismissed by issuance of a commission order within the past three years, unless the gas corporation has filed for or is the subject of a new general rate proceeding." MGE's most recent general rate case, GR-2009-0355, was decided by the Commission Report and Order issued on February 10, 2010. MGE filed its petition in this case on February 8, 2013. The statute cited above does not clarify whether a gas utility must file a petition requesting an ISRS within three years of the most recent rate case decision in order to comply with the statute, or whether the issuance of a Commission order approving such a petition is the relevant date in determining the Commission's statutory authority under that subsection. The Commission will require the parties to file a response regarding whether the Commission has the statutory authority to approve MGE's petition in this case under Subsection 393.1012.2, RSMo Supp. 2012.[15]

OPC, MGE and the PSC Staff each filed a response to the PSC's question.[16] OPC argued that Section 393.1012.2 RSMo prohibited the PSC from approving the proposed ISRS rate increase because more than three years had passed since MGE's last rate

[15] L.F. 071-072.

[16] L.F. 074, 078, and 088.

case.[17] MGE and the PSC's Staff argued that the three-year limitation found in Section 393.1012.2 RSMo applies only to the first time an ISRS rate increase is approved and does not apply to subsequent ISRS rate increases.[18] OPC, the PSC Staff, and MGE filed responsive pleadings, with each party arguing in support of its interpretation of the ISRS statutes.[19]

On May 1, 2013, the PSC approved MGE's ISRS petition in its Order Approving Change in Infrastructure System Replacement Surcharge, Rejecting Tariff, and Approving New Tariff ("Order").[20] The PSC concluded that the three year limitation on the PSC's authority to approve "an ISRS" applies only to the first time rates are increased through the ISRS, and not to subsequent ISRS rate increases.[21]

OPC filed an Application for Rehearing on May 9, 2013,[22] and the PSC denied rehearing on May 15, 2013.[23]

On May 31, 2013, OPC filed its Public Counsel's Motion for Order Directing Reconciliation and Motion for Expedited Treatment.[24] OPC's motion requested that the

[17] L.F. 088.

[18] L.F. 074 and 078.

[19] L.F. 092, 096, 105, 110, and 113.

[20] L.F. 117.

[21] L.F. 121-122.

[22] L.F. 127.

[23] L.F. 133.

PSC direct its Staff to file the reconciliation required by Sections 386.420.4 and 386.510 RSMo "to permit a reviewing court and the commission on remand from a reviewing court to determine how the public utility's rates and charges, including the rates and charges for each customer class, would need to be temporarily and, if applicable, permanently adjusted to provide customers or the public utility with any monetary relief that may be due in accordance with the procedures set forth in section 386.520."[25] The PSC Staff filed the Reconciliation on June 4, 2013,[26] and the PSC approved the Reconciliation on June 6, 2013.[27]

OPC filed its Notice of Appeal with the PSC on June 6, 2013.[28]

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[24] L.F. 136.

[25] Section 386.420.4 RSMo

[26] L.F. 142.

[27] L.F. 151.

[28] L.F. 154.

POINTS RELIED ON

POINT 1

THE PSC ERRED IN ITS ORDER APPROVING AN INCREASE TO MGE'S INFRASTRUCTURE SYSTEM REPLACEMENT SURCHARGE (ISRS), BECAUSE THE ORDER IS UNLAWFUL AND SUBJECT TO REVIEW UNDER SECTION 386.510 RSMO, IN THAT APPROVING THE ISRS RATE INCREASE MORE THAN THREE YEARS SINCE MGE'S LAST GENERAL RATE CASE IS BEYOND THE PSC'S AUTHORITY AND IN VIOLATION OF SECTION 393.1012.2 RSMO.

Authorities:

Section 393.1009 RSMo

Section 393.1012 RSMo

Section 393.1015 RSMo

ARGUMENT

POINT 1

THE PSC ERRED IN ITS ORDER APPROVING AN INCREASE TO MGE'S INFRASTRUCTURE SYSTEM REPLACEMENT SURCHARGE (ISRS), BECAUSE THE ORDER IS UNLAWFUL AND SUBJECT TO REVIEW UNDER SECTION 386.510 RSMO, IN THAT APPROVING THE ISRS RATE INCREASE MORE THAN THREE YEARS SINCE MGE'S LAST GENERAL RATE CASE IS BEYOND THE PSC'S AUTHORITY AND IN VIOLATION OF SECTION 393.1012.2 RSMO.

OPC challenges the lawfulness of the PSC's Order granting MGE an ISRS rate increase more than three years since MGE's last rate case was decided. This is a case of first impression for both the Court and the PSC in that this is the first time the PSC approved an ISRS rate increase more than three years after the company's last rate case.[29] The Order must be reversed because it violates Section 393.1012.2 RSMo, which prohibits the PSC from approving an ISRS rate increase more than three years since MGE's rates were reset in its last general rate case. Section 393.1012.2 RSMo states:

> The commission shall not approve an ISRS for any gas corporation that has not had a general rate proceeding decided or dismissed by issuance of a

[29] L.F. 112.

commission order within the past three years, unless the gas corporation has filed for or is the subject of a new general rate proceeding.

The facts of this case are undisputed. The PSC decided MGE's last general rate case on February 10, 2010.[30] The PSC issued its order approving the ISRS rate increase on May 1, 2013, with an effective date of May 15, 2013, which is more than three years since the last PSC general rate case order for MGE.[31] At the time, MGE had not filed for nor was MGE the subject of a new general rate proceeding.[32]

The Order interprets the Section 393.1012.2 RSMo 3-year limit on petitions for "an ISRS" to apply only when the PSC first approves an ISRS rate increase, and not to subsequent ISRS rate increases.[33] The Order relies upon Section 393.1012.1 RSMo, which states:

393.1012. 1. Notwithstanding any provisions of chapter 386 and this chapter to the contrary, beginning August 28, 2003, a gas corporation providing gas service may file a petition and proposed rate schedules with the commission to establish or change ISRS rate schedules that will allow for the adjustment of the gas corporation's rates and charges to provide for the recovery of costs for

[30] L.F. 119.

[31] L.F. 117.

[32] L.F. 071.

[33] L.F. 121-122.

> eligible infrastructure system replacements. The commission may not approve an ISRS to the extent it would produce total annualized ISRS revenues below the lesser of one million dollars or one-half of one percent of the gas corporation's base revenue level approved by the commission in the gas corporation's most recent general rate proceeding. The commission may not approve an ISRS to the extent it would produce total annualized ISRS revenues exceeding ten percent of the gas corporation's base revenue level approved by the commission in the gas corporation's most recent general rate proceeding. An ISRS and any future changes thereto shall be calculated and implemented in accordance with the provisions of sections 393.1009 to 393.1015. ISRS revenues shall be subject to a refund based upon a finding and order of the commission to the extent provided in subsections 5 and 8 of section 393.1009. [emphasis added].

The PSC concluded that since the sentence "An ISRS and any future changes thereto shall be calculated and implemented in accordance with the provisions of sections 393.1009 to 393.1015" refers to "an ISRS" when referencing the initial setting of an ISRS separately from the reference to "future changes", all references to "an ISRS" elsewhere in the statute must also refer to only the first time the ISRS rate is increased.[34]

The PSC misinterpreted Section 393.1012.2 RSMo because the prohibition against the PSC approving an ISRS more than three years from the last rate case refers to the

[34] L.F. 121.

petition "approval" required by Section 393.1012.1 RSMo, an approval that is required for both establishing and changing an ISRS. The language "shall not approve an ISRS" in Section 393.1012.2 RSMo is in no way limited to initial ISRS approvals, and applies instead to all petition "approvals." Accordingly, the PSC misinterpreted the law.

1. PSCs Legal Conclusion is Inconsistent with § 393.1012 RSMo

The PSC erred in interpreting Section 393.1012.2 RSMo because the Legislature intended equal treatment throughout the ISRS statutes for both establishing and changing an ISRS, since the purpose of this sentence is to make clear that Sections 393.1009 through 393.1015 apply equally to establishing and changing an ISRS without limitation.

Additionally, the purpose of subsection 393.1012.1 RSMo is to allow petitions for establishing *and* changing an ISRS, which is stated in the first sentence. The next two sentences place minimum and maximum restrictions on establishing and changing an ISRS, and use the term "an ISRS" to refer to both. The conclusion that the term "an ISRS" used elsewhere in the subsection applies to both establishing and changing an ISRS is supported by the language of the statute because to interpret "an ISRS" to refer only to when an ISRS is established would create an absurd result. The third sentence of the subsection states, "The commission may not approve <u>an ISRS</u> to the extent it would produce total annualized ISRS revenues exceeding ten percent of the gas corporation's base revenue level approved by the commission in the gas corporations most recent general rate proceeding."[35] If this maximum limit applied only to establishing an ISRS, it

[35] Section 393.1012.1 RSMo. Emphasis added.

would essentially remove the maximum cap on the size of all subsequent ISRS changes. The purpose of this sentence is to avoid ISRS increases that exceed ten percent of revenues, which if interpreted as the PSC has interpreted it, would protect against the cap only when the ISRS is first established, thus allowing subsequent rate increases of unlimited size. This would effectively defeat the purpose of protecting rate-paying consumers by keeping the ISRS below the ten percent cap. Statutory interpretations which result in a section having no meaning or purpose whatever should be avoided. *State ex rel. Thomason v. Roth*, 372 S.W.2d 94 (Mo. 1963).

The PSC's interpretation of Section 393.1012.2 RSMo also conflicts with Section 393.1012.3 RSMo, which prohibits the *duration* of an ISRS from lasting more than 3-years without reconciliation. Section 393.1012.3 RSMo states in part, "In no event shall a gas corporation collect an ISRS for a period exceeding three years unless the gas corporation has filed for or is the subject of a new general rate proceeding…"[36] The Order's interpretation of the term "an ISRS", however, would allow all subsequent ISRS rate increases to continue with no limits on its duration since that term would only apply to the initial ISRS rate increase. Using MGE as an example, MGE's recovery of its initial ISRS amount of $1,224,824 would be required to cease after three years, but the other $5,118,628 approved in subsequent ISRS rate increase petitions could continue being charged to consumers indefinitely.[37]

[36] Section 393.1012.1 RSMo. Emphasis added.

[37] L.F. 062.

2. PSCs Legal Conclusion is Inconsistent with § 393.1015 RSMo

The PSC's interpretation is in conflict with Section 393.1015.1(4) RSMo, which states, "If the commission finds that a petition complies with the requirements of section 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…"[38] This subsection gives the PSC the specific authority to approve an ISRS, and uses the term "an ISRS" to refer to both establishing and making subsequent changes to an ISRS, because to interpret it to apply only to establishing an ISRS would mean that the statute does not include specific authority for the PSC to approve subsequent changes to a previously established ISRS rate.

The PSC's interpretation of the term "an ISRS" also conflicts with Section 393.1015.5(2) RSMo, which states, "At the end of each twelve-month calendar period the ISRS is in effect, the gas corporation shall reconcile the difference between the revenues resulting from an ISRS and the appropriate pretax revenues…[39] This subsection uses the term "an ISRS" to refer to both establishing and making future changes to an ISRS because to interpret it to apply only to establishing an ISRS would allow the gas company to avoid a reconciliation of any subsequent ISRS changes.

The PSC's interpretation also conflicts with Section 393.1015.6(1) RSMo, which requires gas corporations that have "implemented an ISRS" to "file revised rate schedules

[38] Section 393.1015.1(4) RSMo. Emphasis added.

[39] Section 393.1015.5(2) RSMo. Emphasis added.

to reset the ISRS rate to zero when new base rates and charges become effective for the gas corporation following a commission order establishing customer rates in a general rate proceeding that incorporates in the utility's base rates subject to subsections 8 and 9 of this section eligible costs previously reflected in an ISRS."[40] Under the PSC's interpretation of the term "an ISRS," the PSC would only need to incorporate the initial ISRS amounts in rates, and not subsequent ISRS amounts, before resetting the ISRS rate back to zero.

The PSC's interpretation of the term "an ISRS" also conflicts with Section 393.1015.6(2) RSMo, which states,

> Upon the inclusion in a gas corporation's base rates subject to subsections 8 and 9 of this section of eligible costs previously reflected in an ISRS, the gas corporation shall immediately reconcile any previously unreconciled ISRS revenues as necessary to ensure that revenues resulting from the ISRS match as closely as possible the appropriate pretax revenues as found by the commission for that period. [41]

This subsection uses the term "an ISRS" to refer to both establishing and making future changes to an ISRS because to interpret it to apply only to establishing an ISRS would remove the requirement that the gas company reconcile subsequent ISRS changes to ensure the ISRS revenues closely match the appropriate pretax revenues.

[40] Section 393.1015.6(1) RSMo. Emphasis added.

[41] Emphasis added.

Subsections 393.1015.1(1) and (2) RSMo also apply the term "an ISRS" to both establishing an ISRS and changing an ISRS when they use the phrase "seeking to establish or change an ISRS."

The PSC's interpretation also conflicts with Section 393.1015.8 RSMo, which states in part, "In the event the commission disallows, during a subsequent general rate proceeding, recovery of costs associated with eligible infrastructure system replacements previously included in an ISRS, the gas corporation shall offset its ISRS in the future as necessary to recognize and account for any such overcollections." Under the PSC's interpretation, a gas company would not be required to offset its ISRS in the future to account for overcollections of any ISRS rate increases that occurred subsequent to the initial ISRS rate increase since the term would apply only to the initial ISRS.

The Order does not explain how its conclusion is consistent with the clear use of the term "an ISRS" in the multiple subsections quoted above where the term applies equally to establishing and changing an ISRS. When determining the Legislature's intention, provisions of the entire legislative act must be construed together, and if reasonably possible, all provisions must be harmonized. *Collins v. Director of Revenue,* 691 S.W.2d 246 (Mo. 1985). Statutes must also be given common sense and practical interpretations. *Concord Pub. House, Inc. v. Director of Revenue, State of Mo.,* 916 S.W.2d 186 (Mo. 1996). The law favors statutory interpretation that harmonizes with reason, gives effect to the legislature's intent, and tends to avoid absurd results. *State ex rel. Director of Revenue v. Scott,* 919 S.W.2d 296 (Mo.App. W.D. 1996). Words in a statute that have more than one meaning are to be given a reasonable interpretation rather

than an absurd or strained reading. *State v. Schleiermacher*, 924 S.W.2d 269 (Mo. 1996). The plain and unambiguous language of a statute cannot be made ambiguous by administrative interpretation and thereby given meaning which is different from that expressed in clear and unambiguous language of the statute. *Blue Springs Bowl v. Spradling*, 551 S.W.2d 596 (Mo. 1977). Statues are to be construed in a manner consistent with the legislative intent, giving meaning to the words used in the broad context of the legislature's purpose in enacting the law. *Estate of Williams v. Williams*, 12 S.W.3d 302 (Mo. 2000).

The Order's interpretation of the ISRS statute does not recognize that the purpose of the limitation in Section 393.1012.2 RSMo is to avoid *new rate increases* through an ISRS more than three years from when a rate case was decided. If the Legislature intended the 3-year limitation on getting an ISRS approved to apply only to establishing an ISRS, the statute would clearly state as much without the strained interpretation offered by the PSC. The Legislature would have worded Section 393.1012.2 RSMo to state that "the commission shall not *first establish* an ISRS for any gas corporation that has not had a general rate proceeding decided or dismissed by issuance of a commission order within the past three years." By using the word "approve" instead of "establish", the statute is referencing the approval authorized in the first subsection, Section 393.1012.1 RSMo, which applies equally when a gas company petitions the PSC to "establish or change ISRS rate schedules."

3. Additional Support for Interpreting § 393.1012.2 RSMo

The record of this case includes additional support for OPC's interpretation of Section 393.1012.2 RSMo. In OPC's April 30, 2013 filing with the PSC, OPC included a list of all ISRS petitions filed in Missouri since the ISRS statute became effective in 2003.[42] Not counting the present ISRS, or ISRS petitions filed subsequent to when OPC filed the list, there have been thirty-two ISRS petitions approved by the PSC.[43] Only two of the thirty-two were approved more than three years since the last rate case, and in both cases, the utility had a rate case pending, which is consistent with Section 393.1012.2 RSMo.[44] This shows that in the ten years since the ISRS statutes were enacted, the PSC and the gas companies followed a practice where the three-year limitation applied to all ISRS rate increases.

The PSC's initial request asking the parties to file pleadings regarding the Commission's authority under the ISRS statute also provides support. It stated:

> The statute cited above does not clarify whether a gas utility must file a petition requesting an ISRS within three years of the most recent rate case decision in order to comply with the statute, or whether the issuance of a

[42] L.F. 112.

[43] *Id.*

[44] *Id.*

> Commission order approving such a petition is the relevant date in determining the Commission's statutory authority under that subsection.[45]

It is apparent from the PSC's request that the PSC had initially concluded that the three year limitation applied to all ISRS rate increases because the PSC sought only to determine the action that satisfied the three-year limitation – that is, whether it was satisfied by the filing of the petition, or the issuance of the PSC's order approving the petition. The PSC's Order does not explain the reason for this change, except to point out that this is an issue of first impression for the PSC.[46]

MGE also appears to support OPC's interpretation of the ISRS statute in the "ISRS Talking Points" available on MGE's website to educate customers about the surcharge. In the ISRS Talking Points MGE states in regard to the ISRS, "The charge is still subject to MPSC review, plus MGE will initiate a full rate review proceeding no later than three years after implementation of an ISRS."[47] MGE also appears to support OPC's interpretation by the fact that MGE filed its Petition on February 8, 2013, only two days before the three-year period was to end on February 10, 2013.[48]

In summary, the PSCs Order should be reversed because the PSC misinterpreted Section 393.1012.2 RSMo when it concluded that the three-year limit on the PSC's

[45] L.F. 071-072.

[46] L.F. 121.

[47] L.F. 044.

[48] L.F. 071.

authority to approve an ISRS applies only to the first ISRS rate increase. Section 393.1012.2 does not limit its applicability to first establishing an ISRS, and instead applies equally to all requests for an ISRS rate increase.

CONCLUSION

The Office of the Public Counsel requests a decision by the Court that reverses the PSC's Order because the PSC lacked the statutory authority to approve an ISRS rate increase more than three years since MGE's last general rate case.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record this 6th day of September 2013.

*/s/ Marc Poston*_____
Marc D. Poston

CERTIFICATE PURSUANT TO RULE 84.06(b), 84.06(c), 84.06(g), AND WESTERN DISTRICT LOCAL RULE XXXII

I hereby certify that the foregoing Brief complies with the limitations contained in Rule 84.06(b) and, according to the word count of the word-processing system used to prepare this Brief (excepting the cover, certificate of service, this certificate, and the signature block), contains 4,623 words. I hereby further certify that the file submitted to the Court has been scanned for viruses and that the scan indicated that it is virus free.

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