

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

In the Matter of Spire Missouri, Inc.            )  
d/b/a Spire (East) Purchased Gas            )            Case No. GR-2021-0127  
Adjustment (PGA) Tariff Filing            )

**Public Counsel’s Response to Staff’s ACA Recommendation**

**COMES NOW** the Office of the Public Counsel (“Public Counsel”) in response to the Public Service Commission Staff’s (“Staff”) May 27, 2022 Staff Recommendation regarding its review of Spire Missouri, Inc. d/b/a Spire’s (East) (“Spire”) Actual Cost Adjustment (“ACA”), and states:

1. The Staff Recommendation identifies and analyzes a number of important issues relevant to its review of the gas costs Spire charged its customers for the period of October 1, 2019 through September 30, 2020. Issues identified by Staff include Spire’s decisions surrounding its affiliate Spire STL Pipeline, decisions related to Spire-owned storage facilities, decisions related to capacity and storage on other pipelines, and decisions on gas supply purchases involving Spire’s affiliate Spire Marketing.

2. Since Spire’s gas costs collected through the purchased gas adjustment (“PGA”) include costs resulting from contracts with affiliates, an analysis of Spire’s gas costs necessarily requires a determination of whether Spire complied with the important consumer protections within the Commission’s affiliate transaction rules, 20 CSR 4240-40.015. The affiliate transaction rules protect customers by prohibiting a gas utility from providing a financial advantage

to an affiliate. Compliance with these rules is necessary because transactions between affiliated entities are not arms-length transactions where the buyer and seller have separate interests.

3. The Missouri Supreme Court explained the concern when reviewing a 2013 ACA case involving affiliate transactions:

OPC argues, however, that a presumption that a transaction was agreed to prudently should not apply to affiliate transactions because of the greater risk of self-dealing when contracting with an affiliate. This Court again agrees. As noted in the report of a Congressional staff investigation of the particularly egregious affiliate dealings between Enron and its pipeline subsidiaries in the wake of Enron's collapse:

[W]henever a company conducts transactions among its own affiliates there are inherent issues about the fairness and motivations of such transactions. ... One concern is that where one affiliate in a transaction has captive customers, a one-sided deal between affiliates can saddle those customers with additional financial burdens. Another concern is that one affiliate will treat another with favoritism at the expense of other companies or in ways detrimental to the market as a whole.

This greater risk inherent in affiliate transactions arises because agreements between a public utility and its affiliates are not "made at arm's length or on an open market. They are between corporations, one of which is controlled by the other. As such they are subject to suspicion and therefore present dangerous potentialities."<sup>1</sup>

The risks explained by the Supreme Court apply to this Spire case as well. Spire Missouri has a "captive" customer base and Spire, Inc. has an incentive and an opportunity to shift risks and costs to Spire Missouri and away from its unregulated entities through affiliate transactions. This poses a threat to Spire Missouri's customers and "the market as a whole."

4. The Missouri Supreme Court further explained how this affiliate transaction concern is particular to the Commission's ACA gas cost reviews:

Here, the concern is with an ability to offer a lower bid than one's competitors because of access to inside information about costs and terms and because of an ability to shift fixed costs to the regulated utility, thereby allowing the affiliate to bid lower due to lower overhead costs. While this Court does not suggest that there was such conduct here, the risk of this conduct and the incentive to undertake it inherently exists in affiliate transactions.<sup>2</sup>

Applied to the current Spire case, there is an inherent risk that Spire's affiliates have access to inside information about costs and terms, and the ability to shift fixed costs from Spire affiliates to Spire Missouri, thereby allowing the affiliate to bid lower due to lower overhead and other allocated costs.

5. Shifting costs to Spire Missouri's captive customers to allow Spire's affiliates to offer matching or lower bids could result in Spire's customers actually paying *more* for a good or service than they would otherwise pay had Spire chosen to contract with a non-affiliate. Due to these concerns with affiliate transactions, the Missouri Supreme Court determined that the Commission cannot apply a "presumption of prudence" to affiliate transactions – meaning, the Commission cannot presume such transactions are prudent as it does with non-affiliate transactions. Instead, such a finding of prudence should require Spire to come forward with evidence to prove the transactions were prudent. The Supreme Court explained:

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<sup>1</sup> *Office of the Pub. Counsel v. Mo. PSC*, 409 S.W.3d 371, 376-377 (Mo. 2013).

<sup>2</sup> *Id.*, at 377.

[T]he rationale for permitting a presumption of prudence in arms-length transactions simply has no application to affiliate transactions. The PSC enacted the affiliate transaction rules in 2000 with the precise purpose of thwarting unnecessary rate hikes due to cross-subsidization. *State ex rel. Atmos*, 103 S.W.3d at 764. Those rules require that a utility must show that it paid the lesser of the fair market rate or the fully distributed cost to the regulated gas corporation and require that records be kept supporting these calculations. 4 CSR 240-40.016(4)(B) ("[T]he regulated gas corporation shall document both the fair market price of such ... goods and services and the fully distributed cost to the regulated gas corporation to produce the ... goods or services for itself.")

The affiliate rules' stated purpose is to "prevent regulated utilities from subsidizing their non-regulated operations ... and provide the public the assurance that their rates are not adversely impacted by the utilities' nonregulated activities." 240-40.015. A presumption that costs of transactions between affiliates were prudent is inconsistent with these rules.<sup>3</sup>

6. Early in this case, Environmental Defense Fund, Public Counsel, Midwest Energy Consumers Group, and Consumers Counsel of Missouri requested that the Commission establish a contested case procedural schedule whereby Spire would be responsible for satisfying its burden of providing evidentiary support for all gas costs at issue in this case.<sup>4</sup> These parties requested such a schedule because without a presumption of prudence for affiliate transactions, Spire bears the burden to prove that its gas costs were prudently incurred, and should be required to establish prudence.<sup>5</sup>

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<sup>3</sup> *Id.*, at 377-378.

<sup>4</sup> EFIS document no. 5, Comments and Motion to Establish Procedural Schedule of the Environmental Defense Fund, Office of Public Counsel, Midwest Energy Consumers Group and Consumers Council of Missouri, November 9, 2020.

<sup>5</sup> *Id.*, at 378, the Court held "Missouri law sets out the burden of proof in PSC proceedings. As noted earlier, those statutes provide that a gas corporation has the burden to prove that the gas costs it proposes to pass along to customers are just and reasonable. § 393.150.2.

7. Spire having the burden of proof for affiliate transactions means the Commission's Staff, Public Counsel, or any other party should not have to disprove that Spire's affiliate transactions were prudent. Spire should be required in all ACA cases involving affiliate transactions to come forward with detailed testimony and documentation of how each affiliate transaction complied with the consumer protections in the Commission's affiliate transaction rules. In this case, Spire relies upon the Staff's procurement analysis group to gather the data and support a finding of prudence for Spire's affiliate transactions.

8. The Staff's Recommendation identifies a number of concerning facts involving Spire's ACA, including the lack of documentation, poor responsiveness to data requests, lack of transparency, and more:<sup>6</sup>

- a. Spire's documentation of gas supply bidding and contracting "was neither transparent nor did it explain why the Company chose a particular gas supply price."
- b. "Spire's RFP award documentation...did not provide pricing data analyses or specify why the Company chose the particular pricing index that it selected. In this instance the price selected turned out to be higher than the alternative price offered."
- c. "Another concern arises around the general lack of contemporaneous documentation that Spire Missouri initially provided regarding the RFP process to obtain additional gas supplies through new transportation routes implemented in 2015."
- d. "After Spire Missouri reported that it could not provide such documents due to its agreements to destroy the RFP proposals."
- e. "Staff found that Spire Missouri's evaluation process itself was not very transparent as it moved to an ultimate decision in early 2016 to

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<sup>6</sup> EFIS document no. 50, Staff Recommendation, May 27, 2022.

have an affiliated entity, Spire STL Pipeline, construct, own, and operate the pipeline.”

- f. “Staff’s concerns with the affiliated AMA [asset management agreement] are that there does not appear to be similarly situated unaffiliated transactions that was part of an open bidding process for this service. In addition, it is not clear that there is substantial benefit to Spire Missouri for releasing this capacity to Spire Marketing...”
- g. “The release of storage is not a typical release transaction based on the history of capacity release activity of Spire Missouri.”
- h. “...all capacity to deliver propane to the distribution system has been removed...”
- i. “Over the course of its review in this case, Staff has developed serious concerns about Spire Missouri’s resource planning, the way it presents such planning in ACA cases, and the potential for misunderstanding the actual reliability of gas supply.”
- j. “However, in this review Staff has become concerned that these reports have not represented Spire Missouri’s contemporaneous assessment of its supply, transportation and storage resources or their ability to perform fully during periods of peak demand.”
- k. “Staff recommends that Spire Missouri refrain from...perfunctory answers to data requests in ACA cases.”

9. The list of problems the Staff encountered highlights the concerns raised by Public Counsel and other parties in November 2020. Spire is not required to come forward and affirmatively prove its affiliate transactions were prudent and in compliance with the Commission’s regulations, which may reduce the Company’s incentive to retain documents or ensure its processes are transparent. Spire’s response to the Staff’s data request asking Spire to prove its affiliate transactions comply with the rules further highlights this concern:

<b>Data Request No.</b>	0143
<b>Company Name</b>	Spire-Investor(Gas)
<b>Case/Tracking No.</b>	GR-2021-0127
<b>Date Requested</b>	1/10/2022
<b>Issue</b>	Expense - Gas Supply Planning/Reliability
<b>Requested From</b>	Lew Keathley
<b>Requested By</b>	Jamie Myers
<b>Brief Description</b>	Affiliate Rule

Please provide a copy of the Company's support for compliance with the following as it pertains to energy-related, gas cost related, and PGA related transactions: Level of compliance with the Rule (20 CSR 4240-40.015) to address the following areas: 1. The level of compliance with the Rule, including but not limited to the following provisions: b. The Standards found in subsection (2) of the Rule (20 CSR 4240-40.015(2)); c. The Evidentiary Standards found in subsection (3) of the Rule (20 CSR 4240- 40.015(3)); d. The Record Keeping Requirements found in subsection (4) of the Rule (20 CSR 4240-400.015(4)); e. The Records of Affiliated Entities found in subsection (5) of the Rule (20 CSR 4240-40.015 (5)); f. The Access to Records of Affiliated Entities found in subsection (6) of the Rule (20 CSR 4240-40.015 (6)); g. The training and advice requirements found in subsection (9) of the Rule (20 CSR 4240-40.015(9)). 2. The extent to which the existing cost allocation manual (CAM) fully documents newly formed operations, or ways in which the existing CAM should be revised to reflect newly formed operations. 3. The level of compliance with all existing variances from or waivers of the Rule. (Waiver and variance orders should be provided). 4. Any other significant area regarding compliance with the rule and the way it should be addressed. DR requested by Dave Sommerer (David.Sommerer@psc.mo.gov).

Response: Spire Missouri does not have all of these on hand or track all affiliate transactions in front of the Commission. Commission Staff should be able to provide this information. Spire Missouri is compiling documents demonstrating that it was compliant with affiliate transaction rules and will be prepared to discuss during the on-site visit.

The Staff's data request appropriately and necessarily asked Spire to support its affiliate transactions according to specific requirements in the affiliate transaction rules. Spire's answer, and suggestion that Staff should be responsible for supporting Spire's affiliate transactions, indicates a problem with the PGA/ACA process and appropriately applying the burden of proof.

10. Public Counsel recently discussed this case with Staff and Spire. Those discussions were productive, and on July 28, 2022, Spire provided additional documentation of its gas costs. Continued discussions and data review with Spire and the Commission's Staff could help resolve issues related to the gas costs incurred during this ACA period and the ACA process.

11. In the event the parties are unable to resolve their differences, it would help to have a procedural schedule in place. Public Counsel requests the Commission order the parties to agree upon and propose a procedural schedule that includes Spire filing direct testimony that fully supports every affiliate transaction relevant to this case with the data necessary to prove Spire complied with the affiliate transaction pricing requirements.

WHEREFORE, the Office of the Public Counsel respectfully offers this response to the Staff's Recommendation and requests the Commission direct the parties to agree upon and file a proposed procedural schedule.



Respectfully submitted,

**/s/ Marc Poston**

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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 29th day of July 2022.

**/s/ Marc Poston**

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