BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Spire Missouri Inc. to Change its Infrastructure System Replacement Surcharge in its Spire Missouri East Service Territory	)))))	Case No. GO-2019-0115
In the Matter of the Application of Spire Missouri Inc. to Change its Infrastructure System Replacement Surcharge in its Spire Missouri West Service Territory	)))))	Case No. GO-2019-0116

BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

COMES NOW the Office of the Public Counsel ("OPC") and for its *Brief*, states as follows:

Pursuant to the *Order Scheduling Evidentiary Hearing, Establishing Procedural Schedule, and Other Procedural Requirements* issued by the Commission on March 20, 2019, the OPC sets forth its *Brief* in a manner following the list of issues filed on April 1, 2019. Those issues, and the OPC's response are as follows:

A. Are all costs included in the Company's ISRS filings in these cases eligible for inclusion in the ISRS charges to be approved by the Commission in this proceeding?

No. See the OPC's response to issue B for details.

B. If a Party believes that certain costs are not eligible for inclusion in the ISRS charges to be approved by the Commission in this proceeding, what are those costs and why are they not eligible for inclusion?

The OPC believes that there are four types of costs that are not eligible for inclusion in the ISRS charges to be approved by the Commission in this proceeding.[1] The OPC will discuss each of these costs and the reason for their exclusion from the ISRS in turn.

Spire has failed to produce sufficient evidence to prove that the pipes it replaced and are claiming as ISRS eligible in these cases constituted infrastructure that was "worn out or [] in [a] deteriorated condition."

Spire, being the party that brought this request for an ISRS, bears the burden of proof in these cases. *Clapper v. Lakin*, 123 S.W.2d 27, 33 (Mo. 1938) ("The burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue."); RSMo. § 393.150.2 ("At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the gas corporation . . . ."). Spire, therefore, has the burden of providing sufficient evidence to prove that the replacements it has made and is claiming as ISRS eligible under the definition of "Gas utility plant projects" found in section 393.1009(5)(a) do, in fact, meet the definition of "Gas utility plant projects" found in section 393.1009(5)(a). Stated more specifically, Spire must prove that the replacements it made were of "[m]ains, valves, service lines, regulator

[1] While the OPC continues to believe that the overhead costs Spire claims to have incurred should not be recovered in this ISRS proceeding for the reasons laid out herein, the OPC notes that it has reached an agreement with both Staff and Spire concerning these costs that would permit Spire to currently collect these costs through the ISRS approved in this proceeding, with the understanding that their prudency may be challenged as part of a later general rate proceeding. Therefore, while the OPC will still lay forth its argument for why these overhead costs should not be recovered in this ISRS, the OPC ultimately asks that the Commission resolve this issue by approving the Stipulation and Agreement Regarding Overheads filed on April 11, 2019.

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**." RSMo. Section 393.1009(5)(a) (emphasis added). It is this last part of this statutory definition that is the most troubling because Spire has failed to present sufficient evidence in these cases to prove that the vast majority of the replacements it made were of "existing facilities that have worn out or are in deteriorated condition."[2]

Before proceeding to examine what evidence Spire did purportedly present, it is important to make clear that the OPC is not challenging the fact that Spire's pipes **can** wear out or deteriorate. After all, there is no doubt that all pipes, including cast iron and bare steel (as well as any other man-made material for that matter), can and will **eventually** deteriorate over time. Rather, the real obstacle to ISRS recovery is Spire's utter failure to prove that the pipes it replaced in **these specific cases** were actually worn out or deteriorated. This is made all the more vexing given the sheer scale of the replacements that Spire is claiming. For example, Spire's application lists hundreds upon hundreds of replacement projects Spire performed and Spire's own witness testified that Spire replaced between 60 and 65 miles of cast iron pipes in the east and 120 miles of cast iron and bare steel pipes in the west. Tr. pg. 109 lns. 1 – 5 ("so on the east side of the state, we've been replacing roughly 60 to 65 miles of cast

[2] While certain discoveries made during the evidentiary hearing have caused the OPC to second guess its previous decision, The OPC is nevertheless continuing to exclude from this the pipes replaced for the purpose of repairing leaks that are found in Spire's blanket work orders. The OPC chose not to make these pipes an area of contention in this case and will stand by that choice.

iron. And on the west side of the state, we've been doing much more. More like 120 miles of cast iron and bare steel pipe.").

Such extensive replacements clearly are not related to fixing only those pipes that are worn out or deteriorated and, instead, are plainly the product of a full-scale, top-to-bottom redesign of Spire's gas distribution system done to accommodate a change in pipeline material to plastic. This kind of redesign *may* be warranted under the cast iron and bare steel replacement requirements set out by the Commission, but that does not mean that each and every replacement Spire performed is necessarily and automatically ISRS eligible. Instead, to comply with statutory requirements Spire must **prove** that the replacements it made were of infrastructure that was worn out or deteriorated if it wants to recover the cost of those replacements through an ISRS.

The preceding analysis raises an important question: what does the ISRS statute mean by the phrase "worn out or [] in [a] deteriorated condition?" Fortunately, the Commission need not guess at the answer to this question, as the Missouri Supreme Court made it quite clear in the case of *Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520 (Mo. banc 2015), when it held as follows:

> At issue in this case is whether the damage replacement caused by human conduct is encompassed by the plain language of section 393.1009(5)(a). To determine whether this type of damage replacement is contrary to the plain language of the statute, this Court must engage in statutory interpretation. The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and

ordinary meaning of the statutory language. *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013). This Court must presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language. *Wehrenberg, Inc. v. Dir. of Revenue*, 352 S.W.3d 366, 367 (Mo. banc 2011). "Absent a statutory definition, words used in statutes are given their plain and ordinary meaning with help, as needed, from the dictionary." *Balloons Over the Rainbow, Inc. v. Dir. of Revenue*, 427 S.W.3d 815, 825 (Mo. banc 2014) (quoting *Am. Healthcare Mgmt., Inc. v. Dir. of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999)).

To determine whether damage caused by human conduct is included in a gas utility plant project, this Court must determine if the "existing facilities" were "worn out or ... in deteriorated condition." Section 393.1009(5)(a). "Deteriorate," as used in section 393.1009, is not defined by statute. Accordingly, the meaning is to be defined by the plain and ordinary meaning as derived from the dictionary. *See Balloons Over the Rainbow*, 427 S.W.3d at 825. **The definition of "deteriorate" is "to make inferior in quality or value," "to grow worse," and "become impaired in quality, state, or condition."** WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 616 (1993).

The PSC claims that it could take an expansive view of the definition of "deteriorate" because there is more than one dictionary definition. While one definition of "deteriorate" could be construed to mean a condition that diminishes over time, PSC avers that another definition could mean the condition was made inferior because it was "impaired in quality, state, or value." By only accepting a definition of "impaired in quality, state, or value," the PSC asserts that because the pipes were damaged by a third party, they were made inferior or became impaired in quality, state, or value. Hence, the PSC concludes that it followed the plain language of the statute.

However, the PSC's argument selects one of the multiple definitions of "deteriorate" and expands the meaning of that definition to reach its desired conclusion. The PSC ignores the clear language provided by the dictionary. In the dictionary definition of "deteriorate" as "impaired in quality, state, or value," the definition further clarifies its meaning by adding the synonymous cross-reference of "degenerate" and an illustration of usage that "<idle houses ~>." WEBSTER'S THIRD at 616. **Clearly, this definition indicates that deterioration is a gradual process that happens over a period of time rather than an immediate event.** Had the legislature intended to include the replacement of gas utility plant projects which were damaged by a third

> party's negligence, it could have inserted different language into the statute to effectuate that intent.
>
> Accordingly, the PSC's interpretation of the statute is incorrect because it would allow any damage to be eligible for an ISRS surcharge rather than the statutorily limited gas utility plant project as delineated by section 393.1009(5)(a). The PSC's interpretation conflicts with the clear legislative intent as demonstrated by the plain language of the statute. The PSC erred in relying upon its presumption that any change to a gas utility plant project qualifies for an ISRS surcharge. Only infrastructure which is in a worn out or deteriorated condition, as stated herein, is eligible for an ISRS surcharge. Hence, the PSC's order is not lawful because it is contrary to the plain language of the statute, which limits projects that qualify for an ISRS surcharge.

Id. at 524 – 525 (emphasis added).

As can plainly be seen, the Missouri Supreme Court has adopted a very specific interpretation of the phrase "worn out or [] in [a] deteriorated condition" and clearly indicates that the ISRS statutes are meant to apply only to those pipes that have "become impaired in quality, state, or condition" as a result of changes occurring over a long period of time. With this knowledge, it is possible to develop a sort of test that will allow the Commission to determine whether the evidence Spire attempts to rely upon can actually prove any of the replacements it made were worn out or deteriorated. This is done by considering a hypothetical brand-new segment of cast iron pipe (straight from the factory) that Spire could install on its line. Such a brand-new piece of pipe would obviously **not** match the definition of deteriorated laid out by the Missouri Supreme Court in *Liberty Energy* and thus the cost of replacing this hypothetical segment of pipe would **not** be eligible for recovery through an ISRS. Consequently, for every piece of evidence Spire presents in an attempt to prove that its replacements are ISRS eligible, the Commission should ask whether said evidence

would apply equally to a brand-new piece of cast iron pipe. If the answer to that question is yes, then Spire's purported evidence cannot possibly prove that the pipes it replaced were worn out or deteriorated because it would result in Spire claiming that a hypothetical brand-new piece of pipe was also worn out or deteriorated in clear contradiction of the Missouri Supreme Court's *Liberty Energy* opinion. Armed with this "new pipe" test, let us now consider Spire's purported evidence.[3]

The first type of evidence that Spire tries to rely upon to show that its cast iron and bare steel pipes are worn out or deteriorated is its Distribution Integrity Management Plan ("DIMP") and a handful of other federal regulatory documents that show the general need to monitor and replace cast iron and bare steel. Tr. pgs. 74 – 77. For example, Spire's witness Mr. Atkinson talked during the evidentiary hearing about how cast iron and bare steel pipes are ranked as "high risk" on Spire's DIMP and about how the Department of Transportation ("DOT") and the Pipeline and Hazardous Materials Safety Administration ("PHMSA") (two federal regulatory bodies) have recommended accelerating the replacement of pipelines containing those types of pipes. Tr. pgs. 74 – 75. The problem with Spire's argument, however, is that it is ignoring the fact that there are two separate requirements found in section 393.1009(5)(a)'s definition of "Gas utility plant projects." In order to achieve ISRS eligibility, Spire has to prove that its replacements were done to both (1) "comply with state or federal safety requirements" and (2) serve "as replacements for existing

[3] Spire presented absolutely no evidence to show that the plastic pipes it replaced were worn out or in a deteriorated condition and the record strongly suggests that Spire concedes that the plastic pipes segments it replaced were not worn out or deteriorated. Therefore, this analysis will examine only the evidence that Spire presented with regard to the condition of cast iron and bare steel pipes.

facilities that have worn out or are in deteriorated condition." RSMo. Section 393.1009(5)(a); *PSC v. Office of Pub. Counsel (In re Laclede Gas Co.)*, 539 S.W.3d 835, 839 – 841 (Mo. App. W.D. 2017). Spire's DIMP and the regulatory agency documents it cites could only possibly go towards meeting the **first** of these two requirements by establishing a **general** need to replace cast iron and bare steel. They offer absolutely nothing regarding the quality or condition of the **specific** pipes that Spire replaced and seeks recovery for in these **specific** cases. Tr. pg. 142 lns. 5 – 13 ("Q. And [DOT/PHMSA] have told you that all of your cast iron and bare steel is in a deteriorated condition? A. No. I'm re-- I'm re-- referring back to the letter that we showed in evidence that they are recommending replacement of -- they -- they -- specifically line out cast iron and bare steel systems at an accelerated rate and the use of ISRS for – for those replacement projects.").

Because the DIMP and the DOT/PHMSA documents Spire relies upon only discuss the need to replace cast iron and bare steel **generally**, Spire could only possibly argue the documents prove the **specific** cast iron and bare steel pipes it replaced were worn out or deteriorated by arguing that the documents prove **all** cast iron or bare steel pipes are, by their very nature, worn out or deteriorated. In other words, Spire is attempting to use its DIMP and the DOT/PHMSA documents to prove that cast iron and bare steel pipes are worn out or deteriorated solely by virtue of the fact that they are made of cast iron or bare steel. This argument is consistent with the position taken in Spire's response to the OPC's data requests regarding testing as explained in the testimony of John Robinett:

> Q. Did Spire provide any indication as to why it was not performing any testing or leak analysis on the pipes it was replacing?
>
> A. Yes. In response to numerous data requests (such as DR 8502 and DR 8503), Spire stated (in reference to the state or federal safety requirements mandating replacement) that "**pipes subject to these mandates are by definition worn out or in deteriorated condition**." See response to OPC DRs 8502 and 8503 in Schedule JAR-D-3. Therefore, Spire appears to be operating under the assumption that any pipe it replaces as part of a mandated replacement program is "by definition" worn out or deteriorated and that Spire, therefore, does not need to perform any testing or leak analysis to verify that fact.

Ex. 200, *Direct Testimony of John A. Robinett*, pg. 5 (emphasis added). However, this argument is inconsistent with the **real** definition of deteriorated which the Missouri Supreme Court itself laid out in *Liberty Energy*. The Missouri Supreme Court's narrow definition required a **specific** examination of the pipes being replaced to see if the "gradual process" that is deterioration had occurred. *Liberty Energy (Midstates) Corp.*, 464 S.W.3d at 525. Therefore, Spire's claim that the DIMP and the DOT/PHMSA documents prove the pipes it replaced were worn out or deteriorated is simply wrong. This can be easily demonstrated by employing the "new pipe" test the OPC previously outlined. If a brand-new piece of cast iron pipe was installed in the ground, would Spire's DIMP and the DOT/PHMSA documents suggest it should still be replaced? The answer: yes, they would, because those documents recommend that cast iron should either not be used or is a high risk regardless of its age or condition. These documents, therefore, cannot be relied upon to prove that cast iron or bare steel pipes Spire replaced in these cases were worn out or deteriorated.

The second piece of evidence that Spire attempts to rely upon is the factual findings made in Spire's last ISRS cases. In doing so, Spire appears to be operating

under the assumption that the Commission's factual findings in its last ISRS cases established some form of "factual precedent" that extends forward into all future ISRS cases and relieves Spire of the need to present evidence in any future case. Spire even goes so far as to say that the OPC is attempting to "relitigate" the factual issue of whether the pipes it replaced are worn out or deteriorated. Tr. pg. 12 lns. 23 – 25. This is of course untrue. The fact that the Commission made a factual determination regarding the condition of the pipes Spire replaced in its **last** ISRS filing has no legal bearing on the condition of the pipes it replaced in **these cases**.

To better understand the OPC's point, consider this simple analogy. Imagine a basic tort case involving a car collision at a traffic intersection. The driver of one of the cars (plaintiff) sues the driver of the other car (defendant) claiming that the defendant ran a red light, thereby causing the accident. However, instead of presenting evidence regarding the color of the traffic light at the time of the collision (for example by calling the eyewitness who saw what color the light was to testify during the trial), the plaintiff instead reveals that this particular defendant was found liable two years ago in a similar yet unrelated lawsuit after a jury found he had run a red light. The plaintiff does this because he reasons that if a jury found the defendant ran a red light in the previous lawsuit, the defendant **must** have run a red light in this case as well. Of course, such an argument is undeniably erroneous because the current lawsuit and the previous lawsuit were completely different cases based on a completely separate set of facts. Yet, bewilderingly, this is **exactly** the argument that Spire is making in these cases. Spire is literally attempting to argue

that the Commission making a factual finding that the cast iron and bare steel pipes Spire replaced in its **last** ISRS filing were worn out or deteriorated somehow proves that the completely separate and unrelated pipes replaced in **these cases** were also worn out or deteriorated. Such an argument represents a grand departure from some of our legal system's most basic rules of evidence.

Apart from being simply illogical on its face, Spire's attempt to rely on the Commission's past ISRS decision runs into another major hurdle, which is the well-established fact that the Commission's decisions bear no precedential value. *See State ex rel. AG Processing, Inc. v. PSC*, 120 S.W.3d 732, 736 (Mo. banc 2003) ("[A]n administrative agency is not bound by *stare decisis*, nor are PSC decisions binding precedent on this Court."); *State ex rel. GTE N., Inc. v. Mo. Pub. Serv. Com.*, 835 S.W.2d 356, 371 (Mo. App. W.D. 1992) ("An administrative agency is not bound by *stare decisis*. Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable. It is the impact of the rate order which counts; the methodology is not significant." (*citing State ex rel. Churchill Truck Lines, Inc. v. Public Serv. Comm'n*, 734 S.W.2d 586 (Mo. App. 1987); *Columbia v. Missouri State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo. App. 1980); and *State ex rel. Arkansas Power & Light Co. v. Public Serv. Comm'n*, 736 S.W.2d 457 (Mo. App. 1987))); *State ex rel. Laclede Gas Co. v. PSC*, 392 S.W.3d 24, 36 (Mo. App. W.D. 2012) ("The Commission 'is not bound by *stare decisis* based on prior administrative decisions.'" (*quoting State ex rel. Aquila, Inc. v. Pub. Serv. Comm'n of Mo.*, 326 S.W.3d 20, 32 (Mo.

App. W.D. 2010))). In addition, Spire's argument also fails the "new pipe" test in that, under its theory, any cast iron pipe (including hypothetical brand-new cast iron pipe) could be found to be worn out or deteriorated based solely on the fact that the Commission once found **some** of Spire's pipes to be worn out or deteriorated. Finally, it is worth pointing out that the Commission's decision regarding the condition of the cast iron and bare steel pipes Spire replaced in its last ISRS filing is currently on appeal before the Western District. Therefore, any reliance placed on the Commission's previous decision could easily become invalid based on the outcome of that appeal. For all these reasons, it should be readily apparent that the factual findings from Spire's last ISRS case are not evidence of the condition of Spire's pipes in these cases.

The next kind of evidence worth consideration is the evidence regarding leaks in Spire's distribution systems. Based on Spire's responses to the OPC's data requests, the OPC was led to understand that the only replacements made in this ISRS application that were instigated by leaks in Spire's distribution system were those included in the blanket work orders. In particular, the OPC relied on the following data request and corresponding answer, as described in the testimony of Mr. Robinett:

> 8537. Please identify, by work order number, each and every work order undertaken for the purpose of repairing leaks that were not designated as a blanket work order.
>
> Response: As discussed in the Company's application, such leak repairs would be customarily charged to a blanket work order so the Company has not accumulated information for leak repairs not charged to a

> blanket work order and does not believe that there would be any material level of such repairs.

Ex. 200, *Direct Testimony of John A. Robinett*, pg. 4; Schedule JAR-D-2. Based on this response, the OPC did not challenge the blanket work orders to the extent that those work orders included leak repairs.[4] Unfortunately, during the evidentiary hearing one of Spire's witness suggested that some of the replacements Spire made outside of the blanket work orders were also being done to address leaks in Spire's distribution system. Tr. pg. 94 ln. 15. This inconsistency in responses to the same inquiry suggests that either Spire's witness or Spire's responses to the OPC's data requests were incorrect.[5] Moreover, even if the Commission were to believe the statements made by Spire's witness, in direct contradiction of its own data request responses, Spire's witness never provided sufficient indication as to **which** replacement projects the company was claiming were carried out due to the presence of leaks on Spire's system. In fact, a second data request response Spire provided suggests that it doesn't even track that information:

> 8535. Please provide all leak analysis or history on a project by project basis for all projects that are classified as strategic replacement.
>
> Response: The Company has generally plotted leak locations for MO East since approx. 2013 and for MO West since approx. 2015; **however,**

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[4] The OPC made the decision not to challenge the replacements made to repair leaks in the blanket work orders primarily because it considered the matter relatively insignificant and was more willing to take Spire at its word that such leaks were genuine given the blanket work order's nature as a roving authorization to fix problems wherever they arise. The same does not hold true, however, for the rest of the replacements Spire made, which is why the OPC is still challenging the remaining replacements.

[5] A third possible alternative is that Spire's witness was referring to the "non-material" leaks alluded to in the data response, in which case there is **still** no evidence to support a finding that all of the replacements Spire made are worn out or deteriorated.

the Company does not identify which specific main or service the leak is tied to.

Ex. 200, *Direct Testimony of John A. Robinett*, pg. 4; schedule JAR-D-2. Given this, it is unclear how Spire could ever **possibly** prove which of the pipe replacements it is claiming as part of its application were ISRS eligible based on any supposed leaks.

The bottom line is that there is no evidence in the record to show that **all** the replacements Spire made and are claiming as ISRS eligible are worn out or deteriorated based on the presence of leaks in Spire's distribution system. In fact, Spire introduced no evidence to show that Spire made **any** particular replacement based on the presence of a leak outside of the blanket work orders. This lack of evidence is important because, for the Commission to grant Spire's application for an ISRS in total, it must find that every single one of the cast iron and bare steel pipes that were replaced were also worn out or deteriorated. This leads to the inevitable conclusion that, unless the Commission chooses to find that the **entire** amount of roughly 200 miles of cast iron and bare steel pipes that Spire replaced were leaking natural gas, any evidence concerning leaks alone is not sufficient evidence to prove all of Spire's replacements were of infrastructure that was worn out or deteriorated. And if the Commission **does** make that determination, it raises important considerations of its own.

Spire's witness identified it had nearly 600 miles left of cast iron pipes. Tr. pg. 108 ln. 18. Should the Commission determine that Spire's entire existing cast iron distribution system is leaking highly explosive natural gas, then there would be a good argument for needing to inform the public. In fact, it is very easy to argue that

it would be morally irresponsible for Spire not to inform its customers that such an extensive number of natural gas leaks are occurring given the massive swath of individuals that could easily be affected by that alarming situation. On the other hand, if the only leaks in Spire's system are those being addressed in the blanket work orders (as Spire itself has repeatedly suggested) then there is no issue. The blanket work order leaks are limited in scale and being addressed as soon as they become apparent as opposed to being "incidentally" addressed as part of Spire's massive, system-wide re-design. This also means, however, that there is no evidence to show that the pipeline replacements made outside of the blanket work orders were worn out or deteriorated based on evidence of leaks.

The next type of evidence to consider is age. In doing so, it is important to first note that Spire's own witness testified that age alone is not sufficient to prove pipes are worn out or deteriorated. Tr. pg. 79 lns. 2 – 8 ("Q. Does the Company believe that the fact that a cast iron main is at or exceeded its useful life alone means that it's in a deteriorated condition? A. No. We've never said that -- Spire's never said that the age alone has -- determines that the -- the pipe is worn out and deteriorated."). This sentiment is further shared by the OPC and has been previously expressed by the Commission's Staff. Ex. 200, *Direct Testimony of John A. Robinett*, pg. 8. This indicates that the parties are essentially in agreement that evidence of a pipe's age would be insufficient, standing alone, to prove Spire's case. Nevertheless, Spire still offered testimony regarding the average service life of its pipes as part of its attempt

to establish that those pipes were worn out or deteriorated. Tr. pg. 79. The OPC will thus address this evidence.

The problem with Spire's use of average service life as evidence of a pipe's condition is that this metric simply is not an indicator of whether any given piece of pipe is worn out or deteriorated. This is based on a number of different factors, as laid out extensively in the direct testimony of OPC's expert witness John Robinett. Ex. 200, *Direct Testimony of John A. Robinett*, pg. 8 – 10. For example, Mr. Robinett cites to well-established depreciation treatises that explain that service life is just "the number of years elapsing from the time a unit of property is placed into service until it is removed or abandoned." Ex. 200, *Direct Testimony of John A. Robinett*, pg. 9. These treatises further discuss the fact "that wear and tear do not account for all retirements[,] " and that other factors such as "inadequacy, obsolescence, changes in art, changes in demand, **and requirements of public authorities**" must all be given consideration when calculating service life. Ex. 200, *Direct Testimony of John A. Robinett*, pg. 8 (emphasis added). This is a crucial point because it tells us that the average service life of Spire's pipes may have been previously influenced by past retirements made pursuant to the very replacement programs that give rise to this ISRS. In fact, the more pipe replacements Spire makes as part of its mandated replacement program, the lower we can expect the average service life for that type of plant to become in the future.

Given the preceding explanation of average service life, it is easy to see why a utility runs a high risk of engaging in untenable circular logic if it uses average

service life to determine the ISRS eligibility of its replacements. This is because there is a good possibility that the average service life of a utility's pipes are being depressed when it makes a large number of early retirements even though these early retirements are themselves being justified by the depressed average service life. This is a very real problem that Mr. Robinett points out is likely already happening in these cases with regard to the plastic components being retired:

> Q. Does the retirement of plastic that was not worn out and deteriorated raise any other concerns regarding depreciation?
>
> A. Over time the retirements of these portions and segments of plastic mains and services that are being retired that are not in a worn out and deteriorated [condition] will eventually affect the useful life of the main or service of plastic when added up over time. In other words, Spire's continued retirement of pipe that is not worn out or deteriorated will result in an inaccurate measure of the useful life of that plant.

Ex. 200, *Direct Testimony of John A. Robinett*, pg. 11. This phenomenon would easily explain why Spire East's current average service life for cast iron and bare steel mains is ten years **longer** than the average service life for plastic mains, despite the plastic mains being made of a material that should otherwise last longer than either cast iron or bare steel. Ex. 200, *Direct Testimony of John A. Robinett*, pg. 10; Tr. pg. 99 lns. 17 – 18.[6]

In addition to the preceding discussion, there are numerous other major issues with using average service life to try to prove pipes are worn out or deteriorated,

[6] While Mr. Atkinson was not prepared to agree that polyethylene plastic pipes should last "indefinitely," he did agree with the statement that it should last longer that cast iron or bare steel. This of course makes perfect sense, as there would be no reason for the cast iron and bare steel replacement program at all if the material being used to replace those components was itself likely to wear out or deteriorate quicker by comparison.

starting with the fact that average service life is just that, an **average**. As Mr. Robinett explained in his direct testimony, "average service life of an account [is] the average of the lives of **all** such units within a plant account" and that, "[a]s a depreciation expert, I expect approximately half of assets to be retired before the average service and half of them to exceed the average service life." Ex. 200, *Direct Testimony of John A. Robinett*, pg. 10. This means that it is impossible to tell whether any given piece of pipe is actually worn out or deteriorated solely by comparing the age of that pipe to the average service life of similar pipe. OPC expert witness Robert Schallenberg took this line of reasoning even farther in his rebuttal testimony where he explained how mains and services are booked to what is known as a "mass asset account." Tr. pg. 296 ln. 22 – pg. 297 ln. 4. Consequently, depreciation expenses incurred by the utility simply represent an assignment of dollars that were capitalized and then charged to that mass asset account in different periods. Tr. pg. 297 ln. 19 – pg. 298 ln. 9. This, in turn, means that "depreciation has little relationship to the physical condition of the plant[,]" and that the use of an average service life from a depreciation schedule will thus have little to no meaning in trying to determine if any particular piece of pipe is worn out or deteriorated. Tr. pg. 296 lns. 17 – 19. When coupled with the fact that Spire itself has admitted that age alone is insufficient to establish pipes are worn out or deteriorated, it becomes obvious that this purported evidence cannot solve the deficiencies in Spire's case.

The last piece of evidence to discuss is some of the lingering statements provided by Spire's witness Mr. Atkinson. For instance, at one point counsel for Spire

asked Mr. Atkinson whether there was any doubt in his mind if Spire's cast iron and bare steel pipes were worn out or deteriorated, to which Mr. Atkinson responded with a "no." Tr. pg. 89 ln. 19. There are, however, several problems with Mr. Atkinson's testimony on this matter that must be understood when considering that "no." First, he openly admitted he could not recall how many of the pipes Spire had replaced in these cases he had actually seen. Tr. pg. 97 lns. 19 – 22. In fact, Mr. Atkinson couldn't even recall how many cast iron or bare steel pipes were even dug up or exposed in the course of making these replacements. Tr. pg. 97 lns. 11 – 18. Further, Mr. Atkinson made clear that the basis for his answer was the exact same evidentiary points that the OPC has already addressed and disproven in this brief. This can easily be seen in the back and forth between Mr. Atkinson and OPC's counsel during the evidentiary hearing.

> Q. This is going to be a bit of a paraphrasing just because the topic's been covered multiple ways, but -- and so I mean feel free to tell me if you don't think this is correct. But is your position essentially that all cast iron pipes are, by definition, worn out and deteriorated?
> A. We do believe that the cast iron pipes are in a deteriorated condition, yes.
> Q. But is that all cast iron?
> A. Yes.
> Q. So if I installed a piece of cast iron pipe tomorrow, your position would be that that pipe is worn out, deteriorated? Brand new.
> A. We haven't -- we haven't installed cast iron pipe --
> Q. No, no. · I'm asking you if I installed a piece of cast iron pipe tomorrow, would that piece of cast iron be worn out, deteriorated?
> A. No. · We --
> Q. What's the difference between that cast iron and the cast iron that Spire replaced?
> A. It's 60 to 100 years old.
> Q. Age?
> A. Age.
> Q. Age alone?

> A. That's -- that's one factor, but there's also the fact that those pipes have been shown to leak, have breaks, they are -- they have risks in our DIMP program and they've been noted from the Commission findings and from our federal regulators that we should -- those were --
> Q. That applies to all cast iron, doesn't it?
> A. It does.
> Q. Right.
> A. Yes.
> Q. So that's not -- we're not talking about all cast iron. Because you're already said I can install cast iron tomorrow and it's not worn out and deteriorated.
> A. But no cast iron --
> Q. The only difference between that cast iron and your cast iron is age.
> A. If you want to say it that way. But the cast iron -- we wouldn't install cast iron today, so that -- that point is really moot.[7]

Tr. pg. 139 ln. 1 – pg. 140 ln. 21. What this dialogue also makes clear is how most of the reasons for Mr. Atkinson's belief about the nature of Spire's pipes fails the "new pipe" test. Almost all of the reasons Mr. Atkinson' cites to are reasons for believing a brand-new piece of cast iron pipe would be worn out or deteriorated, which Mr. Atkinson even agrees would not be the case. *Id.* In fact, the only remaining factor on which Mr. Atkinson relies is age, which he himself admits is not sufficient evidence on its own. Tr. pg. 79 lns. 2 – 8.

Having addressed all of the evidence that Spire attempted to use, let us take a minute to consider the evidence that Spire **could** have used to prove the condition of its pipes. The first and most obvious thing Spire could have done was collect evidence

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[7] The point is not moot. As the OPC previously explained, the purpose of considering a brand-new piece of cast iron (even if only hypothetically) is to determine if the evidence on which Spire is relying is the type that could ever possibly meet the definition for deteriorated that was laid out by the Missouri Supreme Court in *Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520 (Mo. banc 2015). If the evidence on which Spire wishes to rely could just as easily apply to a hypothetical brand-new piece of cast iron (which everyone should agree is not worn out or in a deteriorated condition), then it does not meet the Missouri Supreme Court's definition and hence cannot be relied upon.

directly from the pipes that were being replaced. For example, Mr. Robinett testified on cross examination that, based on his experience from onsite visits, Spire exposes a certain portion of the pipelines it is replacing in order to "cap" the ends. Tr. pg. 275 lns. 8 – 20. As part of this process, Spire could easily take a small sample of the pipes that it is replacing so as to have it tested (or at least examined) for signs of wear and tear. *Id.* In fact, Mr. Robinett's direct testimony describes how Spire West's pipe replacement program already required the company to take small pipe samples (referred to as "coupons") whenever it has to expose a main because of a break. Ex. 200, *Direct Testimony of John A. Robinett*, pg. 5. Therefore, Spire should almost certainly already have some physical evidence of the condition of its pipes that it could present to the Commission if it chose to.

Alternatively, Spire could develop a leak monitoring program that would tell it where leaks are occurring on its lines and allow it to prioritize replacing sections of pipe that have the highest leak occurrences. Leak monitoring reports developed based on such a system could then also be used as evidence to prove the condition of the pipes Spire was replacing. Unfortunately, Spire currently has no pressing reason to take any of these actions, because it has yet to be fully held to its evidentiary burden to produce evidence regarding the condition of the pipes it is replacing. Therefore, this problem will most likely remain moving forward so long as Spire is not required to prove each project it undertakes meets the eligibility criteria for ISRS recovery.

It is important to remember that the scale of replacements Spire is performing in these cases is no small matter. By its own witness's estimates, Spire is replacing

close to 200 miles of cast iron and bare steel pipes a year. Tr. pg. 109 lns. 1 – 5. And yet, up until now, the Commission appears to have been willing to just **assume** that all these miles upon miles of pipes being replaced were worn out or deteriorated. However, the Commission legally cannot base its decisions on just assumptions. Rather, Spire has to **prove** the condition of its pipes, and it has to prove that point using actual evidence.[8] Spire doesn't need to do this for every single foot of pipe replaced, but it at least needs to offer more than a vague statement regarding the entire ISRS application or an assumption that every pipe made out of a particular type of material is "by definition" worn out or deteriorated (especially when such a claim would suggest that Spire's entire distribution system is therefore worn out or deteriorated and hence currently incapable of providing safe and adequate service). In short, Spire must meet its evidentiary burden (no matter how obvious the answer may otherwise seem), which Spire has proven consistently unwilling or unable to do.

Even if the Commission disregards OPC's argument as to cast iron and bare steel, Spire still cannot recover the cost it incurred for replacement of plastic components.

In *PSC v. Office of the Public Counsel (In re Laclede Gas Co.)*, the Missouri Court of Appeals for the Western District held that the cost to replace plastic

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[8] The OPC wishes to make clear that its insistence on the presentation of evidence is not just some baseless attempt to frustrate or harass Spire. Whenever Spire has shown that it actually does have good reason to support the inclusion of its costs in the ISRS, the OPC has been more than willing to accept those costs. This can easily be seen by the way that the OPC has chosen not to challenge the replacements performed for the purpose or repairing leaks found in the blanket work orders. It can also be seen in the way the OPC chose not to challenge the relocation costs Spire is claiming, despite having done so in the past, because Spire actually supplied evidence related to those costs in these cases. Tr. pg. 63 lns. 5 – 10. If Spire were to just do the same for the rest of its replacement costs, then there wouldn't be a problem. Unfortunately, it would appear that Spire cannot provide such evidence because it has never bothered to check to see if the pipes it is replacing are actually worn out or deteriorated, which is the whole basis of the OPC's concern regarding this matter.

components that were not worn out or in a deteriorated condition could not be recovered through the ISRS mechanism. *PSC v. Office of Pub. Counsel (In re Laclede Gas Co.)*, 539 S.W.3d 835, 841 (Mo. App. W.D. 2017) ("We reverse the Commission's Report and Order as it relates to the inclusion of the replacement costs of the plastic components in the ISRS rate schedules"). In doing so the Court explicitly stated that its "conclusion that recovery of the costs for replacement of plastic components that are not worn out or in a deteriorated condition is not available under ISRS is based solely on [the Court's] determination that those costs do not satisfy the requirements found in **the plain language** of section 393.1009(5)(a)." *Id.* (emphasis added). Thus, this question is purely a matter of simple statutory interpretation and not one of policy. As such, the Commission need only consider two questions: (1) did Spire replace ISRS ineligible plastic and (2) did Spire incur a cost in doing so.

The answer to the first of these two questions is an obvious yes. The direct testimony of John Robinett clearly identifies that the plastic components Spire replaced and are seeking cost recovery for in this ISRS application are not worn out or deteriorated, which no other party has ever challenged. Ex. 200, *Direct Testimony of John A. Robinett*, pg. 12. In addition, questions elicited by the Commission during the testimony of Spire's own witness identifies that none of the plastic pipes Spire currently has on its distribution line are past their average service life.[9] Tr. pg. 127

[9] This evidence does not establish that the plastic components are **not** worn or deteriorated in much the same way that the age of the cast iron and bare steel pipes alone is insufficient to prove that they are worn out or deteriorated. However, it is important to remember that Spire bears the burden of proof in these cases. *Clapper v. Lakin*, 123 S.W.2d 27, 33 (Mo. 1938); RSMo. § 393.150.2. This evidence just provides further basis for why Spire cannot meet that objective with regard to the plastic components that it replaced.

ln. 17 – pg. 128 ln. 7. Finally, there are the two avoided cost analysis studies (one for both Spire East and Spire West) submitted into evidence by the OPC in which Spire states that the "main is being replaced as part of the Cast Iron Replacement Program" and that the projects are "100% ISRS recoverable **because no plastic main or services are being retired**." Ex. 202, *Project Number 902112*; Ex. 203, *Project Number 801843*. As Mr. Robinett testified, this is essentially an acknowledgement by Spire that the plastic pipes being replaced are not ISRS eligible. Tr. pg. 240 lns. 17 – 22. Therefore, there should be no question that the plastic components that Spire replaced and are seeking cost recovery for are not worn out and deteriorated and are thus not ISRS eligible.

Having addressed the first question, we may now consider the second: Did Spire incur a cost in replacing plastic components? The Answer to this question is, again, obviously yes. The ISRS applications filed in these cases are entirely predicated on Spire's effort to recover the costs associated with installing new pipes that were put into service as replacements for the existing cast iron, bare steel, and plastic pipes. These new pipes cost money, as did their installation. Thus, Spire clearly and obviously incurred a cost to install the new pipe. In fact, if there was no cost incurred in installing these new pipes, then there would be no costs to recover and hence no ISRS. This was made clear in both John Robinett's pre-filed direct testimony and live rebuttal testimony. Ex. 200, *Direct Testimony of John A. Robinett*, pg. 13 – 14; Tr. pg. 268 ln. 23 – pg. 269 ln. 5, pg. 280 lns. 6 – 17 ("Q. Is Spire putting new pipe in the ground to replace old pipe? Is that not what's happening here? A. Yes.

Q. And can you assign a cost to that new pipe? A. That would be the cost that they are seeking through this ISRS process. Q. So there's a cost to replace pipe regardless of whether or not it's cheaper to re-use versus replace? A. Yes. These ISRS filings are not zeroes.”).

Despite the obviousness of the fact that Spire incurred a cost to install new pipes and thus a cost to replace the old pipes (including the ineligible plastic ones), Spire nevertheless attempts to argue that there was no cost to replace the plastic based on their fallacious “avoided cost” argument. Stated differently, Spire is attempting to claim that because it was cheaper to replace rather than reuse existing plastic components, there was “no cost” to those replacements. However, this is, again, clearly and obviously wrong. Just because it was cheaper to replace rather than reuse existing plastic pipes, that does **not** mean that those replacements were done without incurring costs. To state it another way, there is still a **cost** to do the replacement even if that cost is **less** than the cost that **could** have been incurred if Spire had reused existing plastic. Spire’s own witness admitted this very point on the stand:

> Q. Okay. And let me look here. And are you in agreement with what Mr. Pendergast said earlier, that basically the -- the ISRS costs that the Company is trying to recover don't include a cost for the plastic because it would have cost more if you had not replaced it -- the plastic?
>
> A. Well, there is a cost inherent to -- you know, to replacing all the pipe that's involved in that. **So there's a cost involved with the plastic**. But what we're saying is that it is, in most cases, cheaper to replace it then what it would have cost us to re-use that plastic so there's an avoided cost. **Not that there's no cost, but it's -- it's a less cost than it would be to re-use it**.

Tr. pg. 131 lns. 9 – 22. Therefore, it should be extremely obvious that the answer to the question of whether Spire incurred a cost to replace plastic components is an emphatic YES.

To further drive the point home, the OPC offers this simple analogy. Imagine an individual who has decided to replace her current automobile. She therefore goes to an auto dealer and purchases a car worth $20,000.00. At that same car dealership there is another car with a $40,000.00 sticker price, but this individual isn't buying the $40,000.00 car, she is buying the $20,000.00 car. Based on this information, what cost did this individual incur in replacing her car? The answer: $20,000.00, because that is the amount of money the individual spent when she made her purchase. On this point, even Spire's own witness agrees. Tr. pg. 159 lns. 11 – 13. But what of the $40,000.00 car this individual could have purchased? Does that not have an impact on the equation? No, of course not; it doesn't matter what the individual **could** have spent, the only thing that matters is what the individual **did** spend.

Now let us take this analogy one step further. Let us say that after making her purchase our hypothetical individual goes to her place of employment and asks that they reimburse her for the purchase of her new car under the theory that, because she uses her car to drive to work, it is a work expense. Her employer, however, informs the individual that company policy prevents it from reimbursing the expense of purchasing a personal vehicle under any circumstances. The individual then proceeds to argue that by not buying the $40,000.00 car she "saved" $20,000.00 and that this means that his company should therefore reimburse her for the $20,000.00

she actually did spend. Her employer naturally responds by continuing to point out that **it does not matter how much the individual saved**, company policy still will not allow the reimbursement of money spent on purchasing a personal vehicle.

As strange and bizarre as this hypothetical individual's argument may seem, it is literally the exact same argument that Spire is making in these cases. Spire is trying to claim that, because it spent just $20,000.00 replacing ineligible plastic pipes instead of $40,000.00 to reuse them, it "saved" $20,000.00. As a result, Spire argues that the $20,000.00 it actually did spend should be included in the ISRS. But, just as with the analogy, **it does not matter what costs Spire did <u>not</u> incur.** The only thing that matters is what costs Spire **did** incur, *i.e.* the $20,000.00 worth of new pipes that Spire put into the ground to replace the existing plastic pipes. Moreover, the Commission needs to take the same position adopted by the hypothetical individual's employer by explaining to Spire that it quite literally **does not matter what the company saved by performing these replacements** because it cannot include **any** of the costs it incurred while replacing plastic in an ISRS under the Western District's ruling. *PSC v. Office of Pub. Counsel (In re Laclede Gas Co.)*, 539 S.W.3d 835, 841 (Mo. App. W.D. 2017) ("We reverse the Commission's Report and Order as it relates to the inclusion of the replacement costs of the plastic components in the ISRS rate schedules").

At the risk of beating a dead horse, the OPC also challenges Spire's claim that they incurred any "savings" as a result of not reusing existing plastic. This is because

no one is arguing that Spire **should** have reused existing plastic pipes.[10] Indeed, if Spire's avoided cost studies are correct then they have successfully proven that it would be imprudent for the company to reuse existing plastic components and that replacing the plastic is thus the prudent alternative.[11] The problem for Spire, though, is that **prudency is not relevant to an ISRS case and does not itself make things ISRS eligible**. Therefore, the roughly $1.2 million Spire claims to have "saved" by not acting imprudently does not have any real meaning. In fact, it is unclear why Spire stopped at just $1.2 million. For example, Spire could just have easily claimed to have "saved" several trillion dollars by not using solid gold pipes to do its replacements and that would be equally as meaningful as the $1.2 million it claims to have "saved" by not reusing plastic. This is true because, again, it does not matter what Spire did **not** do or what costs it did **not** incur, it only matters what Spire did do and what costs it did incur. Thus, Spire cannot escape the fatal flaw in its case which arises from these two simple yet undeniable facts: (1) Spire installed new pipes to serve as replacements for existing plastic components that were not

[10] The OPC is not attempting to argue how Spire should fulfill its mandate to replace the cast iron and bare steel pipes currently used in its distribution lines. *See* Tr. pg. 239 lns. 1 – 2. The OPC simply asks that Spire do so in the safest and most cost-effective manner, *i.e.* that Spire do so prudently. However, acting prudently may sometimes means having to replace pipes that are not ISRS eligible and thus not getting to recover the costs of those replacement through an ISRS. This is exactly what the Missouri Supreme Court held in *Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520 (Mo. banc 2015), when it found that the cost to replace pipes damaged by third parties (which is undeniably a prudent thing to do) was not ISRS eligible. Such occurrences are merely part of the cost of doing business as a public utility.

[11] Staff's late-filed exhibit (Ex. 104) actually calls even this into question though. According to that exhibit (which no party has objected to at the time this brief was filed) Spire West suffered a net **loss** of $267,166.39 by choosing to replace rather than reuse plastic in these cases. Therefore, even if the Commission were to accept Spire's clearly erroneous argument that it is possible to "save" money by replacing rather than reusing ISRS ineligible plastic, the evidence clearly shows that Spire West still did not "save" any money and thus its ISRS costs should be denied even under Spire's own theory.

worn out or deteriorated and (2) these new pipes (and the labor to install them) cost money. As such, Spire cannot recover the money it spent on installing these pipes (*i.e.* the replacement costs of the plastic components) through the ISRS, no matter how much it chose **not** to spend.

At this point, it becomes necessary to discuss the position that has been taken by the Staff of the Commission. While Staff has basically adopted Spire's "avoided cost" argument, it has chosen a different path in reaching its answer that the cost to replace ineligible plastic components should be included in the ISRS. Specifically, Staff has focused on the language found in footnote five of the *In re Laclede Gas Co.* case. That footnote reads, in its entirety, as follows:

> We recognize that the replacement of worn out or deteriorated components will, at times, necessarily impact and require the replacement of nearby components that are not in a similar condition. Our conclusion here should not be construed to be a bar to ISRS eligibility for such replacement work that is truly incidental and specifically required to complete replacement of the worn out or deteriorated components. However, we do not believe that section 393.1009(5)(a) allows ISRS eligibility to be bootstrapped to components that are not worn out or deteriorated simply because [they] are interspersed within the same neighborhood system of such components being replaced or because a gas utility is using the need to replace worn out or deteriorated components as an opportunity to redesign a system (i.e., by changing the depth of the components or system pressure) which necessitates the replacement of additional components.

PSC v. Office of Pub. Counsel (In re Laclede Gas Co.), 539 S.W.3d 835, 839 n.5 (Mo. App. W.D. 2017). Using this footnote as a basis, Staff took the position that each and every single one of the ISRS ineligible plastic replacements Spire performed are ISRS eligible because they were all "incidental" to the replacement of cast iron and bare steel pipes. The problem with Staff's conclusion, though, is that Staff is looking at the

wrong cost. Staff based its analysis off Spire's avoided cost studies (i.e. the measure of what Spire **did not** spend) and hence concluded that the costs Spire did **not** spend are what made the plastic replacements incidental. But again, the only costs that matter are the ones Spire **did incur** in replacing ineligible plastic components, not the hypothetical costs Spire **did not incur**. This is obviously a major problem on its own, but it is made all the worse by the fact that Staff's witnesses openly admitted on the stand that they never actually measured how much Spire **did** spend on pipes that were used to replace existing plastic infrastructure. Tr. pg. 185 ln. 22 – pg. 186 ln. 2 ("Q. Fair enough. Did Staff come up with a cost for replacing plastic essentially or what -- what Spire spent to replace plastic that already existed in its lines? A. I don't know that we have an exact dollar for that."), Tr. pg. 193 ln. 18 – pg. 194 ln. 3 ("Q. You were the other person I was considering asking this question to so I'll just ask the same question essentially. Just to verify, did Staff ever determine a dollar amount related to the plastic pipes -- or rather any pipe that Spire installed to replace existing plastic components? A. Not that I'm aware of. Q. So there was no analysis similar to the one performed in 2018 or rather -- A. Not -- oh, similar to the one in 2018? I don't think so."). This means that Staff never even **measured** what Spire actually spent on replacing ineligible plastic. In fact, Staff's witness admitted it never even calculated the total footage of plastic that was replaced in these cases. Tr. 217 lns. 12 – 15 ("Q. Good afternoon, Mr. Poston. Real quick, did Staff ever calculate the total footage of plastic pipe that was retired in this case? A. I did not."). Given that Staff never calculated either the amount of plastic that was replaced or the costs Spire

did incur in making those replacements, how can it possibly claim that these replacements were incidental? The answer: it cannot.

To really drive the nail home on this "incidental" argument, let us consider some actual numbers. The OPC entered into evidence two work orders Spire completed (one for Spire East and one for Spire West) to represent the typical values related to the replacements Spire made in these Cases.[12] Based on the Spire West work order, we can see that the plastic mains being replaced accounted for 17.25% of the total length of mains replaced and 28.21% of the total retired cost for mains. Tr. pg. 243 lns. 5 – 20. That same work order shows that plastic services made up 98.18% of the total footage of services retired and 99.20% of the total cost for services. Tr. pg. 243 lns. 5 – 20. The Spire East work order fares no better by comparison. That work order showed plastic mains making up 20.65% of the total length of mains replaced and 84.60% of the total dollar amounts retired. Tr. pg. 245 lns. 3 – 10. As for services, they made up 80.12% of the total length and 79.92% of the total dollars retired. Tr. pg. 245 lns. 3 – 10. While parties may certainly quibble over the exact threshold for what is "incidental," there is no way that any rational person could ever consider these amounts to meet the definition of that word.[13] Therefore, the only evidence in

[12] The OPC actually offered **all** of the work orders that Spire completed and claimed as ISRS eligible, but both Spire and Staff objected to this evidence.

[13] During the evidentiary hearing, there was some significant discussion as to the meaning of the term "incidental" with some Commissioners even suggesting that it was impossible to determine what this word means. However, the Commission actually has some degree of guidance in determining the meaning of similar words that can easily translate to helping to define "incidental." For example, the Uniform System of Accounts offers a definition for an "extraordinary" cost stating that "to be considered as extraordinary . . . , an item should be more than approximately 5 percent" of the value being measured. 18 CFR 101. Therefore, any expense item that would constitute less than five percent of the total costs of an ISRS project would qualify as "ordinary" if that same definition were applied in

the record as to the **actual costs and amounts** of plastic that Spire replaced conclusively refutes Staff's assertion that these costs and amounts are "incidental."

In addition, Staff's "incidental" argument fails to accurately address the full meaning of the Western District's footnote five. As the Commission Chairman himself pointed out multiple times during the evidentiary hearing, the Western District explicitly stated that its exception for replacement of plastic components that were "truly incidental" was not an excuse to allow ISRS eligibility to be "bootstrapped to components that are not worn out or deteriorated simply because . . . a gas utility is using the need to replace worn out or deteriorated components as an opportunity to redesign a system (i.e., by changing the depth of the components **or system pressure**) which necessitates the replacement of additional components." *In re Laclede Gas Co.)*, 539 S.W.3d 835, 839 n.5 (emphasis added). Yet in these cases, there is clear and unequivocal evidence that such bootstrapping is occurring. For example, in his direct testimony Mr. Robinett raised an issue with the service renewals Spire was performing. Ex. 200, *Direct Testimony of John A. Robinett*, pg. 6 – 7. Spire responded to Mr. Robinett's testimony during the evidentiary hearing as follows:

> Q. Okay. Do you have any response to Mr. Robinett's claim that service line renewals done in connection with main replacements are not ISRS eligible because they are primarily done so that inside meters could be moved outside?

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the ISRS context. Moreover, we can also easily say that an "incidental" cost is one that would fall below the value of an "ordinary" cost. Therefore, it would not be unreasonable to define "incidental," in terms of an ISRS, as any cost that makes up, say, one percent of the total project cost. Obviously such a definition would naturally be subject to debate, but the point is that it is possible to define the term "incidental" using either existing laws as a starting point or else by exploring dictionary definitions. Of course, the Commission need not dwell on the issue long for these cases because the undisputed evidence shows that the cost to replace plastic components ranges from between 22% and 99% of the total cost of these ISRS projects, which cannot be considered "incidental" under any rationale definition.

> A. Yes, I do. I believe that statement is incorrect. · So to -- to expand on that, our company when it worked to come up with a strategic main replacement project, determined that the proper way to do that was to replace these low pressure utiliz-- utilization systems, which is where the pressures -- the main is the pressure that the home uses, to replace those with the more updated higher pressure 60-pound MEOP systems. To do that, we would -- and if we left the larger pipes in using a utilization pressure, we would be leaving the meters inside with a higher pressure, which would be a very -- you know, a poor safety practice to leave that higher pressure inside. So as part of our overall program, that we decided to -- strategically to replace these lower pressure systems with higher pressure systems. The -- the obvious choice was to move the meters outside as part of this. But it was because of our strategic program for how we were going to replace the -- the cast iron mains and the -- and the bare steel mains that were a lower pressure to do that.

Tr. pg. 82 ln. 12 – pg. 83 ln. 13. By their own admission, Spire was replacing plastic services that were not worn out or deteriorated solely as a result of the changes in pressure it was making to its distribution system. This makes these service renewals a perfect example of one of the types of bootstrapping that the Western District explicitly stated should not be given ISRS eligibility because it shows the utility using the replacement program as an excuse to change its system's pressure thus "necessitate[ing] the replacement of additional components." *In re Laclede Gas Co.*, 539 S.W.3d at 839 n.5. This just further illustrates why these kind of plastic replacements should not be recovered through an ISRS.

Based on the forgoing analysis, neither Spire's "avoided cost" argument nor Staff's "incidental" argument are capable of justifying the inclusion of replacement costs related to ineligible plastic components in these ISRS cases. This determination can be made solely on the basis of the Western District's "plain language" analysis of the ISRS statute without the need to resort to any discussions of policy. However, the

OPC will nevertheless take one moment to discuss the policy implications of its argument because it is important to see not only the legal reasons but also the moral reasons for why Spire should not be allowed to collect costs related to replacing the relatively new and perfectly serviceable plastic pipes. That reason is the fact that Spire has **already collected** the costs it incurred when it initially installed plastic pipes in isolated segments on its distribution line even though it **knew** when it did so that it was supposed to be replacing **all** of its cast iron and bare steel on those lines. For Spire to now come back only a handful of years later to replace those same plastic segments a second time **and** claim special expedited recovery for that second replacement is manifestly unjust.

Spire is essentially replacing the same segment of pipes twice and collecting from their customers for both replacements despite these replacements being less than fifty years apart, at most, and in some cases less than ten. This factor alone should give the Commission serious concern regarding Spire's ability to collect the cost of such replacements, but Spire is not willing to stop there. Not only does Spire want to collect costs for replacing pipes which were themselves just recently installed as replacements for **other** pipes; Spire also wants to **expedite** its recovery of the costs for the second set of replacements through an ISRS. This is simply wrong, and it is the entire problem that the OPC has with Spire recovering the cost of ineligible plastic replacements through the ISRS.

The Western District's holding in the *In re Laclede Gas Co.* case was simple and straightforward: Spire cannot include costs it incurred to replace ineligible

plastic in calculating its ISRS rates. Spire's argument that it had no cost or even that they had a negative cost for doing these replacements is simply and plainly wrong. Spire spent money on replacing plastic pipes, therefore it had a cost. That cost for any given project may have been **less** than the hypothetical cost to reuse plastic, but it still **exists** and hence **cannot be included in the ISRS**. Likewise, Staff's assessment that all of the plastic replacements were "incidental" is clearly wrong. Staff never measured what it cost Spire to replace plastic or even how much plastic was being replaced, and the only evidence in the record that does speak to those points show that plastic made up a large amount of the total replacements Spire performed. Moreover, Spire itself essentially admitted that it was engaging in the type of bootstrapping that the Western District specifically said should not be included in the ISRS. It did this by including the cost of service renewals that were carried out to address safety concerns brought on by the changes Spire made to the pressure of its distribution system. For all these reasons, the cost to replace plastic components that Spire included in its ISRS should be excluded.

The Commission should accept the Stipulation and Agreement Regarding Overheads as a resolution of the overhead issue.

Just as with the cost to perform replacements, Spire bears the burden of proof in these cases to show that the overhead costs it has included are just and reasonable. *Clapper v. Lakin*, 123 S.W.2d 27, 33 (Mo. 1938) ("The burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue."); RSMo. § 393.150.2

(“At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the gas corporation . . . .”). The OPC continues to maintain that Spire has failed to meet this burden.

Both of the OPC’s expert witnesses opined that the size of Spire’s overhead costs raised considerable concerns regarding their reasonableness. Ex. 200, *Direct Testimony of John A. Robinett*, pg. 14; Ex. 201; *Direct Testimony of Robert E. Schallenberg*, pg. 3. Spire responded by offering examples of items that could have been included in overhead costs, but never provided numerical evidence to show how its overhead costs had been calculated and thus never presented evidence to prove those costs were reasonable. *See*, *e.g.*, Tr. pg. 150 ln. 1 – pg. 153 ln. 21. The Commission Staff, meanwhile, generally took the position that the issue of overheads could best be dealt with outside of an ISRS proceeding. *See*, *e.g.*, Tr. pg. 192 ln. 9 – pg. 193 ln. 3.

After listening to the positions taken by the various parties, the OPC decided that the best solution for this issue was to continue its investigation outside of the course of this ISRS proceeding. Therefore, the OPC entered into a stipulation and agreement with Staff and Spire that that would permit Spire to collect those overhead costs currently included in its ISRS application, with the understanding that the prudency of those costs may be challenged as part of a later general rate proceeding. *See Stipulation and Agreement Regarding Overheads* filed in EFIS on April 11, 2019. The OPC believes that this agreement represents the best resolution of this issue and

therefore requests that the Commission accept the *Stipulation and Agreement Regarding Overheads* entered into by the parties.

<u>Costs that were previously denied in prior ISRS filings and that are currently on appeal are not recoverable as part of this ISRS proceeding</u>

Finally, the OPC also notes that, to the extent Spire seeks to recover costs that the Commission denied as part of Spire's last ISRS filing, this request should be denied for all the reasons laid out in the *Motion to Dismiss Portions of Spire's Application* that was filed by Staff as well as the Staff's *Reply* to Spire's *Response* to that same *Motion to Dismiss*. Staff's *Motion to Dismiss* and *Reply* expertly lays out the legal arguments for why these costs are not eligible for inclusion in the ISRS charges to be approved by the Commission in this proceeding and reiterating those points here would be superfluous.

C. <u>How should income taxes be calculated for purposes of developing the ISRS revenue requirement in these cases?</u>

The OPC initially took the position that Spire's income taxes should be calculated according to the methodology set forth in Staff's recommendation and attached memorandum for the reasons laid out in the same. On April 8, 2019, Spire (acting on behalf of itself and Staff) filed a *Stipulation and Agreement Regarding Income Tax Issue* that purported to resolve the issues raised by Staff in its recommendation and attached memorandum regarding the proper calculation of Spire's income taxes. The OPC did not object to this stipulation and agreement. Accordingly, the OPC believes that the Commission should approve the *Stipulation*

and Agreement Regarding Income Tax Issue, and that Spire's income taxes should be calculated for purposes of developing the ISRS revenue requirement in these cases according to the methodology outlined therein.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission accept this *Brief of the Office of the Public Counsel* and grant the relief requested herein.

Respectfully submitted,
OFFICE OF THE PUBLIC COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this fifteenth day of April, 2019.

/s/ John Clizer