

**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) Case No. GO-2019-0356
Surcharge in its Spire Missouri East)
Service Territory)
)

In the Matter of the Application of)
Spire Missouri, Inc. to Change its)
Infrastructure System Replacement) Case No. GO-2019-0357
Surcharge in its Spire Missouri West)
Service Territory)
)
)

MOTION FOR REHEARING OR RECONSIDERATION

COMES NOW the Office of the Public Counsel (“OPC”) and for its *Motion for Rehearing or Reconsideration*, of the Missouri Public Service Commission (“the Commission”)’s October 30, 2019, *Report and Order* (“Order”) in the above styled cases, states as follows:

Pursuant to RSMo. Section 386.500.1 the OPC seeks rehearing and or reconsideration of the Commission’s Order because the Order is unlawful, unjust, and/or unreasonable for the reasons laid out herein.

The Commission’s *Report and Order* is unlawful, unjust, and/or unreasonable because the *Report and Order* incorrectly allows Spire to recover costs related to the replacement of cathodically protected steel mains for which there is no government mandated requirement to replace

The Commission’s Order correctly notes that the Westen District’s decision in the *PSC v. Office of Pub. Counsel (In re Laclede Gas Co.)*, 539 S.W.3d 835, 840 (Mo.

Ct. App. 2017), case established that section 393.1009(5)(a) “sets forth two requirements for component replacements to be eligible for cost recovery under ISRS: (1) the replaced components must be installed to comply with state or federal safety requirements and (2) the existing facilities being replaced must be worn out or in a deteriorated condition.” *Report and Order*, pg. 26. However, the Order then goes on to incorrectly determine that Spire has met both of these requirements with regard to its replacement of cathodically-protected steel mains. *Report and Order*, pg. 37. Specifically, with regard to the first requirement, the Commission’s conclusion is plainly and unambiguously incorrect because there is simply no “state or federal safety requirement” that would mandate the replacement of the cathodically protected steel mains that Spire undertook in these cases.

The *Report and Order* identifies three potential sources of a state or federal safety requirement to replace cathodically protected steel mains. The first is the regulation requiring the development of a distribution integrity management plan (“DIMP”) found in 20 CSR 4240-40.030(17). *Report and Order*, pg. 35. In particular, the Order focuses on subsection (D)4 that requires a gas utility to “[i]dentify and implement measures to address risks” and “[d]etermine and implement measures designed to reduce the risks from failure of its gas distribution pipeline.” *Id.* The Commission’s Order concludes that, because Spire has “identified” corrosion of its steel mains as a risk in Appendix C of its DIMP, 20 CSR 4240-40.030(17)(D)4 establishes a duty to replace cathodically protected steel mains. There are several obvious problems with this conclusion.

First, merely identifying the “risk” of corrosion or other causes of potential pipe failures could not possibly establish a duty to replace all pipes of a particular material type (which is what Spire is doing in this case). Risk of pipe failure is something that a gas utility will **always** face, no matter what material is used to construct its pipes. It is thus nonsensical to conclude that because Spire identified corrosion of steel as a thing that occurs, it is **required** to replace all steel pipes.¹

The second reason that the Commission’s reliance on the DIMP as a source of a mandate to replace catholically protected steel mains is faulty is because the DIMP requirement, on its own, does not require the replacement of **anything**. Contrary to the Commission’s finding, the DIMP is only a “written explanation of the mechanisms or procedures the operator will use to implement its integrity management plan.” 20 CSR 4240-40.030(17)(A)3. The DIMP is thus essentially just a gas utility’s report as to how it manages the integrity of its distribution system, and there is nothing in the DIMP rule that mandates replacement of anything. In fact, the DIMP rule does not even contain an enforcement provision or otherwise provide a penalty if a utility fails to adhere to its DIMP. Consequently, the DIMP rule requires nothing more than the development of a DIMP and thus provides no requirement to replace pipes of any type.

¹ As final proof of this point, just consider: the corrosion of steel is an occurrence that human beings have known about for centuries. Thus, the risk of pipe failures caused by corrosion would never not have been a “risk” that Spire would have had to contend with. Under the logic displayed in the Commission’s Order, therefore, Spire has been “required” to replace steel mains since the moment it began using steel mains. Clearly this is an absurd result.

Finally, even if the DIMP measures could be considered a mandated safety requirement (as that term is used in the ISRS statutes), the Commission has completely overlooked the existence of Appendix D of Spire's DIMP. Appendix D is quite literally labeled: "Identification and Implementation of Measures to Address Risks" and so obviously relates back to the requirement to "[i]dentify and implement measures to address risks[,]" found in 20 CSR 4240-40.030(17)(D)4. Ex. 10 App. D-1. Moreover, Appendix D actually includes a subsection labeled "Replacement Programs" that includes a description of the replacement programs that Spire has adopted. Ex. 10 App. D-1 pg. 6. A thorough examination of this Replacement Programs subsection, though, easily shows that Spire has **not** developed or included a replacement program for cathodically protected steel mains in its DIMP.²

If the portion of Spire's DIMP which is literally labeled "Identification and Implementation of Measures to Address Risks" includes a subsection that is also literally labeled "Replacement Programs" but that subsection **does not** identify a replacement program for cathodically protected steel mains then Spire has fulfilled its requirement to "[i]dentify and implement measures to address risks[,]" found in 20 CSR 4240-40.030(17)(D)4 in a manner that **does not** require the replacement of cathodically protected steel mains. Stated differently, if Spire's requirement under 20 CSR 4240-40.030(17)(D)4 to "[i]dentify and implement measures to address risks[,]" **actually required** the replacement of cathodically protected steel mains, then the

² The DIMP identifies a replacement program for **unprotected** steel main replacements but not one for cathodically **protected** steel main replacements. Ex. 10 App. D-1 pg. 7.

replacement of cathodically protected steel mains would, **at a minimum**, show up in the subsection labeled “Replacement Programs” found in the appendix labeled “Identification and Implementation of Measures to Address Risks” included in Spire’s DIMP.³ Further, the fact that Appendix C of the DIMP (the one labeled “Evaluation and Ranking of Risks”) stated that corrosion of steel pipes was one of many risks the company had to address says absolutely nothing about what Spire was **required** to do (let alone what Spire was **required** to replace). The only part of Spire’s DIMP that could ever remotely matter with regard to 20 CSR 4240-40.030(17)(D)4’s requirement to “[i]dentify and implement measures to address risks” is Appendix D because Appendix D is the **only** part of Spire’s DIMP that directly set out to “[i]dentify and implement measures to address risks.” And because the part of Spire’s DIMP that actually “identifies” and “implements” measures to address risks does not require the replacement of cathodically protected steel mains, the requirement to “[i]dentify and implement measures to address risks[,]” in Spire’s DIMP set forth by 20 CSR 4240-40.030(17)(D)4 does not require the replacement of cathodically protected steel mains.

Moving on from the DIMP requirement, the next two potential sources of a state or federal safety requirement to replace cathodically protected steel mains identified by the Commission’s *Report and Order* is 20 CSR 4240-40.030(13)(B) and section 393.130. The first of these two regulations, 20 CSR 4240-40.030(13)(B)2,

³ The OPC continues to argue that the DIMP does not require the replacement of any pipes at all, but **even if it did** those mandated replacements would necessarily show up in the portion of the DIMP that directly addresses pipe replacements.

states that “[e]ach segment of pipeline that becomes unsafe must be replaced, repaired, or removed from service.” The second, section 393.130.1, states (in part) that “[e]very gas corporation . . . shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable.” Neither of these two regulations required Spire to replace cathodically protected steel mains, however, because Spire’s cathodically protected steel mains are, by its own admission, already safe.

The only evidence in the record regarding the safety of Spire’s cathodically protected steel mains is the statements made by Spire’s own witnesses who testified that the utility’s cathodically protected steel mains were, in fact, safe:

Q. Is it safe to transport natural gas in a pipe like that? Sorry. And for the record, "like that," I am referring to pipe 1.⁴

JUDGE DIPPELL: Thank you.

THE WITNESS: It -- it is -- we have a safe system so it's relatively safe to transport that.

Tr. pg. 116 lns. 1 – 6. And:

Q. And is it safe for Spire to be transporting pipe -- transporting gas on those pipes?

A. If you -- well, if there -- something explode tomorrow, the answer would be no. But we don't know if it's going to have a leak and explode tomorrow. **But I think it's safe now . . .**

Tr. pg. 177 lns. 5 – 10. Because Spire’s witnesses testified that Spire’s pipes are safe, Spire has failed to identify a single “segment of pipeline that [has] become[] unsafe”

⁴ Pipe 1 was identified as a bare steel main put into use in the Missouri West territory in approximately 1952. Tr. pg. 72 lns. 22 – 25.

and thus “must be replaced, repaired, or removed from service” under 20 CSR 4240-40.030(13)(B)2. Further, because Spire’s witnesses testified that Spire’s pipes are safe, Spire does not need to replace those pipes to “furnish and provide such service instrumentalities and facilities as shall be safe” as required under section 393.130. Obviously, this is because there is no need to replace safe pipe in order to meet the obligation to provide safe service. Consequently, there is nothing in either 20 CSR 4240-40.030(13)(B)2 or section 393.130 that requires Spire to replace its cathodically protected steel mains.

The OPC notes that this issue is actually one that was already touched upon by the Western District in the *In re Laclede Gas Co.* case. In footnote six, the Court stated as follows:

Laclede testified that it adopted its new neighborhood replacement strategy in response to new requirements regarding system integrity under 4 C.S.R. 240-40.030(17), which requires gas companies to develop a written integrity management plan to identify threats to gas distribution systems. Other than this general assertion, however, Laclede did not testify that the regulation mandated it to replace entire neighborhood systems. **In fact, after generally testifying that pipe joints or connections increase vulnerability and create a safety concern, Laclede admitted that their pipe joints were in compliance with all gas safety rules.**

In re Laclede Gas Co., 539 S.W.3d at 840 fn. 6 (emphasis added). Spire (formerly Laclede) is now essentially attempting to make the same argument again by arguing that safety concerns mandate the replacement of its cathodically protected steel mains. Much as the Court noted in the *In re Laclede Gas Co.* case, however, Spire has

already admitted that its cathodically protected steel mains are safe, thus undercutting the very basis for why it argues replacements are required.

The *Report and Order* heavily mischaracterizes both the legal requirements of 20 CSR 4240-40.030(13)(B) and the position taken by the OPC in this case. All that 20 CSR 4240-40.030(13)(B) does is require Spire to replace, repair, or retire “unsafe” pipe. All the OPC is arguing in this case is that uncontroverted testimony evidence given by Spire itself shows that the cathodically protected steel mains Spire replaced were safe (*i.e.* not “unsafe”). The OPC did not *for a single instant* suggest that Spire had to wait until its “entire system” was unsafe before it began properly replacing pipes under 20 CSR 4240-40.030(13)(B) as suggested by the Commission’s Order. Instead, the OPC is simply arguing that Spire just has to show that the cathodically protected steel mains it replaced were “unsafe” in order to prove that the company was required to replace them, which is not something that Spire cannot possibly do because its witnesses testified that the cathodically protected steel mains it replaced were safe.

Perhaps the greatest irony of the Commission’s *Report and Order* is that, in its quest to find a “requirement” for Spire to replace cathodically protected steel mains, the Commission has essentially found that Spire is neither providing safe and adequate service nor following Commission rules. To see why, just consider the following:

- (1) The Commission found that **all** of the cathodically protected steel mains replacements that Spire performed were done in order to comply with 20 CSR 4240-40.030(13)(B). *Report and Order*, pg. 36.

- (2) For the replacement of cathodically protected steel mains to be done in order to comply with 20 CSR 4240-40.030(13)(B), those mains must have been unsafe, because 20 CSR 4240-40.030(13)(B) only requires the replacement of segments of pipeline that have become unsafe. 20 CSR 4240-40.030(13)(B).
- (3) Therefore, **all** the cathodically protected steel mains that Spire replaced must have been unsafe.
- (4) But there is no evidence in the record that identifies any difference between the cathodically protected steel mains that Spire **has** replaced and those that Spire has in operation but which **have not yet been** replaced.⁵
- (5) Therefore, **all** the cathodically protected steel mains that Spire currently has in operation must also be unsafe.
- (6) Because **all** of the cathodically protected steel mains that Spire currently has in operation are unsafe, Spire is in violation of 20 CSR 4240-40.030(13)(B)'s requirement to replace, repair, or remove from service unsafe segments of pipe.
- (7) In addition, because **all** of the cathodically protected steel mains that Spire currently has in operation are unsafe, Spire cannot possibly be providing safe and adequate service to its customers.

As anyone can plainly see, this argument establishes the rather obvious point that Spire is otherwise afraid to admit: if Spire is required to replace its cathodically protected steel mains so as to provide safe and adequate service (because those cathodically protected steel mains are currently “unsafe”), then Spire is not presently providing safe and adequate service because it still has a large number of cathodically protected steel mains that it has not replaced. Moreover, the evidence presented in this hearing would necessarily indicate that Spire has been failing to provide safe and adequate service for a **very** long time.

The OPC poses a simple question: at what point, according to the Commission, did Spire’s cathodically protected steel mains become unsafe? Given that the

⁵ In particular, the Commission found that **all** cathodically protected steel mains are “worn out or [] in deteriorated condition.” *Report and Order*, pg. 37. Because the Commission has apparently adopted the position that **all** cathodically protected steel mains are in the same condition, it stands to reason that the Commission has determined that they are all “unsafe.”

Commission has essentially found that **all** of Spire’s cathodically protected steel mains are unsafe, it becomes increasingly important to determine **when** exactly this state of existence came about. For example, the Commission found that steel begins to corrode as soon as it was placed in the ground. *Report and Order*, pg. 37. Does this mean then that the Commission has found that **all** of Spire’s cathodically protected steel mains became unsafe as soon as they were placed into service? If so, then Spire has not been providing safe and adequate service for 60 to 70 years. Moreover, why is Spire still continuing to install steel pipes even today for larger mains?

Alternatively, the Commission’s *Report and Order* notes that steel pipes were in the ground “unprotected for 30-40 years when [they] began to fail.”⁶ *Report and Order*, pg. 37. Does this mean that the Commission believes that **all** of Spire’s cathodically protected steel mains were unsafe after 30 – 40 years? If that is the case, then Spire has **knowingly** had unsafe pipes in the ground for the past 30 years,⁷ which is only further exacerbated when one considers that Spire did not begin their neighborhood-wide replacement strategy until 2010. GO-2018-0309 & GO-2018-0310, *Report and Order*, pg. 5; *In re Laclede Gas Co.*, 539 S.W.3d at 837. Therefore, there is, **at a minimum**, an approximate twenty-year time-frame wherein Spire (1) knew

⁶ This is an incorrect finding, as the OPC will discuss later in this motion.

⁷ These cathodically protected steel mains were installed without cathodic protection in the 1950s and 1960s and then subsequently cathodically protected in the 1990s. Leonberger, *Direct*, pg. 9; Robinet, *Direct*, Schedule JAR-D-8 pg. 6. That means that the pipes have been in service for about 30 years since the 1990s.

it had unsafe pipes in its system, and (2) did absolutely nothing to address this problem according to the Commission's own findings.

If this point has not become clear yet, the Commission's Order has functionally established all the necessary elements needed to bring a complaint against Spire for failure to provide safe and adequate services under section 393.130 and for violations of 20 CSR 4240-40.030(13)(B). That is because the Commission has effectively found that Spire's cathodically protected steel mains are **all** unsafe and have been since **at least** 30 (if not 60 to 70) years. Further, these violations could subject Spire to a potential penalty under section 386.570 ranging from \$100 to \$2,000 dollars a day for every single day for the past several decades. Obviously, this represents rather significant exposure of liability for Spire.

At the end of the day, it all comes down to this: either Spire's cathodically protected steel mains are safe or they are not. If Spire's cathodically protected steel mains are safe – as Spire **itself** claims – then there is no requirement to replace those mains under either 20 CSR 4240-40.030(13)(B) or section 393.130. If, on the other hand, Spire's cathodically protected steel mains are **not** safe – and there is absolutely no evidence to support this – then Spire is presently violating both 20 CSR 4240-40.030(13)(B) and section 393.130 and have been for a considerable amount of time. The OPC has adopted the position that Spire's cathodically protected steel mains are safe because, again, **that is what the evidence presented in this case actually shows**. The OPC would therefore ask that this Commission also determine that Spire's cathodically protected steel mains are safe, and thus find that there is no

federal or state mandate to replace them under either 20 CSR 4240-40.030(13)(B) or section 393.130, because neither of those regulations require the replacement of **safe** segments of pipe. Of course, such a finding by the Commission would also necessitate a finding that there was no federal or state mandate to replace Spire's cathodically protected steel mains at all, and thus invalidate the decision to permit recovery for the costs related to such replacements found in the Commission's Order.⁸

The Commission's Report and Order is unlawful, unjust, and/or unreasonable because the Report and Order incorrectly allows Spire to recover costs related to the replacement of cathodically protected steel mains using an unlawful presumption of condition based on pipe material

Spire bears the burden of proof in this case. *Report and Order*, pg. 25. That means that Spire has to prove that **all** the cathodically protected steel mains it replaced were "worn out or [] in deteriorated condition." §393.1009; *In re Laclede Gas Co.*, 539 S.W.3d at 840. However, Spire cannot possibly accomplish this task using the evidence now before the Commission because Spire's own witnesses have testified that the company cannot prove **where** deterioration exists on its cathodically protected steel mains without digging up and exposing the pipes. Tr. pg. 107 ln. 2 – pg. 108 ln. 15; Tr. pg. 96 lns. 1 – 11; Tr. pg. 98 ln. 24 – pg. 99 ln. 6; Tr. pg. 175 pg. lns. 10 – 14. So instead Spire has requested (and the Commission has now granted) a presumption that all pipes that are made from a particular type of material are "worn

⁸ As always, the OPC is not challenging the **prudence** of Spire's decision to undertake these replacements at this time. There are many things that it may be prudent for a utility to do that are not directly legislatively mandated (*i.e.* required). As such, nothing in the OPC's argument should be taken to mean that Spire could not ultimately collect the costs associated with these replacements as part of a general rate case.

out or [] in deteriorated condition.” This kind of presumption is unlawful because it eliminates Spire’s burden of proof.

Spire’s own witnesses admitted that wear and deterioration of pipes (including cathodically protected steel mains) is not uniform. Tr. Pg. 100 lns. 7 – 12. It therefore necessarily stands to reason that not all cathodically protected steel mains are “worn out or [] in deteriorated condition.” Some cathodically protected steel mains may be worn out or in deteriorated condition, but others will not be worn out or in deteriorated condition. Spire, who has the burden of proof, has to prove which pipes are worn out or in deteriorated condition and which are not. Spire cannot just rely on a presumption that **all** cathodically protected steel main are worn out or in deteriorated condition just because they are cathodically protected steel mains. Yet that is exactly what the Commission has done.

The Supreme Court has already found that the ISRS statute is to be interpreted narrowly. *In re Laclede Gas Co.*, 539 S.W.3d at 839. Further, the Supreme Court explicitly faulted this Commission for relying on presumptions when interpreting the ISRS statute. *Verified Application & in re Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520, 525 (Mo. 2015) (“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.”). The Commission’s presumption in this case that **all** cathodically protected steel main is worn out or in deteriorated condition is no different from the Commission’s presumption that any change to a gas

utility plant project qualifies for an ISRS surcharge. This is especially true when the utility's own witnesses have testified that wear and deterioration is not uniform and that it is impossible to tell where deterioration has occurred on its pipes absent exposing them. Tr. Pg. 100 lns; 7 – 12, Tr. pg. 107 ln. 2 – pg. 108 ln. 15; Tr. pg. 96 lns. 1 – 11; Tr. pg. 98 ln. 24 – pg. 99 ln. 6; Tr. pg. 175 pg. lns. 10 – 14.

In order to fulfill its burden of proof in accordance with the Supreme Court's mandate to interpret the ISRS narrowly, Spire has to prove the condition of the pipes it replaced in each project on a project-by-project basis. Spire cannot rely (and the Commission should not grant) a presumption that **all** pipes made of a particular material are, by definition, worn out or in deteriorated condition. Therefore, the Commission's decision to do so in this case was unlawful and unreasonable.

The Commission's Report and Order is unlawful, unjust, and/or unreasonable because the Report and Order incorrectly allows Spire to recover costs related to the replacement of cathodically protected steel mains for which there was insufficient evidence to prove said mains were worn out or in deteriorated condition

There is no evidence in the record to show that **all** cathodically protected steel mains are worn out or in deteriorated condition. To prove that point, the OPC will consider each and every supposed piece of evidence that the Commission's Order cites to for support of that position.

The first thing the Order points to is the "history of a need for accelerated replacement programs" as evidence by a handful of documents from by various regulatory bodies. This evidence, by its vary nature, could only ever go toward establishing the **prudence** of Spire's replacement program (which, for the record, no

party has ever contested) and not the condition of any of Spire's cathodically protected steel mains. This is because the documents in question, which are all in the record, only discuss the potential risks associated with steel mains. Hoeflerlin, *Direct*, Schedule pg. 7, CRH-1, CRH-2. Absolutely nothing in any one of the documents that the Commission points to, which again are all in the record, states that all cathodically protected steel mains are worn out or in deteriorated condition, or that Spire's cathodically protected steel mains are worn out or in deteriorated condition, or even that any cathodically protected steel mains are worn out or in deteriorated condition. *See OPC, Brief*, pgs. 22 – 23. Again, all any of the documents cited to in the Commission's *Report and Order* ever do is state that incidents involving cathodically protected steel mains have occurred and that it would be prudent for utilities to replace infrastructure that it cannot determine the condition of. *Direct*, Schedule CRH-1.

The OPC also notes that citing to reports indicating a “need for accelerated replacement programs” as proof that all of Spire's cathodically protected steel mains are worn out or in a deteriorated condition does not make any logical sense. It is the direct logical equivalent to citing to an FDA report about the “need to combat childhood obesity in the United States” as proof that all children in the United States are obese; or citing to an NHTSA paper on the need to remove defective cars from use on America's roads as proof that all cars are defective; or even citing to an ICE report about the need to expand criminal background investigations of legal immigrants as proof that all legal immigrants are criminals. In short, broad sweeping statements

about the need to address **potential problems** does not prove the existence of actual problems in any one given circumstance, let alone across a massive swath of possible problem areas.

In addition to the forgoing, the OPC would ask that the Commission also consider the definitions behind the term “worn out or [] in deteriorated condition” to see how illogical it is to find that regulatory white papers, reports, letters, and regulations that promote the need to replace steel pipes prove the condition of any given steel main Spire uses (let alone prove that every single cathodically protected steel main that Spire possess is worn out or in deteriorated condition). The Missouri Supreme Court found that to deteriorate means “to make inferior in quality or value” with the caveat that “this definition indicates that deterioration is a gradual process that happens over a period of time rather than an immediate event.” *Application & in re Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520, 525 (Mo. 2015); *In re Laclede Gas Co.*, 539 S.W.3d at 839. The fact that regulatory bodies have advised the replacement of steel mains does not prove that **all** the steel mains Spire has in operation have been made “inferior in quality or value” as part of “a gradual process that happens over a period of time rather than an immediate event.” Likewise, the dictionary defines worn-out to mean “used, damaged, or worn to the extent of being nearly or completely useless or unserviceable” or, alternatively, “entirely spent or exhausted in strength, energy, or vitality” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1976). Again, the suggestion by regulators that replacement programs be accelerated does not prove that **all** steel mains Spire uses

are “used, damaged, or worn to the extent of being nearly or completely useless or unserviceable” or else are “entirely spent or exhausted in strength, energy, or vitality.” The Supreme Court has found that the ISRS statute is to be interpreted narrowly. *In re Laclede Gas Co.*, 539 S.W.3d at 839. Finding that all mains of a particular material type are worn out or in deteriorated condition because regulators have identified some problems that may arise and recommended addressing those potential issues is not reading the ISRS statute narrowly.

The second thing that the Commission’s *Report and Order* cites to is the ranking of cathodically protected steel mains in Spire’s DIMP. *Report and Order*, pg. 37. As the OPC already tried to explain in its brief, the ranking of risks in the DIMP cannot possibly prove the condition of any given pipe, let alone the condition of all pipes of a given material type. OPC, *Brief*, pgs. 17 – 21. However, the OPC will attempt to explain this again using another simple analogy. Imagine someone breaks down a society by race and sex and then ranks the risk that the various segments of society pose for producing a serial killer. The higher a race/sex appears on the ranking, the more likely it is to produce a serial killer; the lower a race/sex appears on the ranking, the less likely it is to produce a serial killer. Now imagine that one were to say that white males rank very high on that list; what does that mean? According to the logic displayed in the Commission’s *Report and Order*, it means that all white males are serial killers. This conclusion is obviously absurd, but it is also exactly what the Commission has found when it claims that the ranking of risks in the DIMP proves that all cathodically protected steel mains are worn out or in

deteriorated condition. This should be clearly wrong. Just because corrosion of steel mains shows up higher on Spire's rankings of the risks that might cause a potential pipe failure does not prove that each and every steel main is worn out or in deteriorated condition in the exact same manner that white males showing up higher on a ranking of risks for producing a serial killer does not prove that each and every white male is a serial killer.

The third thing that the Commission's *Report and Order* cites to is the testimony of expert witnesses as to the condition of Spire's mains. *Report and Order*, pg. 37. Why the Commission would cite to the expert witness testimony to prove that **all** cathodically protected steel mains are worn out or deteriorated is highly confusing given that the expert witnesses all refused to state that **all** cathodically protected steel mains were worn out or deteriorated and that it was impossible to tell what pipes were worn out and deteriorated and which were not without exposing the pipes themselves. Tr. pg. 107 ln. 2 – pg. 108 ln. 15; Tr. pg. 96 lns. 1 – 11; Tr. pg. 98 ln. 24 – pg. 99 ln. 6; Tr. pg. 175 pg. lns. 10 – 14. So there really is **no** testimony from expert witnesses that states that each and every single cathodically protected steel main Spire replaced was worn out or in deteriorated condition.

The fourth thing that the Commission cited to in its *Report and Order* was the fact that evidence shows that bare steel begins to corrode as soon as it was placed in the ground. *Report and Order*, pg. 37. The OPC has already explained extensively why the fact that steel begins to corrode immediately upon entering the ground cannot be proof that all of Spire's cathodically protected steel mains are worn out or

in deteriorated condition as this would both be inconsistent with the Supreme Court's decision in the *in re Liberty Energy (Midstates) Corp.* case as well as produce an absurd result and effectively render part of the ISRS statute superfluous. OPC, *Brief*, pgs. 3 – 7. The OPC will not reiterate those points here and directs the Commission to the segments of its brief that address this issue.

The fifth thing that the Commission's *Report and Order* relies on is the claim that the steel mains were "in the ground unprotected for 30-40 years when [they] began to fail." *Report and Order*, pg. 37. To start with, the claim that bare steel "began to fail" after 30 – 40 years is incorrect and misleading. The vast majority of Spire's steel mains have **not** failed in that they have not begun to leak. See, *e.g.*, OPC, *Brief*, pg. 41. In fact, that is literally the whole problem with this case. The Commission is making an illogical jump that, because some remote failures occurred after 30 – 40 years, **all** cathodically protected steel mains must be worn out or deteriorated. In reality, the fact that so many pipes have **not** failed is proof that they are **not** worn out or deteriorated. Moreover, the fact that these pipes were in the ground for 30 – 40 years before they were cathodically protected means absolutely nothing given that there is still no evidence in the record to show how long it takes for corrosion to occur. As the OPC pointed out in its brief, steel pipes have an average service life of up to 80 years depending on which Spire entity you consider. OPC, *Brief*, pg. 11 – 12. There is no reason, therefore, for the Commission to conclude that these pipes have all universally deteriorated to the point of being "worn out or in deteriorated condition" after only 40 years.

The sixth thing that the Commission relied on was testimony concerning the possible existence of minute “hot spots” of corrosion that can cause leaks or other unsafe conditions. *Report and Order*, pg. 37. The problem here, as with almost all the other issues, is that the mere possibility of a corrosion “hot spot” developing does not prove that **all** cathodically protected steel mains are worn out or in deteriorated condition. The idea that corrosion “hot spots” can **possibly** occur does not prove that every part of the hundreds of miles of Cathodically protected steel mains that Spire has are worn out or in deteriorated condition. It simply does not make any logical sense to jump from the **possibility** of minute corrosion occurring to the conclusion that **all** pipes of a particular material type are worn out or in deteriorated condition.

The seventh and final thing cited by the Commission’s *Report and Order* is more statistical evidence comparing cathodically protected steel mains to other pipe material type. This is incorrect for all the same reasons that the DIMP’s comparison of risks was wrong. The OPC could easily produce a graph that shows that white males make up 10 – 20 times more of the number of serial killers than any other race or sex, but that would not prove that **all** white males are serial killers. The OPC could also easily show that an increase in the number of white males in a population coincided with an increase in the number of serial killers and that a decrease in the number of white males coincided with a decrease, but that also would fail to prove that **all** white males are serial killers. The exact same is true for main pipe material. The fact that cathodically protected steel mains make up 10 – 20 times more of the number of leaks than plastic does not prove that **all** cathodically protected steel

mains are worn out or in deteriorated condition. Likewise, the fact that there was an increase in the number of leaks that occurred in 2017 and then a decrease in the number of leaks in 2018 does not prove that all cathodically protected steel mains are worn out or deteriorated. This is, again, because statistical comparison between pipe materials cannot possibly prove anything about the current condition of any given pipe as a matter of simple logic.

As the OPC has now demonstrated, none of the evidence presented proves that every single segment of cathodically protected steel main is worn out or in a deteriorated condition. In fact, nothing in the record even shows that any particular section of cathodically protected steel main is worn out or in deteriorated condition. Instead, the evidence that the Commission cites to only proves two things: (1) it is possible for steel mains to wear out or deteriorate, and (2) it is prudent to replace steel mains. However, neither of these two points are being contested in this case. All this case is about is proving that all of the cathodically protected steel mains that Spire replaced and is now seeking cost recovery for were, in fact, worn out or in deteriorated condition, which Spire has clearly failed to do. Consequently, the Commission's finding that all cathodically protected steel mains are worn out or in deteriorated condition is not supported by any evidence and is thus unlawful and unreasonable.

The Commission's Report and Order is unlawful, unjust, and/or unreasonable because the Report and Order incorrectly allows Spire to recover costs related to the replacement of cast iron mains for which there was insufficient evidence to prove said mains were worn out or in deteriorated condition

There is no evidence to support the conclusion that all cast iron mains are worn out or in deteriorated condition for all the same reasons laid out previously with regard to catholically protected steel mains in this motion as well as the OPC's brief. OPC, *Brief*, pgs. 46 – 48. The OPC will not reiterate those points here. There was no evidence presented to prove that any one piece of cast iron pipe that Spire replaced and is seeking recovery for in this ISRS case was worn out or in deteriorated condition and Spire's witness testified that it was impossible to tell where deterioration had occurred on its line without exposing the pipes. Tr. pg. 107 ln. 2 – pg. 108 ln. 15; Tr. pg. 96 lns. 1 – 11; Tr. pg. 98 ln. 24 – pg. 99 ln. 6; Tr. pg. 175 pg. lns. 10 – 14. Therefore, Spire cannot possibly prove that every single segment of cast iron main it replaced was worn out or in deteriorated condition. The Commission's conclusion that every single segment of cast iron main is worn out or in deteriorated condition is thus clearly not supported by the evidence and thus is unlawful and unreasonable.

The Commission's *Report and Order* is unlawful, unjust, and/or unreasonable because the *Report and Order* incorrectly allows Spire to recover costs related to overheads that are not permitted under the Uniform Systems of Accounts

The Commission's *Report and Order* misses the essential point of the OPC's argument with regard to the inclusion of overhead costs that bear no definite relationship to construction. The Commission has cited to testimony by Spire and Staff witnesses who testified that the types of costs that the OPC objected to are capable of being included in overheads per USOA instruction three. *Report and Order*, pg. 41; Tr. pg. 190 lns. 16 – 20, pg. 228 lns. 14 – 21. But the OPC was never arguing that these types of costs could never be included in overheads; rather, the

OPC was arguing that the USOA required a definite relationship to construction in order to be **properly** included. OPC, *Brief*, pgs. 52 – 55. There is nothing in the record that shows the definite relationship that these costs have to construction and nothing in the Commission’s Report and Order that addresses the OPC’s argument on this point.

In addition, the Commission’s fixation on the short time-frame for review of ISRS cases is misguided. As the Commission itself noted, Spire has the burden of proof in these cases. *Report and Order*, pg. 25. If Spire cannot prove a definite relationship exists between these overhead costs and construction here and now, then Spire has failed to meet its burden to show these overhead costs are ISRS eligible and should therefore be denied the opportunity to recover those costs through an ISRS. The Commission cannot just decide that it would be more convenient to address this issue later on and thereby ignore Spire’s burden of proof. Consequently, the Commission’s report and order is unlawful and unreasonable.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission either grant a rehearing or reconsideration of the October 30, 2019, *Report and Order* issued in the above styled cases pursuant to the authority of RSMo Section 386.500.

Respectfully submitted,
OFFICE OF THE PUBLIC
COUNSEL

By: /s/ John Clizer

John Clizer (#69043)
Senior Counsel
P.O. Box 2230
Jefferson City, MO 65102
Telephone: (573) 751-5324
Facsimile: (573) 751-5562
E-mail: john.clizer@opc.mo.gov

CERTIFICATE OF SERVICE

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

/s/ John Clizer