BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of Laclede Gas Company's Request to Increase Its Revenue for Gas Service	))	**File No. GR-2017-0215**
In the Matter of Laclede Gas Company d/b/a Missouri Gas Energy's Request to Increase Its	)) Revenues for Gas Service)	**File No. GR-2017-0216**

AMENDED APPLICATION FOR REHEARING

COMES NOW, the Office of the Public Counsel ("OPC" or "Public Counsel")), and for its Amended Application for Rehearing, respectfully states as follows:

1. Public Counsel submits this *Amended Application for Rehearing* to address Spire's unlawful over collection of Infrastructure Surcharge Replacement Systems ("ISRS") through its surcharge in File Nos. GO-2016-0333, GO-2017-0202, GO-2016-0333 and GO-2017-0202.

2. On March 6, 2018, after the Consumer Parties filed their Request for Rehearing, the Supreme Court denied transfer of Western District Case No. WD80544. On March 7, the Western District disposed of the case by sending its Opinion and Mandate to the parties, making the decision final. As discussed below this matter is now ready for decision in this case.

3. As further discussed below, OPC asks the Commission to amend its Report and Order in accord with the Western District's decision in WD805441 to disallow recovery of ISRS costs as imprudent, because the inclusion of these costs was unlawful. The Western District found Spire (both Laclede and Missouri Gas Energy ("MGE")) included ineligible plant in its ISRS surcharges in the above captioned cases.

[1] *Public Serv. Comm'n v. Office of Pub. Counsel (In re Laclede Gas Co.),* No. WD80544, 2017 Mo. App. LEXIS 1183 (Ct`. App. Nov. 21, 2017).

1. CAPITAL STRUCTURE

A. GM-2013-0254 STIPULATION

4. In 2013, the Commission considered Laclede's acquisition of Missouri Gas Energy. There, the parties executed a stipulation which allowed the acquisition to comply with the "not detrimental to the public interest" standard. That stipulation included a provision by which Laclede/MGE agreed not to seek recovery of the acquisition premium. "Neither Laclede Gas nor its MGE division shall seek ***either direct or indirect rate recovery or recognition*** of any acquisition premium in any future general ratemaking proceeding in Missouri."[2] Despite the commitment not to seek "direct or indirect" rate recovery, Spire sought to implement a capital structure in this case that indirectly included recognition of the acquisition premium. Moreover, by its decision the Commission endorsed Spire's violation of its commitment.

5. As an initial matter, it should be pointed out that the Commission's decision to indirectly provide rate recognition to the acquisition premium is not simply a violation of the stipulation in a rate case. As the courts have recognized, the Commission is not bound by stare decisis. Here, however, the approved commitment (not to seek indirect recovery of the acquisition premium) was a solution to allow the MGE acquisition to comply with the "not detrimental to the public interest" standard. Given the mandates of the AGP decision, the provisions of that stipulation are arguably binding on this Commission.3 Absent the continued enforcement of those merger commitments, the issue of whether the merger is "detrimental to the public interest" is suddenly in question again.

6. Putting legalities aside, however, the Commission should realize that its decision

[2] *Stipulation and Agreement*, Case No. GM-2013-0254, filed July 2, 2013.
[3] See, *State ex rel. AG Processing v. Public Service Commission*, 120 S.W.3d 732 (Mo. banc 2003).

allows indirect recovery of the acquisition premium through the capital structure is much worse for customers than if they had simply allowed direct recovery through rate base, As with other assets in rate base, the acquisition premium would be amortized and eventually be removed from the utility's books. By allowing recovery of the acquisition premium in the capital structure, the Commission has created a situation where ratepayers will be paying for the acquisition premium forever. Specifically, the acquisition premium is never amortized and is never eliminated. Instead, ratepayers will be paying higher rates forever to account for the artificially inflated equity ratio associated with the acquisition premium.

7. The Commission's decision to allow indirect recovery of the acquisition premium through the capital structure has implications that go much broader than simply this case. Repeatedly parties have attempted to resolve cutting edge issues through settlements. In many cases, these settlements include provisions that are to be given effect well beyond the time frame of the immediate case. Settlements involving regulatory plans, mergers, and other important cases all typically include provisions that are designed to creatively resolve matters short of Commission decision through the use of Long-lived settlement provisions. It goes without saying, however that the ability of the parties to be creative in such circumstances is directly dependent on the willingness of the Commission to enforce the settlement terms. Recently in a matter involving Great Plains Energy settlement that included such long-lived provisions, the Commission recognized the importance of enforcing such settlement terms.

> GPE's position is troublesome from a public policy perspective. At the time of the 2001 Agreement, the Commission and the parties relied on KCPL's and GPE's assurances that Section 7 authorized the Commission's oversight over the future holding company. The Commission ordered the parties to comply with the terms of the agreement. Were the Commission to agree with GPE's analysis, it would render the terms of a negotiated stipulation and agreement meaningless and unenforceable; a result that should be avoided. **For public policy reasons, all sides have a vested interest in maintaining trust in**

> **the settlement process. Parties must be confident that when they enter into a settlement agreement, each party can be relied upon to comply with the terms included, and that the Commission will indeed enforce all conditions. Should trust in the** settlement process falter, the ultimate victims will be the ratepayers who will be forced to pay for the resulting lengthy litigation.[4]

The Commission needs to realize here, as it foresaw in the Order in EC-2017-0171, that ratepayers ultimately suffer when the Commission undermines the ratepayers trust in the settlement process." Unfortunately, it will not only be ratepayers that will suffer. Instead, lacking confidence that the Commission will enforce the terms of such settlements, parties will be hesitant to enter into settlements that have terms that continue beyond the scope of the immediate case. Parties will be slow to engage in creative solutions because such solutions will likely be ignored whenever it is expedient for the Commission or utilities to ignore those previous settlements. As the Commission rightly noted, "all parties have a vested interest in maintaining trust in the settlement process."

B. OTHER STATE DECISIONS

8. In its Report and Order, the Commission took great care to make sure, regarding return on equity, that its decision was consistent with other state utility commissions.

> Before examining the analysts' use of the various methods to arrive at a recommended return on equity, it is important to look at some other numbers. In 2014, the average authorized return on equity for a gas local distribution company (LDC) was approximately 9.78 percent. Through the first six months of 2017 that dropped to approximately 9.5%. However, the most recent data available at the hearing showed that the average for the first three quarters of 2017 was approximately 9,8 percent.[5]

Thus the Commission has demonstrated a willingness to look at other state utility commission decisions when it comes to authorizing a return on equity above that recommended by the

[4] *Report and Order*, Case No. EC-2017-0107, issued February 22, 2017
[5] Report and Order, page 30.

consumer advocates.

9. Unfortunately for consumers, however, the Commission willingness to consider the decisions of other states is apparently limited to the return on equity issue. As it pertains to capital structure, it appears that the Commission ignored the decisions of other state utility commissions that have rejected any attempt to recognize the acquisition premium through utility capital structure.

10. For instance, the Massachusetts Department of Telecommunications and Energy has stated, "[b]cause goodwill is not directly associated with a utility's tangible plant assets, it is appropriate to exclude goodwill from capitalization.[6] Still again, the Connecticut Department of Public Utility Control has held, "[t]he Department believes that by not reducing common stock equity by the accumulated amortization of goodwill, the Company is overstating the equity portion of its capital structure."[7] Finally the Maine Public Utilities Commission has stated:

> Therefore, including any of this $40 million [of goodwill] in CMP's capital structure in this or any other proceeding implicitly allows the recovery of some portion of the acquisition premium paid by Energy East in the acquisition of CMP. As noted previously, the Commission's Order in Docket No. 99-411 expressly forbids any such recovery absent certain findings made by the Commission. The Commission has not made any such finding, nor has it been presented any basis upon which to do so.[8]

The following list represents several cases in which state utility commission have disallowed inclusion of goodwill equity in the ratemaking capital structure.

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[6] *Boston Gas Company d/b/a KeySpan Energy Delivery New England*, Case No. D.T.E. 03-40, issued October 31, 2003 (citing to D.T.E. 02-27, at 12; Southern Union Company, D.T.E. 01-52, at 11 (2001); D.T.E. 00-53, at 8-9).

[7] Southern Connecticut Gas Company, Connecticut Department of Public Utility Control, Case No. 08-12-07, issued July 17, 2009, 276 PUR4th 1.

[8] *Central Maine Power Company*, Maine Public Utilities Commission, Docket No. 2004-339, issued December 17, 2004.

State	Utility	Date	Case / Citation
Arizona	Unisource Energy	August 12, 2014	315 PUR4th 353
Connecticut	Southern Connecticut Gas	July 17, 2009	276 PUR4th 1
Connecticut	Connecticut Natural Gas	June 30, 2009	274 PUR4th 345
Connecticut	Consolidated Edison	October 19, 2000	205 PUR4th 182
Connecticut	Energy East	January 19, 2000	Case No. 99-08-09
Delaware	Delmarva Power & Light	June 2, 2015	Case No. 14-193
District of Columbia	Exelon Corp.	February 26, 2016	Case No. 1119
Illinois	Commonwealth Edison	September 11, 2017	Case No. 17-0312
Illinois	Commonwealth Edison	August 15, 2017	Case No. 17-0287
Illinois	Commonwealth Edison	December 18, 2013	Case No. 13-0318
Illinois	Commonwealth Edison	November 26, 2013	Case No. 13-0553
Illinois	Commonwealth Edison	May 29, 2012	Case No. 11-0271
Illinois	Commonwealth Edison	May 24, 2011	Case No. 10-0467
Illinois	Commonwealth Edison	July 26, 2006	250 PUR4th 161
Illinois	Ameren Illinois	December 9, 2015	Case No. 15-0305
Illinois	Ameren Illinois	December 10, 2014	317 PUR4th 371
Illinois	Ameren Illinois	December 9, 2013	Case No. 13-0301
Illinois	Ameren Illinois	September 19, 2012	Case No. 12-0001
Illinois	North Shore Gas	January 10, 2012	Case No. 11-0280
Kansas	Western Resources	July 25, 2001	211 PUR4th 8
Maine	Central Maine Power	December 17, 2004	Case No. 2004-339
Maryland	First Energy	January 18, 2011	287 PUR4th 284
Massachusetts	UIL Holdings	December 15, 2015	327 PUR4th 50
Massachusetts	New England Gas	February 2, 2009	271 PUR4th 1
Massachusetts	Berkshire Gas Company	February 18, 2004	DTE Case No. 03-89
Massachusetts	Boston Gas	October 31, 2003	DTE Case No. 03-40
Montana	Northwestern Energy	July 8, 2008	267 PUR4th 151
Montana	Northwestern Energy	July 31, 2007	259 PUR4th 493
New Jersey	Jersey Central Power & Light	December 12, 2016	ER16040383
New Jersey	Southern Company	June 29, 2016	331 PUR4th 84
New York	Central Hudson	June 26, 2013	306 PUR4th 167
Pennsylvania	Metropolitan Edison	January 11, 2007	102 Pa.PUC 1
Rhode Island	Narragansett Electric	April 11, 2013	Case No. 4323
Virginia	Southern Company	February 23, 2016	PUE-2015-00113
West Virginia	Monongahela Power	October 7, 2013	308 PUR4th 415
West Virginia	Monongahela Power	December 16, 2010	Case 10-0713-E-PC

Wisconsin	Wisconsin Electric Power	January 17, 2008	262 PUR4th 433
Wisconsin	Wisconsin Public Service	December 19, 2003	230 PUR4th 229
Wisconsin	Wisconsin Public Service	June 21, 2002	218 PUR4th 381

11. As with return on equity, the Commission should be careful to ensure that its decision is not outside the mainstream of other state utility commissions. As relates to the treatment of acquisition premiums in the utility ratemaking capital structure, however, it is apparent that the Commission's decision is decidedly unique.

C. IMPACT ON THE STATE ECONOMY

12. In all of its decisions, the Commission, as part of the Department of Economic Development, should be mindful of the impact of its decisions on the state economy. Regarding the capital structure issue, the Commission's decision will have a detrimental impact on the Missouri economy. Specifically, the capital structure issue, in tandem with the authorized return on equity, dictates the amount of profits that the utility is allowed to earn for its shareholders. In this case, by utilizing the equity rich capital structure that reflects the acquisition premium, the Commission has authorized an increased level of profits to the Spire shareholders.

10. The Commission needs to realize, however, that, in making such a decision, the Commission takes money out of the Missouri economy for distribution to Spire shareholders in New York, California or even China. Money that could be used to purchase goods and services in Missouri and stimulate the Missouri economy is extracted from the state economy and transferred to shareholders in other states in order to stimulate the other state economies. While the Commission has a duty to ensure the financial health of the local utility, it has no duty to ensure an inflated level of profits. The Commission's decision on capital structure simply inflates the level of profits with no corresponding benefit to ratepayers or the Missouri economy. In fact, the capital structure decision alone will remove over $19 million[9] from the Missouri economy

in the first year.[10] If Spire stays out for the four years provided under the ISRS statute, the capital structure decision will remove over $76 million from the Missouri GDP. As such, the Commission is decidedly contrary to the efforts of other branches of the Missouri government attempting to stimulate economic growth and jobs.

2. DUE PROCESS AT TAX HEARING

11. On February 1, the Commission scheduled and later performed an "additional hearing."[11] That additional hearing was to be related to the "cost of service as a result of the Tax Cuts a reasons. ***First***, neither the Commission's rules nor Chapter 536, RSMo (2016), allow for putting on additional evidence after a hearing and after briefing. ***Second***, even if the Commission were authorized to hear additional evidence at such a late stage, the Commission also heard evidence outside the scope of the subject matter described in the Commission's February 1, 2018 Order. The hearing in this matter was conducted on January 3, 2018, mere days after nd Jobs Act for each of Spire's operating units."[12] That hearing violated due for two President Trump signed the Tax Cuts and Jobs Act ("Tax Act") into law. As a result, no party could have been prepared to present evidence on the Tax Act issue on the date of the hearing. Thus, special circumstances existed which necessitated a hearing on a later date.

12. In requesting such a hearing, Spire stated that "the amount of the Tax Law benefit is dependent upon a number of factors, including the Commission decisions *on key issues in the rate case*."[13] Those key issues were:

[9] See, Exhibits 421 (Laclede rate impact) and 422 (MGE rate impact).
[10] Of course, this is the direct impact on Missouri economy. As with all other economic factors, there is a multiplier effect on the Missouri economy. A dollar spent in Missouri is not simply spent one time. Rather, that dollar is spent multiple times having a multiplier effect on the economy. See, Haslag Direct, Case No. EC-2014-0224, filed February 12, 2014.
[11] EFIS Item No. 569.
[12] *Id.*

- Permanent Capital Structure;
- Financing of Gas Storage Inventories ("GSI");
- Prepaid Pension Asset;

13. Recognizing that Spire's request would be reopening issues already on the record and submitted, OPC Responded by pointing out to the Commission that the taking of additional evidence on issues that have been submitted and briefed would be a violation of the Commission's Rules at 4 CSR 240-2.110(8), which states:

> (8) A party may request that the commission reopen the record for the taking of additional evidence if the request is made after the hearing has been concluded, but before briefs have been filed or oral argument presented, or before a decision has been issued in the absence of briefs or argument. Such a request shall be made by filing a motion to reopen the record for the taking of additional evidence. The motion shall assert the justification for taking additional evidence including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. The petition shall also contain a brief statement of the proposed additional evidence, and an explanation as to why this evidence was not offered during the hearing.

14. "Administrative rules and regulations are interpreted under the same principles of construction as statutes."[14] "Words are given their ordinary, plain meaning."[15] According to plain and ordinary meaning of this Commission's rule, this Commission can only reopen the record "before briefs have been filed or oral argument presented." Here, the only issue not briefed and not argued orally was the issue of the Tax Act. The issues that Spire sought to include in that hearing were argued orally[16] and were briefed.[17] Not only that, but the issues were

[13] EFIS Item No. 564, paragraph 3 (emphasis added).
[14] *McGough v. Dir. of Revenue*, 464 S.W.3d 459, 462 (Mo. App. E.D. 2015) (internal citations omitted).
[15] *Id.*

also discussed by the Commission during agenda meetings. Reopening those issues was inappropriate at such a late stage. Consistent with this information, OPC asked this Commission to "limit the hearing to presentation of currently known and measurable tax impacts of the Tax Cuts and Jobs Act," and not "issues already argued and submitted to the Commission." Recognizing that the Commission cannot reopen closed issues, the Commission correctly limited the February 5, 2018, hearing to "specific adjustments that would be needed to include in rates any change in cost of service as a result of the Tax Cuts and Jobs Spire's operating units."[18] Despite Spire's request to revisit certain issues, the Commission *did not* include those issues on its notice.

Despite the limited scope of the Commission's Notice, the hearing was not limited to the Tax Act. Instead, Spire sought the Commission to rehear four issues:

- Gas storage in rate base;
- Pre-'96 pension funding recovery;
- Capitalization of cash incentive comp.;
- Spire Missouri LT capitalization.

Rightly so, these requests/questions were objected to. Lewis Mills objected that:

> The Commission did not notice that these issues were going to be heard today. I didn't bring a capital structure witness. I didn't bring witnesses to address these issues. And for them to go beyond the scope of what the Commission set for the hearing and talk about and offer evidence in support of these particular items I think goes beyond what you were suggesting that the purpose of Exhibit 71 was and really goes to the point of rearguing the issues that we've already argued and closed the record on."

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[14] *McGough v. Dir. of Revenue*, 464 S.W.3d 459, 462 (Mo. App. E.D. 2015) (internal citations omitted).
[15] *Id.*
[16] EFIS Item No. 509.
[17] EFIS Item Nos. 542-546 and 549-555.
[18] EFIS Item No. 569.

15. OPC's attorney Lera Shemwell also objected, stating that "I think we may need the opportunity then to call further witnesses at some point, since we understood that only the tax issue would be argued here."[20] Despite the proper objections that the previously submitted hearings were outside the scope of the hearing Notice, the Commission overruled beyond the scope objections time and time again during a day-long hearing.

16. "Due process requires notice and a hearing; moreover, the adequacy of the notice and the hearing must be evaluated in the context of the specific procedure at issue, in this case, an administrative proceeding."[21] Because this Commission heard evidence on issues other than the Tax Act, the Notice issued was inadequate to satisfy due process. The Notice only referenced one subject, "the specific adjustments that would be needed…as a result of the Tax Cuts and Jobs Act…."[22] However, the evidence taken by the Commission exceeded the scope of the notice because it delved into other issues. Whether those other issues had "strings…attached" to the tax issue[23] is irrelevant. Those issues were not listed on the Commission's Notice.

17. "In an administrative proceeding, due process is provided by affording parties the opportunity to be heard in a meaningful manner."[23] "The parties must have knowledge of the claims of his or her opponent, [and] have a full opportunity to be heard, *and to defend, enforce and protect his or her rights*."[24] [A] party to an administrative hearing must be given the opportunity to hear evidence submitted against him, *to confront and cross-examine witnesses*, and *to rebut testimony of such witnesses by evidence on his own behalf*."[25]

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[20] Tr. 2825.

[21] *State ex rel. Mo. Pipeline Co. v. Mo. Pub. Serv. Comm'n*, 307 S.W.3d 162, 174 (Mo. App. W.D. 2009) (internal citation omitted).

[22] EFIS Item No 569.

[23] Tr. 2820.

[24] *State ex rel. Mo. Pipeline Co. v. Mo. Pub. Serv. Comm'n*, 307 S.W.3d 162, 174 (Mo. App. W.D. 2009)

18. Because evidence, a full day's worth at that, was presented on issues that had been previously submitted and were outside the scope of the Notice, OPC and the other interveners were unable to defend their positions in a meaningful manner. They were not able to prepare for cross-examination on any subject other than the Tax Act, which impedes their ability to adequately confront Spire's witnesses. They were unable to call their own witnesses with knowledge specific to the added subject matters. They were unable to introduce any additional evidence with regard to those subjects. There was simply no way for OPC or the intervening parties to know that the subject of the February 5 hearing was going to cover anything but the Tax Act. The Due Process rights of Missouri ratepayers were violated by the February 5, 2018 hearing.

19. In addition, this pleading addresses the procedure by which the Commission accepted evidence, after the completion of briefs, to consider the impact of the recent federal tax legislation. As this pleading indicates, the method by which the Commission accepted evidence, specifically the acceptance of evidence on matters other than tax legislation, violated the parties due process rights. As such, the Commission should exclude all evidence accepted at that hearing that does not pertain to the tax legislation, rehear its decision, and limit its consideration on non-tax issues solely to the evidence previously adduced at hearing.

3. REMEDY FOR UNLAWFUL ISRS SURCHARGES

20. In its March 6 decision, the Western District' concluded a significant number of Spire Inc.'s (both Laclede and Missouri Gas Energy ("MGE") Commission-approved-ISRS replacements were unlawful. The Court methodically determined that Spire had replaced pipelines that were neither: "(1) required for Spire to comply with state or federal safety requirements, or (2) worn out or in a deteriorated condition," leading the Court to find that Spire

had unlawfully claimed ISRS recovery for this infrastructure. Specifically, the Court found Laclede had unlawfully replaced thousands of feet of pipeline: "In fact, a sample of work orders provided by Laclede and analyzed by the parties revealed that 53,415 feet of main lines were retired, of which 8,817 feet were plastic (approximately 16 percent), and 53,279 feet of service lines were retired, of which 34,223 feet were plastic (approximately 64 percent).

21. The Western District left no open question as to whether Laclede was permitted to recover for the entire neighborhood system replacements under ISRIS. The surcharge was inconsistent with the plain language of section 393.1009, RSMo. With that issue settled, the only remaining issue for this Commission to determine is the proper remedy for the unlawful surcharges imposed upon Laclede's ratepayers. That remedy is laid out in section 393.1015.8, RSMo:

> In the event the commission disallows, during a subsequent general rate proceeding, recovery of costs associated with eligible infrastructure system replacements previously included in an ISRS, the gas corporation shall offset its ISRS in the future as necessary to recognize and account for any such overcollections."

22. Subsection 8 applies to this case, as both of the elements are met:

- "Commission disallows…recovery of costs associated with eligible infrastructure system replacements previously included in an ISRS": The Western District's remand was for "further proceedings consistent with this opinion." Therefore, this Commission must "disallow" the ISRS surcharge that it previously approved.

- "During a subsequent general rate proceeding:" In GR-2017-0215 & 0216, the current general rate proceeding, the tariffs do not go into effect until April 19, 2018. Additionally, on March 29, 2018, this Commission ordered Staff to file a recommendation on April 2, 2018, demonstrating that the case is still ongoing as of the date of this filing.

23. Thus, the appropriate remedy is to "offset its ISRS in the future as necessary to recognize and account for any such overcollections." Id. Thus, the appropriate remedy moving forward is to, in the tariff(s) for the current rate case, apply the overcollection to that rate base to offset the overcollections from the ISRS cases.

24. Recently, in File Nos. GO-2016-0333, GO-2017-0202, GO-2016-0332 and GO-2017-0201, which were the cases appealed to the Western District, Public Counsel witness John Robinett has been able to calculate a conservative estimate of the amounts of overcollection. His affidavit in those cases is attached hereto.

WHEREFORE, the Office of Public Counsel respectfully requests the Commission reconsider and Rehear and Amend its Report and Order in this matter and issue findings consistent with this pleading and address Spire's unlawful ISRS collection in this subsequent rate case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 30th day of March 2018, I hereby certify that a true and correct copy of the foregoing motion was submitted to all relevant parties by depositing this motion into the Commission's Electronic Filing Information System ("EFIS").

/s/ Lera L. Shemwell