

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

In the Matter of the Application of Spire Missouri)
Inc. to Establish an Infrastructure System) **File No. GO-2018-0309**
Replacement Surcharge in its Spire Missouri)
East Service Territory)

In the Matter of the Application of Spire Missouri)
Inc. to Establish an Infrastructure System) **File No. GO-2018-0310**
Replacement Surcharge in its Spire Missouri)
West Service Territory)

REPLY OF SPIRE MISSOURI INC. TO RESPONSE OF OPC

COMES NOW Spire Missouri Inc. (referred to herein as “Spire Missouri” or “Company”), on behalf of itself and its two operating units, Spire Missouri East (“Spire East”) and Spire Missouri West (“Spire West”), and submits its Reply to the Response to Commission Order Directing Filing submitted by the Office of Public Counsel (“OPC”) on October 30, 2018. In support thereof, the Company states as follows:

1. On October 24, 2018, the Commission issued an order in the above captioned proceedings in which it indicated that it had recently become aware of the fact that one of the attorneys representing OPC in these proceedings had previously been employed as a law clerk for Judge Edward R. Ardini, Jr. of the Missouri Western District Court of Appeals. The Commission further noted that while Mr. Clizer was employed by that Court, Judge Ardini had signed the opinion in Case No. WD80544 (the “ISRS Opinion”) which reversed and remanded the Commission’s decision in two prior ISRS cases (File Nos. GO-2016-0332 and GO-2016-0333) on the same plastic issue that was also litigated in these more recent ISRS cases. Because Missouri Supreme Court Rule 4-1.12(a) provides that “... a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person..., unless all parties to the proceeding give

informed consent, confirmed in writing. . . ”, the Commission directed OPC to explain whether Rule 4-1.12(a) or (c) applies and, if so, how it has complied with the rule’s requirements.

2. In its Response, OPC states Rule 4-1.12(a) is not applicable because Mr. Clizer did not participate “personally and substantially” in Case No. WD80544 in that all work done in that case, including all research and drafting, was performed by another law clerk in the employ of the court.¹ In a footnote, OPC also rejects the notion that the current ISRS cases involve the “same matter” as the prior ones since they involve different ISRS investments and were not formally consolidated.

3. Turning to OPC’s second argument first, there is simply no tenable basis for arguing that the six ISRS cases recently decided by the Commission did not involve the “same matter.” In each case, the impact on ISRS charges relating to the replacement or retirement of plastic facilities was the key issue. Moreover, the Parties, including OPC, addressed the issue in the same exact way in all six ISRS cases, relying on the same legal, policy and factual arguments to support their respective positions. A central component of those arguments in all six cases, of course, was the meaning, significance and effect of the ISRS Opinion that was written and issued by Judge Ardini at the time Mr. Clizer was a clerk for him. In any event, OPC’s attempt to draw some distinction between the matters at issue in these two ISRS cases and those involved in the four prior ones is, at its core, a meaningless argument given the fact that Mr. Clizer represented OPC in those prior cases as well.

¹Although no explanation was given by the Western District Court of Appeals for its decision, the Court may have accepted this explanation in denying the Commission’s Motion to Disqualify Mr. Clizer from participation in the appeal of the Commission’s Orders in the first four ISRS cases. That determination, however, especially in light of the complete absence of any explanation of how it was reached, does not affect the Commission’s authority to reach its own conclusions regarding the propriety of Mr. Clizer’s participation in proceedings before it.

4. As to OPC's assertion that Mr. Clizer did not participate "personally and substantially" in Case No. WD80544, OPC states in paragraph 3 of its Response that the research was performed by another law clerk "in the employ of the court." To Spire Missouri's knowledge, the other law clerk would not just have been working for the court, but would have been working directly for Judge Ardini. In other words, assuming Judge Ardini had two law clerks, it would appear that in an office of three attorneys, two were working on the ISRS Opinion, and the third was Mr. Clizer. While Spire Missouri has no basis for disputing Mr. Clizer's contention that he did not research or write the opinion in that case, the Company also has no way to know what other communications, advice, or discussions, if any, may have taken place in Judge Ardini's offices, or even between Mr. Clizer and other Court employees, regarding these matters, or what undisclosed insights into the Court's thinking on this matter Mr. Clizer may have acquired as a result of any such discussions.²

5. What Spire Missouri does know, however, is that Mr. Clizer has participated "personally and substantially" in all of the ISRS cases before the Commission since he joined OPC. No sooner had Mr. Clizer moved to OPC from the Western District, then OPC plugged him directly into the remand matter on an opinion authored by his supervisor. Although OPC also had a senior counsel working on these ISRS cases, all of the pleadings submitted by OPC after August 24th, including OPC's Position Statement, its Brief, and the Application for Rehearing that would be included in the Notice of Appeal, were signed by Mr. Clizer, and solely by Mr. Clizer. As a consequence, as the legal issues arising from these cases bounce back to the Western District, one of the Court's recently employed clerks will be prominently identified as counsel for one of the

² OPC's Response also does not address what information or insights Mr. Clizer may have gained at the Court and shared with his colleagues at OPC. Nor does it represent that no such information was shared, as prescribed by Sections 4-1.11 and 4-1.12(c) of the Rules of Professional Conduct.

appealing parties. Whether this is the result of pure happenstance or a calculated effort to gain some advantage during the regulatory appellate process, it creates at least an appearance of impropriety that could and should have been avoided by not having Mr. Clizer participate in these proceedings.³

6. Spire Missouri is not proposing that the Commission adopt a specific remedy in response to these circumstances created by Mr. Clizer's participation in these proceedings. Spire Missouri does believe, however, that all of these considerations provide additional justification for granting the Company's request for rehearing of the Commission's September 20th Report and Order in these cases. Alternatively, the Company suggests that the Commission could "cut the gordian knot" in these cases by authorizing Spire Missouri to defer for potential recovery in its next ISRS filing the revenues and costs excluded in these cases, subject to the Company satisfying the roadmap for ISRS inclusion first articulated by the Commission in its Order.

WHEREFORE, for the foregoing reasons, Spire Missouri Inc. respectfully requests that the Commission accept this Reply to OPC's Response and renews its request that the Commission grant rehearing of its September 20th Report and Order in these cases and upon rehearing, modify its Order to permit recovery of the ISRS revenues and costs previously excluded. In the alternative, the Company respectfully renews its request that the Commission authorize it to defer for potential recovery in its next ISRS filing the revenues and costs excluded in these cases subject

³See *State v. Lemasters*, 456 S.W.3d 416, 420 (Mo banc. 2015) for a discussion of how Sections 4-1.11(a)(2) and 4-1.9(c) of the Rules of Professional Conduct relating to government attorneys prohibited a public defender turned prosecutor from participating in any way in the prosecution of a defendant she had once represented or from revealing any information relating to her representation of defendant. In the *Lemasters* case, the attorney voluntarily complied with this professional obligation by not participating in the prosecution of the defendant and by not disclosing to the prosecution any information that might have worked to the disadvantage of the defendant.

to the Company satisfying the roadmap for ISRS inclusion first articulated by the Commission in its Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing pleading was served on Staff and the Office of the Public Counsel, on this 12th day of November 2018 by hand-delivery, fax, electronic mail or by regular mail, postage prepaid.

/s/ Rick Zucker
