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	))))	**File 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	))))	**File No. GO-2019-0116**

RESPONSE IN OPPOSITION TO STAFF'S MOTION TO DISMISS PORTION OF ISRS REQUEST

COMES NOW Spire Missouri Inc., on behalf of itself and its two operating units, Spire Missouri East ("Spire East") and Spire Missouri West ("Spire West") and submits this Response in opposition to the Staff's Motion to Dismiss certain portions of the Company ISRS Application (the "Motion"). In support thereof, the Company states as follows:

1. Staff filed its Motion on March 20, 2019, seeking to dismiss those portions of the Company's applications that include ISRS investments that the Commission did not permit to be recovered in the Company's prior ISRS cases, Case Nos. GO-2018-0309 and GO-2018-0310. According to Staff's Motion, the Commission is powerless to consider inclusion of those amounts in this ISRS filing because the Commission's Report and Order in those cases has been appealed to the Western District Court of Appeals and, as a result, jurisdiction over any further action relating to these investments now resides exclusively in the Court of Appeals.

2. As a preliminary matter, Staff's action in waiting over two months since the filing of the Company's ISRS applications to raise this legal issue is inappropriate. Since the moment it filed its ISRS Application, the Company has been very clear that that it was seeking to include

such amounts in its ISRS filing. Indeed, that fact was extensively discussed in the applications themselves. (see pages 3 and 4 of the Company's Applications). Moreover, the judicial review proceedings involving Case Nos GO-2018-0309 and GO-2018-0310 had already been initiated and were well underway at the time the applications were filed. Since these primary factors relied upon by Staff to support its Motion have remained unchanged throughout this entire period, Staff's last-minute assertion of these legal claims is, at a minimum, extremely prejudicial to the Company. That is certainly evidenced, at least in part, by the fact that the Company must now respond in two business days to a pleading that Staff could have submitted two months ago if it truly believed the Commission did not have jurisdiction to consider this element of the Company's request.[1]

3. In any event, and as discussed more fully below, Staff's Motion should be denied outright because it: (a) fundamentally mis-states the nature of the Company's request to recover such amounts in this case; (b) is blatantly inconsistent with the provisions of the ISRS statute that specify what amounts a gas corporation may seek to recover in an ISRS filing; (c) is contrary to decades of judicial decisions on the proper interplay between judicial review proceedings and the Commission's exercise of statutory ratemaking powers; (d) would unnecessarily and unfairly penalize the Company for attempting to comply with this Commission's instructions on how to demonstrate the eligibility of ISRS plant – instructions that the Company only became aware of at the conclusion of the ISRS proceedings in which it first sought recovery of such investments; and (e) is contrary to the principles typically governing whether to grant a motion to dismiss.

Mis-statement of the Nature of the Company's Request

4. At page 1 of its Motion, the Staff erroneously characterizes the Company's inclusion of those prior investments in its ISRS filing as a "renewal of the Company's previous

[1] At the very least, if Staff believe it was appropriate to proceed with a Motion to Dismiss it could and should have filed it at the time Staff mentioned this issue in March 15, 2019 Recommendation.

ISRS cost recovery request (hereafter the "Old Request") which was denied by the Commission in a prior case. . ." The Staff also erroneously suggests, at page 3 of its Motion, that the Company is now asking the Commission "to reconsider its denial in view of certain additional evidence." However, the Company is doing neither of these things. It is neither renewing a previous request nor seeking reconsideration of the Commission's previous decision.

5. It is important to note that in its Report and Order in Case Nos. GO-2018-0309 and 0310, the Commission did not determine that the ISRS investments at issue were inherently ineligible for inclusion in the Company's ISRS request, but instead excluded them because, in the Commission's view, the Company had not provided a sufficient number of engineering analyses to demonstrate their eligibility. While the Company disagreed with that conclusion, it is in no way seeking to revisit, let alone challenge, that decision or its impact on prior ISRS revenue recoveries, in its current ISRS cases.[2] To the contrary, the Company fully recognizes that judicial review of that decision is the proper avenue for raising such a challenge and that is what the Company has done.

6. Instead, what the Company is seeking to do in the current ISRS filings is *implement* the Commission's decision in those prior cases *on a going forward basis* by following the evidentiary roadmap the Commission established in its Report and Order in those cases for

[2]The case on appeal is based on the evidence presented in August and September of 2018 that sought ISRS revenues beginning in October 2018. This case is based on new evidence that will be presented in March and April 2019, and seeks ISRS revenues beginning in May 2019. If the Commission approves recovery of the 10/1/17 - 6/30/18 ISRS costs based on the new evidence, beginning in May 2019, then the case on appeal would still be relevant to address the revenue loss the Company incurred by not recovering those costs between October 2018 and May 2019. Should Spire prevail on appeal, then the Company would be entitled to a temporary rate adjustment that would cover approximately seven months of lost ISRS. If the Company loses the appeal, then it will have lost ISRS revenues for the seven months that elapsed before the Company provided evidence that the Commission found to be adequate to approve ISRS recovery. In sum, if the Commission approves ISRS recovery based on the new evidence presented in these ISRS cases, the effect would be to limit the amount at issue in the appeal to seven months of ISRS revenues.

demonstrating ISRS eligibility. That evidentiary roadmap was laid out at pages 15 to 16 of its Report and Order, in which the Commission stated:

> In the future, if Spire Missouri wishes to renew its argument that plastic pipe replacements result in no cost or a decreased cost of ISRS, it should submit supporting evidence to be considered, such as, but not limited to, a separate cost analysis for each project claimed, evidence that each patch was worn out or deteriorated, or evidence regarding the argument that any plastic pipe replaced was incidental to and required to be replaced in conjunction with the replacement of other worn out or deteriorated components.

7. In short, the Company's current ISRS filing is in no way an attempt to "renew" its ISRS request in Case Nos. GO-2018-0309 and 0310 or have the Commission "reconsider its denial" of the costs at issue in those cases. It is instead an effort by the Company to accept and follow through on the Commission's explicit invitation to provide the kind of additional engineering analyses that the Commission itself determined should be provided "in the future" to substantiate the ISRS eligibility of these projects. The Company is now asking the Commission to decide on the ISRS eligibility of these investments based upon the evidence presented in these cases, not upon the evidence presented in the prior ISRS cases. The Commission should reject Staff's argument that the Commission is powerless to consider such new evidence because of an appellate case where such evidence was neither at issue nor made a part of the evidentiary record being reviewed by the Court.

Inconsistency with ISRS Statute

8. The Staff's Motion is completely barren of any reference to the ISRS Statute that provides the legal basis for the ISRS process under consideration here. This omission is damaging to the Motion, since the ISRS statute is very specific regarding the kind of costs that are eligible for inclusion in an ISRS filing. To that end, Section 393.1009(3) RSMo. describes "eligible infrastructure system replacements", as gas utility plant projects that:

(a) Do not increase revenues by directly connecting the infrastructure replacement to new customers;
(b) Are in service and used and useful;
(c) *Were not included in the gas corporation's rate base in its most recent general rate case*; and
(d) Replace or extend the useful life of an existing infrastructure. (*emphasis supplied*)

9. These same criteria are also set forth in the Commission's implementing ISRS rules. See Rule 4 CSR 240-3.265(1)(B). As the language in these provisions makes clear, the only temporal or process-related limitation on the ISRS investments that are deemed eligible for inclusion in an ISRS filing is the one under (3)(c) that precludes inclusion of any investments that have already been included in the Company's rate base. As long as this condition is met – and there is no dispute by Staff that the investments at issue here meet this condition – the utility can seek to include such investments at any time subsequent to the rate case.

10. Given this framework, barring a utility from seeking recovery of an ISRS investment that meets this statutory condition – merely because such costs were not previously allowed in a prior Commission Order that is now under appeal – would impermissibly add a new eligibility condition to this statutory language. Moreover, adding such a condition would also require one to conclude that there is something in the ISRS statute that defers recovery of such ISRS investments until a judicial review proceeding is concluded, even if the utility can demonstrate that they are eligible for recovery under the ISRS rules. Again, there is nothing in the statute to support such a construction.

11. In addition to violating its technical terms, Staff's attempt to bar the Company from applying the Commission approved roadmap to these ISRS investments would be contrary to the public policy underlying the ISRS statute. One of those purposes was to provide gas utilities with a more financially viable framework for making needed safety-related infrastructure investments

as well as satisfying public improvement mandates. The ISRS statute does this by permitting gas utilities to begin recovering the depreciation, taxes and return on such investments between rate cases. Preventing a gas utility from proving up the eligibility, and beginning recovery, of the ISRS investments it has made since its last rate case simply because there is a judicial review proceeding involving a prior ISRS Order, decided under different facts, would fly in the face of this statutory purpose. In effect, it would eliminate the remedial cost-recovery measures in the ISRS statute that are supposed to apply to such investments between rate cases. There is simply nothing in the letter, let alone the spirit, of the ISRS statute that would support such a result.

Inconsistency with Historical Interplay between Judicial Review Proceedings and the Commission's Exercise of its Ratemaking Powers

12. Staff's Motion also fails to discuss or even acknowledge the long line of court and Commission cases that have dealt with the interplay between judicial review proceedings and this Commission's exercise of its ratemaking powers. Instead, the Staff relies exclusively on judicial cases involving the interplay between judicial review proceedings and circuit court cases involving parties other than administrative agencies.

13. Even a cursory review of these more relevant cases and practices shows that there is no tenable legal foundation for Staff's assertion that the Commission lacks jurisdiction to take action regarding these prior investments. And one does not need to look far for such guidance. For example, in the Company's recently concluded rate cases, the Commission approved a rebasing of the Company's ISRS costs without adjustment (See Amended Report and Order, Case Nos. GR-2015-0215 and 0216, pp. 5). The Commission did so even though some of the costs being rebased were subject to an appellate proceeding at the time. At no time did any party argue

that the Commission was somehow powerless to take such action, simply because some of the costs were at issue in an appellate proceeding.

14. Another example of the Commission's power to consider and exercise its ratemaking powers to determine cost recovery issues regardless of what related appellate activities may be underway, can be found in the Missouri Supreme Court's recent decision in the ***Missouri American Water Company*** case, 516 S.W.3d 823 (Mo. banc 2017). That case involved an appeal by the Office of the Public Counsel ("OPC") of an ISRS petition that had been filed by Missouri-American Water Company. In its appeal, OPC had alleged that Missouri-American's collection of the ISRS was unlawful on a number of grounds, including that St. Louis County did not have the requisite population required by the statute for Missouri-American to use the ISRS mechanism. During the pendency of the appeal, however, the Commission approved a rebasing of Missouri-American's ISRS in a general rate case proceeding that had been filed by the utility. Since the Commission had approved the rebasing of the utility's ISRS, the Supreme Court determined that the OPC's appeal was moot since the ISRS rates had now been superseded by new rates. *See* 516 S.W.3d at 828. The relevant consideration here, of course, is that the Commission took such action to rebase Missouri-American ISRS charges and costs in the rate case even though such costs were the subject of an appeal. In other words, the Commission did not, as Staff would suggest it do here, determine that it was powerless to deal with the ISRS costs in the rate case because they were the subject of a judicial review proceeding.

15. In short, the existence of a judicial review proceeding does not and cannot interfere with the Commission's exercise of its statutory ratemaking power to routinely consider and decide whether and to what extent costs or revenues should be reflected in rates. This proposition is demonstrated even more clearly by the long line of cases applying the mootness doctrine in other

appeals involving Commission decisions. See e.g. ***State ex rel. Missouri Public Service Co. v. Fraas***, 627 S.W.2d 882 (Mo.App.W.D. 1981); ***State ex rel. Monsanto Co. v. Pub. Serv. Comm'n***, 716 S.W.2d 791, 793 (Mo. banc 1986); ***In re Sw. Bell Tel. Co.'s Proposed Revision to Gen. Exch. Tariff,*** *P.S.C. MO–No. 35,* 18 S.W.3d 575, 577 (Mo.App.2000) (*quoting* ***State ex rel. County of Jackson v. Pub. Serv. Comm'n***, 985 S.W.2d 400, 403 (Mo.App.1999)). The significance of these cases is that they clearly establish that it is the *Commission,* and not the appellate courts, that "drive the bus" when it comes to how and when the Commission goes about its business of performing ratemaking and other statutory duties. The Commission does not typically refrain, in either whole or part, from considering and disposing of rate cases, complaint cases or ISRS proceedings because some cost, revenue or other element of such a proceeding may the subject of a judicial review proceeding. Instead, the Commission carries out its statutory duties as prescribed by law and then leaves it to the appellate courts to determine whether its consideration of an issue has been mooted because the existence of new rates makes it impossible to grant relief.

16. The legal theory underlying Staff's Motion would completely reverse this traditional interplay between appellate proceedings and the Commission's exercise of its ratemaking powers. Carried to its logical extension, Staff's view of the law would require the Commission to comb through regulatory filings to determine whether any cost or revenue elements may be subject to an appeal and then defer any action on that item until the appeal is resolved. Even more significantly, the Commission would have to defer action on such items even though the Company has provided new evidence that is in full accord with what the Commission previously deemed would be persuasive; and which new evidence has now been endorsed by the Commission's own Staff, as evidenced in its March 15, 2019 recommendation in these proceedings. The Company respectfully requests that going down this path would needlessly

encroach on the Commission's ability to exercise its ratemaking powers in a workable and orderly manner and that the Commission should accordingly decline Staff's invitation to reduce its authority in this way.

Unnecessarily Punitive Impact of Staff's Approach

17. The Staff's Motion to prevent any consideration of these investments is also unnecessarily punitive to the Company. In effect, the Staff wants the Company to wait to begin recovering these safety-related investments even though: (a) the Company has provided the kind of analyses that the Commission instructed it to provide to substantiate their ISRS eligibility; (b) the Staff has affirmatively endorsed the propriety and correctness of those analyses; (c) considering such investments is fully consistent with both the letter and spirit of the ISRS statute; and (d) the Commission's consideration of such costs is far more consistent with the historical way in which the Commission has exercised its ratemaking powers while appeals are being undertaken. The Company respectfully submits that there is no sound legal or policy principle that would justify such a result. In fact, Staff's actions under these circumstances seem to be little more than an effort to discourage the Company's right to judicial review. Staff's Motion should accordingly be denied.

Inconsistency with Principles Governing the Granting of a Motion to Dismiss

18. Finally, granting the Staff's Motion would be inconsistent with those analogous principles that have traditionally governed whether to grant a motion to dismiss. For example, in terms of whether a petition has stated a cause of action that can be acted upon, Missouri courts have held that "[t]he defendant bears the burden of establishing that the elements pled by the plaintiff fail to state a cause of action." ***Weicht v. Suburban Newspapers***, 32 S.W.3d 592 (Mo.App. E.D. 2000) (citing to ***Saidawi v. Giovanni's Little Place, Inc.***, 987 S.W.2d 501, 504

(Mo.App. E.D. 1999). Placing this heavy burden on Staff as the movant is appropriate when one realizes that "as a matter of policy Missouri law favors the disposition of cases on their merit when possible." ***Myers v. Moreno***, 564 S.W.2d 83 (Mo.App. 1978) (citing to ***Human Development Corporation v. Wefel***, 527 S.W2d 652, 655 (Mo.App. 1975)).

19. As the Commission recently noted, in considering a motion to dismiss, "the Commission is only testing 'the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true and liberally grants to plaintiff all reasonable inferences therefrom." (*Order Denying Motion To Dismiss*, ***Re The Office of the Public Counsel and The Midwest Energy Consumer Group v. KCP&L Greater Missouri Operations Company***, File No. EC2019-0200 (March 6, 2019)(citing ***City of O'Fallon v. Union Electric Co.***, 462 S.W.3d 438, 441 (Mo. App. 2015), quoting ***State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n***, 392 S.W.3d 24, 28 (Mo. App. 2012)). In reviewing a Motion to Dismiss, the Commission simply "review[s] the petition to determine whether the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. If the allegations invoke principles of substantive law entitling plaintiff to relief, the petition should not be dismissed." See e.g., Gettings v. Farr, 41 S.W.3d 539 (Mo.App. E.D. 2001)(citing to ***Nazeri v. Missouri Valley College***, 860 S.W.2d 303, 306 (Mo. banc 1993) and ***Industrial Testing Labs Inc. v. Thermal Science, Inc***., 953 S.W.2d 144,146 (Mo.App 1997)). See also, ***Bosch v. St. Louis Healthcare Network***, 41 S.W.3d 462 (Mo. banc 2001). In reviewing the sufficiency of the Company's ISRS Application, the Commission "must treat all facts alleged in the petition as true and construe all allegations most favorable to the plaintiff." ***Otte v. City of Ste. Genevieve***, 526 S.W.2d 559 (Mo.App. E.D. 1996).

20. The Staff's Motion does not argue that the Company's Application for inclusion of the prior investments at issue is insufficient or unlawful under the ISRS statute, but instead Staff

excluded the ISRS costs at issue from their revenue requirement because "Staff believes it is premature to include any additional costs related to that ISRS case at this time" while the judicial review of the last order is pending. (Staff Recommendation, p. 3 of 11). On its face, this argument does not support Staff's motion to dismiss a portion of the Company's Application.

WHEREFORE, for the foregoing reasons, Spire Missouri Inc. respectfully requests that the Commission issue its Order denying Staff's Motion to Dismiss a Portion of the Applications filed by the Company in these proceedings.

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 22nd day of March 2019 by hand-delivery, fax, electronic mail or by regular mail, postage prepaid.

/s/ Rick Zucker