BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of Spire Missouri Inc.'s d/b/a Spire Request for Authority to Implement a General Rate Increase for Natural Gas Service Provided in the Company's Missouri Service Areas	))))))	Case No. GR-2021-0108

APPLICATION FOR REHEARING OR RECONSIDERATION

COMES NOW the Office of the Public Counsel ("OPC") and for its *Application for Rehearing or Reconsideration* of the Missouri Public Service Commission's ("the Commission") October 27, 2021, *Report and Order* in the above styled case, states as follows:

Pursuant to RSMo. section 386.500, the OPC seeks rehearing or reconsideration of the Commission's *Report and Order* because the order is unlawful, unjust, and/or unreasonable for the reasons laid out herein.

The Commission's ordered arithmetic regarding capital structure is inconsistent with the substance of the Commission's Order

One of the issues raised in this case concerned the appropriate capital structure for the Commission to use for ratemaking purposes. The OPC raised the argument that the Commission should consider the consolidated capital structure of Spire Inc. – the parent company of Spire Missouri ("Spire" or "the Company") – in determining the appropriate capital structure for ratemaking purposes. *See*, *e.g.*, OPC, *Initial Brief*, pg. 34. The Commission, however, declined to agree with the OPC's

assessment and instead determined that "the appropriate capital structure to use for ratemaking purposes is that of Spire Missouri, modified to address the inclusion of short-term debt." *Report and Order*, pg. 88. While the OPC maintains the arguments it presented throughout this case, the OPC is not presently requesting the Commission either rehear or reconsider the decision to use Spire Missouri's actual capital structure (modified to include short-term debt) for the purpose of ratemaking in this case.[1] To repeat, the OPC is **not** presently seeking the Commission reverse its decision to use Spire Missouri's current capital structure (modified to include short-term debt) for ratemaking purposes in this case. However, the OPC believes that the Commission has erred in describing the arithmetic required to achieve the letter and spirit of the Commission's Order. The OPC thus requests the Commission reconsider its guidance regarding how its order is implemented.

To best understand the OPC's assertion, it is wise to briefly review the evidence in the record on the calculation of Spire Missouri's capital structure. Figure 1 shows the Capital Structure Schedule prepared by the Commission's staff as filed in Staff's True-Up Accounting Schedules for Spire East and West.

[1] The OPC presently intends to raise the same or similar arguments again in future cases and the decision not to further pursue its legal theory in this case should not be interpreted as any repudiation of the accuracy of that theory.

Figure 1: Staff Capital Structure Schedule

Spire Missouri East
Case No. GR-2021-0108
Test Year Ending 09/30/2020
True Up Through 05/31/2021
Capital Structure Schedule

Line Number	A Description	B Dollar Amount	C Percentage of Total Capital Structure	D Embedded Cost of Capital	E Weighted Cost of Capital 9.12%	F Weighted Cost of Capital 9.37%	G Weighted Cost of Capital 9.62%
1	Common Stock	$1,589,497,000	54.28%		4.951%	5.086%	5.222%
2	Other Security-Non Tax Deductible	$0	0.00%	0.00%	0.000%	0.000%	0.000%
3	Preferred Stock	$0	0.00%	0.00%	0.000%	0.000%	0.000%
4	Long Term Debt	$1,338,737,000	45.72%	3.99%	1.824%	1.824%	1.824%
5	Short Term Debt	$0	0.00%	0.00%	0.000%	0.000%	0.000%
6	Other Security Tax Deductible	$0	0.00%	0.00%	0.000%	0.000%	0.000%
7	TOTAL CAPITALIZATION	$2,928,234,000	100.00%		6.775%	6.910%	7.046%
8	PreTax Cost of Capital				8.325%	8.502%	8.681%

Exhibit 146, *Staff True-Up Accounting Schedules East and West*, Schedule 12. First, please note that the Percentage of Total Capital Structure (Column C) for lines 1 and 4 directly correspond to the Commission's finding of fact for Spire Missouri's current capital structure as of May 31, 2021 (54.28% equity and 45.72% long-term debt). *Report and Order*, pg. 76 ¶257. Second, please note that the percentages of total capital structure (Column C) for lines 1 and 4 equal the Dollar Amount (Column B) for that specific line divided by the Dollar Amount (Column B) for the TOTAL CAPITALIZATION (Line 7), converted into a percentage. Exhibit 146, *Staff True-Up Accounting Schedules East and West*, Schedule 12. To illustrate:

$$54.28\% = \frac{\$1{,}589{,}497{,}000\ (Dollar\ Amount\ Common\ Stock)}{\$2{,}928{,}234{,}000\ (Dollar\ Amount\ Total\ Capitilization)} \times 100\ (convert\ to\ \%)$$

$$45.72\% = \frac{\$1{,}338{,}737{,}000\ (Dollar\ Amount\ Long - Term\ Debt)}{\$2{,}928{,}234{,}000\ (Dollar\ Amount\ Total\ Capitilization)} \times 100\ (convert\ to\ \%)$$

Id. The important point here is that the percentages for the total capital structure are derived from the **actual** dollar amount of each type of capital that Spire actually carried on its books as of May 31, 2021. Thus, if the Commission truly wants to use Spire Missouri's **actual** capital structure for ratemaking purposes, then these dollar amounts should be maintained.

Having established how capital structure was calculated, the next step is to determine how it should be modified to include short-term debt as ordered by the Commission. *Report and Order*, pg. 88 ("the appropriate capital structure to use for ratemaking purposes is that of Spire Missouri, **modified to address the inclusion of short-term debt**."). The correct way to do this would be to simply add the amount of short-term debt (after excluding Storm Uri costs per the Commission order) at line five of Staff's Capital Structure Schedule (which is labeled short-term debt). This is effectively what the OPC's witness did in his True-Up Rebuttal Testimony:

Figure 2: Capital Structure Calculation by OPC Witness

Use of Short-term Debt and Asset Balances for the 13-months ended May 31, 2021

	Amount	Percentage of Capitalization
Common Equity	$1,589,496,633	49.66%
Long-Term Debt	$1,338,736,661	41.83%
Short-Term Debt	$272,457,948	8.51%
Total	$3,200,691,242	100.00%

Exhibit 242, *True-Up Rebuttal Testimony of David Murray*, DM-TR-1. Again, please note that the dollar amounts for "common equity" and "long-term debt" included in Figure 2 are consistent with the dollar amounts found at lines 1 and 4 of Staff's Capital Structure Schedule[2] (Figure 1), which is itself consistent with the Commission's finding of fact regarding Spire Missouri's current capital structure as of May 31, 2021. Exhibit 146, *Staff True-Up Accounting Schedules East and West*, Schedule 12; *Report and Order*, pg. 76 ¶ 257. Moreover, this method of modification to included short-term debt would appear to be what the Commission ultimately ordered. *Report and Order*, pg. 88 ("In other words, the Commission approves the use of **a modified version of Spire Missouri's capital structure as proposed by OPC**, but further modified to remove any short-term debt from the capital structure calculation that was incurred to cover Winter Storm Uri associated costs.").

So far, this should be relatively straightforward and simple. However, the present situation is thrown into confusion because the *Report and Order* also states: "[o]nce OPC's recommendation is recalculated to remove the Winter Storm Uri costs, then that short-term debt amount should be deducted from the amount of long-term debt in Spire Missouri's capital structure." *Id.* at pg. 88. This is not consistent with either the modified capital structure proposed by the OPC or with any other capital structure proposed by any party to this case. Instead of including short-term debt in the capital structure, this sentence would result in the substitution (and thereby elimination) of a portion of Spire's existing long-term debt. There is nothing in the

[2] After rounding to the nearest thousandth dollar.

record to support this elimination of long-term debt from Spire Missouri's existing capital structure.

The Commission found "that Spire Missouri's short-term debt is being used to finance long-term assets." *Id.* at 88. The same is obviously true of Spire's long-term debt, which is why it has been consistently included in the capital structure without controversy. Stated differently, the Commission has found that both long-term debt and short-term debt (in excess of short-term assets) are being used by Spire to finance long-term-assets. In order to give proper meaning to this finding, **both** the full amount of long-term debt held by Spire as of May 31, 2021, and the average short-term debt net of short-term assets (including Storm Uri costs) should be included in the capital structure. The Commission's current *Report and Order* does not accomplish this goal because it deducts the short-term debt from the long-term debt. There is no basis in the evidentiary record to support this reduction of long-term debt, which would render such an action unreasonable. *State ex rel. AG Processing, Inc. v. PSC*, 120 S.W.3d 732, 734-35 (Mo. banc 2003) ("An order's reasonableness depends on whether it is supported by substantial and competent evidence on the whole record . . . ."). The Commission should instead include short-term debt in the capital structure without a corresponding reduction in long-term debt, as proposed by the OPC. Exhibit 242, *True-Up Rebuttal Testimony of David Murray*, DM-TR-1. Again, this appears to be what the Commission actually intended. *Report and Order*, pg. 88 ("In other words, the Commission approves the use of a modified version of Spire Missouri's capital structure **as proposed by OPC** . . .").

Given the language of the *Report and Order*, the OPC believes that the sentence requiring short-term debt to be deducted from the amount of long-term debt in Spire Missouri's capital structure was an inadvertent error. The simple removal of this line[3] from the current *Report and Order* should be sufficient to correct this mistake. The OPC therefore requests the Commission amend its *Report and Order* to omit this line or else provide further clarification as to its interpretation. The failure to make this correction would result in the Commission ordering a capital structure that reduces the amount of long-term debt Spire Missouri actually held in an arbitrary manner without any support in the record. Such action would be unreasonable. *State ex rel. Sprint Mo., Inc. v. PSC*, 165 S.W.3d 160, 164 (Mo. 2005) ("In [determining whether the PSC's order is reasonable], this Court determines whether the order was supported by substantial and competent evidence on the whole record, whether the decision was arbitrary, capricious, or unreasonable, or whether the PSC abused its discretion." (Internal citations omitted)). The Commission should therefore issue a corrected *Report and Order* that clarifies this problem by removing the identified sentence.

[3] The last full sentence of the first paragraph under the heading "Decision Regarding Cost of Capital – Issue 1" on page 88 of the *Report and Order* that reads: "Once OPC's recommendation is recalculated to remove the Winter Storm Uri costs, then that short-term debt amount should be deducted from the amount of long-term debt in Spire Missouri's capital structure."

The Commission erred in its analysis of incentive compensation in that its decision is directly contradicted by the evidentiary record as a whole and the Commission's own findings of fact

The inclusion of cost related to incentive compensation programs in Spire's rates will result in double recovery of those costs by the Company. This double recovery occurs because the incentive compensation programs will generate increased earnings for Spire between rate cases that will be greater than the cost to run the programs and these increased earnings will ultimately be retained by the Company as an addition to its bottom line. Spire will thus recover once through the rates charged to customers and again through the increased earnings generated by the incentive compensation programs. Moreover, the truth of this argument is proven through the uncontroverted testimony by witnesses for both Spire and Staff as well as the Commission's own findings of fact.

Despite the evidence in the record, the Commission's currently drafted *Report and Order* rejects the OPC's assertion on this point. The full discussion of this argument is rendered in one paragraph in the Commission's "Decision" section:

> OPC argues that incentive compensation bonus expense is recovered by Spire Missouri (or any utility) twice. The first recovery is in rates. The alleged second recovery is in the monetary reward reaped by Spire Missouri after the successful implementation of an incentive compensation plan. However, OPC does not recognize that the monetary benefits for which the bonuses are paid have already been included in Spire Missouri's cost of service. OPC's alleged second recovery is dependent on two assumptions, that every incentive compensation program is designed and implemented to increase revenues or decrease costs (or has that effect, and that effect would be measureable); and that every incentive compensation program is successful in its

> implementation goals. The Commission finds that these assumptions are not credible.

Report and Order, pg. 34. However, the analysis provided in this paragraph is faulty as it fails to consider the record as a whole and is further contradicted by the Commission's own findings of fact. To explain why, the OPC will review the paragraph line-by-line.

The first sentence correctly recites what the OPC argues. The second and third sentences are also correct. The fourth sentence, which reads "[h]owever, OPC does not recognize that the monetary benefits for which the bonuses are paid have already been included in Spire Missouri's cost of service," is clearly incorrect. It is thus here where we begin our detailed analysis.

A. Incentive compensation costs are included to generate new monetary benefits beyond of the test-year and these monetary benefits are therefore not included in Spire's current cost of service

Please recall that the central premise of this issue is whether Spire should be allowed to recover expenses to permit Spire to pay incentive compensation bonuses **moving forward**. Stated another way, the expense to be included in rates is meant to cover bonuses that have not yet been paid. These expenses have not yet been paid because the monetary benefits for which bonuses are paid **have not yet been realized**. Because the monetary benefits have not yet been realized, they cannot possibly have been included in the Company's cost of service, which is based on a **historical** test year.

Considering the fundamental framework for regulatory ratemaking helps explain this point. At a basic level, the purpose of a historical test year is to allow regulators to look at what expenses the utility has incurred in the **past** in order to determine how much revenue the utility needs to cover the same type of expenses in the **future**. Consequently, the very purpose for including incentive compensation expense in Spire's revenue is to allow for the **future** payment of bonuses that will be made when **new** monetary benefits are achieved **beyond** the test year. This is something that the Commission's own findings support:

> Annual incentive compensation incentivizes employees to capture further savings **past the year previously incentivized**. An employee must generate **new** savings in order to earn **further** incentive payments.

Report and Order, pg. 29 ¶77 (emphasis added); pg. 31 ¶ 88 ("Incentive payments are paid out once and an employee has to generate **new** savings in order to get another **further** incentive payment **in a future year**." (emphasis added)); pg. 31 ¶ 89 ("The AIP corresponds to Spire Missouri's fiscal year with bonuses paid out to employees **after the end of the fiscal year** for performance goals reached **during the fiscal year**." (emphasis added)). If the incentive compensation expense is being used to reward employees for generating **new** cost-savings/revenues in between rate cases, then the monetary benefits of those **new** cost-savings/revenues necessarily cannot be included in the **current** cost of services that is based on a **historical** test year.

To really drive home this point, please consider an actual example. Let us assume that Spire's rates are approved and go into effect January 1, 2022. In February of 2022, a Spire employee ("Employee") devises a means to improve

efficiency that increases the company's revenue by $100,000. Because that $100,000 increase in revenue has occurred **after** Spire's rates went into effect, it has not been included in Spire's cost of service. We know that the $100,000 was not included in Spire's cost of service revenues because the cost of service in Spire's rates was based on historical revenues. Exhibit 101C, *Staff's Revenue Requirement Cost of Service Report*, pg. 50 lns. 2 – 3 ("To determine the level of Spire East and Spire West revenue, Staff applied standard ratemaking adjustments to test year (historical) volumes and customer levels."). The idea that the "monetary benefits for which the bonuses are paid have already been included in Spire Missouri's cost of service" is thus necessarily false.

The confusion in this case stems from the fact that the Commission is relying solely on the testimony of Staff witness Mr. Jeremy Juliette to support the idea that the monetary benefits for which the bonuses are paid have already been included in Spire Missouri's cost of service. *See Report and Order*, pg. 30 ¶83; pg. 32 ¶ 94. However, **the exact same witness** clarified on the stand that his testimony was referring to monetary benefits **that have already been paid for by Spire's customers** and thus represent costs that **do not need to be included in rates**:

> Q. Okay. So the benefits that have already been achieved, they're built into rates. We do not need to worry about them. Right?
>
> A. When you say benefits, you're talking about the cost savings?
>
> Q. Either reduced O&M or -- just reduced costs or increased revenue. Either way, the ones that have already achieved, they are already in rates. We don't need to worry about them?
>
> A. As long as they are in the test year. Yes.

<u>Q. We don't have to include costs to pay for those benefits we've already achieved. We're looking for cost to achieve new benefits. Right?</u>

<u>A. That is correct.</u>

Tr. pg. 559 lns. 1 – 14 (emphasis added). **<u>That exact same witness</u>** further identified that the costs at issue in this case are those needed to capture **<u>new</u>** monetary benefits that have not been achieved yet. *Id.* (". . .We're looking for cost to achieve new benefits. Right? A. That is correct."). This statement by Mr. Juliette clarifies his **<u>own</u>** *surrebuttal* testimony and shows how the Commission's interpretation is plainly incorrect. Because the costs at issue are meant to cover incentive compensation payments for **<u>new</u>** benefits that are not in the **<u>current</u>** test year, they have not actually been included in Spire's cost of service. It is manifestly unjust and unreasonable for the Commission to ignore the clarification offered by the **<u>exact same witness upon whom the Commission relies for support of its decision</u>**.

Further, the same Staff witness, Mr. Jeremy Juliette, testified that the monetary benefits created by Spire's incentive compensation programs that arise in-between rate cases will flow directly to Spire's bottom line and are thus retained by the Company:

Q. By incentivizing employees to reduce expenses or increase revenues, does Spire's bottom line increase, which benefits its shareholders?

A. Yes, reducing expenses and increasing revenues would increase Spire's bottom line.

Exhibit 131, *Surrebuttal Testimony of Jeremy Juliette*, pg. 10 lns. 8 – 11.

Q. Okay. So in your surrebuttal testimony you acknowledge the fact that the Company is going to increase its bottom line in between rate cases because of the incentive plan. Do you agree with that?

A. Yes.

Q. Would you qualify that increase to bottom line as regulatory lag?

A. **As my surrebuttal stated, if the Company recognizes revenues greater than what is built into rates, then yes, they would get to keep that in between rate cases.**

Q. So would you agree with me that we could use the term positive regulatory lag to describe that phenomenon?

A. Positive for the Company?

Q. Yes.

A. Yes.

Tr. pg. 560 ln. 22- pg. 561 ln. 12 (Cross examination of Jeremy Juliette) (emphasis added).

Again, the **exact same testimony** of the **exact same Staff witness** for whom the Commission relied for support of the statement that "the monetary benefits for which the bonuses are paid have already been included in Spire Missouri's cost of service" has **also** testified that Spire **will** achieve the second recovery cited by the OPC ("the monetary reward reaped by Spire Missouri after the successful implementation of an incentive compensation plan") in the form of an increase to Spire's bottom line. Exhibit 131, *Surrebuttal Testimony of Jeremy Juliette*, pg. 10 lns. 8 – 11; Tr. pg. 560 ln. 22- pg. 561 ln. 12 (Cross examination of Jeremy Juliette). It is manifestly arbitrary and unreasonable to ignore these clarifying statements made by **the same witness upon whose testimony the Commission's decision is based**.

B. The second recovery of Spire's incentive compensation program costs through regulatory lag is not based on any assumption.

The last two sentences in the paragraph explaining the Commission's decision on this issue should be read together:

> OPC's alleged second recovery is dependent on two assumptions, that every incentive compensation program is designed and implemented to increase revenues or decrease costs (or has that effect, and that effect would be measureable); and that every incentive compensation program is successful in its implementation goals. The Commission finds that these assumptions are not credible

Unfortunately, the Commission has clearly misinterpreted the record because neither of the two "assumptions" that the Commission claims to dismiss are actually assumptions at all. The first is an **admission** made by witnesses for Staff and Spire that is further recognized by the Commission's own findings of fact. This supposed "assumption" is therefore actually an uncontroverted fact **that the Commission itself found to be true**. The second assumption, on the other hand, is irrelevant.

Regarding the first "assumption" identified by the Commission, it is important to remember that the **only** incentive plans at issue in this case are the two new AIP business unit performance metrics Spire implemented in 2018.[4] *See List of Issues*,

[4] The other incentive plans were disallowed by Staff because they were earnings based and Spire did not dispute this. *Report and Order*, pg. 30 ("Staff appropriately disallowed recovery of the bonuses paid under the corporate performance component of Spire Missouri's AIP because it was earnings based. Spire Missouri did not dispute Staff's recommended disallowance of corporate performance bonuses."); *see also* Exhibit 101C, *Staff's Revenue Requirement Cost of Service Report*, pg. 66 lns. 12 – 17 ("Staff reviewed Spire's short-term incentive compensation plan and long-term incentive compensation plan. Staff also reviewed the two new metrics Spire has incorporated in their short-term plan. Staff is recommending removal of all the long-term incentive compensation expense as it is earnings based. Staff is also recommending removing the expense associated with the corporate performance component in Spire's short-term plan as it is also earnings based. Staff is recommending recovery of Spire's two new metrics.").

¶13(b) ("Should the two new metrics Spire implemented in the fall of 2018 be included in base rates?"); *Report and Order*, pg. 30 ¶ 81 ("In 2018, Spire Missouri implemented two new AIP business unit performance metrics – utility contribution margin, and utility adjusted operations and maintenance (O&M) per customer."). **The Commission itself found that these two metrics were designed to "increase revenues or decrease costs."** *Report and Order*, pg. 30 ¶ 82 ("Both of the new metrics provide benefits to ratepayers as they incentivize employees to reduce expenses or increase revenues while providing safe and reliable service."). Thus, the fact that the two new business unit performance metrics were "designed and implemented to increase revenues or decrease costs" is not an "assumption" by the OPC; **it is a finding of fact by the Commission**. The Commission must address this clear incongruity between its decision and its own findings of fact.

When discussing the first alleged "assumption" the Commission further claims the OPC only "assumed" that the business performance metrics will actually have the effect of increasing revenues or decreasing costs and that effect would be measureable. This can be viewed as two "sub-assumptions" that can be rephrased to be: (a) the business performance metrics would achieve their goal of reducing costs or increasing revenues and (b) that it would be possible to measure the degree to which the business performance metrics would achieve their goal of reducing costs or increasing revenues. The first of these two sub-points really just restates the second main "assumption" (which will be examined shortly) while the second is irrelevant.

Regarding the second "sub-assumption" (that it would be possible to measure the degree to which the business performance metrics would achieve their goal of reducing costs or increasing revenues), Spire's own witness admitted that, for these business incentive performance metrics to be prudent, they **must** be designed to generate more earnings for Spire than the plan costs to run:

> Q. So you don't know if the plan you are proposing might actually end up cost customers an average in the aggregate more than they will see in savings?
>
> A. I would hope not, Mr. Clizer.
>
> Q. You would hope that the cost, the plan in the aggregate would generate cost savings greater than the cost of the plan itself. Right?
>
> A. For O&M reduction, yes.
>
> Q. Right. And for the other one, the utility contribution margin, that should increase company revenues. Right?
>
> A. Correct.
>
> Q. And it should increase revenues by more than the plan costs. Correct?
>
> A. An ideal incentive comp makeup, yes.
>
> Q. You say ideal. Wouldn't it be imprudent to have a plan that doesn't generate more revenues than it costs?
>
> A. That would be a problematic compensation plan.
>
> Q. Right. So we would agree that a prudent compensation plan is going to generate more revenues than it costs to run?
>
> A. Or reduce expenses.

Tr. pg.552 lns. 2 – 25 (Re-cross Examination of Scott Weitzel). Staff's witness stated effectively the same:

> Q. Okay. Would you agree with me that a prudent incentive plan will generate more earnings for a company than the plan costs to run?

A. Yes.

Tr. pg. 559. lns. 15 – 18 (Cross examination of Jeremy Juliette). It therefore **does not matter** if it is possible to measure the degree to which the business performance metrics would achieve their goal of reducing costs or increasing revenues because we know that whatever benefits were achieved, it was more than the cost of the plans themselves **if those plans are prudent**.[5] There is no "assumption" here. Both parties who testified against the OPC as to this point **admitted** that the incentive compensation plans in question are designed to increase revenues or decrease costs in an amount greater than the plans cost to run. The Commission found this fact to be true. The Commission's dismissal of these facts as "not credible" assumptions by the OPC is therefore an obvious and plain error.

The second main "assumption" that the Commission claims the OPC made ("that every incentive compensation program is successful in its implementation goals") is irrelevant. The Commission's own findings of fact state: "The AIP corresponds to Spire Missouri's fiscal year with bonuses paid out to employees **after the end of the fiscal year** for performance goals reached **during the fiscal year**." *Report and Order*, pg. 31 ¶ 89 (emphasis added). This establishes a simple but crucial point: incentive compensation payments are only made **after** benefits are achieved. The question in this case is whether customers should pay for costs Spire incurs to make these incentive compensation payments. Here is where the problem lies: if

[5] If the incentive compensation plans did not result in increased earnings greater than they cost to operate, then the plans are imprudently designed, **as Spire's own witness testified**. Tr. pg.552 lns. 2 – 25 (Re-cross Examination of Scott Weitzel).

incentive compensation payments are only made **after** benefits are achieved, then the cost of those payments are only incurred **if** benefits are achieved. Therefore, the idea that the OPC is "assuming every incentive compensation program is successful in its implementation goals" is irrelevant because an incentive compensation program that did **not** produce a benefit would also **not** be paid out and thereby would not create a cost that Spire would have needed to recover. To put it another way:

- Spire's incentive compensation programs (AIP) must actually pay out to incur a cost, which only occurs **after** the end of the fiscal year. *Report and Order*, pg. 31 ¶ 89.
- In order for Spire's incentive compensation programs (AIP) to pay out after the end of the fiscal year, performance goals must have been reached **during** the fiscal year. *Report and Order*, pg. 31 ¶ 89.
- If the incentive compensation plan is not successful because performance goals are not met during the fiscal year, then there is no pay out by the plan. *Report and Order*, pg. 31 ¶ 89.
- If the plan does not pay out, then there are no costs incurred, so there are no expenses for Spire to recover.
- If there are no costs for Spire to recover, then there is no reason to include expense in Spire's revenue requirement.
- Consequently: the only expense to be included in Spire's revenue requirement would be for costs incurred by **successful** incentive compensation programs

The question of whether the plan is "successful" is therefore irrelevant because there will **only** be a cost incurred **and hence a cost to be expensed** if the plan **was** successful. Again, this means that there is no "assumption" to be made that the Commission *could* find credible or not. The Commission's denial of the OPC's entire incentive compensation program argument based on an irrelevant "assumption" is thus clearly an error that the Commission should correct.

C. Conclusion

The monetary benefits that will be achieved by the successful implementation of Spire's AIP program in between rate cases will flow through to Spire's bottom line. Exhibit 131, *Surrebuttal Testimony of Jeremy Juliette*, pg. 10 lns. 8 – 11. Tr. pg. 560 ln. 22- pg. 561 ln. 12. These monetary benefits have not – **and necessarily cannot have been** – included in Spire's current cost of service because they are future benefits and Spire's cost of service is based on a historic test year. Tr. pg. 559 lns. 1 – 14; *Report and Order*, pg. 29 ¶77; pg. 31 ¶ 88; pg. 31 ¶ 89; Exhibit 101C, *Staff's Revenue Requirement Cost of Service Report*, pg. 50 lns. 2 – 3. These incentive plans **will** generate either increased revenues or decreased expenditures as the Commission **itself** found and those increased revenues or decreased expenditures will be greater than the cost of operating the plan, as Spire's **own** witness testified. *Report and Order*, pg. 30 ¶ 82; Tr. pg.552 lns. 2 – 25. Whether the AIP plans are successful is irrelevant: if they are successful then the plans pay for themselves; if the plans are not successful then there is no payout and thus no cost incurred. Every one of these points is based on the uncontroverted testimony of **opposing** witnesses

and the Commission's own findings of fact. There is no justification for the Commission to ignore all this evidence and contradict its own findings.

"An order's reasonableness depends on whether it is supported by substantial and competent evidence on the **whole** record . . . ." *State ex rel. AG Processing, Inc. v. PSC*, 120 S.W.3d 732, 734-35 (Mo. banc 2003) (emphasis added). In this case, the Commission's decision is based on the testimony of a Staff witness, but the Commission fails to consider the full context of his testimony. When the record is considered as a **whole**, it becomes clear that the cost of incentive compensation plans at issue (which are those needed to achieve **new** monetary benefits) have **not** yet been included in Spire's cost of service. Tr. pg. 559 lns. 1 – 14 ("Q. We don't have to include costs to pay for those benefits we've already achieved. We're looking for cost to achieve new benefits. Right? A. That is correct."). Therefore, the Commission's decision stating "that the monetary benefits for which the bonuses are paid have already been included in Spire Missouri's cost of service" is not "supported by substantial and competent evidence on the whole record," and is hence unreasonable. *State ex rel. Sprint Mo., Inc. v. PSC*, 165 S.W.3d 160, 164 (Mo. banc 2005). Moreover, the Commission's finding that the so-called "assumptions" made by the OPC are not credible is itself refuted **by the Commission's own findings**. Therefore, it is also not "supported by substantial and competent evidence on the whole record[.]" *Id.* For these reasons, the Commission should reconsider its prior decision and disallow the cost of the two new business unit performance metric AIP programs Spire implemented in 2018 that will otherwise be double recovered.

The Commission erred in determining that the OPC's proposed tracker related to the net operating loss issue is not necessary, in that, this conclusion is directly contradicted by the Commission's own findings of fact

As part of its argument regarding the net operating loss issue, the OPC requested that the Commission "order a tracker to track the amount of unspent current income tax included in rates but not in ADIT." OPC, *Initial Brief*, pg. 109. The purpose of this tracker, as the OPC stated, was to track the difference between the current income tax expense that was included in rates and collected from customers but not paid to the IRS (*i.e.* the "unspent current income tax included in rates") that was **not** included in ADIT. *Id.* The Commission's *Report and Order* found that "[t]he difference between current income tax expense collected from customers and cash paid to the IRS does **not** factor into the ADIT component of rate base." *Report and Order*, pg. 22 ¶ 53 (emphasis added). To reiterate, the "difference between current income tax expense collected from customers and cash paid to the IRS" **is** the "unspent current income tax included in rates" that the OPC is asking the Commission to track.[6] The Commission has thus **explicitly found** that the very thing that the OPC is asking the Commission to order a tracker for "does **not** factor into the ADIT component of rate base." *Id.* (emphasis added). This finding is then directly contradicted by the Commission's finding that "[t]he information sought by the tracker proposed by OPC is already being accounted for through the ADIT offset,

[6] It is "unspent" in the sense that it is not paid to the IRS.

and would likely not produce any benefit." *Id.* at ¶ 55. This contradiction in the Commission's own findings needs to be addressed.

It is functionally impossible for both paragraph 53 and paragraph 55 of the Commission's findings of fact to be true. Paragraph 53 of the Commission's findings of fact effectively states that the information sought by the tracker proposed by OPC does not factor into the ADIT component of rate base. *Id.* at ¶ 53. Paragraph 55 of the Commission's findings of fact expressly states "[t]he information sought by the tracker proposed by OPC is already being accounted for through the ADIT offset . . . ." *Id.* at ¶ 55. The information sought by the tracker proposed by OPC cannot simultaneously "not factor into the ADIT component of rate base" and still be "accounted for through the ADIT offset." One of these two statements must be false. Moreover, it is patently unreasonable for the Commission to base its decision on findings of fact that are openly and flagrantly contradictory. The Commission should therefore amend its report and order to rectify this clear contradiction and, if necessary, have a new hearing to specifically address this issue.

The Commission has erred because it unlawfully and unreasonably shifted the burden of proof from Spire to the OPC with regard to the affiliate transactions issue

The Commission's conclusion of law correctly states that "[t]ransactions between Spire Missouri and Spire Inc. are subject to the Commission's affiliate transaction rule, 20 CSR 4240-40.015." *Report and Order*, pg. 64 ¶ CC. The Commission further correctly cites rule 20 CSR 4240-40.015, which states (in part) that "[a] regulated gas corporation shall not provide a financial advantage to an affiliated entity" and that this includes when a utility "transfers information, assets, goods or services of any kind to an affiliated entity below the greater of A. The fair market price; or B. The fully distributed cost to the regulated gas corporation." *Id.*, at ¶ EE. The Commission's finding of fact also correctly states that "[t]he Spire Missouri 2020 annual CAM report lists and describes each of six services and goods provided by Spire Missouri to each affiliate **and the holding company**." *Id.* at pg. 62 ¶ 216 (emphasis added). Spire Inc. is the holding company for Spire Missouri. *Id.* at pg. 7 ¶6. ("Spire Missouri is a wholly-owned subsidiary of Spire Inc."). A review of the 2020 annual CAM report cited by the Commission shows that no costs were assigned to Spire Inc. for the majority of the six services and goods provided by Spire Missouri to Spire Inc. Exhibit 203C, *Direct Testimony of Robert E. Schallenberg*, schedule RES-D-6 part 1, PDF pgs. 73 – 76 (Spire Missouri 2020 annual CAM report, pp. 36-40). Based on the Commission's own findings and cited company material, Spire Missouri has thus provided (*i.e.* transferred) goods and services to Spire Inc. at no cost.

Because Spire has transferred goods or services to Spire Inc. at no cost, it has transferred goods or services below the greater of A. The fair market price; or B. The fully distributed cost to the regulated gas corporation. 20 CSR 4240-40.015. Spire Missouri has therefore provided Spire Inc. a financial advantage in a manner prohibited by Commission's affiliate transaction rule 20 CSR 4240-40.015(2)(A). Because Spire has violated the Commission's affiliate transaction rule, the Commission should order a disallowance to Spire Missouri's revenue requirement and remove the cost of goods and services that Spire Missouri provided to Spire Inc. at no cost. Nothing in the Commission's findings of fact, conclusions of law, or decision on this issue repudiates this simple point. Instead, the Commission has determined that it "cannot order an adjustment without sufficient evidentiary support." *Report and Order*, pg. 67. This represents an unlawful shifting of the burden of proof from Spire to the OPC.

Missouri Revised Statutes section 386.150.2 states that "[a]t any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the gas corporation . . . ." Mo. Rev. Stat. § 386.150.2; *see also Report and Order*, pg. 10 ¶ H. It is therefore Spire's obligation – not the OPC's – to show what portion of the affiliate transaction costs included in Spire's case should be allowed recovery in rates. *See Mo. Am. Water Co. v. Mo. Pub. Serv. Comm'n*, 602 S.W.3d 252, 260 (Mo. App. WD 2020) ("Missouri-American bore the burden of proof with respect to the appropriate amount of the ADIT to be used in calculating the ISRS rate."). Unfortunately, the Commission

has now violated this basic legal principle by deciding the OPC failed to prove how much should be **disallowed** instead of requiring Spire to prove how much should be **allowed**. The Commission has effectively ordered that Spire be allowed to have its proposed increased rate unless the OPC meets an evidentiary burden to prove there should be a disallowance, which directly contradicts and violates Missouri Revised Statute § 386.150.2. This decision by the Commission to shift the burden of proof from Spire to the OPC renders the *Report and Order* both unlawful and unreasonable. *See Office of the Pub. Counsel v. Mo. PSC*, 409 S.W.3d 371, 372 (Mo. banc 2013) ("Because the PSC reviewed the transaction between Atmos and its affiliate through the lens of the presumption of prudence, its order is unlawful and unreasonable.").

The shifting of the burden of proof is of particular importance because this is an issue involving affiliate transactions. Therefore, the Commission cannot rely on what has sometimes been called the "presumption of prudence" to support its decision. *Id.* at 379 ("The presumption of prudence is inapplicable to affiliate transactions."). The PSC's determination that it "cannot order an adjustment without sufficient evidentiary support" means that the Commission is committing the exact same error that the Missouri Supreme Court has previously reversed. *Id.* ("The PSC used the presumption of prudence to shift the burden from Atmos, which should have been required to show that it complied with the affiliate transaction rules, and instead placed the burden on staff to show that Atmos did not do so."). This decision by the Commission is thus clear error.

If the Commission determines that there is no evidence to show how much of Spire's affiliate transaction costs represent the value of goods and services that the Company provided to Spire Inc. at no cost, then Spire has failed to meet its burden of proof to show that the recovery of those costs in rates is just and reasonable under Missouri Revised Statutes section 386.150.2. In that scenario, the correct action would be to disallow **all** affiliate transaction costs charged to Spire. By instead determining that it was the OPC's obligation to prove that Spire's proposed rate increase was not just and reasonable by proving the amount necessary to disallow these rule-violating costs, the Commission's decision has contradicted the plain language of section 386.150.2. *Office of the Pub. Counsel v. Mo. PSC*, 409 S.W.3d at 381. The OPC thus requests the Commission amend to its *Report and Order* to correct this unlawful decision and, if necessary, order a new hearing to determine the proper amount that would need to be disallowed to remove the cost of goods and services Spire Missouri provided to Spire Inc. from Spire Missouri's authorized rates.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission grant a rehearing and/or reconsideration of its October 27, 2021, *Report and Order* issued in the above styled case pursuant to the authority of RSMo section 386.500.

Respectfully submitted,

By: /s/ John Clizer
John Clizer (#69043)
Senior Counsel

Missouri Office of the Public
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 Fifth day of November, 2021.

/s/ John Clizer