

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

In the Matter of the Application of)
Spire Missouri, Inc. to Change its)
Infrastructure System Replacement) Case No. GO-2019-0356
Surcharge in its Spire Missouri East)
Service Territory)
)

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

BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

COMES NOW the Office of the Public Counsel (“OPC”) and for its *Brief*, states as follows:

The OPC will respond to the issues in the order they are set forth in the *List of Issues, List and Order of Witnesses, Order of Cross-Examination, and Order of Opening Statements* filed in this case:

Issue A. Are all costs included in the Company’s ISRS filings in these cases eligible for inclusion in the ISRS charges to be approved by the Commission in this proceeding?

No. See response to second issue for details.

Issue B. If a Party believes that certain costs are not eligible for inclusion in the ISRS charges to be approved by the Commission in this proceeding, what are those costs and why are they not eligible for inclusion?

Spire, being the party that brought this request for an ISRS, bears the burden of proof in these cases. *Clapper v. Lakin*, 123 S.W.2d 27, 33 (Mo. 1938) (“The burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue.”); RSMo. § 393.150.2 (“At 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 . . .”). Spire, therefore, has the burden of providing sufficient evidence to prove that the costs it seeks recovery for in this ISRS proceeding are actually ISRS eligible. Spire has failed in this goal with regard to the costs associated with five different issues.

1: Replacement of Cathodically Protected Steel Mains

The Missouri Western District Court of Appeal’s case *PSC v. Office of Pub. Counsel (In re Laclede Gas Co.)*, 539 S.W.3d 835 (Mo. App. WD 2017), held that “[s]ection 393.1009(5)(a), *supra*, clearly sets forth two requirements for component replacements to be eligible for cost recovery under ISRS: (1) the replaced components must be installed to comply with state or federal safety requirements and (2) the existing facilities being replaced must be worn out or in a deteriorated condition.” *Id.* at 839. Spire has failed to show that the replacement of cathodically protected steel mains that it undertook and seeks ISRS recovery for in this application meets either of these requirements.

Cathodically Protected Steel Mains are not Worn Out or in Deteriorated

Condition

Let us begin our analysis by considering the legal meaning behind some of the relevant terms found in section 393.1009(5)(a) keeping in mind that, "[a]bsent a statutory definition, words used in statutes are given their plain and ordinary meaning with help, as needed, from the dictionary." *Verified Application & in re Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520, 525 (Mo. 2015) (quoting *Balloons Over the Rainbow, Inc. v. Dir. of Revenue*, 427 S.W.3d 815, 825 (Mo. banc 2014)). The first term to consider is "worn out." The dictionary defines worn-out to mean "used, damaged, or worn to the extent of being nearly or completely useless or unserviceable" or, alternatively, "entirely spent or exhausted in strength, energy, or vitality" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976).¹ This clearly implies that the article in question has been rendered incapable of performing its primary intended use due to wear. Such an understanding meshes well with the testimony provided by several witnesses during the evidentiary hearing who indicated that they understood "worn out" to mean the existence of a leak or hole in the pipe. Tr. pg. 263 lns. 22 – 24; Tr. pg. 172 lns. 22 – 23. At that point, the pipe's usefulness has been effectively exhausted because it is no longer capable of performing the basic function of transporting gas from point A to point B without gas being lost in transit. Thus, we can determine that pipes are "worn out" when and where a leak is present.

¹ There is a third possible definition listed in the dictionary: "being out of fashion or use." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976). The OPC does not believe that this use can be applied to the ISRS standard and so will not address it further.

That brings us to the second half of the equation: “in deteriorated condition.” The good news is that, here at least, the Courts have already done some of the leg work for us. Specifically, the Missouri Supreme Court found that to deteriorate means “to make inferior in quality or value” with the caveat that “this definition indicates that deterioration is a gradual process that happens over a period of time rather than an immediate event.” *Application & in re Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520, 525 (Mo. 2015); *In re Laclede Gas Co.*, 539 S.W.3d at 839. However, a new problem arises. Spire’s witnesses testified that pipes begin “deteriorating” or “corroding” immediately upon entering the ground.² Tr. pg. 137 lns. 9 – 24.; Tr. pg. 173 ln. 22 – pg. 174 ln. 1. This creates an issue for the interpretation of the term “in deteriorated condition” for at least two reasons.

The first reason for why there is a problem defining “in deteriorated condition” if all pipes begin deteriorating **immediately** upon entering the ground is the clear inconsistency such an understanding has with the Missouri Supreme Court’s determination that deteriorated means “a gradual process that happens over a period of time **rather than an immediate event.**” *Application & in re Liberty Energy (Midstates) Corp.*, 464 S.W.3d at 525; *In re Laclede Gas Co.*, 539 S.W.3d at 839. The second reason is that if the Commission were to define “in deteriorated condition” to mean simply that the pipe had begun the process of deteriorating (which begins immediately upon being placed in the ground), then the Commission would create an

² Testimony during the evidentiary hearing indicated that the primary form of deterioration affecting cathodically protected steel mains would be corrosion. Tr. pg. 106 ln 17 – pg. 107 ln. 1.

absurd result and effectively render part of the ISRS statute superfluous. Under such a definition, all of a gas company's pipes would be "in deteriorated condition" as soon as they were placed in service, and thus, the definition would be applicable to all pipes under all circumstances. This would necessarily render the definition pointless; an outcome which contradicts one of the primary canons of statutory interpretation found in Missouri law which requires Courts to "presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language." *Application & in re Liberty Energy (Midstates) Corp.*, 464 S.W.3d at 525 (citing *Wehrenberg, Inc. v. Dir. of Revenue*, 352 S.W.3d 366, 367 (Mo. banc 2011)); see also *State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 608 (Mo. 2019) ("[T]he construction of a statutory scheme 'should avoid unreasonable or absurd results.'" quoting *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012)).

Between these two considerations, it quickly becomes clear that "in deteriorated condition" must necessarily mean something more than just having begun the process of deterioration by being placed in the ground. In fact, such a conclusion is actually consistent with the testimony of Spire's own witness.

Q. At what point is it deteriorated?

A. I -- it would depend on the -- the -- if -- the certain factors. If it's general corrosion, if there's corrosion at the -- at a -- at a point where rock impingement, if there's -- if there's corrosion underneath an ineffective coating. There -- there -- there would be areas where it would be -- could be corroded more or less.

Q. So are we talking about, for example, loss of -- penetration of corrosion? Is that -- is that what we're talking about in terms of -

- A. We're -- we're talking about lessening the -- the pipe wall is -- is getting thinner.
- Q. Okay. So there's a point at which the pipe wall gets thin enough to be considered deteriorated?
- A. I would say it's starting to be deteriorated -- like I said, it's corroding and deteriorating right away. At what point it becomes the def-- definition of deteriorated, I -- I don't know what that time period would be.

Tr. pg 174 lns. 1 – 22. We must therefore continue to investigate the meaning of the phrase “in a deteriorated condition.”

In order to avoid the problems identified above and provide the phrase “in deteriorated condition” with some semblance of meaning and purpose – given that pipes begin to deteriorate immediately upon entering the ground – the phrase must be understood to mean something more than just exposed to deterioration. Specifically, “in deteriorated condition” must mean that the pipe has been exposed to such a level of deterioration that it would constitute some material change in the pipe’s nature. This was a concept that was touched upon by the OPC’s expert witness Mr. John Robinett when he discussed the existence of certain “safety factors” that are built into pipes. Mr. Robinett described how engineers “build [] extra protection” into a system to make it “bigger and better than [] need[ed].” Tr. pg. 268 lns. 11 – 12. As a result, “a pipe can undergo some deterioration [] before hitting that safety factor.” Tr. pg. 268 lns. 13 – 14. This then provides the key to balancing the fact that pipes begin deteriorating immediately upon entering the ground with the holding of the Missouri Supreme Court in *Application & in re Liberty Energy (Midstates) Corp.* and the need to ensure that nothing in section 393.1009(5)(a) is rendered superfluous.

Under this analysis, a section of pipe can only be considered “in deteriorated condition” if it has deteriorated to such an extent that it has been rendered unsafe for continued use based on the parameters of its design.

The idea that pipes are “in deteriorated condition” when they have deteriorated to the point of becoming unsafe not only harmonizes the competing concepts of deterioration being an event that occurs slowly but begins immediately, it also brings the phrase back into alignment with the concept of being “worn out” as previously discussed. In short, a section of pipes is “worn out or in deteriorated condition” when it has been rendered unusable or unsafe either due to the existence of a leak in the pipe or else an accumulation of deterioration or corrosion sufficient to impede the safe operation of the pipe. With this understanding in hand, we can now turn to the problem presented by the current case, which is the simple fact that Spire has failed to present sufficient evidence to prove that virtually any of the cathodically protected steel mains that it replaced (and is seeking recovery for in this ISRS proceeding) are either “worn out” or “in deteriorated condition.”

The first and most basic problem with Spire’s case is the fact that its own witnesses admitted that the company cannot prove the level of deterioration or corrosion that exists on its cathodically protected steel pipe lines without digging up and exposing the pipes. Consider, for instance, the following testimony by Spire witness Craig Hoeflerlin:

Q. So Spire's position is 100 percent of its cathodically protected bare steel mains are corroded?

A. There is some corrosion on there and we're addressing the most corrosive atmosphere first.

Q. But it's not 100 percent?

A. Unless we go out and dig up every single foot of pipe, we don't know for sure.

Q. So there are sections of your main system that are not corroded?

A. I -- I don't know unless I dig it all up. But I just know corrosion's out there, we've seen it We've seen the leak rate, we've seen it on a national -- that's why --

Q. So you --

A. -- all companies are taking care of this.

Q. You don't know that all of the mains you have are corroded?

A. No. But I -- if you did not put it under cathodic protection for 40-plus years, it will corrode. So I would say if you don't -- if you didn't have it under cathodic protection to begin with, it will corrode. It will grow at different rates, but will corrode. So I would say there is some form of corrosion somewhere on those mains, yes.

Q. But not all of the mains?

A. I -- I can't say for sure on that. I just can't unless you actually dig it up. But I know corrosion will occur. It's a natural process, it will occur. All my engineer --

Q. No one is arguing that corrosion will occur.

A. Right.

Q. No one's arguing that.

A. Right.

Q. I want to know if all of the mains that Spire replaced in this ISRS application were corroded. How do you know that?

JUDGE DIPPELL: I think the witness has answered that question "I don't know"

Tr. pg. 107 ln. 2 -- pg. 108 ln. 15.³ Now there are several important things to consider about this testimony starting with one point that desperately needs to be cleared up.

³ Other instances in the transcript include:

The OPC wants to make this perfectly clear: metal does corrode, it does deteriorate. **No one** is arguing that steel pipes are incapable of deteriorating overtime. Even the OPC's own witness acknowledged that point. Tr. pg. 253 lns. 9 – 19. **But that is not the problem in this case.** The problem in this case is determining **whether** and **to**

- Q. So there are pipes you're replacing that don't have that level of replacement -- of corrosion?
- A. There are pipes that may not have uniform corrosion, but you'll -- you'll find corrosion along the pipe as you go -- as you dig it up, yes.
- Q. How much of the pipe is corroded?
- A. It -- it just varies. I mean it could be corroded right where you're digging it up and then, you know, around the corner may not be as corroded and then further down it will be corroded again. I mean --

Tr. pg. 96 lns. 1 – 11. And:

- Q. Are you replacing segments of pipe that aren't corroded?
- A. I can't say for sure if there may be some areas that do not have some corrosion on it, but the majority of the pipe we are replacing is corroded.
- Q. The majority, but not all?
- A. Unless we dug every single piece up, we wouldn't know for sure. And that's all I can say.

Tr. pg. 98 ln. 24 – pg. 99 ln. 6. And:

- Q. So would it be impossible to tell, in your opinion, whether 100 percent of the steel that was replaced in this ISRS was deteriorated?
- A. There would be no way to know because it was not all dug up.

Tr. pg. 175 pg. lns. 10 – 14. It should also be noted that, with regard to the excerpt in the body and the first two excerpts in this footnote, the witness in question had taken the position that **any** level of corrosion **whatsoever** meant that the pipe was worn out or in a deteriorated condition:

- Q. Your position is any level of corrosion whatsoever means pipes is worn out and deteriorated?
- A. Yes.

Tr. pg. 100 lns. 17 – 19. As the OPC has already explained, such a conclusion is inconsistent with the Missouri Supreme Court's decision in *Application & in re Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520, 525 (Mo. 2015), not to mention well established laws of statutory interpretation. *See Id.* at 367; *see also State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 608 (Mo. 2019) (“[T]he construction of a statutory scheme ‘should avoid unreasonable or absurd results.’” quoting *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012)). Therefore, to the extent that the witness testified that a “majority” of the pipes being replaced were corroded, that is not an absolute indication that the pipe is truly “worn out or in deteriorated condition.”

what extent the cathodically protected steel mains that Spire replaced were corroded or deteriorated.

To put the problem in perspective, consider this. Spire completes a work project that replaces two city blocks (let us say roughly 1,800 linear feet or about one third of a mile) worth of cathodically protected steel mains. Of that length of main, how much of it shows any sign of corrosion? Of the main that does show some signs of corrosion, how much can be considered to have been rendered so corroded as to be unsafe and therefore “in deteriorated condition?” The simple answer is the one that Spire’s witness gave during the hearing: we do not know. Specifically, we do not know **because Spire does not check**. As Spire’s own witnesses explained, the rate of corrosion is not uniform. Tr. Pg. 100 lns. 7 – 12. Further, Spire has acknowledged that it does not know how quickly its pipes corrode. Tr. pg. 137 ln. 25 – pg. 138 ln. 2; *see also* Tr. pg. 101 ln. 14 – pg. 102 ln 11; Tr. pg. 93 lns. 17 - 24. Finally, Spire made it clear that there are a great many factors that impact the development or existence of corrosion, many of which appear to stem from outside forces. Tr. pg. 91 ln. 25 – pg. 92 ln. 8; Tr. pg. 92 ln. 24 – pg. 93 ln. 3; Tr. pg. 93 lns. 17 - 24. All of this leads inevitably to one conclusion: Spire cannot possibly prove the extent of corrosion in its cathodically protected steel mains, and thus show that the pipes it replaced (and is seeking recovery for in this ISRS filing) are all in a deteriorated condition, based on the evidence it has presented in this case.

This understanding brings us to the heart of an issue that the OPC has sought to address now for several ISRS cases. Spire’s entire case is necessarily based on

assumptions. Spire cannot prove that any one section of the pipes it replaced were corroded (let alone to such an extent to be “in deteriorated condition”) without exposing its pipes and so asks the Commission to assume that all of its pipes are corroded. Moreover, Spire is asking the Commission to assume that its steel mains reached this state of being wholly or mostly corroded within the thirty to forty years before they were cathodically protected.⁴ This raises a whole host of additional questions and conundrums. Why, for example, should the Commission just assume that steel mains are sufficiently corroded to be considered “in deteriorated condition” after only forty or fewer years, especially when Spire East has a depreciable average service life for steel mains of eighty years? Robinett, *Direct*, pg. 10. In fact, forget steel mains, Spire East has a depreciable average service lives for cast iron mains that is also eighty years and Spire’s own witness acknowledged that steel should last as least as long as cast iron. Robinett, *Direct*, pg. 10; Tr. pg. 103 lns. 22 - 24. Why then should the Commission assume that all the cathodically protected steel mains Spire

⁴ While it is true that pipes continue to deteriorate even after cathodic protection is applied, they do so at a much slower rate. Robinett, *Direct*, pg. 4; Tr. pg. 85 ln. 25 – pg. 86 ln. 4. Therefore, Spire’s pipes must have been, at a minimum, mostly deteriorated before cathodic protection was applied in order to be “in deteriorated condition” now. To see why, just visualize deterioration as a progress bar like the kind one might see on the loading screen of a computer program. The bar slowly fills up from left to right and once it is full, the pipe is “in deteriorated condition.” Under this visualization, Spire’s pipes must have been more than half-way toward being “in deteriorated condition” before the cathodic protection was applied. If the pipes had not gotten to the half-way point of being “in deteriorated condition” before the cathodic protection was applied, then the pipes would have had to “make up” the remaining “distance” while under cathodic protection. However, the pipes were installed 30 to 50 years before cathodic protection was applied in the 1990s and so the pipes have been under cathodic protection for less time than they have not been under cathodic protection. Leonberger, *Direct*, pg. 9; Robinett, *Direct*, Schedule JAR-D-8 GO-2002-50 case file pg. 6. This means that the pipes would have had to have corroded faster under cathodic protection than it had previously corroded under no cathodic protection in order to make up the remaining distance. This does not make sense. We can conclude, therefore, that Spire’s pipes must have been mostly deteriorated before cathodic protection was applied if they are “in deteriorated condition” now.

replaced got to be “worn out or in deteriorated condition” in less time than the average service life of Spire’s cast iron mains despite the fact that Spire acknowledged the steel mains should be lasting as least as long the cast iron ones?

Another important question to ask is what Spire has been doing with itself all these years when it must have known since **at least** the 1990s that its pipes were, in its opinion, “in deteriorated condition?” As already discussed, **if** Spire’s pipes are in fact “in deteriorated condition” they must have gotten to that state wholly or mostly within the thirty to forty years **before** they were cathodically protected in the 1990s.⁵ Robinett, *Direct*, Schedule JAR-D-8 GO-2002-50 case file pg. 6. However, Spire did not begin to undertake its major system-wide strategic replacement strategy until around 2010 – 2011. GO-2018-0309 & GO-2018-0310, *Report and Order*, pg. 5; *In re Laclede Gas Co.*, 539 S.W.3d at 837. That leaves a twenty year gap during which Spire would have known that it had miles upon miles of cathodically protected steel mains that **it claims** were “in deteriorated condition” but for which it did next to nothing. The only reasonable explanation is that Spire’s steel mains were (and are) not anywhere near as corroded or deteriorated after their forty years in the ground as Spire would have the Commission believe. Yes, **some** of Spire’s steel mains would have shown signs of corrosion, but that corrosion would be dispersed widely across the system based on individual factors specific to individual pipes, **as Spire’s own witnesses indicated**. Tr. pg. 91 ln. 25 – pg. 92 ln. 8; Tr. pg. 92 ln. 24 – pg. 93 ln. 3;

⁵ Again this is because the pipes were under cathodic protection for less time than they were not under cathodic protection and cathodic protection substantially slows the rate of corrosion, so any corrosion that might have occurred would have had to have happened primarily before the pipes were cathodically protected.

Tr. pg. 93 lns. 17 - 24. Further, even among the pipes that would have shown any sign of corrosion, there would have been no reason to say that all of those pipes are unsafe. We know this because, even today, Spire maintains that its steel mains (even the corroded ones) are still safe:

Q. Is it safe to transport natural gas in a pipe like that? Sorry. And for the record, "like that," I am referring to pipe 1.⁶

JUDGE DIPPELL: Thank you.

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

Tr. pg. 116 lns. 1 – 6. and

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

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

Tr. pg. 177 lns. 5 – 10. So then why should the Commission conclude that all the cathodically protected steel mains that Spire replaced are “in deteriorated condition?”

Spire’s case just does not make sense. It makes no sense for **all** of Spire’s steel mains to have become wholly or mostly “in a deteriorated condition” in just thirty to forty years. It makes no sense for Spire to have **known** this, spent ten years cathodically protecting the pipes, and then spent another twenty years without systematically replacing them. And it certainly makes no sense for Spire to claim to

⁶ Pipe 1 was identified as a bare steel main put into use in the Missouri West territory in approximately 1952. Tr. pg. 72 lns. 22 – 25.

have a system with over 800 miles of cathodically protected steel mains that is somehow simultaneously both “in a deteriorated condition” and yet still “safe.” Surely the only logical way to view this situation is to assume that the majority of Spire’s cathodically protected steel main distribution system is currently functional and safe and hence not “worn out or in deteriorated condition.” Does that mean that there is no corrosion at all in Spire’s system? No. All of Spire’s steel mains have been exposed to corrosion simply by virtue of being placed in the ground. Some of Spire’s steel mains (quite possibly much of Spire’s steel mains) might show some level of corrosion or deterioration, although not enough to be considered “in deteriorated condition.” The OPC is even willing to admit that there is a more-likely-than-not chance that **some** portion of Spire steel mains are “in deteriorated condition” and that replacing them would be ISRS eligible. But the critical questions in this case is **where** and **how much**. Spire has the burden to prove what part of its steel mains are “in deteriorated condition,” and the testimony of their own witnesses show that it is impossible for them to do so without exposing pipes. Tr. pg. 107 ln. 2 – pg. 108 ln. 15; Tr. pg. 96 lns. 1 – 11; Tr. pg. 98 ln. 24 – pg. 99 ln. 6; Tr. pg. 175 pg. lns. 10 – 14. Therefore Spire has not met its burden of proof. Moreover, this Commission should not be presuming facts in Spire’s favor to make up for these deficiencies.

The OPC has much more to say regarding the problems with Spire’s evidence, but, before doing so, the OPC will digress for one moment to address a potential concern that it believes merits discussion. The foregoing analysis of Spire’s case is likely to raise the important question of how Spire could **ever** show the ISRS

eligibility of its replacements. Stated differently, one might argue that the OPC's strict insistence that the law be followed would make it impossible (or at least cost-prohibitive) for Spire to prove that any of the steel mains it replaces are "in deteriorated condition," and thereby eliminate the potential for Spire to recover under an ISRS. This is simply not true. Spire can easily show the ISRS eligibility of its cathodically protected steel main replacements using the presence of leaks on the system as a touchstone. First, the existence of a leak is most likely itself proof that some section of pipe has become "worn out" as that term is used by the ISRS statute. *see* Tr. pg. 263 lns. 22 – 24; Tr. pg. 172 lns. 22 – 23. Second, once Spire finds a leak, it could take a small "coupon" sample of the surrounding pipe to determine its quality.⁷ If that coupon sample showed that the pipe surrounding the leak had sufficient corrosion to demonstrate that it was no longer safe and was thus "in deteriorated condition," then Spire could justify ISRS recovery for the replacement of the surrounding pipes as well. Spire could then simply proceed outward from the point of the leak continuing to sample pipe until it had addressed all of the unsafe pipe that was "in deteriorated condition." In the alternative, Spire could rely on an even better method of proving where its steel mains were "in deteriorated condition" that would require even less effort and costs: leak aggregation monitoring.

Steel mains becoming "worn out" and being "in deteriorated condition" both stem from the same initial source: corrosion of the pipes caused by oxidation of the

⁷ Spire is already supposed to be doing this for cast iron mains. Robinett, *Direct*, pg. 7; Tr. pg. 136 lns. 20 – 23. All that would be required is for Spire to extend this practice to steel as well.

metal. Tr. pg. 95 lns. 3 – 8; Tr. pg. 252 lns. 9 – 12. Therefore, where steel mains wear out and develop leaks, it is more likely that the surrounding main will be “in deteriorated condition” as well. It would thus be easy to show where steel mains are “in deteriorated condition” by keeping track of where leaks occur and looking for the spots where multiple leaks are happening in close proximity within a set time-frame. The aggregation of leaks within specific areas and specific amounts of time would provide good evidence of the condition of the steel mains in that area. It would also free the Commission of the need to make presumptions regarding the entire extent of Spire’s current steel main distribution system. Instead, the Commission would be able to make authoritative findings of fact regarding very precise, easily identifiable, and readily quantifiable sections of pipe. This is clearly a better alternative to the one now before the Commission.

One of the greatest ironies of this case is that the OPC’s proposal to identify which parts of Spire’s steel mains are actually in deteriorated condition by looking to the aggregation of leaks is based off of a requirement that Spire is **already supposed to be performing**. As will be discussed in detail later on, Spire is literally already supposed to be checking its steel mains to see where it develops five leaks in 500 feet over a three year period. Robinett, *Direct*, Schedule JAR-D-8 GO-2002-50 case file pg. 29. All the OPC is requesting is that Spire simply provide to the Commission the evidence that it should already be gathering under this requirement. This is the simplest and most likely cheapest means by which Spire could resolve this ISRS issue. Therefore, if Spire wishes to forego future litigation on this issue, all it has to

do is provide the Commission and the OPC with data that shows the steel mains it is replacing (and seeking ISRS recovery for) have had multiple leaks over a relatively short period of time.

The OPC is going to switch gears again now and return to the discussion of the evidence Spire offers to prove that cathodically protected steel mains are “worn out or in deteriorated condition.” The OPC will start by addressing Spire’s Distribution Integrity Management Program (“DIMP”). As the OPC has attempted to point out multiple times in the past, the DIMP does not – and by its very nature cannot – prove that **any** of Spire pipes are “worn out or in deteriorated condition.” All the DIMP does is rank different possible risks that might cause a pipe failure. Ex. 10 App. C-1 pg. 3 (

). Therefore, the fact that corrosion of Spire’s cathodically protected steel mains appears on the DIMP does not mean that **all of Spire’s steel mains are corroded, it only means that there is a **risk** of pipe failure related corrosion.⁸ Further, the fact that the risk of a pipe failure caused by the corrosion of steel mains might appear above or below the risk of a pipe failure caused by corrosion on any other type of pipe has absolutely no correlation to the amount of corrosion that actually exists on Spire’s steel mains. All the ranking of protected steel mains in the DIMP shows (and could ever possibly show) is that a pipe failure caused

⁸ The OPC would once again like to point out that the existence of a risk related to cathodically protected steel main corrosion is not something it or anyone else in this case is disputing. This is, again, because no one is arguing that corrosion does not occur.

by the corrosion of steel mains is considered more or less of a risk to the company than a pipe failure caused by any other given source.

To better illustrate the OPC's point, consider the following. Imagine someone claims that, because the University of Kansas football team is ranked higher than the University of Illinois football team in a comparison of NCAA football teams, Kansas was going to win the NCAA National Championship. Such a claim would obviously be foolish. The fact that Kansas is ranked higher than Illinois does not mean that Kansas is going to win the NCAA National Championships. It just means that Kansas has a better chance of winning than Illinois does. The same applies to the DIMP. If corrosion of cathodically protected bare steel mains is ranked higher than cathodically protected coated steel mains that does not **in any possible way** indicate that cathodically protected bare steel mains are actually corroded or otherwise are "worn out or in deteriorated condition." It only ever means that corrosion of cathodically protected bare steel mains poses a greater risk of causing a pipe failure than the risk posed by the corrosion of cathodically protected coated steel mains. But the fact that something poses more risk of occurring is not proof that the event has happened or is even guaranteed to actually happen. It is therefore entirely illogical to conclude that cathodically protected bare steel mains are worn out or deteriorated just because they are ranked higher than cathodically protected coated steel ones in Spire's DIMP.

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Ex. 10 App. C-1 pgs. 16 – 29. So what does this table tell us? Well it tells us that, on average, protected bare steel pipes have less risk of a pipe failure caused by corrosion than cast iron and more risk of a pipe failure caused by corrosion than coated steel, which is something that most people could easily have guessed on their own. What this does **not** tell us, however, is that all of Spire’s cathodically protected bare steel mains are sufficiently corroded to be “worn out or in deteriorated condition.” In fact, the DIMP does not say **anything** about the condition of **any** particular section of Spire’s mains. Again, all the DIMP provides is a statement of comparative probabilities regarding the risk of pipe failures and nothing more. The ranking of potential risks cannot possibly be used to establish a factual finding regarding the current nature of existing sections of pipes, let alone Spire’s entire steel main gas distribution system.⁹

Hopefully, this analysis has dispensed with using the DIMP as a means of proving a general statement regarding the condition of an entire subset of Spire’s

⁹ The same logic extends to the comparison of leak rates found in the testimony of Spire witness Craig Hoferlin. *see* Hoferlin, *Direct*, pgs. 24 – 25. This data basically just shows that “bare” steel mains have a higher leak rate than “coated steel mains and plastic mains. Hoferlin, *Direct*, pgs. 24 – 25. Does this mean that all the “bare” steel mains that Spire replaced have been exposed to sufficient deterioration to be rendered unusable or unsafe? No, of course it does not prove that. It would be wholly illogical for the Commission to rely on evidence that shows “bare” steel has more leaks than coated steel to conclude that every single segment of “bare” steel Spire currently has in service has been exposed to sufficient deterioration to be rendered unusable or unsafe.

distribution system. The OPC will thus move on to the next type of evidence. Spire has repeatedly attempted to point to statements made by federal regulators advocating for the general need to replace certain types of pipe as somehow proving the condition of **its** pipes. There are a couple of problems here. The first is that no federal regulator has ever said that Spire's pipes are "worn out or in deteriorated condition." What these federal regulatory bodies have said instead is that it would be **prudent** for Spire to replace certain types of infrastructure (like cast-iron pipes) because of their **potential** to deteriorate over time. *see* Hoeflerlin, *Direct*, Schedule CRH-3. But the prudence of Spire's replacements are not an issue before this Commission. *In re Laclede Gas Co.*, 539 S.W.3d at 840 ("While Laclede's replacement strategy may laudably produce a safer system, the question squarely before us is not whether its chosen approach is prudent but rather whether the replacement of plastic components that were not in a worn out or deteriorated condition are ISRS-eligible."). The question squarely before this Commission is whether the cathodically protected steel mains that Spire replaced and is seeking recovery for through the ISRS were "worn out or in deteriorated condition," which we have already established means that they had been rendered useless or unsafe as the result of exposure to corrosion. None of the federal regulatory sources Spire relies on spoke to the condition of **Spire's** cathodically protected steel mains to any extent, and thus none of them provide any evidence to answer this question. More importantly than even that, though, none of the federal regulators on which Spire relies advocate for the replacement of cathodically protected steel pipes **at all**.

Spire witness Craig R. Hoeflerlin cites to several documents generated by federal regulatory bodies that he claims show that federal safety officials have actively encouraged the replacement of cathodically protected bare steel mains. Hoeflerlin, *Direct*, pgs. 7 – 9. However, an examination of these sources show no support for his claims. First is the letter from the Federal Department of Transportation to the Governor of Alabama (CRH-1).¹⁰ This letter says absolutely nothing with regard to replacement of cathodically protected bare steel pipes. Hoeflerlin, *Direct*, Schedule CRH-1. At best, all this letter does is encourage state utility Commissions “to accelerate pipeline repair, rehabilitation, or replacement programs for systems whose integrity cannot be positively confirmed.”¹¹ Hoeflerlin, *Direct*, Schedule CRH-1. Does this mean that all of Spire’s cathodically protected steel mains have been exposed to sufficient deterioration to render them unsafe or useless? No, of course not. It would be wholly illogical to conclude that a request from the Federal Department of Transportation to the Governor of Alabama to accelerate repair, rehabilitation, or replacement programs indicated that all the cathodically protected steel mains owned by a Missouri gas company had been exposed to sufficient deterioration to render them unsafe or useless.

¹⁰ Why Spire has included a letter between the federal DOT and the Governor of Alabama is beyond the understanding of the OPC, but the OPC will press on regardless.

¹¹ The DOT letter bases the need to accelerate such programs on explosions that occurred in San Bruno, California and Allentown, Pennsylvania. Hoeflerlin, *Direct*, Schedule CRH-1. An examination of the PHMSA white paper attached to Mr. Hoeflerlin’s direct as CHR-2 indicates that the San Bruno explosion was “was the result of an improperly-welded section of pipe that had been installed in 1956 and never subjected to hydrostatic pressure testing[.]” while preliminary reports of the Allentown explosion indicated “that the source of the gas leak was an 83-year-old, 12-inch cast iron gas main.” Hoeflerlin, *Direct*, Schedule CRH-2 pgs. 5 – 6. Neither of these explosions were caused by failure of cathodically protected steel mains.

The second attachment is a PHMSA whitepaper (CRH-2). This PHMSA whitepaper recommends that state public utility Commissions “consider accelerating work on the following kinds of high-risk intrastate gas infrastructure in the future: [b]are steel pipe **without** adequate corrosion control (i.e., **cathodic protection** or coating)[.]” *Hoeflerlin*, Direct, Schedule CRH-2. This PHMSA white paper does not, therefore, advocate the replacement of cathodically protected steel mains, but rather, advocates for the replacement of **non-cathodically protected** steel mains. Also, contrary to Mr. Hoeflerlin’s assertion, the white paper does not “look favorably” upon Missouri’s ISRS, but rather just explains what the ISRS is and describes how it works. *Hoeflerlin*, Direct, CRH-2 pgs. 9 – 11. The third attachment is just a PHMSA bulletin to gas operators and state pipeline safety representatives on cast iron pipe and hence has no bearing on the replacement of cathodically protected steel. *Hoeflerlin*, Direct, pg. 7.

As the OPC has now demonstrated, none of the federal regulatory sources that Spire cites to as proof that it had been encouraged to replace cathodically protected bare steel mains actually advocate that position let alone indicate that Spire’s steel mains are “worn out or in deteriorated condition.” Finally, even if something in any of these federal regulatory documents could be interpreted as advocating for the replacement of Spire’s cathodically protected steel mains, that alone would not prove that Spire’s cathodically protected steel mains are “worn out or in deteriorated condition.” We have already seen how the phrase “worn out or in deteriorated condition” means having been exposed to corrosion sufficient to render the pipes

useless or unsafe. Advocacy for the general replacement of mains by agents of the federal government does not and cannot provide the evidence necessary to make such a factual finding. The federal government advocating for the replacement of steel mains could only ever show that such replacements were prudent, not that the pipes themselves are “worn out or in deteriorated condition.” But, as previously stated, prudence is not an issue in this case. *In re Laclede Gas Co.*, 539 S.W.3d at 840.

We turn now to another bugbear of the ISRS case: age of infrastructure. As the OPC has advocated previously, age alone is not sufficient to establish that pipes are “worn out or in deteriorated condition.” Proof of this point can be seen in several different places. It can be seen in the Staff memorandum filed in a Liberty Midstates Gas case (File No. GO-2019-0091) that stated the “age of ... pipe does not meet the criteria used in Staff’s evaluation because the age of pipe is not necessarily a safety concern; provided that the pipe is in good condition.” Robinett, *Direct*, pg. 8. It can be seen in the April 2011 Commission issued *Pipeline Safety Program Report* attached to Mr. Hoferlin’s direct testimony which stated “[t]he age of the steel pipeline, by itself, may not be a determining factor. The age, as well as other integrity factors would need to be included in the review.” Hoferlin, *Direct*, pg. 9. And it can be seen in the testimony and documentation related to depreciable average service lives that the OPC has repeatedly offered. Robinett, *Direct* pgs. 8 – 12. But all of that is almost secondary to the simple fact that much of the cathodically protected steel mains that Spire replaced are **not** beyond the 80 year average service life for such mains approved for Spire East.

There are several sources to consider regarding the age of the cathodically protected steel mains that Spire retired in this case. The first is OPC's exhibit 203, which is the Work Order Authorization Information for Spire Work Order 800039. This exhibit shows that a large number of the steel mains being replaced in this ISRS proceeding were installed in the 1950s and 1960s. Ex. 203 pg. 6. This is corroborated by the information found in Spire's DIMP which shows Spire's remaining bare steel mains with cathodic protection were installed from ** ***. Ex. 45 pg. 16. It is further corroborated by the fact that Spire witness Mr. Leonberger testified that most of the cathodically protected bare steel pipes that Spire replaced had been in the ground for 30 to 50 years prior to cathodic protection being applied. . Leonberger, *Direct*, pg. 9. Because the cathodic protection was applied predominantly in the 1990s, that would place the age of these pipes in the 1940 to 1960 range.¹² Robinett, *Direct*, Schedule JAR-D-8 GO-2002-50 case file pg. 6. When considered together, this evidence therefore suggests that the pipes Spire replaced were predominately installed in the 1950s and 1960s and are thus approximately 60 to 70 years old.

The next question to consider is why the Commission should use the 80 year average service life adopted in Spire East when considering the age of Spire's cathodically protected steel mains (especially when the overwhelming amount of steel main replacement occurred in the Spire West service territory). The answer to that question lies in the manner by which the average service lives for Spire West and

¹² The OPC highly doubts that much if any steel was installed in the 1940s due to the ongoing Second World War. The OPC instead believes that most of the pipes had been installed in the 1950s and 1960s as demonstrated in the work order authorization sheet that the OPC admitted into evidence. Ex. 203 pg. 6.

Spire East were determined. As OPC witness John Robinett explained in his direct testimony:

The difference in average service lives between Spire Missouri East and Missouri West are the result of historical data retention. Laclede (now Spire Missouri East) has retained historical depreciation records for approximately the last 150 years. Unlike Laclede, the MGE properties (now Spire Missouri West) experienced a significant data loss. The reason for the data inadequacy is that when Southern Union Company acquired Missouri Gas Energy in 1994 from WRI, WRI's plant retirement records were not transferred to the possession of MGE. Due to the property records not being transferred as part of the sale in 1994, neither the Company nor Staff have been able to perform a statistically valid study that reflects the life of MGE's assets. So it is highly likely that, like other natural gas utilities in this state, Spire Missouri West is utilizing surrogate depreciation rates until the time when sufficient data exists to perform a statistically valid study. This historical data loss is the reason for why the average service life for mains on the west side of the state are twenty to thirty years less than mains on the east depending on material.

Robinett, *Direct*, pg. 11. Mr. Robinett further reiterated this information during the course of the evidentiary hearing:

- Q. Can you give me a brief description of how -- start with the west -- depreciable lives are ca-- were calculated for the west?
- A. Depreciable lives were calculated on the west, and they date back several years because we have a loss of historical data that occurred when Southern Union bought MGE in 1994. So Black and Veatch, who at that point in time was the depreciation consultants for MGE, had to come in and estimate. And I believe they created data so that there is something there that you can potentially perform a study on.

Tr. pg. 270 lns. 7 – 17. And:

- Q. So Mr. Robinett, we're just talking about the difference in the depreciation lives or the service lives of pipes from the east and the west side of the state. Could conditions on the west side of the state be different than conditions on the east side of the state?

- A. I would say yes, they could be.
- Q. Could -- could there be -- just hypothetically could there be conditions that are a cause of service lives being different on one side than on the other side?
- A. I would say there could be a cause, but in the current scenario between these two, the more likely scenario is the loss of data that occurred during the '94 merger would be more overwhelming probably what has caused the difference.

Tr. pg. 280 ln. 23 – pg. 281 ln. 13. Finally, the OPC submitted into evidence the depreciation studies that show how Spire's current depreciation rates were set.

OPC Exhibit 205 is the Report on Depreciation Accrual Rates used to develop the rates that were set for Spire West (then doing business as Missouri Gas Energy).

As the report itself states:

The rates recommended in this report reflect consideration of the results of simulated plant balance analysis, regional industry norms, survivor curve retirement analysis, and our experience with other utilities. In our previous four reports, sufficient retirement history did not exist to adequately perform survivor curve analysis. We now have nineteen years of continuing plant data and were able to perform survivor curve analysis on select accounts, but the results are not sufficiently conclusive to use in developing recommended rates with one exception, Account 397.1 Communication Equipment (ERT). We are able to rely on the simulated plant balance approach to estimate average service lives for some accounts. We also relied upon a survey of depreciation rates for regional gas utilities.

Ex. 205 pg. 3. With specific reference to the Main accounts, the report went on to state:

For the purpose of this report, we conducted simulated plant balance analyses to estimate average service lives based on historical plant activity. The simulated plant balance method may produce reliable results when aged retirement data is unavailable. Data requirements for the simulated plant balance approach are far less rigorous than for

survivor curve analysis. The only data needed for a simulated plant balance analysis are annual additions and end of year plant balances. In the simulated plant balance method, actual end of year plant balances are compared to those simulated by applying the percent surviving at a given age to the initial additions using the same general curves as used in the survivor curve analysis. The curve type that best simulates actual plant balances is the curve that best explains the mortality characteristics of the plant.

[. . .]

For the Company's largest account, Mains -Account 376, we find a best fit curve to be a "square curve" which indicates that all plant will retire at the average service life. Square curves are not a reasonable portrayal of our expectation of the retirement disbursement for natural gas mains. Our experience is that underground utility plant generally retires in a right modal pattern, meaning the majority of the plant retires after the average service life. We find our second and third best fit curve fits are an R0.5 and S0.5 with an average service life of 53 and 50 years respectively when the analysis was run starting with a zero beginning balance in 1968 (Table 4-2). We believe these to be reasonable indications of life estimation for the mains account, however we relied on our benchmarking survey as well for verification.

Ex. 205 pg. 7 – 8. All of this information is being provided to prove exactly one point: that the average depreciable service life approved for the main account used by Spire West (then MGE) was based on simulated plant balance analysis and not actual historical data. *Compare* Ex. 205 pg. 26 Table 5-4 (showing recommend average service lives (column j) for mains and service at 50 and 40 years respectively) *and* GR-2014-0007, *Order Approving Stipulation and Agreement*, attached *Stipulation and Agreement* pg. 22 and Attachment 2 (setting average service lives for mains and service at 50 and 40 years respectively).¹³

¹³ The depreciation rates adopted in GO-2014-0007 were continued forward in GR-2017-0216 which set Spire's most recent rates. GR-2017-0216, *Amended Report and Order*, pg. 148; *Partial Stipulation and Agreement*, pg. 5.

Spire East, on the other hand, did not suffer the same loss of historical data and so was able to use actual data when compiling its own depreciation study as shown in OPC exhibit 206:

The average service life estimates were based on informed judgment which incorporated analyses of available historical service life data related to the property, a review of management's current plans and operating policies, and a general knowledge of service lives experienced and estimated in the gas industry. The use of survivor curves to reflect the expected dispersion of retirements provides a consistent method of estimating depreciation for gas property. Iowa type survivor curves were used to depict the estimated survivor curves for the plant account property groups.

The procedure for estimating service lives consisted of compiling historical data for the plant accounts or depreciable groups, analyzing this history through the use of widely accepted techniques, and forecasting the survivor characteristics for each depreciable group on the basis of interpretations of the historical data analyses and the probable future. The combination of the historical experience and the estimated future yielded estimated survivor curves from which the average service lives were derived.

The Company's service life estimates used in the depreciation calculation incorporated historical data compiled through 2012 from the property records of the Company. Such data included plant additions, retirements, transfers and other activity. Generally, retirement data for the years 1964 through 2012 were used in the actuarial life table computations which were the primary statistical support of the service life estimates.

Ex. 206 pgs. I-3 – I-4. It was this kind of statistical analysis based on long-term information that lead to Spire East's Commission approved 80 year average service lives for steel mains. Robinett, *Direct*, pg. 10 – 11.

So why does the difference between how these average service lives matter? It all comes down to this: it is inherently and inescapably illogical to say that a section of pipe is “worn out or in deteriorated condition” because it has spent 60 years in the

ground when that exact same pipe would not be “worn out or in [a] deteriorated condition” if it had been placed in the ground – under identical conditions – 250 miles away on the other side of the state. However, that is exactly the result one runs into if one attempts to use the average service lives of both companies to determine if cathodically protected steel mains are worn out or deteriorated. A piece of steel main installed in 1960 and retired in 2020 will have been in the ground 60 years. If that pipe had been installed in the Spire West service territory it would have been 10 years past its average service life. If it was instead installed in the Spire East service territory (under identical conditions no less) it would have had 20 years left to go before it hits the average service life for steel mains. The only difference between the pipes is which subsidiary of the same parent company owns them.

It is unquestionably arbitrary and capricious for this Commission to determine that steel mains are “worn out or in deteriorated condition” by comparing the age of the mains to the average service life of steel mains when that the average service life changes based on which subsidiary of the same parent company owns the pipe. In order to avoid being arbitrary or capricious, this Commission would need to identify what the **actual** expected lifespan of a steel main is. If the Commission wanted to adopt one of the two depreciable average service lives that exist for Spire to achieve this end, then it is only reasonable that the Commission pick the one based on real data and not simulated plant analyses. That would mean using an average service life of 80 years. However, if the Commission does adopt a uniform expected life of 80 years for steel mains, then a large percentage of the cathodically protected steel

mains that Spire retired and is seeking ISRS recovery for in this case are not past their average service life. This just leaves one less reason for the Commission to find that these cathodically protected steel pipes are “worn out or in deteriorated condition.”

There is one last concern regarding the evidence that Spire presented during the evidentiary hearing that needs to be addressed. When the OPC confronted Spire witness Mr. Hoeflerlin with a copy of the Work Order Authorization Information for Spire Work Order 800039, Mr. Hoeflerlin acknowledged that some of the steel mains being retired would have been coated and not bare steel. Tr. pg. 134 lns. 1 – 18. But Mr. Hoeflerlin also acknowledged that nothing in the work order identified which pipes were coated and which were not other than the date. Tr. pg. 134 lns. 19 – 23. Mr. Hoeflerlin further acknowledged that the coated steel pipes were not “worn out or in deteriorated condition.” Tr. pg. 131 ln 24 – pg. 132 ln. 1. This then creates a serious problem.

Spire’s DIMP indicates that the direct bury of coated steel mains first began in ** and also shows that the company has remaining coated steel mains with cathodic protection dating back to **.14 Ex. 45 pg. 16 – 17. Considering the Work Order Authorization Information for Spire Work Order 800039, this could mean that virtually all of the steel main being retired might potentially be coated steel. Ex. 203 pg. 6. The OPC does not actually believe that all these steel mains are, in fact, coated steel; the OPC just seeks to show that it is basically impossible to tell from the

¹⁴ How exactly this is possible is something of a mystery to the OPC.

work orders what percentage is coated and what percentage is not. Instead, one would have to look at Spire's GIS as Mr. Hoeflerlin explained. Tr. pg. 135 lns. 10 – 12. The problem is that Staff's witness admitted that Staff did not investigate the GIS. Tr. pg. 241 lns. 20 – 24. Thus, we are left with three facts: (1) Spire has included coated steel pipes in its replacement program, (2) these pipes are not "worn out or in deteriorated condition," and (3) there is no evidence currently in the record to show how much of the steel mains Spire replaced were coated and how much was not. When these three facts are put together, an obvious conclusion forms: Spire, by its own admission, cannot possibly prove how much of the cathodically steel mains it replaced and is seeking ISRS recovery for are bare steel and how much is coated steel that it concedes is not "worn out or in deteriorated condition." Consequently, even if the Commission were to ignore all of the OPC's arguments as to how Spire cannot prove its cathodically protected bare steel is "worn out or in a deteriorated condition," there is still undisputed evidence that Spire has included costs related to the replacement of cathodically protected **coated** steel in its ISRS application.

As previously stated, Spire's position in this case is premised on the Commission adopting a **categorical assumption** as to the nature of **every single segment** of Spire's cathodically protected steel main distribution system. This is because Spire has no evidence to show that any **particular** section of cathodically protected steel main is "worn out or in deteriorated condition," and so has to rely on an all-or-nothing strategy by having the Commission categorically declare that **all** cathodically protected steel mains are "worn out or in deteriorated condition." But

this kind of categorical approach contradicts the holding of the the Missouri Supreme Court which found the “[worn out or in deteriorated condition] requirement to be mandatory and has interpreted it narrowly.” *In re Laclede Gas Co.*, 539 S.W.3d at 839. The Commission therefore simply cannot declare an entire category of pipe material to be “worn out or in deteriorated condition,” especially when Spire’s own witnesses admit that it is impossible to tell the condition of any one given section of pipe without first digging up the pipe. Tr. pg. 107 ln. 2 – pg. 108 ln. 15; Tr. pg. 96 lns. 1 – 11; Tr. pg. 98 ln. 24 – pg. 99 ln. 6; Tr. pg. 175 pg. lns. 10 – 14. To do so would be an inversion of the burden of proof because the Commission would be assuming that all of Spire’s pipes are in the same condition.

Further, a Commission finding that all steel pipes are, as a class of pipe material, “worn out or in deteriorated condition” makes absolutely no sense. Spire’s witnesses have already admitted that not all of the company’s cathodically protected steel mains are worn out or deteriorated. Tr. pg. 96 lns. 1 – 11; Tr. pg. 98 ln. 24 – pg. 99 ln. 6. And why would they? Deterioration occurs at different rates and is not uniform because it is affected by multiple different factors. Tr. Pg. 100 lns. 7 – 12; Tr. pg. 91 ln. 25 – pg. 92 ln. 8; Tr. pg. 92 ln. 24 – pg. 93 ln. 3; Tr. pg. 93 lns. 17 - 24. It does make sense that there would be some deterioration on Spire’s lines, but that deterioration would not be universal. So the Commission has no basis for finding that all cathodically protected steel mains are essentially by definition “worn out or in deteriorated condition.”

Given this, how do you find and how do you focus on the areas that are “worn out or in deteriorated condition?” You focus on the **leaks**. The OPC has offered its road-map on how to avoid future litigation. All the company needs to do is provide information that shows where corrosion related leaks are occurring on its system and demonstrate that the replacements it is undertaking are meant to address these trouble spots. If there are spots on the line where a relatively large number of leaks occur in a relatively short period of time, then that section of pipe is most likely “worn out or in deteriorated condition.” If, on the other hand, Spire is replacing large sections of pipe that are not seeing very many (if any) leaks, then it is hard to see why anyone would conclude that the pipe in that area is “worn out or in deteriorated condition.” And again, it is worth pointing out that Spire is literally already supposed to be monitoring for high leak repetition **under the terms of its own replacement program**. Robinett, *Direct*, Schedule JAR-D-8 GO-2002-50 case file pg. 29. Thus, all the OPC is asking for is that Spire (1) undertake the leak monitoring that it is already supposed to be performing and (2) provide that information to the other parties and the Commission whenever it seeks an ISRS.

No State or Federal Requirement to Replace Cathodically Protected Steel

Mains

There can be no question that Spire must prove that the cathodically protected steel main replacements it performed were done to comply with state or federal safety requirements for Spire to recover the cost of those replacements in an ISRS. To see

why, consider the following excerpt from the Missouri Western District Court of Appeals *In re Laclede Gas Co.* decision:

Additionally, the Commission's order does not identify a single "state or federal safety requirement" that mandated the replacement of the plastic mains and service lines or, for that matter, replacement of the neighborhood systems as a whole. The Commission's reasoning that patched lines are more "vulnerable . . . to leaks" and could result in "degradation of safety" is not a relevant consideration under section 393.1009(5)(a), which unambiguously requires that the replacement be done to "comply with state or federal safety requirements." Although Laclede has a cast iron main replacement program pursuant to 4 C.S.R. 240.030(15), no state or federal safety requirement has been cited mandating the manner and extent of the replacement strategy employed by Laclede. Replacement programs undertaken by a gas utility that incidentally improve safety, but are not grounded in a government-mandated requirement, fail to trigger cost recovery under ISRS. *Cf. Liberty Energy*, 464 S.W.3d at 525 (holding that costs for replacing lines damaged by a third party were not eligible for recovery under ISRS). While Laclede's replacement strategy may laudably produce a safer system, the question squarely before us is not whether its chosen approach is prudent but rather whether the replacement of plastic components that were not in a worn out or deteriorated condition are ISRS-eligible. In analyzing that proposition, we cannot ignore the plain language of the statute for "convenience, expediency[,] or necessity" to conclude that the costs are eligible for recovery through the ISRS process. *Laclede Gas Co.*, 504 S.W.3d at 859 ("Neither convenience, expediency[,] or necessity are proper matters for consideration in the determination of whether or not an act of the Commission is authorized by statute." (citation omitted)); see also *Liberty Energy*, 464 S.W.3d at 525 (stating that the legislative intent is "demonstrated by the plain language of the statute").

PSC v. Office of Pub. Counsel (In re Laclede Gas Co.), 539 S.W.3d 835, 840 (Mo. Ct. App. 2017). Again, this excerpt makes it unquestionably clear that Spire must show a state or federal requirement to replace cathodically protected steel mains in order to collect the cost of those replacements through an ISRS. This is something that Spire simply cannot do.

Let us consider some potential requirements that Spire might turn to in an attempt to justify the replacement of cathodically protected steel mains. The first, and by far the most obvious, is the Replacement/Cathodic Protection Program for steel mains found in 20 CSR 4240-40.030(15)(E). However, as the name implies, this program is meant to replace or cathodically protect steel mains. 20 CSR 4240-40.030(15)(E). The rule itself reads as follows:

Operators who have unprotected steel transmission lines, feeder lines, or mains shall develop a program to be submitted with an explanation to the Commission by May 1, 1990, for Commission review and approval. This program shall be prioritized to identify and cathodically protect or replace pipelines in those areas that present the greatest potential for hazard in an expedited manner. These high priority areas should include, but not be limited to:

1. High-pressure unprotected steel pipelines located beneath pavement which is continuous to building walls;
2. High-pressure unprotected steel pipelines near concentrations of the general public such as Class 4 locations, business districts, and schools;
3. Areas where extensive excavation, blasting, or construction activities have occurred in close proximity to unprotected steel pipelines;
4. Sections of unprotected steel pipeline that lie in areas of planned future development projects, such as city, county, or state highway construction/relocations, urban renewal, etc.;
5. Sections of unprotected steel pipeline that exhibit a history of leakage or corrosion; and
6. Sections of unprotected steel pipeline subject to stray current.

20 CSR 4240-40.030(15)(E) (emphasis added). To start with, it should be noted that, as written, all this rule actually requires is for Spire to develop a plan to be submitted to the Commission by May 1, 1990. However, if one looks past that and assumes that the second sentence instills a further requirement on the utility, one still is left with only a requirement to cathodically protect or replace pipelines. “[T]he word ‘or’ is

typically used as a function word to indicate a choice between alternative things, states, or courses.” *Gasconade Cty. Counseling Servs. v. Mo. Dep't of Mental Health*, 314 S.W.3d 368, 376 (Mo. App. E.D. 2010) (citing WEBSTER’S THIRD INTERNATIONAL DICTIONARY 1585 (1981); *Council Plaza Redevelopment Corp. v. Duffey*, 439 S.W.2d 526, 532 (Mo. banc 1969) (acknowledging that "or" is typically disjunctive); *Norberg v. Montgomery*, 173 S.W.2d 387, 390 (Mo. Banc 1943) ("The word 'or' is ordinarily used as a disjunctive to mean 'either' as 'either this or that.'"); *State v. Graham*, 149 S.W.3d 465, 467 (Mo. App. E.D. 2004) (“The disjunctive 'or' in its ordinary sense marks an alternative generally corresponding to the term 'either.'”). Thus, Spire was required to choose to either cathodically protect its steel mains or replace them. Spire fulfilled that requirement when it chose to cathodically protect them. With its obligation fulfilled, Spire no longer has any requirement to replace its steel mains.¹⁵

Spire attempts to argue that it still has some lingering requirement to replace steel pipes by claiming that permitting cathodic protection under the steel main Replacement/Cathodic Protection Program was merely a “stop gap measure.” Leonberger, *Direct*, pg. 9. Well if that were indeed true, then the Staff responsible for drafting the rule truly missed the mark because there is absolutely nothing in the rule that suggests cathodic protection was only meant to be temporary. Instead the rule clearly and simply states that the utilities are required to either cathodically

¹⁵ Several Spire witnesses testified that the existence of an “or” did not prohibit Spire from both cathodically protecting and then replacing steel pipes. In this regard, Spire has completely missed the point. It is true that the Replacement/Cathodic Protection Program doesn’t prohibit a utility from doing both, it just does not **require** the utility to do both.

protect or replace its steel mains, and nothing more. Further, Spire’s “stop gap measure” claim does not match what the Commission said when it adopted the rule in 1989. In fact, the PSC’s *Order of Rulemaking* found in the *Missouri Register* actually notes a comment that Spire itself made (then doing business as Laclede gas):

Laclede comments that it currently has a replacement program and **does not plan to cathodically protect mains that it intends to replace**, except in areas that have experienced leaks. Details of the program will be submitted to the Commission as requested. The company further reports that it has already replaced three million four hundred seventy-eight thousand feet (3,478,000’) of bare steel mains on a planned basis since 1958.

Order of Rulemaking vol. 14 no. 23 Mo. Reg. pg. 1581, 1589 (December 1, 1989). The Commission responded to these comments as follows:

The Commission finds that nothing in this requirement obligates an operator to cathodically protect a main that it intends to replace. The operator programs are to provide for cathodic protection or replacement, not both.

Order of Rulemaking vol. 14 no. 23 Mo. Reg. pg. 1581, 1589 (December 1, 1989). The irony of Spire’s comment is hard to understate. Apparently at some point after making this comment, Spire (then Laclede) had a complete change of heart and decided to cathodically protect what they had previously planned to replace. Spire has now suffered a second reversal of the heart and seeks to replace the pipes it has already cathodically protected all the while ignoring the Commission’s original response to its comment.

Spire can claim that the Replacement/Cathodic Protection Program was just a “stop gap measure” as much as it wants, but the rule is as the rule was written and,

as written, the rule does **not** require Spire to both cathodically protect and replace steel pipes. Spire was only required to do one, it did one, and now it is no longer required to do anything under the rule. Let us then move on to consider another possible source of a requirement for Spire to replace cathodically protected steel mains, its Commission approved replacement programs. To start with, only the Commission approved replacement program for Spire West addresses cathodically protected steel mains. The Commission approved replacement program for Spire East says absolutely nothing about cathodically protected steel mains. Robinett, *Direct*, Schedule JAR-D-9 GO-91-275 case file. Further, the Commission approved replacement program for Spire West only **requires** at most the replacement of five miles of cathodically protected steel mains a year. Robinett, *Direct*, Schedule JAR-D-8 GO-2002-50 case file pg. 29.

Spire's Commission approved replacement program for Spire West sets a five mile a year **minimum** for replacement of cathodically protected steel mains. Robinett, *Direct*, Schedule JAR-D-8 GO-2002-50 case file pg. 29, 32. This then, is all Spire can claim to be truly **required** to perform.¹⁶ But there is more to the program than even that. One of the key elements of the cathodically protected steel main replacement requirement found in Spire West's Commission approved replacement program is the fact that replacements are to be triggered by the 5-5-3 program. Robinett, *Direct*, Schedule JAR-D-8 GO-2002-50 case file pg. 29. This means that "5

¹⁶ To see why, just consider if the situation was reversed. If it was the OPC claiming that Spire had to replace more than five miles a year, Spire would have no problem dismissing the OPC's claim by pointing out that the program only set a minimum and that was all that was required.

leaks within 500 feet within a 3-year period of time triggers replacement.” Robinett, *Direct*, Schedule JAR-D-8 GO-2002-50 case file pg. 29. The purpose of the 5-5-3 program, and the cathodically protected steel main replacement portion in general, is stated in this excerpt from the staff recommendation made in the case that adopted Spire West’s Commission approved replacement program:

The Staff believes that the replacement program for cathodically-protected bare steel mains contained in the Application should be approved. These bare steel mains were not cathodically protected for many years following installation and then from 1992 to 1997, cathodic protection was added to these mains under a program approved by the Commission in Case No. 00-91-277. A large number of leaks have accumulated on these mains and the Staff agrees that a replacement program is needed. The annual reporting of leaks and replacements of these protected bare steel mains will allow MGB and the Staff to monitor the appropriate level of replacements for these mains. The 5-5-3 criterion is one that was used by MGE's predecessors for many years and is a good initial criterion for this program.

Robinett, *Direct*, Schedule JAR-D-8 GO-2002-50 case file pg. 6. Such sentiments were echoed in the verified explanation of MGE employee Steve Holcomb that was attached to the initial application:

Pursuant to paragraph 12 of the foregoing Application, MGE proposes to replace a minimum of 5 miles of protected bare steel mains per year using a 5-5-3 program, whereby replacement will be triggered by the occurrence of 5 leaks within 500 feet within a 3-year period. These replacement criteria are, in my opinion based on my experience, reasonable and will result in replacement of protected bare steel mains at the appropriate time.

Robinett, *Direct*, Schedule JAR-D-8 GO-2002-50 case file pg. 32. Between these two sources, we can clearly see that the cathodically protected steel main replacement

program that the Commission approved was dependent on the existence of leaks in Spire's system as both its justification and as an essential element to the requirement. Of course Spire has naturally supplied absolutely no evidence whatsoever to indicate that it is in compliance with this requirement.

There is absolutely nothing in the record to indicate how many instances of the 5-5-3 program trigger occurred to justify any of Spire's replacement of cathodically protected bare steel mains. In an attempt to rectify this, the OPC used the only data it had available to it to try and estimate the largest possible number of triggers for the program. Using the reports Spire had made to the Department of Transportation, the OPC determined that Spire has reported only 429 total corrosion related leaks for mains over the past three years. Robinett, *Direct*, pg. 3. If we give the company the greatest possible benefit of the doubt by assuming that every single one of these leaks was part of a 5-5-3 trigger and then calculate the maximum number of 5-5-3 triggers that could possibly have occurred, it still only results in less than 86 triggers of the 5-5-3 program. Robinett, *Direct*, pg. 3. Spire West has submitted more than 300 work orders for this ISRS application. Robinett, *Direct*, pg. 3. Consequently, Spire is obviously not replacing cathodically protected steel mains pursuant to the requirement set out in its Commission approved replacement program.

The next potential source of a requirement to replace cathodically protected bare steel mains is the requirement to "[i]dentify and implement measures to address risks[.]" in its DIMP found in 20 CSR 4240-40.030(17)(D)4. Hoferlin, *Direct*, pg. 8. There isn't much that needs to be said to show why this is not a requirement to

replace cathodically protected steel mains. Spire included Appendix D of its most recent DIMP in this case. Ex. 10 App. D-1. That Appendix is labeled: “Identification and Implementation of Measures to Address Risks” and so obviously relates back to the requirement to “Identify and implement measures to address risks[,]” found in 20 CSR 4240-40.030(17)(D)4. Ex. 10 App. D-1. Appendix D includes a description of the replacement programs that the company has adopted pursuant to this requirement. Ex. 10 App. D-1 pg. 6. The DIMP identifies a replacement program for **unprotected** steel main replacements but not one for cathodically **protected** steel main replacements. Ex. 10 App. D-1 pg. 7. Because Spire has not developed or included a replacement program to replace cathodically protected steel mains in its DIMP, the requirement for Spire to “Identify and implement measures to address risks[,]” in its DIMP found in 20 CSR 4240-40.030(17)(D)4 does not require the replacement of cathodically protected steel mains.

The only other sources of a potential requirement that merit any consideration are those related to ensuring the safety of Spire’s system found in 20 CSR 4240-40.030(13)(B) and RSMo. § 393.130. Again, little needs to be said to show how these do not provide a requirement to replace cathodically protected steel mains because Spire’s witness has already testified that its cathodically protected steel mains are safe:

Q. Is it safe to transport natural gas in a pipe like that? Sorry. And for the record, "like that," I am referring to pipe 1.

JUDGE DIPPELL: Thank you.

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

Tr. pg. 116 lns. 1 – 6. And:

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

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

Tr. pg. 177 lns. 5 – 10. Of course, it should be absolutely no surprise that Spire would claim its cathodically protected steel mains are safe because the alternative would mean that they are not providing safe and adequate service and have not been for many, many years. Remember that Spire wants this Commission to make a categorical finding regarding its steel mains. In other words, it wants to Commission to find that **all** steel mains (those it replaced and those it left in the ground) are ISRS eligible. However, if the Commission were to actually make a categorical finding that all of Spire's cathodically protected steel mains were "unsafe" then it would mean that Spire is currently operating with over 800 miles of unsafe pipe and hence could not possibly be supplying safe and adequate service or complying with the requirements of 20 CSR 4240-40.030(13)(A). Moreover, Spire has claimed that the majority of its steel mains developed the level of corrosion they currently possess **before** cathodic protection was applied (which means before the 1990s). So the Commission would not only be finding that Spire is not currently providing safe and adequate service, it would also necessarily be finding that Spire has not been

providing safe and adequate service since approximately the early 2000s. This would be a horribly illogical conclusion for the Commission to make.

With all the potential sources of a requirement to replace cathodically protected steel mains considered, it should now be obvious that Spire has no such requirement. Spire can still choose to replace cathodically protected steel mains, and that choice may very well be prudent, but Spire is by no means **required** to do so. This is a clear problem for Spire because it is the requirement to undertake the replacement that triggers ISRS eligibility. *In re Laclede Gas Co.*, 539 S.W.3d at 840. Understanding why the need for a requirement exists is an important part of understanding why Spire should not receive ISRS recovery for the replacement of its cathodically protected steel pipes.

It is well established law that “[s]ingle-issue ratemaking is generally prohibited in Missouri ‘because it might cause the [Commission] to allow [a] company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area.’” *State of Mo. ex rel. Pub. Counsel v. PSC of Mo.*, 397 S.W.3d 441, 448 (Mo. App. WD 2012) (quoting *State ex rel. Midwest Gas Users’ Ass’n v. Psc*, 976 S.W.2d 470, 480 (Mo. App. WD 1998)). Nonetheless, the legislature has provided the Commission with the authority to permit gas utilities to engage in a specific and discrete form of single-issue ratemaking through the ISRS. RSMo. §§ 393.1009 – 393.1015. But this act of legislative grace should not be mistaken for a blank check to permit a company like Spire to include whatever costs it likes. On the contrary, the ISRS was clearly intended only as a means of permitting

a gas utility to recover costs in order to offset the burdens placed on it by regulatory oversight. That is why the ISRS conditions eligibility on the existence of a requirement for the company to perform some act. It is a *quid pro quo* exchange: the company is forced to carry out certain improvements to its system and in return receives expedited recovery of its costs. But that is not what is occurring in this case.

Here Spire is not being required to replace the cathodically protected steel mains, it is doing so because it believes that to be a prudent investment. Such a decision by a utility may well be considered admirable, **but it does not trigger the *quid pro quo* exchange that is the ISRS.** More importantly though, Spire's ISRS application belies the fact that its ratepayer have already had to pay for the cathodic protection. It is entirely unreasonable for Spire to force its ratepayer to pay for the cathodic protection of steel mains before turning around and leaving those costs stranded by deciding to replace the now cathodically protected mains but still demand that ratepayer pay for the replacements **at an expedited rate.** It is just this last part that the OPC is concerned with. Was there a need to cathodically protect steel mains? Absolutely. Is it prudent to now replace those cathodically protected steel mains thereby stranding the cost of the cathodic protection? Potentially, but the OPC is certainly not going to argue that point here. If its decision was prudent, can Spire collect both the cost of cathodic protection and replacement? Yes, in a rate case, if it was prudent. Should Spire get to expedite its recovery of the replacements? No; emphatically no. Customers are already paying to fix the same problem **twice**; why

should the company be allowed to force its customers to pay even more (and even faster) for the second fix to the same problem?

Conclusion

The dual requirements imposed by the ISRS exist for a reason. Specifically, they exist to ensure that the ISRS is maintained for its original purpose: to be a method of allowing a gas company to recoup costs associated with the difficult task of spot-fixing problem areas. The ISRS was never meant to be means of recouping costs related to a full-blown, system-wide replacement program, no matter how prudent such an idea might be. *In re Laclede Gas Co.*, 539 S.W.3d at 840. That is why it does not make sense for the Commission to make categorical declarations that all pipes of a particular material type are “worn out or in deteriorated condition.” Instead the ISRS should be focused. It should ask where are the problem areas? What is the most urgent thing to fix? Allowing Spire to use the ISRS in this way dilutes and distorts its intended purpose. Spire gleefully declares that **everything** is a problem area and that **all** of the replacements are urgent and then proceeds to systematically supplant whole segments of its distribution system without any verification as to the condition of mains it is replacing. Moreover it takes this position despite having already charged its customers for cathodically protecting all the mains and with complete disdain for the requirement to track leak occurrences that is outlined in its own replacement program. This is not how a gas company should operate.

2: Replacement of Cast Iron Mains

The OPC's argument regarding the replacement of Cast Iron Mains is predominantly identical to the argument presented with regard to the replacement of cathodically protected steel mains with the omission, when necessary, of those parts that are inapplicable to cast iron. For the sake of brevity, therefore, the OPC will not repeat those arguments here except to say that, while the OPC is fully aware of the significant number of differences between the evidence regarding cast iron and cathodically protected steel mains, the OPC continues to maintain this position out of the necessity for intellectual honesty. There is no dispute that Spire's cast iron mains are much older than the cathodically protected steel mains. Ex. 45 pg. 16. There is no dispute that there has been a push to replace cast iron mains unlike cathodically protected steel mains. Hoeflerlin, *Direct*, CRH-3. And there is no dispute that Spire is under actual legal requirements to replace its cast iron mains. *see* 20 CSR 4240-40.030(15)(D). But still, it would be illogical and unwise for the Commission to attempt to make a categorical factual finding regarding the nature of a particular pipe material. Stated differently, there is no legal support for the conclusion that all cast iron mains are "worn out or in deteriorated condition" simply by virtue of the fact that they are made of cast iron. Instead, the Commission should look to evidence that identifies the specific rationale behind each of Spire's replacements, for example, by looking to see where leaks are occurring. By requiring Spire to provide an actual factual basis for each of its replacements, the company could avoid the otherwise difficult problem of justifying why it has chosen **not** to prioritize cast iron main replacements in Spire West.

The evidence in the record suggests that Spire West is not prioritizing the replacement of cast iron mains (which they are required to replace) over the replacement of cathodically protected steel mains (for which there is no requirement to replace). As the OPC's expert witness Mr. Robinett explained in his pre-filed direct testimony:

When I examined the annual reports that Spire West has provided to the United States Department of Transportation, I noticed that between the 2015 and 2016 reports, Spire had replaced 19.09 miles of cathodically protected steel mains and 4.62 miles of cast iron mains. This meant that 80.51 % of the mains replaced in the west between 2015 and 2016 were cathodically protected steel mains and not cast iron mains. I similarly found 85.09% of the mains replaced between 2016 and 2017 and 83.30% replaced between 2017 and 2018 were cathodically protected steel and not cast iron mains. Given these findings, I must conclude that Spire is not prioritizing cast iron main replacements in the west, despite these pipes being much older.

Robinett, *Direct*, pg. 15 – 16. If Spire had been replacing pipes based on leak incidents, then there might be a rational explanation for its behavior in the west. Such as it is, though, Spire has presented no evidence to show why it replaces one type of pipe over the other and hence cannot explain why it has spent so much more replacing the newer and more resilient steel instead of the older and thereby more likely to be actually unsafe cast iron. Again, if Spire would just present evidence tied to actual pipe replacements and not sweeping generalizations about its infrastructure, this could probably be avoided.

3: Replacement of Plastic Mains and Services

The OPC's position on this issue remains unchanged from the last Spire ISRS case. The Western District made it clear that Spire cannot recover the cost to replace plastic components through the ISRS. *In re Laclede Gas Co.*, 539 S.W.3d at 841 (“We reverse the Commission's Report and Order as it relates to the inclusion of the replacement costs of the plastic components in the ISRS rate schedules”). Spire's whole case now turns on attempting to prove that there was no “cost” to replace plastic. This is wrong.

To see why there must necessarily have been a cost incurred by the company to replace plastic components, just consider this straightforward deductive argument:

- (1) Spire installed new pipes to replace existing plastic components
- (2) Spire incurred a cost when it installed new pipes

- (3) Therefore, Spire incurred a cost to replace existing plastic components.

Again, this is deductive logic. If all premises are true, the terms are clear, and the rules of deductive logic are followed, then the conclusion reached is necessarily true. So which of these two premises does Spire dispute? There is no dispute that Spire replaced existing plastic components. Robinett, *Direct*, pgs. 16 – 17. There is no dispute that installing new pipes cost money (which is actually the entire basis for this ISRS). Robinett, *Direct*, pg. 17. So Spire must have incurred a cost to replace existing plastic components.

Spire continues to try and dance around this point by arguing that it cost them less to have replaced plastic components than the costs the company would have incurred to reuse the plastic. Spire argues that this meant replacement of plastic

created no “incremental cost.” The problem with Spire’s logic, though, is the question is not whether replacement of plastic was “incrementally” more or less expensive than any other method Spire could have employed. Instead, the question is simply and solely whether there was a cost to replace plastic **at all**. *In re Laclede Gas Co.*, 539 S.W.3d at 841 (Note that the court stated “[w]e reverse the Commission's Report and Order as it relates to the inclusion of **the replacement costs** of the plastic components in the ISRS rate schedules” and made absolutely no mention of “incremental costs” or anything similar. (emphasis added)). And, as already stated, Spire must have incurred **some** cost to replace existing plastic components because it installed new pipes to replace the existing plastic ones and these new pipes cost money. Robinett, *Direct*, pgs. 16 – 17.

Further, the whole “no incremental” cost argument is completely misleading. Spire’s argument is basically premised on the idea that the company **could** have spent **more** money than it actually did in order to “reuse” its existing plastic components, which the company presumably assumes would then all be ISRS eligible. Spire must therefore believe that if it can prove that it could have spent **more** money to be ISRS eligible, any instance where is spent less money must be ISRS eligible by default. But this analysis is flawed. To begin with, the OPC would not agree that all the costs incurred in an attempt to “reuse” existing plastic components would be ISRS eligible.¹⁷ More importantly, though, Spire overlooks the fact that such a reuse of

¹⁷ The reuse of existing plastic would necessarily involve the addition of new pipes to tie the new line into the exiting plastic lines. This new plastic would not be a replacement for anything and thus fall outside of the definition of ISRS eligible “gas utility plant projects.” RSMo. § 393.1009(5).

existing plastic would necessarily be imprudent under their own analysis. There is no legal justification for saying that, because Spire could have acted in an imprudent but potentially ISRS eligible manner, the company's prudent decision was therefore ISRS eligible. This is because prudence is not part of the ISRS evaluation. *In re Laclede Gas Co.*, 539 S.W.3d at 840. If it truly cost less to replace plastic rather than reuse it, then Spire's decision to incur a cost to replace plastic may well have been prudent, but that fact does not itself mean the costs incurred to replace the plastic was ISRS eligible.

Spire cannot prove that it did not incur a cost when it replaced existing plastic components simply because it cost the company less money than if they had attempted to reuse the plastic components. Does eating fast food cost less than going to a fancy steak-house? Yes. Does that mean eating fast food is free? No, of course not. The exact same holds true for Spire. Replacing plastic components might have been less costly than reusing plastic components, but that does not make the replacement of plastic free. This Commission already noted as much in the last ISRS case:

Spire Missouri's cost studies may show that it cost less to replace the plastic components than it cost to reuse them; however, nothing in Spire Missouri's cost studies or other evidence proves that the plastic components being replaced were costs that could be recovered under ISRS.

GO-2019-0115 & GO-2019-0116, *Report and Order on Rehearing*, pg. 45. The Commission needs to simply follow the legal logic of its last decision.

4: Overhead Costs that Bear no Definite Relation to Construction Costs

The OPC's argument on this point is exceedingly straightforward. The OPC is arguing that Spire has included costs in its ISRS application that are not eligible for recovery under the ISRS statutes (RSMo. §§ 393.1009 – 393.1015). Because these sections do not specifically address what overhead costs are ISRS eligible, the Commission should default to the requirements set out in the gas Uniform System of Accounts ("USoA"), which is applicable to Spire Missouri under Commission rule 20 CSR 4240-40.040. Schallenberg, *Direct*, pg. 6. Section 4 of the gas USoA, sub part B states (with respect to overhead costs) that:

As far as practicable, the determination of pay roll charges includible in construction overheads shall be based on time card distributions thereof. Where this procedure is impractical, special studies shall be made periodically of the time of supervisory employees devoted to construction activities to the end that only such overhead costs as have a definite relation to construction shall be capitalized. The addition to direct construction costs of arbitrary percentages or amounts to cover assumed overhead costs is not permitted.

Schallenberg, *Direct*, pg. 5. Spire has included for recovery in its ISRS application overheads that do not bear a definite relationship to construction and have instead been assigned using arbitrary or "general" allocators. Schallenberg, *Direct*, pgs. 8 – 9. These overhead costs are: Director Fees, Administrative & General Salaries, Injuries and Damages, General Office Supplies, and Miscellaneous Administrative & General expense. Schallenberg, *Direct*, pg. 9. Because these "overhead costs [are] charged to ISRS construction projects on a general basis . . . [they] do not conform to the requirements of the USOA." Schallenberg, *Direct*, pg. 9. To permit these overhead

costs to be recovered through the ISRS would thus violate Commission rules and these costs are therefore not ISRS eligible.

Despite the exceedingly simple nature of the OPC's argument, an unfortunate wrinkle was added during the evidentiary hearing. Spire's witness attempted to walk back answers that Spire had previously given to the OPC in response to certain data requests. To be clear, the OPC directly asked Spire to identify, "[f]or each ISRS overhead component listed in the book and tax matrices," the "**precise relationship to ISRS constructions and the specific basis used to charge this cost to ISRS projects.**" Schallenberg, *Direct*, Schedule RES-D-4 pgs. 4 – 5. Spire responded to this request by stating that the overhead costs outlined above were allocated to construction using **general rates**. Schallenberg, *Direct*, Schedule RES-D-4 pgs. 4 – 5. But then, during the evidentiary hearing, Spire sought to change its answer claiming that these general allocators were an "intermediate step" and that further allocations occurred. Tr. pg. 203 ln. 21 – pg. 204 ln. 10. First, the OPC notes that this is not acceptable behavior from any party appearing before the Commission. Second, and more importantly, this last minute effort to re-write data request responses should not be enough for Spire to meet its evidentiary burden to show the ISRS eligibility of these overhead costs, as Spire itself did not provide any accounting policies, procedures, manuals, or audits to show that all its generally allocated overheads have a definite relationship to the ISRS projects being charged.¹⁸

¹⁸ The Commission Staff also filed a report supporting Spire Missouri's inclusion of overheads charged by general allocation to ISRS projects. However, an examination of their report shows that the Staff only examined overheads charged on the basis of labor. Overheads charged to ISRS projects based on

Spire has the burden of proof to show that its overhead costs are ISRS eligible. *Clapper v. Lakin*, 123 S.W.2d 27, 33 (Mo. 1938); RSMo. § 393.150.2. The evidence presented by the OPC shows that Spire has included costs that are not permissible under the USoA. Schallenberg, *Direct*, pgs. 8 – 9. These costs show the Commission that this filing included non-ISRS eligible costs and should be rejected.

5: Recovery of Costs Denied in Past ISRS Cases

This exact same issue was raised in the last ISRS proceeding Spire brought before this Commission. GO-2019-0115 & GO-2019-0116, *Report and Order on Rehearing*, pg. 16. In that case, the Commission's Staff filed a motion to dismiss Spire's request to recover costs sought in past ISRS cases on the basis that the Commission lacked jurisdiction to hear those arguments. GO-2019-0115 & GO-2019-0116, *Report and Order on Rehearing*, pg. 16. The Commission agreed stating in its *Report and Order on Rehearing* that:

The settled case law is that the Commission loses jurisdiction to the Court once an appeal has been filed and the Commission may not modify or alter its order that is being appealed and it may not issue a new order. The Commission maintains jurisdiction to implement its orders that are appealed and the Commission maintains jurisdiction to hear new cases on similar issues or new cases involving the same costs or revenues, such as in a rate case. Even though Spire Missouri has presented new evidence with regard to the Old ISRS Request, it is still asking the Commission to rehear the evidence from the prior case and to make a

the labor charged to the ISRS projects are not being challenged by OPC. It is the overheads charged to the ISRS projects based on general allocators that are the issue in this case and these are not addressed in the Staff report. Finally the recommendation to forego a decision in this case as to the eligibility of generally allocated overheads and instead postpone that decision until the next rate case is inappropriate because the statute requires the Commission to find that all the costs in this case are compliant before approving the requested ISRS modifications.

new order based on those costs that the Commission has already determined to be ineligible for ISRS recovery.

GO-2019-0115 & GO-2019-0116, *Report and Order on Rehearing*, pg. 22. There has been no material change in the law since the Commission issued this order. Therefore, the Commission should adhere to its own prior legal determination and deny Spire the recovery of costs that were previously denied in past ISRS cases which are now on appeal before the Western District Court of Appeals.

Issue C. How should income taxes be calculated for purposes of developing the ISRS revenue requirement in these cases?

The OPC offers no position as to this issue.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission accept this *Brief* and rule in the OPC's favor as to all issues presented.

Respectfully submitted,
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CERTIFICATE OF SERVICE

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

/s/ John Clizer