CIVIL PROCEDURE FORM NO. 8-A(2)

IN THE _____ JUDICIAL CIRCUIT, _____ COUNTY, MISSOURI

Judge or Division:	**Circuit Court Case Number:** GO-2017-0201 and GO-2017-0202		
Plaintiff/Petitioner: The Office of the Public Counsel	Appellate Number:	☐ Filing as an Indigent	
	Date of Judgment/Decree/Order: (ATTACH A COPY) Issued: September 20, 2018 Effective: October 1, 2018	Court Reporter:	
vs.	Date Post Trial Motion Filed: September 29, 2018	☐ Sound Recording Equipment	
Defendant/Respondent: The Missouri Public Service Commission	Date Ruled Upon: October 17, 2018	The Record on Appeal will consist of: ____ Legal File only or __X__ Legal File and Transcript	

FILED
OCT 17 2018
Missouri Public Service Commission
DS 1:09 pm
(Date File Stamp)

Notice of Appeal to Missouri Court of Appeals - Civil

District: ☒ Western ☐ Eastern ☐ Southern

Notice is given that The Office of the Public Counsel appeals from the judgment/decree/order entered in this action on September 20, 2018 (date).

Appellant's Name (If multiple, list all or attach additional pages) Marc Poston, Acting Division Director – Office of the Public Counsel	Respondent's Name (If multiple, list all or attach additional pages) Ryan A. Silvey, Chairman – Missouri Public Service Commission
Address 200 Madison Street, Suite 650 PO Box 2230 Jefferson City, MO 65102	Address 200 Madison Street PO Box 360 Jefferson City, MO 65102
Appellant's Attorney/Bar Number (If multiple, list all or attach additional pages) Marc Poston, Mo. Bar # 45722	Respondent's Attorney/Bar Number (If multiple, list all or attach additional pages) Shelley Brueggemann, Mo. Bar # 52173
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Brief Description of Case (May be completed on a separate page)
Application of Laclede Gas Company, Inc. (n/k/a Spire Missouri, Inc.) to Change its Infrastructure System Replacement Surcharge in its Missouri Gas Energy and Laclede Gas Service Territories.

Issues Expected To Be Raised On Appeal (May be completed on a separate page. Appellant is not bound by this list.)
The Public Service Commission's misapplication of the law and the record in characterizing the Office of the Public Counsel's requested relief; the Public Service Commission's failure to address all of the issues that have been raised; and the Public Service Commission's misapplication of the law in determining that the Commission is incapable of refunding the revenue the utility improperly collected from its customers.

Signature of Attorney or Appellant	Date 10/17/18

Certificate of Service on Persons other than Registered Users of the Missouri eFiling System

I certify that on October 17, 2018 (date), a copy of the foregoing was sent to the following by facsimile, hand-delivery, electronic mail or U.S. mail postage prepaid to their last known addresses.

The Missouri Public Service Commission

Appellant or Attorney for Appellant

Directions to Clerk

Transmit a copy of the notice of appeal and all attached documents to the clerk of the Court of Appeals and to any person other than registered users of the eFiling system in a manner prescribed by Rule 43.01. Clerk shall then fill in the memorandum below. See Rule 81.08(i). Forward the docket fee to the Department of Revenue as required by statute.

Memorandum of the Clerk

I have this day served a copy of this notice by ☐ regular mail ☐ registered mail ☐ certified mail ☐ facsimile transmission to each of the following persons at the address stated below. If served by facsimile, include the time and date of transmission and the telephone number to which the document was transmitted.

I have transmitted a copy of the notice of appeal to the clerk of the Court of Appeals, Western District.

☒ DS Docket fee in the amount of $70.00 was received by this clerk on 10/17/2018 (date) which will be disbursed as required by statute.

☐ No docket fee was received because:

☒ a docket fee is not required by law under Rule 100.02(b) (cite specific statute or other authority).

☐ a motion to prosecute the appeal in forma pauperis was received on _____ (date) and was granted on _____(date).

10/17/2018
Date

Debbie Stock
Clerk

Additional Parties and Attorneys

List every party involved in the case not listed on page 1, indicate the position of the party in the circuit court (e.g. plaintiff, defendant, intervenor) and in the Court of Appeals (e.g. appellant or respondent) and the name of the attorney of record, if any, for each party. Attach additional pages to identify all parties and attorneys if necessary.

Party Name	Attorney Name
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LIST OF PARTIES TO THE COMMISSION PROCEEDINGS

(As required by § 386.510 RSMo)

The following parties participated in Public Service Commission Case Numbers GO-2017-0201 and GO-2017-0202.

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STATEMENT OF THE ISSUES

(As required by § 386.510 RSMo)

Appellant Public Counsel will raise the following issue on appeal:

The Office of the Public Counsel challenges the lawfulness and reasonableness of the Public Service Commission's September 20, 2018 *Order Denying Request to Modify Commission Order* for failing to require Laclede Gas Company, Inc.'s (k/n/a Spire Missouri Inc.) to return to customers certain costs improperly recovered through the Infrastructure System Replacement Surcharges of its two operating units (Missouri Gas Energy and Laclede Gas Service).

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 20th day of September, 2018.

In the Matter of the Application of Laclede Gas Company to Change its Infrastructure System Replacement Surcharge in its Missouri Gas Energy Service Territory	File No. GO-2017-0201
In the Matter of the Application of Laclede Gas Company to Change its Infrastructure System Replacement Surcharge in its Laclede Gas Service Territory	File No. GO-2017-0202

ORDER DENYING REQUEST TO MODIFY COMMISSION ORDER

Issue Date: September 20, 2018 Effective Date: October 1, 2018

Procedural history

On September 30, 2016, Laclede Gas Company filed applications and petitions with the Missouri Public Service Commission ("Commission") to change its Infrastructure System Replacement Surcharge ("ISRS") in its Missouri Gas Energy and Laclede Gas Service territories (collectively, "Spire Missouri")[1]. Spire Missouri requested an adjustment to its ISRS rate schedule to recover costs incurred in connection with infrastructure system replacements made during the period March 1, 2016 through October 31, 2016. These two cases were opened by the Commission as File Nos. GO-2016-0332 and GO-2016-0333 (collectively, "2016 cases"). The Office of the Public Counsel ("OPC") filed a motion

[1] The company subsequently underwent a corporate reorganization and changed its name to Spire Missouri, Inc. with East and West service territories.

requesting that the Commission reject the petition or schedule an evidentiary hearing. The Commission held an evidentiary hearing on January 3, 2017.

On January 18, 2017, the Commission issued a Report and Order in the 2016 cases permitting Spire Missouri to file new tariffs to recover certain ISRS revenues, including plastic pipe replacements. OPC appealed the 2016 Report and Order to the Missouri Western District Court of Appeals (WD80544), challenging the Commission's decision that certain plastic pipe replacements were eligible ISRS costs.

On February 3, 2017, Spire Missouri filed new ISRS applications for its East and West service territories requesting to change its ISRS to recover costs in connection with eligible infrastructure system replacements made during the period November 1, 2016 through February 28, 2017. These two cases were opened by the Commission as File Nos. GO-2017-0201 and GO-2017-0202 (collectively, "2017 cases"). On April 26, 2017, the Commission issued an *Order Approving Unanimous Stipulation and Agreement*, in which all parties agreed that the Commission should approve the rates Staff had recommended in the 2017 cases and put aside the dispute about plastic pipe replacements pending the outcome of OPC's appeal in the 2016 cases. That stipulation and agreement stated, in part:

> If the courts make a final, non-appealable decision reversing the Commission's January 18 Order on the grounds that the Commission's decision on the Plastics Issue is unlawful or unreasonable, then the court's final decision shall be applied to the Current Cases *[2017 cases]* in the same manner as it is applied to the Prior Cases *[2016 cases]*, as applicable. In such event, upon remand, any one or more Signatories may request that the Commission determine the amount of refund, if any, that shall be made in both the Prior Cases and the Current Cases as a result of such reversal. LAC, MGE *[Spire Missouri]* and Staff agree not to challenge OPC's right to make such request, and LAC and MGE *[Spire Missouri]* further agree to produce work order or other information in their possession necessary to determine the amount of plastic that was replaced in the Prior Cases and the Current Cases. All Signatories reserve

their rights to make any argument they wish regarding the methodology, propriety, and quantification of such refund, if any.[2]

On November 21, 2017, the Missouri Western District Court of Appeals issued an opinion in the 2016 cases (WD80544) that held that the recovery of costs for replacement of plastic components that are not worn out or in a deteriorated condition is not available under ISRS. The Court reversed the Commission's 2016 Report and Order "as it relates to the inclusion of the replacement costs of the plastic components in the ISRS rate schedules, and the case is remanded for further proceedings consistent with this opinion".[3] On March 7, 2018, the Court of Appeals issued the mandate in the appeal after the Supreme Court of Missouri denied transfer.

On March 30, 2018, OPC filed in both the 2016 and 2017 cases a pleading titled *Public Counsel's Recommendation* referencing the Court of Appeals opinion in the 2016 cases and requesting changes to the ISRS. Specifically, OPC requested that the Commission determine which ISRS costs from Spire Missouri's 2016 and 2017 cases were ineligible for ISRS cost recovery and apply any over-collection to the rate base set in Spire Missouri's general rate cases, GR-2017-0215 and GR-2017-0216 ("rate cases"), as an offset in future ISRS filings pursuant to Section 393.1015.8, RSMo. On the date that OPC's pleading was filed, the Amended Report and Order in the rate cases had already become effective, although compliance tariffs had not yet been approved.[4]

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[2] Unanimous Stipulation and Agreement, File Nos. GO-2017-0201 and GO-2017-0202, p. 3.

[3] *Matter of Application of Laclede Gas Co. to Change Its Infrastructure Sys. Replacement Surcharge in Its Missouri Gas Energy Serv. Territory v. Office of Pub. Counsel*, 539 S.W.3d 835, 841 (Mo. App. 2017), *reh'g and/or transfer denied* (Dec. 14, 2017), *transfer denied* (Mar. 6, 2018).

[4] Amended Report and Order, *In the Matter of Laclede Gas Company's Request to Increase Its Revenues for Gas Service,* GR-2017-0215, and *In the Matter of Laclede Gas Company d/b/a Missouri Gas Energy's Request to Increase Its Revenues for Gas Service,* GR-2017-0216, March 7, 2018; Order Approving Tariff in Compliance with Commission Order, *In the Matter of Laclede Gas Company's Request to Increase Its Revenues for Gas Service,* GR-2017-0215, and *In the Matter of Laclede Gas Company d/b/a Missouri Gas Energy's Request to Increase Its Revenues for Gas Service,* GR-2017-0216, issued April 4, 2018.

In compliance with the Western District Court of Appeals' opinion remanding the 2016 cases back to the Commission for further proceedings, the Commission conducted oral arguments and an evidentiary hearing to receive additional evidence for the 2016, 2017, and 2018 ISRS cases.[5] In total, the Commission admitted the testimony of ten witnesses and 29 exhibits into evidence and took official notice of several documents. Post-hearing briefs were filed on September 6, 2018, and the case was deemed submitted for the Commission's decision on that date when the Commission closed the record.[6]

Discussion

Although the Commission conducted an evidentiary hearing in these cases, no law requires one.[7] Therefore, this action is not a contested case,[8] and the Commission need not separately state its findings of fact.[9]

The Commission's Order Approving Unanimous Stipulation and Agreement, issued in these cases on April 26, 2017, was a final order and concluded these proceedings except for subsequent compliance tariff filings. OPC's subsequent pleading titled *Public Counsel's Recommendation* on March 30, 2018, ultimately requested (1) a determination to modify the ISRS amounts previously approved in the order approving the Unanimous Stipulation and Agreement in light of the Appeals Court decision, and (2) apply or offset the over-collected ISRS revenues of $4,905,862.58 to the rate base from the rate cases pursuant to Section 393.1015.8, RSMo.

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[5] Transcript ("Tr."), Volume 3.
[6] "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).
[7] Section 393.1015.2(3), RSMo, provides that "The commission may hold a hearing on the petition and any associated rate schedules..." (emphasis added).
[8] Section 536.010(4), RSMo 2016, states that "Contested case" means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.
[9] *State ex rel. Public Counsel v. Pub. Serv. Comm'n*, 210 S.W.3d 344, 355 (Mo. App. 2006).

The first part of the requested relief would require the Commission to modify the final order approving the Unanimous Stipulation and Agreement and setting ISRS revenues in these ISRS cases. The second portion of the requested relief, however, would ultimately require the Commission to modify the Commission's Amended Report and Order from the rate cases, currently under appeal. In general, the Commission has the legal authority to modify or vacate its orders.[10] Also, the Commission is entitled to interpret its own orders and to ascribe to them a proper meaning.[11] Section 393.1015.8, RSMo, permits the Commission to disallow in a general rate case the recovery of costs for eligible infrastructure system replacements previously included in an ISRS and offset a future ISRS to account for those over-collections. Those rate cases have been decided and are currently under appeal in case no. SD35485. The Commission is without authority to issue any substantive orders in those cases while on appeal.[12] Therefore, it would be improper for the Commission to attempt to modify the final order of those rate cases, especially in the context of a separate ISRS case, so the Commission will deny OPC's request to modify the Amended Report and Order in the rate cases.

Since OPC filed its request in these ISRS cases, the Commission will consider OPC's pleading as a request to modify the final Commission order approving the Unanimous Stipulation and Agreement issued on April 26, 2017, in these ISRS cases. The stipulation and agreement did provide for the situation that eventually occurred, where the Court of Appeals reversed the Commission's 2016 Report and Order on the grounds that

[10] Section 386.490.2, RSMo, "Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission, unless such order be unauthorized by this law or any other law or be in violation of a provision of the constitution of the state or of the United States." (emphasis added)

[11] *State ex rel. Beaufort Transfer Co. v. Pub. Serv. Com'n of Missouri,* 610 S.W.2d 96, 100 (Mo. App.1980).

the Commission's decision to allow ISRS cost recovery for plastic pipe replacements was unlawful or unreasonable. In that situation, the signatories agreed that they may request that the Commission determine the amount of refund, if any, that shall be made in both the 2016 and 2017 cases as a result of such reversal, and that Spire Missouri and Staff agreed not to challenge OPC's right to make such request.

The signatories did not agree on a specific mechanism to effectuate such refunds. Even if they had so agreed, however, the Commission cannot order a refund of ISRS costs without statutory authority. In the remand of the 2016 ISRS cases, which was conducted concurrently with the hearing in these cases, the Commission found Spire Missouri's plastic pipe replacements to be ineligible, but it also concluded that it did not have statutory authority to refund those ineligible costs to customers.[13] The Commission found that neither the ISRS statute, Section 393.1015, in light of the intervening general rate case, nor the general statute regarding temporary rate adjustments following appeal of a Commission order, Section 386.520, provide any legal authority for the Commission to order refunds in those 2016 cases to return ineligible costs.[14]

The same reasoning prevents the refund of ineligible ISRS costs in the 2017 cases. Even if the Commission now determines that some of those prior costs in the 2017 cases were improperly classified as ISRS-eligible, the Commission cannot correct those previous tariffs retroactively by applying a refund prospectively in future ISRS cases.[15] First, there

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[12] *State ex rel. Missouri Cable Telecommunications Ass'n v. Missouri Pub. Serv. Com'n*, 929 S.W.2d 768 (Mo. App. 1996).

[13] Report and Order on Remand, *In the Matter of the Application of Laclede Gas Company to Change its Infrastructure System Replacement Surcharge in its Missouri Gas Energy Service Territory*, File No. GO-2016-0332 and *In the Matter of the Application of Laclede Gas Company to Change its Infrastructure System Replacement Surcharge in its Laclede Gas Service Territory*, File No. GO-2016-0333, issued September 20, 2018. The Commission takes official notice of this Report and Order on Remand.

[14] *Id.*

[15] *Matter of Missouri-Am. Water Co.*, 516 S.W.3d 823, 828 (Mo. 2017).

was not an appellate decision of the 2017 cases to allow the possibility of Section 386.520 rate adjustment mechanisms. Second, the ISRS statutes do not allow superseded ISRS tariffs to be corrected retroactively after a general rate case includes those infrastructure costs in base rates.[16] Therefore, since there is no legal remedy, the Commission concludes that OPC's request to modify the final order approving the stipulation and agreement is moot and will be denied.

Since the Commission is issuing orders in related Spire Missouri ISRS cases concurrently with these cases, the Commission will, consistent with those other orders, make this order effective on October 1, 2018.

THE COMMISSION ORDERS THAT:

1. The requests submitted in the Office of the Public Counsel's pleading titled *Public Counsel's Recommendation*, filed on March 30, 2018, are denied.

2. This order shall become effective on October 1, 2018.

BY THE COMMISSION

Morris L. Woodruff
Secretary

Silvey, Chm., Kenney, Hall, Rupp, and Coleman, CC., concur.

Bushmann, Senior Regulatory Law Judge

[16] *Id.*

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Laclede Gas Company to Change its Infrastructure System Replacement Surcharge in its Missouri Gas Energy Service Territory	)))))	File No. GO-2017-0201
In the Matter of the Application of Laclede Gas Company to Change its Infrastructure System Replacement Surcharge in its Laclede Gas Service Territory	)))))	File No. GO-2017-0202

APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel ("OPC") and for its *Application for Rehearing* of the Public Service Commission's ("Commission") September 20, 2018 *Order Denying Request to Modify Commission Order* ("Order") in the above styled cases, states as follows:

Pursuant to RSMo. section 386.500,[1] the OPC seeks rehearing of the Commission's Order because the Order is unlawful, unjust, and/or unreasonable. Specifically, the Order is unlawful, unjust, and/or unreasonable in that it misapplies the law and the record by mischaracterizing the OPC's request, fails to address all of the issues that have been raised, and misapplies the law by determining that the Commission is incapable of refunding the revenue Spire improperly collected from its customers.

I. The Commission erred in characterizing the OPC's request.

The Order states that the Commission is considering the "OPC's pleading as a request to modify the final Commission order approving the Unanimous Stipulation and Agreement

[1] All references are to the Revised Statutes of Missouri (2016) unless otherwise noted.

issued on April 26, 2017, in these ISRS cases."[2] This is an incorrect characterization of the OPC's pleadings. At no point did the OPC file a motion requesting to "modify" the *Unanimous Stipulation and Agreement* issued on April 26, 2017. In fact, neither the OPC's *Recommendation*, its *Initial Brief*, nor its second *Brief* following the evidentiary hearing even uses the word "modify." What the OPC is requesting (and what it has always been requesting) is the exercise of its rights under the terms of the *Unanimous Stipulation and Agreement.*

Specifically, the OPC points to the language of the *Unanimous Stipulation and Agreement* which states:

> If the courts make a final, non-appealable decision reversing the Commission's January 18 Order on the grounds that the Commission's decision on the Plastics Issue is unlawful or unreasonable, then the court's final decision ***shall*** be applied to the Current Cases in the same manner as it is applied to the Prior Cases, as applicable. In such event, upon remand, any one or more Signatories may request that the Commission determine the amount of refund, if any, that ***shall*** be made in both the Prior Cases and the Current Cases as a result of such reversal.

(emphasis added).[3]

The OPC does not seek to change or "modify" the language of the *Unanimous Stipulation and Agreement* in any way and instead seeks to exercise its right, as a signatory, to have the amount of money that Spire improperly collected determined and refunded to customers. The Commission's characterization of the OPC's pleadings as a request to modify the *Unanimous Stipulation and Agreement* is therefore unlawful, unjust, and/or unreasonable.

II. The Commission erred by failing to address all of the issues that have been raised.

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[2] EFIS, GO-2017-0201 & GO-2017-0202, Order Denying Request to Modify Commission Order, pg. 5.

[3] EFIS, GO-2017-0201 & GO-2017-0202, Unanimous Stipulation and Agreement, pg. 3.

In its March 30 *Recommendation*, which the OPC filed immediately following the Western District's reversal of the Commission's decision in the 2016 cases, the OPC requested that the refunds to be made under the terms of the *Unanimous Stipulation and Agreement* be refunded to Spire's customers as part of Spire's then ongoing general rate case.[4] After hearing input from the other parties, the Commission determined not to follow the OPC's recommendation and instead held oral arguments on August 9, 2018, to determine how to proceed.[5]

Pursuant to these oral arguments, the OPC filed a brief wherein it requested that the Commission order the money Spire improperly collected returned to customers as a line item on customer's bills.[6] These oral arguments were followed by an evidentiary hearing held on August 27, 2018, after which the OPC filed yet another brief. This second brief again requested that the money Spire over-collected be refunded as a line item on customer's bills through the temporary rate adjustment mechanism found in section 386.520.2.[7]

This second brief was the last filing the OPC made prior to the issuance of the Commission's September 20, 2018, Order and hence represents the current nature of the OPC's request regarding the exercise of its rights under the *Unanimous Stipulation and Agreement*. Despite this, the Commission's Order does not address the requests made in either the OPC's *Initial brief* or its *Brief* following the evidentiary hearing. Instead it considers only the request made in the OPC's original *Recommendation* and concludes that

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[4] EFIS, GO-2017-0201 & GO-2017-0202, Public Counsel's Recommendation, pg. 4.

[5] *See generally*, EFIS, GO-2017-0201 & GO-2017-0202, Tr. Vol. 2.

[6] EFIS, GO-2017-0201 & GO-2017-0202, Initial Brief of the Office of the Public Counsel, pg. 8.

[7] EFIS, GO-2017-0201 & GO-2017-0202, Brief of the Office of the Public Counsel, pg. 24-25.

because it cannot alter its order in Spire's last general rate case (which is currently on appeal), it cannot provide the OPC's requested relief.

The OPC has long since moved past requesting the Commission apply the required refund in Spire's last general rate case and the Commission should instead be addressing the OPC's request as outlined in its subsequent filings, which its current Order fails to do. As such, the Commission's Order fails to address all of the issues that have been raised and is thus unlawful, unjust, and/or unreasonable.

III. The Commission erred by determining that it is incapable of refunding the revenues Spire improperly collected.

Without citing to authority, the Order finds that the Commission cannot effectuate the refunds provided for in the *Unanimous Stipulation and Agreement* because it "cannot order a refund of ISRS costs without statutory authority."[8] That the Commission would even reach such a conclusion is truly perplexing given that the Commission ***independently*** found and concluded "that the stipulation and agreement is a reasonable resolution of the issues in this case and allow[s] for the best use of Commission and party resources" and that as a result, "the Unanimous Stipulation and Agreement should be approved[.]"[9] The current Order is thus a direct contradiction of the Commission's previous order issued in the same case by at least four of the same commissioners.[10] In effect, the Commission is stating that

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[8] EFIS, GO-2017-0201 & GO-2017-0202, Order Denying Request to Modify Commission Order, pg. 6.

[9] EFIS, GO-2017-0201 & GO-2017-0202, Order Approving Unanimous Stipulation and Agreement, pg. 3.

[10] Interestingly, the Commission's order approving the *Unanimous Stipulation and Agreement* explicitly states that "[t]he signatory parties are ordered to comply with the terms of the stipulation and agreement." EFIS, GO-2017-0201 & GO-2017-0202, Order Approving Unanimous Stipulation and Agreement, pg. 3. This makes the Order's decision to chastise the OPC for being foolish enough to request compliance all the more quizzical.

its previous order was, in actuality, unenforceable, and that it was necessary for the OPC to have requested a separate evidentiary hearing followed by a separate appeal for what amounts to the ***exact same case*** to achieve some redress for its claims.

It is unlawful, unjust, and/or unreasonable for the Commission to invalidate its prior order upon which all of the parties have relied and agreed to be bound. The Commission should therefore observe the provision of the prior order adopting the *Unanimous Stipulation and Agreement* by requiring Spire to adhere to the terms of that agreement. Of course, this does not settle the issue because part of the Commission's decision relies on the conclusions reached in its September 20, 2018 *Report and Order on Remand* in the 2016 cases ("2016 Order"), where it found that nothing in "Section 386.520, provide any legal authority for the Commission to order refunds in those 2016 cases to return ineligible costs."[11] Therefore, it is necessary for the OPC to also address the errors committed in the Commission's 2016 Order that led the Commission to incorrectly determine that it did not have statutory authority to issues refunds in the 2016 cases.

In its 2016 Order, the Commission concludes "that it does not have the statutory authority to order a refund of any ineligible costs for plastic pipe replacements from Spire Missouri's previous ISRS cases."[12] This conclusion is unlawful, unjust, and/or unreasonable because Section 386.520.2 provides the Commission with the statutory authority to order temporary rate adjustments so as to effectuate the refund of over-collections following the remand of a Commission's previous order.

Section 386.520.2(1) states:

> In the event a final and unappealable judicial decision determines that a commission order or decision unlawfully or unreasonably decided an issue or

[11] EFIS, GO-2017-0201 & GO-2017-0202, Order Denying Request to Modify Commission Order, pg. 6.

[12] EFIS, GO-2016-0332 & GO-2016-0333, Report and Order on Remand, pg. 16

> issues in a manner affecting rates, then the court shall instruct the commission to provide temporary rate adjustments and, if new rates and charges have not been approved by the commission before the judicial decision becomes final and unappealable, prospective rate adjustments. Such adjustments shall be calculated based on the record evidence in the proceeding under review and the information contained in the reconciliation and billing determinants provided by the commission under subsection 4 of section 386.420 and in accordance with the procedures set forth in subdivisions (2) to (5) of this subsection;

Section 386.520.2(2) further states:

> If the effect of the unlawful or unreasonable commission decision issued on or after July 1, 2011, was to increase the public utility's rates and charges in excess of what the public utility would have received had the commission not erred or to decrease the public utility's rates and charges in a lesser amount than would have occurred had the commission not erred, then the commission shall be instructed on remand to approve temporary rate adjustments designed to flow through to the public utility's then-existing customers the excess amounts that were collected by the utility plus interest at the higher of the prime bank lending rate minus two percentage points or zero. Such amounts shall be calculated for the period commencing with the date the rate increase or decrease took effect until the earlier of the date when new rates and charges consistent with the court's opinion became effective or when new rates or charges otherwise approved by the commission as a result of a general rate case filing or complaint became effective. Such amounts shall then be reflected as a rate adjustment over a like period of time. The commission shall issue its order on remand within sixty days unless the commission determines that additional time is necessary to properly calculate the temporary or any prospective rate adjustment, in which case the commission shall issue its order within one hundred * twenty days;

In the 2016 cases, the Western District reversed the Commission's prior decision "as it related to the inclusion of the replacement cost of the plastic components in the ISRS rate schedules" and remanded the case "for further proceedings consistent with this opinion."[13] The 2016 decision, thus, falls squarely within the criteria of section 386.520.2(1), which applies when "a final and unappealable judicial decision determines that a commission order or decision unlawfully or unreasonably decided an issue or issues in a manner affecting

[13] *Public Serv. Comm'n v. Office of Public Counsel (In re Laclede Gas Co.)*, 539 S.W.3d 835, 841 (Mo. App. W.D. 2017).

rates[.]"[14] Section 386.520.2(2) also clearly applies because Spire was collecting money in excess of what was actually authorized under the ISRS statutes, so its rates and charges were "in excess of what the public utility would have received had the [C]ommission not erred." Therefore, section 386.520.2 not only grants the Commission the authority to issue a refund to Spire's customers in the form of temporary rate adjustments, it also mandates the Commission do so.

Despite the clear application of section 386.520, the 2016 Order nevertheless finds that because "the opinion of the Court of Appeals did not include [explicit instruction to approve temporary rate adjustments], even though OPC had requested such an instruction three times in its briefs before the Court," the Court of Appeal's opinion does not grant the Commission authority to issues refunds.[15] This conclusion is plainly erroneous, as the statutorily mandated instruction required by section 386.520 is obviously implicit in the Appellate Court's remand of the case. Specifically, the Appellate Court's generally stated remand of the case was for "further proceedings ***consistent with this opinion.***"[16] This language clearly implies that the Commission was to comply with the statutory requirements of section 386.520, which were triggered by the issuance of the opinion.

For the Commission to conclude otherwise necessarily requires it to: (1) assume the court of appeals ordered a pointless remand of the case, (2) assume that the Court of appeals willfully and purposefully violated the law, and (3) ignore its own prior precedent which has

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[14] The decision of the Western District became final and unappealable following the Missouri Supreme Court's denial of transfer issued on March 6, 2018. *Laclede Gas Co. v. Office of Pub. Counsel*, No. SC96868, 2018 Mo. LEXIS 85, at *1 (Mar. 6, 2018). Further, the Western District's decision clearly affects rates as it explicitly ordered the reversal of the approved rate schedules as they applied to the inclusion of plastic components.

[15] EFIS, GO-2016-0332 & GO-2016-0333, Report and Order on Remand, pg. 16

[16] *In re Laclede Gas Co.*, 539 S.W.3d at 841.

already been found acceptable by the appellate courts. With regard to this first point, it should be immediately apparent that the Court of Appeals remanded the Commission's 2016 order with the expectation that doing so might actually effect the outcome of the case. After all, if the Court did ***not*** intend for its decision to have any possible practical effect on the present case, then it would simply have reversed the Commission's 2016 decision without ordering a remand for further proceedings. Yet the logic of the 2016 Order compels the opposite conclusion and assumes that the Western District remanded the case without any effective purpose thereby implying the Court was actively wasting judicial resources. The OPC obviously rejects such a determination and recommends the Commission should as well.

In a similar vein, the Commission should not assume that the Court of Appeals decided to willfully and purposefully violate the law in issuing its opinion, which is the only possible conclusion based on the 2016 Order. As the Commission itself points out, section 386.520 states that "the court ***shall*** instruct the commission to provide temporary rate adjustments" with the purpose of refunding to ratepayers the amount a utility over-collected, plus interest.[17] The Supreme Court has previously stated, "'[s]hall' means 'shall[,]'" and the term "unambiguously indicates a command or mandate."[18] The Supreme court has further stated that "[t]o suggest any other meaning is to ignore the plain language of the statute."[19] Therefore, the only legal conclusion that may be drawn is that section 386.520 "commanded" or "mandated" the Court to issue the necessary instructions. This, in turn, gives rise to only two possible interpretations of the Appellate Court's opinion in the 2016 cases: (a) the court adhered to its statutory mandate by implicitly instructing the Commission as required by

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[17] *See* EFIS, GO-2016-0332 & GO-2016-0333, Report and Order on Remand, pg. 16 (emphasis added).

[18] *Frye v. Levy*, 440 S.W.3d 405, 408 (Mo. Banc 2014).

[19] *Id.*

section 386.520 through its broad "consistent with this opinion language" or (b) the court ignored its statutory mandate thus violating the requirements of section 386.520.

Given these two options, the OPC obviously adopts the first interpretation, as it chooses to operate under the assumption that the Western District Court of Appeals followed the law in reaching its conclusion. The Commission's 2016 Order meanwhile assumes that the Court did not instruct the Commission to issue refunds and therefore necessarily adopts the second reading, *i.e.* that the Court of Appeal's violated the law. Moreover, the Commission correctly points out that the OPC brought the existence of section 386.520 to the Court's attention multiple times, therefore ensuring that the Court's failure to explicitly include instruction was not the product of an accident or mistake.[20] Thus, the Commission is clearly assuming no only that the Court of Appeals violated the law, but that it did so intentionally. The OPC again adamantly argues this Commission should not assume, as the 2016 Order does, that the Western District Court of Appeals purposefully chose not to follow a clear statutory mandate in issuing its Opinion. Instead, the OPC urges the Commission to adopt the OPC's position and conclude that the court did follow the law by implicitly instructing refunds through its broad "consistent with this opinion" language.

The OPC also notes that adopting its position would bring the 2016 Order into alignment with the Commission's prior precedent, which the 2016 Order currently ignores. Specifically, the OPC points to *AG Processing, Inc.* case, which arose from a complaint filed by an industrial steam customer against Kansas City Power and Light ("KCP&L").[21] The customer alleged imprudent management of the utility's fuel hedging program and the Commission initially agreed and ordered a refund of the net cost of operating the hedging

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[20] EFIS, GO-2016-0332 & GO-2016-0333, Report and Order on Remand, pg. 16.

[21] *AG Processing, Inc. v. KCP&L Greater Mo. Operations Co.*, 432 S.W.3d 226, 227 (Mo. App. W.D. 2014)

program.[22] On appeal, however, the Western District found the Commission had "erred by shifting the burden of proof to KCP&L and by ordering KCP&L to pay customer refunds because it failed to meet that burden." [23] The court accordingly "reversed the Commission's September 28, 2011 report and order and remanded the cause 'for further consideration under the appropriate burden of proof.'"[24]

Despite the opinion using this broad remand language, on remand the Commission nevertheless "found that it needed to make a temporary rate adjustment under Section 386.520.2(3)."[25] Specifically recognizing the applicability of the statute:

> [t]he Commission relied upon Section 386.520.2(3)'s provision that, if an unlawful or unreasonable decision of the Commission results in a decrease in the public utility's rates and charges in a greater amount than what would have occurred had the Commission not erred, the Commission shall be instructed on remand to approve temporary rate adjustments designed to allow the utility to recover from its customers the amounts it should have collected plus interest.[26]

This case thus demonstrates not only that the Commission has previously issued temporary rate adjustments under section 386.520 based on a remand that exclusively used broad "consistent with this opinion" language, but that the Court of Appeals has found such actions by the Commission reasonable.

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[22] *Id.*

[23] *Id.* at 228.

[24] *Id.* The quoted language is actually the last line of the analysis section. The conclusion reads as follows: "The Commission's Report and Order is reversed, and the cause is remanded for further consideration consistent with this opinion." *Ag Processing Inc. v. KCP&L Greater Mo. Operations Co.*, 385 S.W.3d 511, 516 (Mo. App. W.D. 2012). This language is almost identical to that used by the same court in the present case.

[25] *AG Processing, Inc.*, 432 S.W.3d at 228.

[26] *Id.*

Unfortunately, the 2016 Order ignores this prior precedent of both the Commission and the Court of Appeals without any explanation. The OPC steadfastly asserts that the Commission should not flippantly abandon its own precedent, but rather, should reach the same conclusion that it previously reached in *AG Processing*, which has already been tacitly accepted by the Court of Appeals.

Based on the forgoing reasons, the Commission should abandon the position taken in its 2016 Order that suggests it is incapable of refunding the revenue Spire improperly collected because it was not explicitly instructed to do so, which is clearly unlawful, unjust, and/or unreasonable.

The 2016 Order also makes reference to the Supreme Court's *Missouri-American Water Compan*y case, which it relies upon to determine that the Commission cannot retroactively correct previously issued tariffs that have been superseded by the subsequent tariffs issued during Spire's most recent general rate case when its ISRS costs were incorporated into base rates.[27] Based on the context of the segment of the 2016 Order in which this discussion is found, it is unclear the extent to which the Commission is relying on this proposition to its finding that it lacks the statutory authority to issue refunds under section 386.520. Nevertheless, the OPC will address this proposition out of an abundance of caution.

Neither the Commission's inability to retroactively correct previously issued and then superseded tariffs, the fact that Spire's ISRS costs were incorporated into base rates during Spire's subsequent general rate case, nor any other reasoning applied in the Supreme Court's *Missouri-American Water Compan*y case precludes the Commission from establishing

[27] EFIS, GO-2016-0332 & GO-2016-0333, Report and Order on Remand, pg. 14-15.; *see Mo. Pub. Serv. Comm'n v. Office of the Pub. Counsel (In re Mo.-Am. Water Co.)*, 516 S.W.3d 823 (Mo. banc 2017).

temporary rates under section 386.520 to effectuate a refund of the money the Commission has already found Spire improperly collected.

To begin with, the OPC is *not* requesting the modification of Spire's prior ISRS Tariffs. This is because modification of these tariffs is obviously unnecessary given the Court of Appeals struck down the Commission's order approving such Tariffs "as it relates to the inclusion of the replacement costs of the plastic components ***in the ISRS rate schedules***[.]"[28] Because the Court's opinion rendered the Commission's order approving Spire's ISRS tariffs invalid, the only thing that the OPC is requesting (and hence the only question before the Commission) is the refund of the money Spire improperly collected based on those invalid tariffs. Moreover, the Western District found Spire's tariffs invalid ***before*** the Commission approved new rates for Spire in GR-2017-0215 and GR-2017-0216. For the commission to find that it cannot provide refunds for money collected under invalid tariffs because it cannot modify the invalid tariffs is clearly unlawful, unjust, and/or unreasonable.

Equally unlawful, unjust, and/or unreasonable is the 2016 Order's reliance on the fact that the Spire ISRS was reset to zero during its next general rate case when ISRS costs were incorporated into rate base. This reset mechanism would only effect the collection of revenue moving forward in time. It would not (and in fact could not) have retroactively validated the revenue that Spire collected prior to their general rate case under the terms of its invalid ISRS tariff.[29] Because it is only the revenue Spire collected under the terms of the invalid

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[28] *PSC v. Office of Public Counsel (In re Laclede Gas Co.)*, 539 S.W.3d 835, 841 (Mo. App. W.D. 2017) (emphasis added).

[29] In particular, Spire collected money equal to the original cost of the newly added plant (less accumulated depreciation and deferred income taxes) multiplied by Spire's average weighted cost of capital plus money related to depreciation expenses, income taxes, and property taxes. *See* RSMo. § 393.1009(1)-(7). Had Spire not received an ISRS, this revenue would not have been recoverable. Instead, Spire would have had to wait until it filed its next rate case to collect any revenue on the newly installed plant and, even then, would only be able to collect

ISRS tariff that was in effect ***prior*** to its next general rate case that the OPC seeks refunded, the resetting of Spire's ISRS during a subsequent rate case is immaterial and in no way inhibits the Commission's ability to issue a refund.

Finally, there is nothing else in the reasoning applied in the Supreme Court's *Missouri-American Water Compa*ny case that would otherwise preclude the Commission from issuing a refund in these cases. The Supreme Court's *Missouri-American Water Compa*ny case primarily concerned the issue of mootness which occurs when "the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy."[30]

In the *Missouri-American Water Compa*ny case, the question presented for decision was whether the ISRS tariff approved by the Commission was valid and the judgment sought by the OPC was a determination that it was invalid.[31] The Supreme Court decided the case was moot because the ISRS tariff had already been superseded by the general rate case tariffs meaning that, even if the Court agreed with OPC, changing the old ISRS tariff would have no effect.[32] However, as previously pointed out, the current case is materially different from

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depreciation expenses, taxes, and return on the plant that accumulated moving ***forward*** in time. Moreover, the amount Spire could collect going forward could only be determined ***after*** it accounted for any depreciation that occurred prior to the rate case. This means that, absent an ISRS, Spire would ***never*** have been able to collect the revenue that it collected prior to its next general rate case and hence the fact that Spire's ISRS reset to zero during the next general rate case had absolutely no effect on the amount of revenue Spire collected under its invalid ISRS.

[30] *State ex rel. Praxair, Inc. v. PSC*, 328 S.W.3d 329, 334 (Mo. App. W.D. 2010) (*quoting Mo. Pub. Serv. Comm'n v. Mo. Interstate Gas, LLC*, 266 S.W.3d 881, 885 (Mo. App. W.D. 2008)); *see Mo. Pub. Serv. Comm'n v. Office of the Pub. Counsel (In re Mo.-Am. Water Co.)*, 516 S.W.3d 823 (Mo. banc 2017).

[31] *In re Mo.-Am. Water Co.*, 516 S.W.3d at 826.

[32] *Id.*

the *Missouri-American Water Compa*ny case because the Western District has already determined the invalidity of Spire's ISRS tariffs, which means that the only remaining issue before the Commission is the refund of the money Spire collected as a result of these invalid tariffs. As such, nothing in the Supreme Court's *Missouri-American Water Compa*ny case should be read to preclude the Commission from issuing the OPC's requested refunds.

The OPC also notes that any Suggestion by the 2016 Order that Spire's intervening general rate case impedes the Commission's ability to issue a refund inherently contradicts the plain language of section 386.520. The statute specifically states that any excess collections made by a utility as the result of an erroneous ruling by the Commission will be "calculated for the period commencing with the date the rate increase or decrease took effect until the earlier of the date when new rates and charges consistent with the court's opinion became effective ***or when new rates or charges otherwise approved by the [C]ommission as a result of a general rate case filing or complaint became effective.***" This language means that the statute explicitly anticipates a situation where, as is the case here, a period of over-collection by a utility ended because of an intervening rate case, yet the statute still requires a refund of any money improperly collected prior to that general rate case. Consequently, should the 2016 Order be read to suggest the Spire's intervening case prevents the Commission from issuing a refund it would render this portion of section 386.520 meaningless, thus violating on of the primary canons of statutory interpretation.[33]

For all the reasons herein stated, the 2016 Order's conclusion that that it is incapable of refunding the revenues it acknowledges Spire improperly collected is unlawful, unjust,

[33] *See Dev. Corp. v. Urgent Care Assocs.*, 429 S.W.3d 487, 496 (Mo. App. W.D. 2014) (courts "must presume that the legislature does not enact meaningless provisions or intend absurd results.").

and/or unreasonable. This means that the current Order's reliance on the rationale of the 2016 Order to establish why it cannot provide refunds is entirely misplaced.

The current Order also states that because there "was not an appellate decision of the 2017 cases" the temporary rate adjustments of section 386.520 cannot apply. This is incorrect. The terms of the *Unanimous Stipulation and Agreement* state "the court's final decision shall be applied to the [2017] Cases in the same manner as it is applied to the [2016] Cases." Therefore, all of the parties in the case have already consented to the application of section 386.520 to the 2017 cases. If the Commission should determine that temporary rate adjustments are warranted in the 2016 case, Spire is thus obligated to provide them of its own accord in the 2017 case as well. The Commission need only enforce its previous order requiring Spire "to comply with the terms of the stipulation and agreement." Even if the Commission did lack statutory authority to ***independently*** order refunds it still has the power to order Spire to adhere to the terms of the *Unanimous Stipulation and Agreement* because the Commission does not need special authority to require the signatories to a stipulation to adhere to the terms of that stipulation.

Moreover, under section 386.040, the Commission is "vested with and possessed of the powers and duties in this chapter specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the ***purposes*** of this chapter." Given that the purpose of section 386.520 was to effectuate a refund for over or under collections that stemmed from a commission error, The Commission clearly has the power to issue temporary rate adjustments in the 2017 case that meet that ***purpose*** even if there has not been an appeal of that specific case.

For all the reasons herein stated, the Order's conclusion that that it is incapable of refunding the revenues it acknowledges Spire improperly collected is unlawful, unjust, and/or unreasonable.

WHEREFORE, the Office of the Public Counsel respectfully requests a rehearing of the Commission's September 20, 2018 *Order Denying Request to Modify Commission Order* pursuant to the authority of RSMo section 386.500.

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 29th day of September, 2018.

/s/ John Clizer