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-2016-0332**
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**
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**

OFFICE OF THE PUBLIC COUNSEL'S RESPONSE TO
SPIRE MISSOURI'S MOTION TO STRIKE

COMES NOW the Office of the Public Counsel ("OPC" or "Public Counsel") and in response to Spire Missouri's *Motion to Strike Extra Record Evidence Submitted by OPC and Staff and* respectfully states:

These proceedings are the result of the Western District's remand to the Commission. *PSC v. Office of Public Counsel (In re Laclede Gas Co.)*, 539 S.W.3d 835 (Mo. App. W.D. 2017). This proceeding is a result of the mandate to the Commission to for the purpose of complying with the mandate. "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, and the case is remanded for further proceedings consistent with this opinion."

These are the further proceedings, and must address the unlawful "inclusion of the replacement costs of the plastic components in the ISRS rate schedules." Accordingly the Commission's mandate is to hold proceedings to determine how to remove the cost of the plastic that was included in the cases above. The fact that the plastic pipe was "not worn out or deteriorated" was not the only issue the Court addressed. *In re Laclede Gas Co.* at 839-841.

In its decision the Court addressed both of OPC's arguments: "[t]he OPC argues that the replacement costs of the plastic mains and service lines are not ISRS-eligible under this section because those components were not worn out or deteriorated and, additionally, their replacement was not done to comply with a government mandated safety requirement." *In re Laclede Gas Co.* at 838.

In its *Motion* Spire makes a critical admission. Spire says that it has "never denied that the amount of plastic pipe can be identified, but instead has maintained, without dispute by any other party, that such incidental replacement has not resulted in an increase in its ISRS charges." (Spire Motion at 5) Even if this were true, which it is patently not, the Court has rejected all of Spire's arguments for including plastic pipe including the idea that "incidental placement does not increase costs." (Spire *Motion* at 5)

This includes Spire and Staff's "effort to assign ISRS eligibility to plastic pipes that are not worn out or deteriorated by evaluating an entire neighborhood system as a singular unit finds no support in the plain language of *section 393.1009(5)(a)*." *In re Laclede Gas Co.* at 839.

> the plastic main and service line replacements were not merely de minimis but "varied from just a few feet to several hundred feet in length." (emphasis added). In fact, a sample of work orders provided by Laclede and analyzed by the parties revealed that 53,415 feet of main lines were retired, of which 8,817 feet were plastic (approximately 16 percent), and 53,279 feet of service lines were retired, of which 34,223 feet were plastic (approximately 64 percent). *Id.*

> 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)). *Id.* at 840.

Spire's efforts to relitigate the underlying facts must be denied. *Spire Motion* at 6. The Court has rejected those arguments and found that plastic pipe not worn out is ineligible for recovery under the ISRS statute. *In re Laclede at 839*. Specifically as described in OPC's Initial Brief on Remand, the Court has already rejected Spire's arguments. *Initial Brief of the Office of the Public Counsel* at 4-5

The Court found an additional flaw in the Commission's Order

"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.'"

If the Commission were to agree with Spire's argument and strike Staff's and OPC's calculations of the costs of plastic included in the ISRS cases, its only alternative under mandate would be to disallow all of the replacement costs Spire claimed. This would not be unreasonable given that there is no record evidence of any government mandated safety requirements Laclede replace any of the infrastructure claims.

Further this Commission approach would conform to the Courts holding that the statute must be narrowly construed. "No party contests that the plastic mains and service lines were not in a worn out or deteriorated condition . . . . " This creates a challenge for Laclede because our Supreme Court has found this requirement to be mandatory and has interpreted it narrowly. *In re Laclede* at 839(citing *Liberty Energy,* 464 S.W.3d at 525(footnote omitted)(holding that replacement of components damaged by a third party's negligence is not encompassed by the statute).

Public Counsel did not violate the Parties' Agreement.

Spire contends that both Staff and OPC violated the Parties' agreements presented to and approved by the Commission. Spire alleges "OPC and Staff have both violated the agreement . . . . by introducing new evidence that is not present in the record of the original case." (Spire *Motion* at 3-4) Spire's argument or contention about using new information in their "arguments" is unclear. *Id*. All Parties agreed to recommend a Briefing schedule to present their arguments to advise the Commission how to proceed. Spire primary issue is its claims both OPC and Staff have introduced a "new methodology." Public Counsel used the percentages the Court identified in its Opinion.

Spire's argument is that Public Counsel's post-hearing Brief is not or does not contain its "argument" as anticipated by the Parties May 25 *Response* to the Commission's *Order Directing Filing*. But in the May 25 filing the Parties agreed as to what the Commission should do on remand:

> In the Opinion, the Western District reversed the Order to the extent that that the Order allowed ISRS cost recovery "for the replacement of plastic components that were not in a worn out or deteriorated condition." (Opinion, pp. 1-2) <u>On remand, the Parties believe that the Commission should decide what costs, if any, were recovered through ISRS charges for the replacement of plastic components that were not worn out or in deteriorated condition[.]</u> (emphasis supplied).

The idea that Public Counsel's Brief is not its "argument" to the Commission is not supported by the above paragraph or by the following Agreement in the May 25 filing:

> The parties April 30, 2018, filing stated that the proposed findings and recommended decision would be based on the record in those cases as it stands today. *However, the Parties agree that the Commission has the authority to allow new evidence to be presented in determining the value of the replacement cost of plastic pipe in these matters.* In the Unanimous Stipulation and Agreement filed in Case Nos. GO-2017-0201 and GO2017-0202, Spire Missouri agreed to make available "work order or other information in their possession necessary to make a determination of the amount of plastic pipe that was replaced." *As such, the Parties request that they be allowed to utilize such information in forming their arguments.* (emphasis added).

Spire's flawed argument that Staff's and Public Counsel's filings are "post-hearing" is incorrect. "[t]he opinions and recommendations rendered by expert witnesses is *radically* different from arguments made by parties in a post-hearing brief." Spire *Motion* at 8.(emphasis added). In fact, this case is not post-hearing; it is post appeal. The filings are not "post hearing" briefs, which were filed prior to the appeal of the Commission's decision and the Western District's Opinion reversing and remanding the case. In that regard, Staff's Report and Public Counsel's Briefs are its argument to the Commission on how to comply with the Western District's reversal and remand of the Commission's decision. Both Staff's Report and Public Counsel's Brief are its "arguments" which are reasonably accompanied by verified statements.

Public Counsel states there is no conflict between its recommendation for disallowance and the procedures the Parties outlined in their May 25 filing.

This process is exactly what Spire agreed to.

The Parties are engaged in the processes to which all Parties agreed and which was filed by Spire on April 30 and May 25. Spire had ample opportunity to object to the recommended

process and its failure to do so and not claim it is not being afforded due process is disingenuous. There is no "egregious violation of the Company's due process rights" Spire *Motion* at 8.

The Commission does not have rules for practice and procedure for post-Appellate Court reversal and remand cases. This is the reason for the Commission's Order that the Parties "state how they believe the Commission should proceed," and advise it on the procedures the Parties recommend in this circumstance. March 22, 2018 *Order Directing Filing*. During the technical conferences Spire did not raise the issue of its due process rights. Accordingly Spire did not request and the Commission did not grant a hearing.

Spire again returns to the underlying cases to make an untenable argument. Contrary to Spire's claims there is nothing in the Court of Appeals Opinion to require or suggest the Commission must hold additional hearings. If the Court's determined specific procedures were necessary, it would have said so in its remand. It did not.

In conclusion, as stated by both Staff and Public Counsel in their Responses to Spire's *Motion to Strike*, if the Commission were to follow Spire's recommendation to strike Staff's Report and OPC's Brief, in order to comply with the mandate, the Commission must disallow all cost recovery in the underlying cases and order a refund to customers of the total amount Spire claimed.

In fact, if the Commission were to look to the whole opinion to guide its actions, all cost recovery would be denied because Spire failed to cite to any state or federal safety requirement. The Court recognized this second ISRS requirement that there be a state or federal safety regulation that mandates pipe replacement. Spire has yet to present any evidence in this regard.

WHEREFORE Public Counsel advises the Commission to deny Spire's *Motion to Strike Extra-Record Evidence*, but if it does grant Spire's *Motion*, OPC advises the Commission

it must necessarily deny Spire recovery of all ISRS costs claimed in the underlying cases, further OPC asks the Commission grant such other and further relief as the Commission deems just in the circumstances.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

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CERTIFICATE OF SERVICE

On this 30th day of July, 2018, I hereby certify that a true and correct copy of the foregoing reply was submitted to all relevant parties by depositing this motion into the Commission's Electronic Filing Information System ("EFIS").

/s/ Lera L. Shemwell