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 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-2016-0332**
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**

SPIRE MISSOURI'S MOTION TO STRIKE
EXTRA-RECORD EVIDENCE SUBMITTED BY OPC AND STAFF

COMES NOW Spire Missouri Inc. (f/k/a Laclede Gas Company and referred to herein as "Spire Missouri" or "Company"), on behalf of itself and its two operating units, Spire Missouri East and Spire Missouri West (f/k/a Missouri Gas Energy), and moves the Commission to strike OPC's and Staff's extra-record evidence. In support of this motion, Spire Missouri states as follows.

I. INTRODUCTION

On April 30, 2018 and May 25, 2018, Spire filed procedural recommendations on behalf of all of the Parties in response to Commission Orders directing the Parties to advise it on how these remand proceedings should be conducted. In those recommendations, the Parties agreed that the Commission's determination should be based on the record in File Nos. GO-2016-0332 and GO-2016-0333 as it stood at the time

of the filing, with the caveat that the Company would furnish additional work order information relating to these ISRS cases.[1] As paragraph 6 of the May 25th Response stated:

> 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 GO-2017-0202, 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 supplied*)

On June 29, 2018, the Office of the Public Counsel ("OPC"), Staff and the Company filed their initial briefs.[2] Both OPC and Staff recommended substantial disallowances of charges previously incurred by the Company and collected as a result of these ISRS cases. The Company argued that no disallowance was appropriate since no incremental costs were incurred as a result of replacing plastic as part of its cast iron and bare steel replacement programs compared to what would have been incurred to reuse such plastic facilities. In fact, ISRS charges were lower than they otherwise would have been as a result of the approach taken by the Company.

Both OPC and Staff based their proposed disallowances on a new methodology that relies on a simple ratio of the amount of plastic replaced versus the total amount of pipe replaced.[3] Neither Staff or OPC cited to record evidence in the case to support their theory. In contrast, the Company supported its position by citing to the record testimony of two witnesses in the ISRS cases.

[1] See Paragraph 2.A. of the Parties April 30, 2018 Response to Order Directing Filing.
[2] Staff filed its brief in the form of a report, which it subsequently amended by filing a Notice.
[3] *See* OPC Initial Brief, pp. 6-8 and supporting affidavit of John Robinett; Staff Report, pp. 7-8.

The Commission should strike those portions of the post-hearing submissions of OPC and Staff that, for the first time, propose a new method for adjusting the Company's ISRS charges based solely on work order information that simply details the quantities of plastic replaced as part of the Company's cast iron and bare steel replacement programs. Specifically, the Commission should strike: (i) the section headed by "Public Counsel's Calculation of the Appropriate Refund on pages 6-8 of OPC's Initial Brief; (ii) the attached supporting affidavit of John Robinett; and (iii) section 6 on pages 7-9 of Staff's Report, as amended by its subsequent Notice. The Commission should also strike the two sections in Staff's Attachment A headed by the titles starting "Staff's Revenue Calculation" and the outcome of this calculation on Appendix A.

As discussed below, such action is necessary and appropriate for two reasons. First, to comply with the Parties' agreement on how this remand proceeding was to be conducted and, second, to avoid an egregious violation of the Company's due process rights and the Commission's own procedural rules.

II. ARGUMENT

A. Granting the Motion to Strike is Necessary to Comply with the Parties' Agreement on How this Remand Proceeding was to be Conducted

OPC and Staff have both violated the agreement that the parties proposed to the Commission, as well as the Commission's order approving that agreement, by introducing evidence that is not present in the record of the original cases, as supplemented by additional work order data. Although presented in the form of an "argument," both OPC and Staff have presented new evidence in the form of a new methodology for disallowing the Company's ISRS charges. This new methodology, which seeks to disallow ISRS costs based on a simple ratio of the amount of plastic pipe

replaced versus the total amount of pipe replaced, is not in the evidentiary record of these cases, nor is it contained in the work order information supplied by the Company. This point is demonstrated by the fact that both Staff's Report and OPC's Brief are bereft of any citation to the record evidence to support their methodologies. This is not an oversight; there are no citations because there is nothing in the record that supports the proposition that the percentage of plastic pipe can be reasonably and reliably used to determine how ISRS costs and charges have actually been impacted by the incidental replacement of plastic pipe.

The assumption underlying this proposed method – i.e. that ISRS charges were increased as a result of the incidental replacement of plastic pipe – is contrary to the only testimony on the record which establishes that such incidental replacement reduced rather than increased the level of ISRS charges recovered by the Company. (Ex 3, pp. 10-11; Ex. 2, p.11). As result, OPC and Staff are not only attempting to introduce a new methodology for the first time, but also one that implicitly seeks to rebut the Company's evidence that the approach it took resulted in no incremental costs being incurred, but instead a cost savings.[4]

Staff and OPC's new methodology is based on nothing more than an unsubstantiated assumption that because there is a coincidence of activity between the installation of new pipeline and the replacement of the prior plastic pipe, there must also be a causation of cost resulting from this activity. Because this assumption is neither explained nor supported by the evidence in these cases, however, it cannot serve as any

[4]To the extent the new methodology proposed by OPC and Staff constitutes a rebuttal of the Company's position, it should have been filed by December 23, 2016 as rebuttal testimony pursuant to the procedural schedule approved by the Commission. Notably, OPC filed no rebuttal testimony by that deadline, and Staff's rebuttal testimony was supportive of the Company's position. Obviously, filing rebuttal to the Company's position more than a year and a half after it was due is not compliant with the procedural requirements of the cases or this remand proceeding.

kind of meaningful rebuttal to the actual *evidence* presented by the Company's witnesses in these cases showing that the approach utilized by the Company definitively reduced costs, not caused them.

For its part, Staff merely references a statement by Company counsel that the amount of plastic replaced could be identified and answers by Company witness Buck during cross-examination that Staff inaccurately summarizes as standing for the proposition that "it would be possible to determine the ineligible amount of plastic by using a simple average." (Staff Report, p. 7). The first reference is meaningless as the Company has never denied that the amount of plastic pipe replaced can be identified, but has instead maintained, without dispute by any other party, that such incidental replacement has not resulted in an increase in its ISRS charges. In short, this reference is a complete red-herring.

The second reference is simply misleading in that Mr. Buck maintained throughout his cross examination that using a simple percentage of how much plastic pipe was replaced to adjust ISRS charges would *not* be appropriate. To the contrary, when asked about the propriety of such a method, Mr. Buck testified that: "I don't think that would really be accurate" (Tr. 100, lines 14-15); that "I don't think that's how you could do that" (Tr. 101, lines 22-23); that "I don't think that's a logical way to look at it, no." (Tr. 102, lines 4-5); and that "I wouldn't agree with it . . ." (Tr. 102, lines 12-13). It is simply inexplicable how the Staff could possibly cite Mr. Buck's testimony as being supportive of the method it is now proposing.

OPC cites even less to the record in support of such a method. OPC's brief is focused on trying to determine various percentages of replaced plastic pipe that were mentioned in the Court of Appeals' opinion or identified in Staff workpapers. (OPC

Initial Brief, p. 6). None of these citations, however, in any way support a method that merely assumes that such percentages should be used to adjust ISRS charges in a proportional manner. Nor do they in any way rebut the undisputed evidence by Company witnesses Lauber and Buck that the use of such a method is not appropriate.

Perhaps the most significant disconnect between the evidentiary record and the method being proposed by Staff and OPC, however, is the fact that even Staff's and OPC's own witnesses expressed significant concerns regarding the propriety of relying on a simple, percentage-based method for adjusting ISRS charges. So, far from effectively rebutting the Company's evidence that there was no incremental cost added by the plastic replacements, Staff and OPC witnesses undermine the very methodology they now seek to introduce. In fact, OPC witness Charles Hyneman, and Staff witnesses Kim Bolin and Mark Oligschlaeger all agreed that it would be problematic to use a simple, percentage-based formula for a number of reasons. (See Tr.172-173; 175, 179, 197-198).[5] Notably, in their post hearing references to the evidentiary record, neither Staff nor OPC make any effort to address the meaning and significance of this testimony that, when combined with the testimony of the Company's witnesses, signifies a unanimous verdict by the experts in these cases against the reasonableness and propriety of the method Staff and OPC are now proposing to the Commission.

In any event, the attempt to introduce and utilize such a method through these post-hearing submissions is contrary to the explicit agreement of the parties and must be

[5] Mr. Hyneman's concerns about the propriety of using a simple percentage of plastic pipe replaced versus all pipe replaced to adjust ISRS charges were addressed in the Company's Initial Brief on Remand. For her part, Staff witness Bolin testified that she did not know whether using percentages "would be the best possible way to do this... "or "…would get you to the exact cost of the plastic that's being replaced..." (Tr. 172, lines 15-18). Mr. Oligschlaeger testified that "there's some complications involving the facts present here that might make that [the use of a simple percentage] somewhat suspect." (Tr. 179, lines 6-8).

rejected. The fact that such a method is flatly inconsistent with the sworn testimony of their own witnesses during the evidentiary hearing only underscores how inappropriate such an effort is.

The new methodology being proposed by OPC and Staff is basically the same type of expert opinion that might be rendered by a class cost of service witness testifying in a rate case proceeding. In such an instance, a class cost of service witness will use raw data to form an opinion. That data may, for example, include cost information relating to mains, services, equipment, O&M expenditures, etc. The expert interprets the data and uses it in rendering an opinion on how to allocate costs between various functions and classes. In this case, Mr. Robinette is serving as the new "expert" witness for OPC and essentially Staff. His raw data was contained in the work orders supplied by the Company. His determination to allocate costs based on the relative amount of material replaced is his expert opinion, an opinion rendered for the first time in briefs. It is an opinion that, while sworn to in an affidavit, was never subjected to the indispensable light of discovery, rebuttal testimony or cross-examination from which the accuracy of such an opinion can be weighed.

The critical point here is that the opinion or recommendation made by a witness based on his or her review of the data *is itself a separate and distinct piece of evidence that is subject to challenge through discovery, rebuttal testimony and cross-examination during the hearing process*. In proposing a new methodology for determining how the amount of plastic replaced by the Company impacted the Company's ISRS costs, Staff and OPC have gone well beyond the raw work order information in the record, and into the realm of supplemental evidence. In essence, OPC decided on a methodology that would result in the Company refunding millions of dollars that it spent on its main

replacement programs. However, because no support for that methodology existed in the record, OPC simply supplemented the record with the purported expert testimony of its new witness, John Robinette. The fact that OPC filed an "affidavit" with its brief should be proof enough that it improperly supplemented the record.

OPC and Staff may try to justify their new methodology on the theory that they are simply using the work order information to fashion their "arguments" on this issue. However, as noted above, the opinions and recommendation rendered by expert witnesses is radically different from the arguments made by parties in a post-hearing brief. Returning to the class cost of service example discussed above, the Commission would never consider adopting a class cost of service that was presented for the first time in a party's brief based on an analysis and methodology that was not part of the record. No matter how persuasive an attorney might be in presenting such an analysis, it would not constitute record evidence. Instead, it would be an attempt to introduce new evidence dressed in argument's clothing. As such, it cannot be relied upon as competent and substantial evidence since it was never tested through the normal hearing process.

Given these considerations, it is clear that the Commission should strike any references to the new methodology for adjusting ISRS charges that OPC and Staff have presented for the first time in their respective post-hearing submissions as contrary to the agreement of the Parties on how this remand proceeding should be conducted.

B. Granting the Motion to Strike is Necessary to Avoid an Egregious Violation of the Company's Due Process Rights and the Commission's Procedural Rules

Any reliance on these post-hearing factual assertions to adjust the Company's ISRS charges would also constitute an egregious violation of the Company's due process rights as well as the Commission's rules of practice and procedure. Notably, there is

nothing in the Western District Court of Appeals' Opinion that can be construed to require or authorize the Commission to ignore its procedural rules or the due process rights of the parties when making its decision on remand in these ISRS proceedings.

That is the exact position, however, in which OPC – and now the Staff – have placed the Commission by failing to present their proposed methodology for adjusting ISRS charges on a timely basis. In fact, OPC has failed from the inception of this case to present evidence quantifying such an adjustment or even providing a method that could be used for such a purpose. As Staff witness Bolin correctly noted during redirect examination in these cases, it is the party sponsoring a particular proposal or adjustment – in the case OPC – that has the responsibility to provide such a quantification as well as the method used for deriving it. (Tr. 175). In this case, OPC did neither. Nor did Staff provide such a quantification or method until the submission of its post-hearing response after the record was closed.

As a result of this failure, the Company has not been accorded any opportunity to rebut, cross examine or otherwise exercise its due process rights, and the Company continues to be deprived of those rights with respect to both OPC's and now Staff's proposed methods. As the Western District Court of Appeals has observed, due process requires that that administrative hearings be fair and consistent with rudimentary elements of fair play. ***State ex rel Fischer v. Public Service Commission***, 645 S.W.2d 39, 43 (Mo. App. W.D. 1983), citing ***Tonkin v. Jackson County Merit System Commission***, 599 S.W.2d 25, 32–33[7] (Mo.App.1980) and ***Jones v. State Department of Public Health and Welfare***, 354 S.W.2d 37, 39–40[2] (Mo.App.1962). One component of this due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner. Id., citing, ***Merry Heart Nursing and Convalescent***

Home, Inc. v. Dougherty, 131 N.J. Super. 412, 330 A.2d 370, 373–374[7] (1974). Obviously, the Company will have been afforded neither a full, nor a meaningful hearing if the Commission decides to disallow any of its ISRS costs based on an asserted methodology that was never presented and made subject to cross examination and rebuttal during an evidentiary hearing.[6]

Fortunately, the Commission's rules of practice and procedure are designed to prevent the kind of unproductive and unfair infringement of the due process rights of parties participating in Commission proceedings. Specifically, Rule 4 CSR 240-2.130(7)(A) explicitly requires that direct testimony of the kind filed by OPC witness Hyneman in these cases . . . "shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief." Having provided its case-in-chief, and having further advocated and agreed to address the record 'as is' in this remand proceeding, OPC cannot now supplement its direct testimony in these cases by adding a description or explanation of the method that it believes should be used to adjust replacement costs.[7]

[6]As a result of the untimely introduction of this new method by OPC and Staff in their post-hearing submissions, the Company has not been provided an opportunity to show the degree to which this new method is flawed and inaccurate. Specifically, the Company has been denied the opportunity to demonstrate that the method and resulting quantifications of ISRS impacts fail to take into consideration a variety of critical factors, a number of which were addressed in the Company's Initial Brief on Remand (see pages 11-13). These factors include, among others, the failure to make any allowance for: (a) differences between the footage of installed versus replaced pipe, (b) the amount of plastic pipe that would be considered incidental even under the Court of Appeals opinion; (c) the amount of plastic pipe that would, in fact, be considered in a worn out or deteriorated condition; and (d) the costs incurred for transfers and other activities that must be incurred to maintain service regardless of whether existing pipe is being replaced or reused. The Company firmly believes that such considerations warrant rejection of the disallowances proposed by OPC and Staff. However, if the Commission disagrees, then it should, at a minimum, permit the Company to supplement the record with its own evidence addressing these matters.

[7]As previously noted, to the extent the method proposed by OPC and Staff is construed as an implicit rebuttal of the Company's position that the incidental replacement of plastic pipe did not increase its ISRS charges, then the introduction of such a method at this late stage and in this manner also violates the procedural schedule approved in this case for when rebuttal testimony was to be filed.

That such a failure requires rejection of any proposed disallowance or adjustment to the Company's ISRS charges is confirmed by the Commission's decision in a recent KCPL rate case, in which the Commission rejected KCPL's proposal to include certain projected costs in its revenue requirement, because the proposal was not made in KCPL's case-in-chief, but instead was raised for the first time in surrebuttal testimony. The Commission determined that it would be unfair and prejudicial to the rights of other parties to consider such a proposal. In affirming the Commission's decision, the Western District Court of Appeals stated the following.

> In its Report and Order, the PSC also denied KCPL's request to add specific estimated future costs in the calculation of KCPL's revenue requirement. The PSC found the following with regard to each requested expense. First, the requests to add the projected future costs to KCPL's revenue requirement did not come until surrebuttal testimony and as such violated PSC Rule 4 CSR 240-2.130(7)(A), which requires that direct testimony "shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief." The PSC found that KCPL's failure to include its estimates and requests in its case-in-chief prevented other parties from having a sufficient opportunity to conduct discovery or provide testimony on the matters.

See ***In the matter of Kansas City Power and Light Company's Request for Authority to Implement a General Rate Increase for Electric Service v. Public Service Commission,*** WD 79125 consolidated with WD 79143 and WD 79189 (Opinion Issued September 6, 2016).

The deficiencies in how OPC (and now Staff) have submitted their proposals to disallow costs in these ISRS cases are even more extreme. At least in the KCPL case, the utility submitted a fully formed proposal, albeit at a late stage in the proceeding. Neither OPC nor Staff did even that in the ISRS proceedings. Nor can this deficiency be cured based on whatever assertions might be made in the post-hearing submissions of OPC and Staff regarding the meaning or significance of work order or other information.

As previously discussed, statements made by lawyers in briefs and pleadings do not and cannot substitute for expert testimony presented during a hearing, where all parties are given an opportunity to rebut, cross-examine and otherwise challenge the propriety, accuracy and meaning of the assertions being made. For all of these reasons, the Company respectfully requests that the Commission strike any reference to these newly articulated methods for adjusting the Company's ISRS charges on the grounds that any consideration of them would constitute a gross violation of the Company's due process rights.

In light of the considerations discussed above, the Company firmly believes that the Commission should find that no disallowance of the Company's ISRS charges is appropriate because there is no competent and substantial evidence to support one. Notwithstanding the suggestions made by OPC and Staff, the Western District Court of Appeals did not determine that any specific level of ISRS charges should be disallowed because of the incidental replacement of plastic pipe. Nor did the Court dispense with the fundamental requirement that the Commission's decision not be arbitrary and capricious, but be based on competent and substantial evidence and fashioned in a manner respectful of the due process rights of all parties. A finding that no disallowance of the Company's ISRS charges is justified is the only result that can be squared with these requirements.

As the Company stated in its Initial Brief on Remand, although there is no evidentiary basis to justify a retroactive adjustment to the Company's historical ISRS charges in these cases, the Commission can continue to apply the legal guidance provided in the Opinion to the ISRS eligibility of costs that might actually be incurred to replace plastic or other facilities that might not be in a worn out or deteriorated condition. There will be multiple opportunities in future ISRS or other proceedings to address these issues

in an informed and fair manner that does not suffer from the significant procedural infirmities resulting from how OPC and Staff have developed and presented their proposed disallowances in the present case.

The Company respectfully submits that the only course of action that can be reconciled with all of the requirements of Missouri law is to grant the Company's Motion to Strike and determine that there is no evidence on the record to support any disallowance of the Company's ISRS charges.

III. CONCLUSION

In conclusion, the Company respectfully requests that the Commission strike those portions of Staff's Report, as amended, and OPC's Initial Brief as described herein, on the grounds that such action is necessary to uphold the terms of the Parties' agreement on how this remand proceeding should be conducted, and to avoid a gross violation of both the Company's due process rights as well as Commission's own procedural rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing pleading was served on the General Counsel of the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel, on this 23rd day of July 2018 by hand-delivery, fax, electronic mail or by regular mail, postage prepaid.

/s/ Marcia Spangler