

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

In the Matter of the Application of Spire Missouri Inc. to Establish an Infrastructure System Replacement Surcharge in its Spire Missouri East Service Territory	) ) ) ) ) )	Case No. GO-2018-0309
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In the Matter of the Application of Spire Missouri Inc. to Establish an Infrastructure System Replacement Surcharge in its Spire Missouri West Service Territory	) ) ) ) ) )	Case No. GO-2018-0310
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**THE MISSOURI OFFICE OF THE PUBLIC COUNSEL’S RESPONSE TO SPIRE  
MISSOURI INC.’S RESPONSE TO THE MISSOURI OFFICE OF THE PUBLIC  
COUNSEL’S POSITION STATEMENT**

**COMES NOW** the Office of the Public Counsel (“OPC”) and for its *Response to Spire Missouri Inc.’s Response to the Missouri Office of the Public Counsel’s Position Statement*, states as follows:

1. On April 15, 2020, the Public Service Commission for the State of Missouri (“the Commission”) ordered that the parties to the above referenced cases each file a proposal or position on how these cases should move forward and statements about the need for additional evidence.

2. On April 22, 2020, the OPC filed its position as ordered by the Commission.

3. On April 27, 2020, Spire Missouri Inc., (“Spire”) filed a response to the OPC’s position.

4. The OPC now responds to Spire's response.

5. In doing so, however, the OPC notes that it has chosen not to respond to every point Spire has raised. That is not because any of those points not addressed are any less wrong, though. Instead the OPC has chosen to restrain its response so as to minimize the amount the Commission needs to consider and perhaps to avoid a descent into endless responsive filing. Should, the Commission order it to, the OPC is prepared to respond to the remaining points of Spire's response.

**Response to Spire's Apparent Claim that the Courts of Appeal Cannot Issue Specific Instruction on Remand of a Commission Decision**

6. Relying on section 386.510 and inapplicable case law, Spire's first point in its response appears to be arguing that the Missouri Courts of Appeal cannot issue specific remands of Commission decisions.

7. This is clearly wrong, as can easily be seen in the plain language of section 386.520.

8. While Spire attempts to nonchalantly dismiss 386.520 as irrelevant to the question at hand, an examination of the law itself reveals a different story. The relevant part of the statute states:

In the event 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 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

RSMO. § 386.520.2(1) (emphasis added). Thus, contrary to the apparent assertion of Spire, section 386.520 clearly does permit the Missouri Courts of Appeal to instruct the Commission with a specific remand to calculate and order temporary rate adjustments. This is exactly what the Court of Appeals did in this case.

9. Moreover, Spire's reliance on *Grain Belt Express Clean Line, LLC v. Pub. Serv. Comm'n* is misplaced. An examination of the full footnote Spire cites reveals that it only exists because "Grain Belt assert[ed] [the Court] should remand with instructions to enter an order consistent with the Commission's concurring opinion in this case." *Grain Belt Express Clean Line, LLC v. Pub. Serv. Comm'n'n*, No. ED105932, 2018 Mo. App. LEXIS 184, at \*12 n.5 (Ct. App. Feb. 27, 2018). This situation is nothing like *Grain Belt* in that no party asked the Court on appeal to order the Commission to adopt a competing opinion (which the OPC agrees would be impermissible under 386.510) and instead the OPC was simply asking for the Court to adhere to the statutory provisions of 386.520. So this case is inapplicable.

10. All the Commission need to consider is this: if it wanted to, the Court of Appeals for the Western District could have remanded this case with instructions to the Commission to determine if Spire's cast-iron or bare steel pipe were worn out or deteriorated, to just hold a new evidentiary hearing, or simply with for "further proceedings consistent with the decision" thereby providing a general remand that left it to the Commission's discretion to consider new evidence. *See Smith v. Brown*

*& Williamson Tobacco Corp.*, 410 S.W.3d 623, 634 (Mo. banc 2013). But the Western District Court of Appeals did not do any of these things; it did not order new evidence, a new hearing, or provide a general remand. Instead, the Court issued an order with a plain and unambiguous remand for specific instructions in accordance with the plain language of 386.520.2.

11. All this Commission can and should do is (1) calculate the temporary rate adjustments and (2) order those rate adjustments. The Commission cannot and should not permit Spire to re-litigate its entire case a second time around.<sup>1</sup>

**Response to Spire’s Claim that the OPC is misreading the Court of Appeal’s Mandate**

12. Spire maintains that the OPC has misread the Western District’s mandate when it said that “[t]he case is remanded for the sole purpose of removing the cost incurred to replace cast iron and bare steel mains and service lines **not shown to be worn out or deteriorated from the ISRS revenue awarded to Spire.**” In doing so, Spire seems to be operating under the presumption that it is unclear *which* pipes the Western District Court of Appeals found to have not been shown to be worn out or in deteriorated condition. This is an absurd position.

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<sup>1</sup> With regard to the quote that “[w]hile § 386.420.4 provides a mechanism for calculating temporary or permanent rate adjustments in accordance with § 386.520.2(1), it does not prohibit the PSC from conducting further evidentiary proceedings to determine the rate adjustments that may be required to provide customers with monetary relief” found in *Laclede Gas Co. v. Mo. PSC*, 593 S.W.3d 582, 593 n.9 (Mo. App. W.D. 2019), the OPC points out only that it is not arguing that **section 386.420.4** would prevent new evidentiary proceedings as Spire attempted to do in that case. The OPC is instead simply relying on well-established Supreme Court case law that says that a **specific remand** limits the scope of what can be considered on remand.

13. The Western District’s opinion was focused on the replacements Spire made pursuant to section 393.1009(5)(a), which required the pipes being replaced be worn out or in deteriorated condition for ISRS eligibility to apply. The Court further noted that its “review of the record reveals that Spire’s primary argument revolved around the age of the facilities and the assumption that old facilities must be worn out or deteriorated” but that “[t]here was no evidence with respect to how long it takes cast iron and steel to become worn out or deteriorated.”

14. Based on these points, the Court determined that Spire had failed to meet its burden of showing that the cast iron and bare steel mains and services it had replaced pursuant to section 393.1009(5)(a) were worn out or in deteriorated condition and so ordered these cases remanded to remove the cost of these pipes that Spire had “not shown to be worn out or deteriorated from the ISRS revenue awarded to Spire.”

15. It is thus clear which pipes the Court of Appeal was referring to in its remand order.

16. Spire’s contention that more evidence is needed to determine which pipes the Court of Appeals ordered the Commission to refund is therefore false.

17. Moreover, Spire is not actually seeking to add evidence to show which pipes the Court of Appeals determined Spire had failed to provide sufficient evidence for, but rather, is seeking to add completely new evidence so that it can effectively re-

litigate its entire case on remand. This is outside of the scope of the Western District's remand.<sup>2</sup>

18. The Court of Appeals made a determination that Spire had failed to show that that the cast iron and bare steel mains and service it had replaced were worn out or in deteriorated condition so the Court ordered these cases remanded to remove the cost of those pipes the that Court had determined were not shown to be worn out or deteriorated. All the Commission needs to do is determine the cost of those replacements and order the temporary rate adjustments.

### **Response to Spire's Argument Regarding Due Process**

19. Spire attempts to argue that if this Court were to adhere to the Western District mandate as written, it would be denied due process. This is untrue.

20. As the petitioner, Spire bore the burden of proof in these cases. Nothing prevented Spire from presenting evidence regarding the condition of its cast-iron and bare steel pipes as part of the original hearing (which included segment of live rebuttal that should have allowed for Spire to present whatever evidence it needed to prove its point). Moreover, Spire did not present evidence because the Company did not believe it needed to, as the Court of Appeals itself found: "Spire seems to believe that it does not need to present evidence that the pipes it replaces are worn out or deteriorated because it considers any pipe subject to a state or federal replacement

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<sup>2</sup> Spire's response states that while "[i]t is clear that the Court does not believe that Spire should refund ISRS revenues for cast iron and bare steel facilities that were worn out or deteriorated[,] [i]t does not say when or how that showing should occur . . ." This is an obviously flawed statement. The showing of whether the cast iron and bare steel facilities were worn out or deteriorated was supposed to occur during the pendency of the initial case. If the Court had wanted to give Spire a **second** change to make that showing, it would have explicitly done so. But the Court of Appeals did not.

requirement to be by definition worn out or deteriorated. Missouri courts have found otherwise.”

21. A petitioner who was not denied the opportunity to present evidence to meet their burden of proof and who fails to meet that burden has not suffered any due process violation when they are denied a second bite at the proverbial apple.

**Response to the remainder of Spire’s Response**

22. The OPC again notes that it is not conceding the merit of any other portion of Spire’s response.

23. However, the OPC also does not believe that responding to any other portion of Spire’s response is necessary at this time.

24. Therefore, the OPC will forego any further response unless it becomes necessary.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission accept the position originally laid out by the OPC in its April 22 filing.

Respectfully submitted,  
OFFICE OF THE PUBLIC  
COUNSEL

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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 twenty-eighty day of April, 2020.

/s/ John Clizer