

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

In the Matter of the Application of Spire)
Missouri Inc. to Change its Infrastructure)
System Replacement Surcharge in its) **File No. GO-2018-0309**
Spire Missouri East Service Territory)

In the Matter of the Application of)
Spire Missouri Inc. to Change its)
Infrastructure System Replacement) **File No. GO-2018-0310**
Surcharge in its Spire Missouri West)
Service Territory)

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 *Report and 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 in that it misapplies the law in denying the OPC’s motion to dismiss, misapplies the law and is unsupported by sufficient evidence with regard to the eligibility of Spire’s claimed replacements, and misapplies the law and is unsupported by sufficient evidence with regard to the eligibility of Spire’s claimed relocations.

I. The Commission erred in denying the OPC’s motion to dismiss.

The OPC filed a motion to dismiss Spire’s petition in this case on August 21, 2018. As the Commission’s Order correctly notes, one of the reasons for the dismissal of Spire’s petition set forth in OPC’s motion is the fact that the petition “included claims for the cost of

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

infrastructure replacements that the Western Dist. Court of Appeals has determined do not qualify for ISRS recovery.”² However, the Commission errs when it finds that Spire’s petition alleges facts to prove “the infrastructure system replacements included in the Petitions and submitted for ISRS cost recovery are eligible under the ISRS statutes.”³ A review of Spire’s petition demonstrates it includes no such facts. Instead, Spire’s petition contains merely a conclusion of law claiming that all of the projects for which Spire seeks recovery through ISRS meet the statutory definition of “gas utility plant” found in section 393.1009.⁴

Missouri law clearly states that “[l]egal **conclusions** cannot be pleaded as ultimate **facts**.”⁵ “Missouri rules of civil procedure demand more than mere conclusions that the pleader alleges without supporting facts.”⁶ “A conclusion must be supported by factual allegations that provide the basis for that conclusion, that is, ‘facts that demonstrate how or why’ the conclusion is reached.”⁷ “Where a petition contains only conclusions and does not contain the ultimate facts or any allegations from which to infer those facts[,] a motion to dismiss is properly granted.”⁸

Because Spire’s petition contains only a barebones legal conclusion that the projects for which it seeks recovery through ISRS meet the statutory definition of “gas utility plant”

² EFIS, GO-2018-0309 & GO-2018-0310, Report and Order, pg. 10.

³ *Id.*

⁴ EFIS, GO-2018-0309 & GO-2018-0310, Verified Application and Petition of Spire Missouri Inc. to Establish an Infrastructure System Replacement Surcharge, pg. 9.

⁵ *Jordan v. Peet*, 409 S.W.3d 553, 560 (Mo. App. W.D. 2013) (quoting *Musser v. Musser*, 281 Mo. 649, 221 S.W. 46, 50 (Mo. 1920)).

⁶ *Id.* (quoting *In re Transit Cas. Co.*, 43 S.W.3d 293, 302 (Mo. banc 2001)).

⁷ *Id.* (quoting *Westphal v. Lake Lotawana Ass’n, Inc.*, 95 S.W.3d 144, 152 (Mo. App. W.D. 2003)).

⁸ *Lotawana Ass’n, Inc.*, 95 S.W.3d at 152 (quoting *Berkowski v. St. Louis County Bd. of Election Comm’rs*, 854 S.W.2d 819, 823 (Mo. App. E.D. 1993)).

found in section 393.1009, Spire has pleaded no facts upon which relief can be granted and the OPC's motion to dismiss should be granted.

II. The Commission erred in determining that Spire's claimed replacement of cast-iron and bare steel pipes were ISRS eligible.

The Order correctly sets forth the two requirements that must be met before component replacements may be recovered through an ISRS: "(1) the replaced components must be installed to comply with state or federal safety requirements and (2) the existing facilities being replaced must be worn out or in a deteriorated condition."⁹ Yet the Order does not cite to any evidence showing that the cast-iron and bare steel pipes Spire replaced are actually "worn out or in a deteriorated condition."

The closest that the Order comes is to state that these pipes *can* wear out or deteriorate over time; *i.e.* that cast-iron pipes are "*subject*" to cracking and leaking and that bare steel pipes corrode "*relatively quickly*." However, the question of whether the cast-iron and bare steel pipes Spire replaced are *capable* of wearing out or deteriorating was never an issue. Instead, the real question before the Commission is whether the pipes Spire replaced were *actually* worn out or deteriorated. The record is bereft of any evidence to prove this fact, as demonstrated by the Order's failure to cite to anything. Nor could Spire ever hope to produce any evidence to support its argument as it has readily admitted that it does not even test the pipes that it is abandoning.¹⁰ Instead, the record shows that Spire simply considers any pipe subject to the steel and cast-iron replacement program to be "by definition worn out or in [a] deteriorated condition."¹¹

⁹ EFIS, GO-2018-0309 & GO-2018-0310, Report and Order, pg. 13.

¹⁰ EFIS, GO-2018-0309 & GO-2018-0310, Exhibit 207, pgs. 2-3.

¹¹ EFIS, GO-2018-0309 & GO-2018-0310, Exhibit 206, pg. 1.

The only other evidence cited in the Order that even remotely touches on this issue is a single unsupported statement by one of Spire’s witnesses that “[m]ost of the cast iron pipes being replaced are over a hundred years old.”¹² However, this statement is directly contradicted by Spire’s own business records that show that the majority of the pipes being abandoned are *not* more than 100 years old.¹³ The Commission should not place more evidentiary weight on the lone, unsupported statement of Spire’s witness over and above Spire’s own uncontested business records. Even if it did, the age of the pipes alone does not show that they are worn out or deteriorated.

The Commission correctly points out that “[s]ince Spire Missouri brought the Petitions, it bears the burden of proof.”¹⁴ This means “Spire Missouri must convince the Commission it is “more likely than not” that its allegations are true.”¹⁵ Spire cannot prove that its more likely than not that the cast-iron and bare steel pipes it replaced are worn out or in a deteriorated condition because Spire has presented literally no evidence to prove that point. Instead, the Commission has granted Spire some sort of unlawful evidentiary presumption by assuming that just because pipes *can* wear out, they *are* worn out. The Order’s conclusion that the cast-iron and bare steel pipes Spire replaced are worn out or deteriorated is thus the direct result of the Commission misapplying the law regarding Spire’s burden of proof.

III. The Commission erred in determining that Spire’s claimed relocation of pipes were ISRS eligible.

¹² EFIS, GO-2018-0309 & GO-2018-0310, Report and Order, pg. 6.

¹³ EFIS, GO-2018-0309 & GO-2018-0310, Exhibit 208, pg. 10; EFIS, GO-2018-0309 & GO-2018-0310, Exhibit 209, pgs. 8-9.

¹⁴ EFIS, GO-2018-0309 & GO-2018-0310, Report and Order, pg. 9.

¹⁵ *Id.* pg. 9-10.

The Order finds that Spire’s relocations are ISRS eligible by relying solely on the legal conclusion stated in Spire’s petition that all of the relocations for which recovery was sought meet the statutory definition of “gas utility plant” found in section 393.1009.5(c). Again, Missouri law states that “[l]egal **conclusions** cannot be pleaded as ultimate **facts**.”¹⁶ “Missouri rules of civil procedure demand more than mere conclusions that the pleader alleges without supporting facts.”¹⁷ “A conclusion must be supported by factual allegations that provide the basis for that conclusion, that is, ‘facts that demonstrate how or why’ the conclusion is reached.”¹⁸ In its Order, the Commission has already found that Spire offered ***absolutely no facts to support its legal conclusion***.¹⁹

The OPC also notes that: the individual who signed the verification for this legal conclusion is not an attorney and is not admitted to practice law;²⁰ the same sentence containing the statement on which the Commission is relying also states that all of the replacements for which Spire sought recovery were ISRS eligible (which the Commission’s Order determines to be objectively false given the inclusion of plastic components that are not worn out or in a deteriorated condition);²¹ that this legal conclusion is directly

¹⁶ *Jordan v. Peet*, 409 S.W.3d 553, 560 (Mo. App. W.D. 2013) (quoting *Musser v. Musser*, 281 Mo. 649, 221 S.W. 46, 50 (Mo. 1920)).

¹⁷ *Id.* (quoting *In re Transit Cas. Co.*, 43 S.W.3d 293, 302 (Mo. banc 2001)).

¹⁸ *Id.* (quoting *Westphal v. Lake Lotawana Ass'n, Inc.*, 95 S.W.3d 144, 152 (Mo. App. W.D. 2003)).

¹⁹ The Petition states that “[t]he ***only*** evidence in the record relating to this issue are the Petitions of Spire Missouri” (emphasis added). EFIS, GO-2018-0309 & GO-2018-0310, Report and Order, pg. 16.

²⁰ EFIS, GO-2018-0309 & GO-2018-0310, Exhibit 5, pg. 2; EFIS, GO-2018-0309 & GO-2018-0310, Verified Application and Petition of Spire Missouri Inc. to Establish an Infrastructure System Replacement Surcharge, pg. 10.

²¹ EFIS, GO-2018-0309 & GO-2018-0310, Verified Application and Petition of Spire Missouri Inc. to Establish an Infrastructure System Replacement Surcharge, pgs. 4,14.

contradicted later in the same petition when Spire lists the cost of replacements as being “net” of reimbursements;²² and that it is further directly contradicted by the testimony of Spire’s witness Glenn Buck who testified that Spire was performing relocations not because they were required due to construction or improvement of a highway, road, street, public way, or other public work, but rather, to correct issues regarding the pipe’s “angle of repose”.²³

Finally, the OPC notes that the Commission again has misapplied the law regarding burden of proof by finding that “OPC did not present any evidence in support of its contention.”²⁴ The Commission has already stated that “[s]ince Spire Missouri brought the Petitions, it bears the burden of proof.”²⁵ This means “Spire Missouri must convince the Commission it is ‘more likely than not’ that its allegations are true.”²⁶ As such, the OPC does not *need* to present evidence to show that Spire failed to meet its burden of proof regarding the ISRS eligibility of the relocations. Instead, it is Spire who needs to present evidence to show that the relocations are ISRS eligible. Spire has failed to do so and the Commission should therefore deny Spire recovery for these costs.

"WHEREFORE, the Office of the Public Counsel respectfully requests a rehearing of the Commission’s September 20, 2018 *Report and Order* pursuant to the authority of RSMo section 386.500.

²² EFIS, GO-2018-0309 & GO-2018-0310, Exhibit 1, Appendix B, pg. 2; EFIS, GO-2018-0309 & GO-2018-0310, Exhibit 2, Appendix B, pg. 2.

²³ EFIS, GO-2018-0309 & GO-2018-0310, Exhibit 6, pg. 5.

²⁴ EFIS, GO-2018-0309 & GO-2018-0310, Verified Application and Petition of Spire Missouri Inc. to Establish an Infrastructure System Replacement Surcharge, pg. 17.

²⁵ EFIS, GO-2018-0309 & GO-2018-0310, Report and Order, pg. 9.

²⁶ EFIS, GO-2018-0309 & GO-2018-0310, Report and Order, pgs. 9-10.

