Exhibit No. 208

OPC – Exhibit 208
Geoff Marke
Surrebuttal Testimony
File No. GR-2021-0108

Exhibit No.: _____
Issue(s): AMI/AMI Opt-Out/Corporate Governance: Workplace Discrimination/Propane Storage/Research and Development/Rate Design
Witness/Type of Exhibit: Marke/Surrebuttal
Sponsoring Party: Public Counsel
Case No.: GR-2021-0108

SURREBUTTAL TESTIMONY

OF

GEOFF MARKE

Submitted on Behalf of the Office of the Public Counsel

SPIRE MISSOURI, INC.

CASE NO. GR-2021-0108

July 14, 2021

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Spire Missouri Inc.'s d/b/a Spire Request for Authority to Implement a General Rate Increase for Natural Gas Service Provided in the Company's Missouri Service Areas	)))))	Case No. GR-2021-0108

AFFIDAVIT OF GEOFF MARKE

STATE OF MISSOURI)
) **ss**
COUNTY OF COLE)

Geoff Marke, of lawful age and being first duly sworn, deposes and states:

1. My name is Geoff Marke. I am a Chief Economist for the Office of the Public Counsel.

2. Attached hereto and made a part hereof for all purposes is my surrebuttal testimony.

3. I hereby swear and affirm that my statements contained in the attached testimony are true and correct to the best of my knowledge and belief.

Geoff Marke
Chief Economist

Subscribed and sworn to me this 14th day of July 2021.

NOTARY PUBLIC NOTARY SEAL STATE OF MISSOURI

TIFFANY HILDEBRAND
My Commission Expires
August 8, 2023
Cole County
Commission #15637121

Tiffany Hildebrand
Notary Public

My commission expires August 8, 2023.

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SURREBUTTAL TESTIMONY

OF

GEOFF MARKE

SPIRE MISSOURI, INC.

CASE NO. GR-2021-0108

I. INTRODUCTION

Q. Please state your name, title, and business address.

A. Geoff Marke, PhD, Chief Economist, Office of the Public Counsel (OPC or Public Counsel), P.O. Box 2230, Jefferson City, Missouri 65102.

Q. Are you the same Dr. Marke that filed direct and rebuttal testimony in GR-2021-0108?

A. I am.

Q. What is the purpose of your surrebuttal testimony?

I am responding to the rebuttal testimony of other parties' witnesses on select topics. The following is a list of those topics and the witnesses:

- AMI
  - Spire Inc. ("Spire") witness James Rieske
- AMI Opt-Out
  - Staff witness Claire M. Eubanks
- Corporate Governance: Workplace Discrimination
  - Spire witness C. Eric Lobser and
  - Staff witness Jeremy Julitte
- Propane Storage
  - Spire witness Robert Noelker
- Research and Development
  - Staff witness Karen Lyons
- Rate Design
  - Spire witness Scott A. Weitzel

I am also formally adopting former OPC witness Amanda Conner's direct and rebuttal testimony on the topics of "Bad Debt and Uncollectables" and "Credit Card Fees" if those issues require further commentary in an evidentiary hearing.

Finally, my silence regarding any issue should not be construed as an endorsement of, agreement with, or consent to any other party's filed position.

II. AMI

Q. What was your recommendation in direct testimony regarding Spire's AMI costs?

A. I believe customers should only be charged, and the Company should only be earning a profit on, one meter, not two (or more) meters per account as the Company is requesting and currently practicing.

As such, my primary recommendation is that the Commission disallow the total costs associated with AMI deployment in utility account 381100 that Spire is seeking in this rate case.

Q. Did Spire agree?

A. No.

Q. Did Staff agree?

A. Yes.

Q. Did Spire respond to each of your arguments in direct testimony?

A. No. Spire witness James Rieske only responded to the following four arguments:

1. Spire's premature retirement of its diaphragm meters creates stranded assets;[1]

[1] "Stranded asset" is a term that has different meanings depending on the context. For example, regulation-based stranded assets differ from market-based stranded assets. The latter simply compares the book value of an asset relative to some future market value of the asset. For example, if an oil reserve has $1 billion book value but sliding demand due to carbon taxes or other environmental regulations reduces its market value to $400 million, the result is $600 million in stranded assets. By contrast, regulation-based assets are assets that are covered by cost of service or other rate-of return regulation. Government regulators at some point have explicitly approved this type of asset in the past to earn a return over a defined period of time—typically in line with the Company's depreciation schedule and subsequent rate cases; however, assets can and should remain useful above and beyond the point they have been paid off. In this case, the stranded assets are the diaphragm meter's remaining book value when Spire decided to "retire"

2. That further capital investment is necessary for full two-way AMI capability;
3. Diaphragm meters are not obsolete; and
4. It is not clear what benefits these meters provide customers.

I will provide greater context and respond to each of these four rebuttals to my direct position in turn.[2]

Stranded Assets

Q. What was Mr. Rieske's response to your objection to Spire prematurely retiring their existing diaphragm meters before the end of their depreciated and useful life?

A. Mr. Rieske argues the Company is required to by citing to Commission safety rule 20 CSR 4240-10.030 (19) which states:

> Unless otherwise ordered by the commission, each gas service meter installed shall be periodically removed, inspected and tested at least once every one hundred twenty (120) months, or as often as the results obtained may warrant to insure compliance with the provisions of section (18) of this rule.

Q. That rule only says the Company needs to test the meters, not replace them every ten years. Did you submit further discovery to clarify Spire's practice?

A. Yes. OPC DR-2142 inquired into this practice by asking the following question:

> **Request**: The rebuttal testimony of James Rieske p. 4, lines 12-13 states: *Finally, the Company's installation strategy minimizes the potential for stranded assets by focusing on diaphragm meters that are already scheduled for replacement.*

these assets within ten years despite the Company's Commission approved 35-year depreciation schedule the Company has offered and maintained for multiple consecutive rate cases (including this one).

[2] Mr. Rieske was silent as to my assertion that Spire failed to engage stakeholders on this topic in the eight months preceding direct testimony. He was also silent on Spire's failure to provide any cost-benefit studies or RFP's to support the capital investment decision. Finally, although he agreed with my assertion that that natural gas AMI meters do not produce the same espoused benefits as electric AMI meters he did not speak to the fact that several State Commissions have rejected the case for electric AMI investments due to lack of demonstrable benefits relative to their costs.

- Please provide a copy of "the Company's installation strategy" referenced above.
- Please define "replacement" in the above referenced statement. Is Spire removing and retiring meters (i.e., no longer in service) with thirty-five useful lives every ten years?

Q. Did Spire clarify whether or not they are removing meters from service categorically at the ten-year mark (or close to it) despite the meters 35-year depreciation schedule?

A. Yes. He provided the following specific response on that question:

> When a meter is selected for the accuracy testing beginning at 10 years, it is removed from service and shipped back to the Company's testing facility. The meter is tested for accuracy and the external condition is evaluated against its age. However, the working mechanisms of the meter are inside the sealed body of the meter core. To examine or repair these internal parts the body must be opened. The process to open the core, replace the gaskets and reseal it would take far longer than the meter is worth for reuse. The Company, as most other companies in the industry, have found that reconditioning or refurbishing a used meter is nearly as expensive or more expensive than buying a new one. We are not able to physically inspect the condition of the internal components of the meter or perform replacement or repair cost effectively. This means reusing a removed meter increases the occurrence of mechanical failure or metrology inaccuracies.
>
> This is common occurrence in the industry that has existed for years. **For these reasons, for years the Company has condemned most meters that are removed for accuracy testing, particularly if that age exceeds more than 15 years.** At times the Company will retire a meter as old as 10 years old

based on the actual condition and useful life of that particular meter. (emphasis added)[3]

Q. Is it fair to say that Spire interprets the phrase "testing" under 20 CSR 4240-10.030 (19) as "retirement and replacement"?

A. It would appear so.

Q. Do you agree with that interpretation?

A. No. That would clearly be an inefficient use of an asset that is booked on a 35-year depreciation schedule.

Q. What is the practical result of this?

A. The Company's unique interpretation of these rules has allowed it to increase its rate base beyond what it should be at great costs to customers. Moreover, Spire's repeated failure to update its meter depreciation schedules to assume a 10-year operational life means that it has been earning a larger return on it meter investments than it should have. Customers are effectively paying for the costs (including profits) of two meters despite only using one at a given time.

Q. Are there other concerns if the Commission approves the ultrasonic meters?

A. Yes. Based on Spire's interpretation of the Commission's rule 20 CSR 4240-10.030 (19), the Company would be continuing the practice of replacing meters every ten years despite the ultrasonic meters having a twenty-year depreciation life.

Q. Your discovery also asked to provide a copy of the installation strategy. Did Spire provide it?

A. In part. A three-and-a-half page "Overall Strategy" was provided for ultrasonic/AMI deployment across all of its regulated affiliates (only three pages were Missouri applicable).

[3] See GM-1.

However, the overall strategy can be summarized as follows: Plans will be developed. [4]

Q. Have you seen any of these plans?

A. No.

Q. Can you summarize your response to Spire's rebuttal to your assertion that the Company is creating a multi-million dollar stranded asset?

A. Yes. Based on discovery Spire is:

- Removing all diaphragm meters that have been in service more than ten-years (or that are otherwise present in a domicile, regardless of age, if a service representative needs to make a scheduled visit);
- Retiring those meters despite the approximate 25-years in remaining depreciation on the books;
- Replacing those retired meters with brand new meters under a 20-year depreciation schedule;
- Continuing to replace the new meters every ten-years based on the Company's interpretation of 20 CSR 4240-10.030 (19);
- Apparently, this practice has been going on for years with no proposed adjustments; and
- The Company is still in the process of developing plans to articulate and measure how they will accomplish this.

The end result is that customers are paying above and beyond the cost of service for a capital investment whose primary responsibility is to just tell the Company and the customer how much gas they used on a monthly basis. There have been no cost-benefit studies conducted, no

[4] See also GM-2. I have highlighted the sentences in each section that effectively state plans will be developed to emphasize the lack of details surrounding said strategy. Examples include, "A complete implementation plan will be developed", "A training plan will be created", "A customer communication plan will be developed", "The change strategy and plans will include…"

Request-for-Proposals issued, and no implementation plans designed to date. The Company is simply replacing functional meters that have not been paid off with more expensive meters that require further capital investments.

Further Capital Investments for AMI Capability

Q. Did Spire address your concern about the prudency of further capital investments related to these meters?

A. In part. Mr. Rieske says that the benefits from ultrasonic meters could be enhanced by additional investment in a wireless network but is silent on whether this would include additional costs related to customer information system ("CIS") build-out. My experience with at least one utility who converted to AMI, Evergy, included hundreds of millions of additional dollars in software costs above and beyond the hardware meter investments.

Q. What benefits did Mr. Rieske identify as a result of further investment in an advanced wireless network system to complement the ultrasonic meters?

A. Mr. Rieske identifies three benefits:

1.) Customers could see their hourly gas usage;

2.) Anomalies in gas usage could be detected on a more frequent finite (hourly) level; and

3.) The Company could more accurately model customer load profiles (peak day and peak hour demand requirements)

Q. Did Mr. Rieske provide any cost estimates for the wireless network system?

A. No.

Q. Do you agree these are benefits worth investing in?

A. No. To be clear, I have no idea what it would cost to obtain these benefits, but I struggle to see a scenario where these three identified benefits (which are effectively the same thing—more real time data) would ever justify the likely costs.

I am aware of no demand for hourly gas usage data from Spire customers. Furthermore, the value of knowing one's natural gas consumption on a more real-time basis as opposed to consumption on a monthly basis needs to be contrasted with the costs for such a service.

Natural Gas Diaphragm Meters Are Not Obsolete

Q. Mr. Rieske counter's your assertion that diaphragm meters are not obsolete by including a letter from Itron informing customers that they will no longer be offering diaphragm natural gas meters. What is your response?

A. First, one Company sending out a letter to customers that they no longer plan to offer a product is not evidence that a product is obsolete. Second, it is now mid-July and Itron is still advertising diaphragm meters on its website.[5] Third, the letter from Itron is dated 10 September 2020 which is 77 days *after* Spire filed its Depreciation Authority Order in Case No: GO-2020-0416 with the Commission. It appears as though the impetus behind Spire's meter switch predates Itron's letter to no longer offer diaphragm meters.

Finally, just because Itron is no longer offering diaphragm meters (despite the website suggesting differently) does not mean other natural gas meter vendors are not offering or making diaphragm meters.

Q. Do you have any evidence to support that assertion?

A. I sent an email to Gasco natural gas meter representatives affiliated with Sensus (a Xylem Inc. brand) with the following questions on that very topic. The email questions and response are as follows:

1.) Are diaphragm natural gas meters currently in stock and available? If yes, what sizes do you have?

2.) Is there any legitimate fear that diaphragm natural gas meters from Gasco will not be available in the next year? Next five years?

[5] Itron. (2021) I-250 Residential and Light Commercial Gas Diaphragm Meter. https://www.itron.com/na/solutions/product-catalog/i250 7/12/2021 1:40pm

3.) Is there any legitimate fear that diaphragm natural gas meters will not be available from any Company (if Gasco were to stop carrying diaphragm natural gas meters) in the next year? Next five years?

I received the following email response:

> Hi Geoff,
>
> Yes, we have ¾", 1", & 1-1/4" in R275's. In the R415's we have 1-1/4" & 1-1/2" connections in-stock. No, there is no fears of these not being available next year or five years even if we did not sell them anymore, they would still be available. There are no plans for us to stop selling them within the next five years. Depending on the needed meter we have hundreds in stock and thousands on order with Sensus.
>
> I hope this is helpful. Please don't hesitate to give us a call.[6]

Based on this response I doubt the soundness in Spire's assertion that diaphragm natural gas meter technology is obsolete.

Q. That's one example. Could you find any other examples?

A. Figure's 1 and 2 include snippets of 250 series natural gas diaphragm meters currently advertised for sale by other prominent vendors.

[6] See GM-3 for a copy of the email and response.

Figure 1: Honeywell AC-250[7]

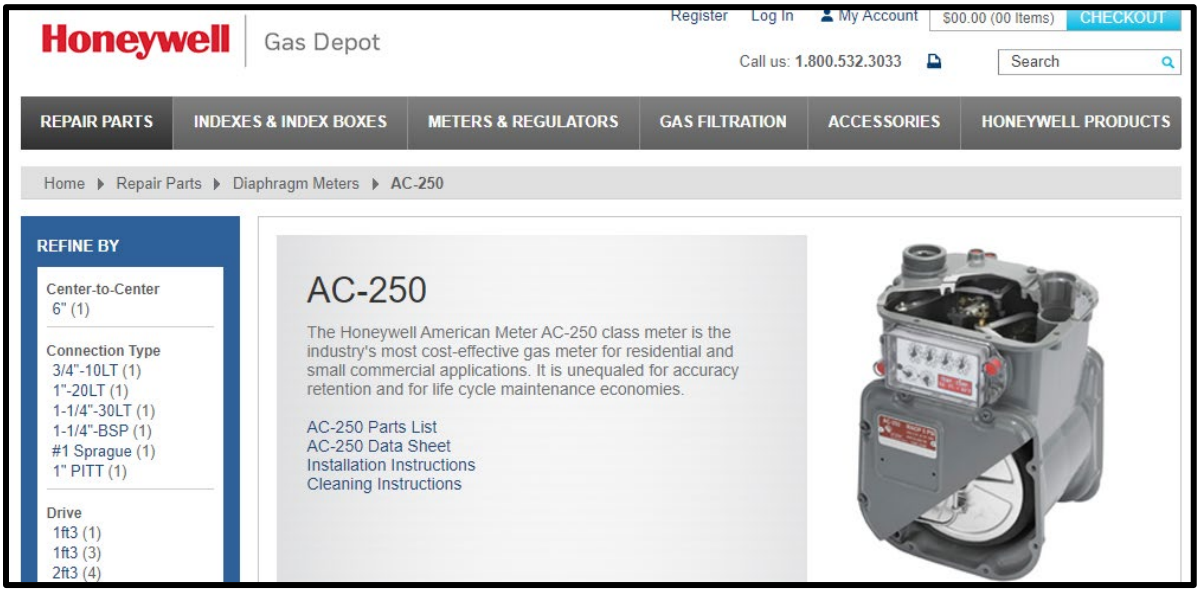


Figure 2: American Meter AM-250[8]

[7] Honeywell (2021) Gas Depot. AC-250 https://www.honeywellgasdepot.com/repair-parts/diaphragm-meters/ac-250.html

[8] IMAC Systems Inc. (2021) Diaphragm Gas Meters: American Meter AM-250 Diaphragm Gas Meter. https://www.imacsystems.com/am250.htm

Benefits to Customers

Q. What benefits from ultrasonic meters did Mr. Rieske identify to justify prematurely retiring diaphragm meters with 25-years of remaining useful life?

A. He identified four benefits including:

1.) Safety benefits for customers;

2.) Safety benefits for Spire service/meter employees;

3.) A 20% increase in accuracy compared to diaphragm meters; and the

4.) Reliability of not having to change moving parts within a meter

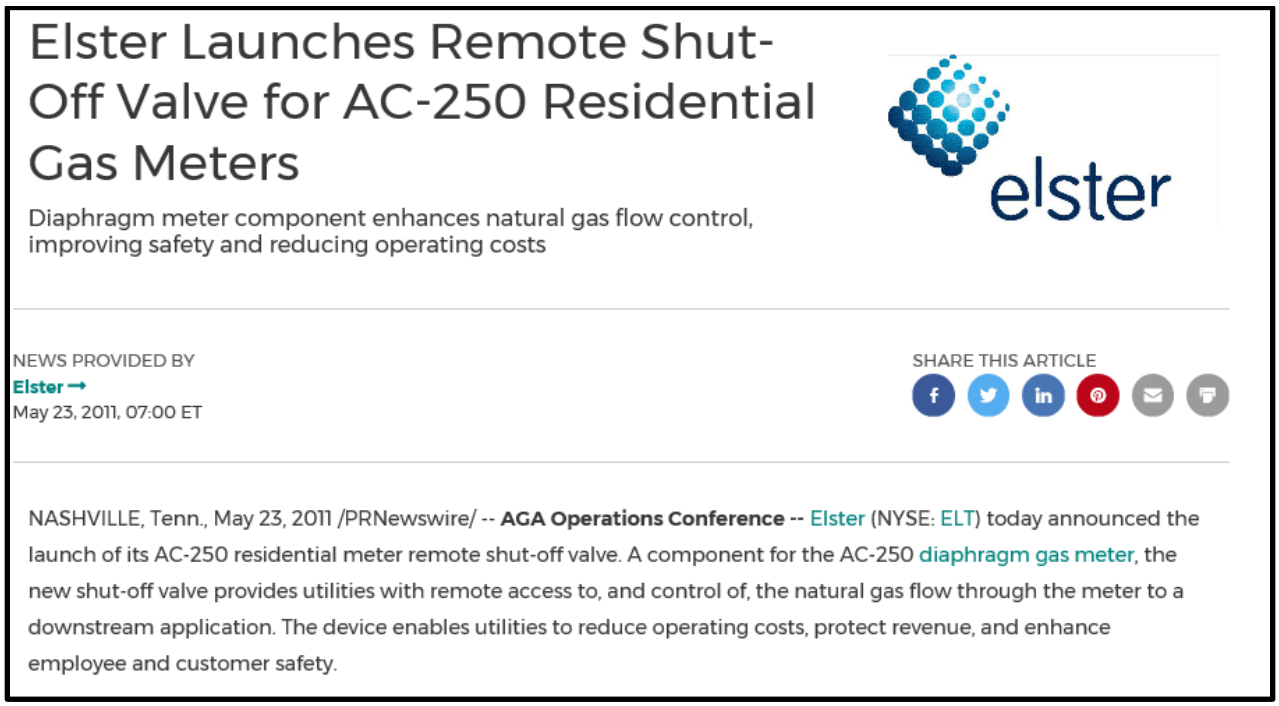
Q. Mr. Rieske posits that if ultrasonic meters were present in the 2018 Merrimack gas explosion the disaster could have been averted. Do you agree?

A. I believe the presence of a remote shut-off could theoretically have minimized that outcome.

Importantly, the ability to remotely shut-off at the meter is not a feature unique unto ultrasonic technology.

A cursory Google review of the term "natural gas diaphragm meter remote shut off" suggests that the remote shut-off feature exists for diaphragm meters as well. For example, Figure 3 includes a snippet of news clip in 2011 from Elster announcing the launch of a remote shut-off valve for its AC-250 Residential gas meter.

Figure 3: Elster remote shut-off of natural gas diaphragm meters[9]



Elster Launches Remote Shut-Off Valve for AC-250 Residential Gas Meters

Diaphragm meter component enhances natural gas flow control, improving safety and reducing operating costs

elster

NEWS PROVIDED BY
Elster
May 23, 2011, 07:00 ET

SHARE THIS ARTICLE

NASHVILLE, Tenn., May 23, 2011 /PRNewswire/ -- **AGA Operations Conference** -- Elster (NYSE: ELT) today announced the launch of its AC-250 residential meter remote shut-off valve. A component for the AC-250 diaphragm gas meter, the new shut-off valve provides utilities with remote access to, and control of, the natural gas flow through the meter to a downstream application. The device enables utilities to reduce operating costs, protect revenue, and enhance employee and customer safety.

Just as important is the admission by Mr. Rieske that the remote shut-off feature is not currently in place on any ultrasonic meter installed to date but rather a feature expected to be included in a future 400 series later this year. To be clear, no ultrasonic meters currently in operation and subject to the revenue requirement in this case have the "remote shut-off" feature that he singles out as the primary safety customer benefit.

Q. Did you review any literature on the Merrimack explosion to see if ultrasonic meters were cited as a recommended feature to prevent future over-pressurization events?

A. Yes. I reviewed the official Merrimack Valley Natural Gas Explosions After Action Report September 13 - December 16, 2018[10] and the American Gas Association's ("AGA")

[9] Elster (2011) Elster launches remote shut-off valve for AC-250 residential gas meters. *PR NEWSWIRE* https://www.prnewswire.com/news-releases/elster-launches-remote-shut-off-valve-for-ac-250-residential-gas-meters-122436468.html

[10] Merrimack Valley Natural Gas Explosions After Action Report September 13 - December 16, 2018 https://andoverma.gov/DocumentCenter/View/7038/September-2018-Merrimack-Valley-Natural-Gas-Explosion-AAR_MEMA?bidId=

Leading Practices to Reduce the Possibility of a Natural Gas Over-Pressurization Event[11] that came out after the Merrimack tragedy. Neither document recommends or references ultrasonic meters or remote shut-offs. I believe that having the ability to remotely shut-off a meter would have been helpful, but it would not have prevented the over-pressurization event, which represented multiple failures across the utility and distribution system.[12] Moreover, I fail to see why ultrasonic meters, specifically, would have been uniquely more beneficial if they were in place.

Q. Mr. Rieske says ultrasonic meters would have saved a Spire employee life if they had been operational. What do you know about this claim?

A. OPC DR-2144 inquired on this topic and was informed of a 2000 fatality in Barnhardt, Missouri of a Laclede Gas employee who died after a contractor for Southwestern Bell Telephone Company punctured a main.[13]

Q. What is your response?

A. At the likely risk of coming across as unsympathetic. I cannot unequivocally say that the Laclede employee would be alive today if ultrasonic meters were operational twenty-years ago as the leak appears to have occurred prior to the meter on the main, and again, the remote shut-off is not a unique feature solely attributable to ultrasonic meters. Diaphragm meters can be equipped with this feature as well.

Q. Do you have any final comments on customer safety?

A. Spire has relied upon customer safety as the lynchpin argument for its ultrasonic investment, but a little scrutiny reveals that many of the customer safety assertions are not exclusive to

[11] American Gas Association (2018) Leading Practices to Reduce the Possibility of a Natural Gas Over-Pressurization Event https://www.aga.org/globalassets/safety-and-operations-member-resources/leading-practices-to-prevent-over-pressurization-final.pdf

[12] For example, the official after action report speaks to the "Strength" in having available locksmiths to ensure utility presence in entering homes. No doubt that strength may not be applicable in every conceivable situation.

[13] Missouri Lawyers Media (2002) Worker killed in residential gas explosion—hew was responding to puncture of main. https://molawyersmedia.com/2002/12/02/worker-killed-in-residential-gas-explosion-he-was-responding-to-puncture-of-main/ see also GM-4.

ultrasonic meters. The Commission should not be swayed by tragedies that are, at best, only distantly tangible to the argument at hand.

More to the point, when Mr. Rieske speaks of customer benefits, he conveniently omits any discussion of the costs associated with this abrupt conversion including: 1.) the existing undepreciated diaphragm meter; 2.) the new more expensive ultrasonic meter; 3.) the accompanying software expenses to enable AMI capability; 4.) the operational expenses of replacing said meters; and 5.) the profit on top of all of these capital investments against any other reasonable alternative scenario which should include using the investments that are already in rate base to determine the customer's monthly bill.

The Company has merely identified a feature—remote shout-off that it implies is unique to ultrasonic meters—which is not true. Even the Merrimack explosion is a bad illustrative example, as that event was the result of failure at the district regulator stations not the meters. Finally, I cannot confidently sit here and say that the existing diaphragm meters could not be retrofitted with remote shut-off valves, because again, no analysis (or RFP) was conducted to consider alternative actions.

Q. Mr. Rieske's next purported benefit includes safety to Spire employees. Do you agree?

A. First, I would argue that this is just an extension of the first purported unique benefit—customer safety. Second, my argument remains the same. The Company has provided no empirical analysis on the costs or benefits necessary for this investment and the unique feature being espoused "remote shut-off" is not unique to ultrasonic meters.

Q. Mr. Rieske's next purported benefit is a 20% increase in meter accuracy. Do you agree?

A. No. I have to believe this is a misstatement on his end. I struggle to believe that Spire's current diaphragm meters are producing such inaccurate usage results. Let alone this being the first time we are hearing this.

Q. Did you submit discovery to verify this claim?

A. Yes. OPC DR-2145 inquired into this claim requesting any and all-empirical work that the Company may have relied on to substantiate Mr. Rieske's reliability claims. There was no

data provided on diaphragm meter accuracy results. There was no data provided on ultrasonic meter accuracy results in the field. His response only spoke to pre-installation accuracy test results.[14]

Q. Mr. Rieske's final purported benefit for ultrasonic meters is over increased reliability. Do you agree?

A. I do not. Yet again, Mr. Rieske provides no empirical evidence to substantiate this claim. His identified "benefit" is made based on the logic that ultrasonic meters do not have "movable parts" like their diaphragm meter counterparts; therefore, there should be cost benefits through increase reliability by not having to retrofit faulty moving parts.

Even if we were to accept this argument at face value without the support of any empirical validation (savings in movable parts), the reliability argument is a flawed one because the *average* useful life of a diaphragm meter is 35 years. While the *average* useful life of an ultrasonic meter is 20 years. Stated differently, the average diaphragm meter provides service for an additional 15 years on average. That is of course if the Company were following its Commission-approved depreciation schedules. However, we know that is not the case because they are retiring meters every ten years (or soon thereafter). Importantly, under Spire's logic and based on its response to Staff DR 0443-#13, this is true for any meter.[15] Thus, the reliability argument for ultrasonic meters is suspect at best based on the Company's interpretation of the Commission's meter testing rules.

Q. Spire was critical that you did not identify any benefits related to the meter replacements in your testimony. Do you have a response?

A. Ultrasonic meters are not a new, novel technology. They have been around since the late 1970s.[16] The remote shut-off feature (which is on no ultrasonic meters currently deployed by Spire) is a feature not limited to ultrasonic meters alone. The Company's

[14] See GM-5.
[15] See the highlighted text in GM-6.
[16] Scelze, M. et al. (2005) Fundamentals of ultrasonic meters. GE Infrastructure Sensing. https://asgmt.com/wp-content/uploads/pdf-docs/2005/1/A3-A4.pdf

"testing/retirement" practice is very concerning and raises many questions beyond their decision to switch to a more expensive meter. Despite a filed pleading and memorandum articulating OPC's concerns last summer, the Company did not engage OPC before filing its case-in-chief or identify these investments in its direct testimony. I have still yet to see any evidence that the Company compared the two types of meters (diaphragm and ultrasonic) side-by-side, that a cost-benefit analysis was conducted, that alternative options were considered, or any request-for-proposals submitted. I have heard no arguments for why existing diaphragm meters need to be prematurely retired or seen any articulated problems that can/have to be solved immediately by investing hundreds of millions of dollars in ultrasonic meters. The Company's stated strategy is literally to "create a series of plans." This is to say nothing for the lingering additional "AMI" supporting software costs to support—hourly natural gas usage data. A feature no one is asking for.

All of that being said, I could theoretically envision a benefit to customers in having a remote shut-off option on future (or retrofitted) meters in the abstract, but I cannot expected to reasonably support such a position without having the facts, the costs and the available options in front of me to make an informed decision with captive ratepayers money. That is what prudent management is supposed to do.

A Carbon Neutral Fossil-Fuel Company

Q. Do you have any additional comments to make?

A. Yes. At the conclusion of Mr. Rieske's testimony he explains that Spire's replacement meter strategy (i.e, replacing meters whenever there is an opportunity to be on the premise of an account) supports the Company's commitment to becoming a carbon neutral company by mid-century.

Q. Did you inquire as to how Spire intends to become carbon neutral by mid-century?

A. Yes. OPC DR-2148 asked the following question and received the following response:

Request: The rebuttal testimony of James Rieske p. 16, line 18 states:

Spire has committed to becoming a carbon neutral company by mid-century.

- How does a fossil fuel energy company become carbon neutral?
- Does Spire anticipate that ratepayers will shoulder the costs towards becoming carbon neutral by mid-century?

Response: Spire has clearly articulated our commitments in the attached Corporate Social Responsibility Report. Residential natural gas consumption only accounts for 4.6% of GHG. Natural gas LDC's and their residential customers are the closest sector to being carbon neutral. Other sectors have a much harder hurdle to become carbon neutral with industry at 23%, Electricity at 25%, and the transportation sector at 29% https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions.

Spire strongly believes that natural gas is a clean and efficient fuel that serves an important role in our country's energy plan for the future. As we better try to understand our true environmental impact and neutralize it, it is important that we find ways to more accurately measure the gas we deliver to our customers. The ultrasonic meter delivers significantly more accurate measurement and will sustain that accuracy over the life of the meter. Again, it speaks to the fact that diaphragm meter technology met the demands of the past but its design and capability simply do not meet the needs of our customers and community now and going into the future.

Q. What is your response?

A. As it pertains to meters, I would point out that utilizing a diaphragm meter until the end of its useful life would require no immediate car trips thus saving even more tailpipe emissions than Mr. Rieske contemplates.

As to the larger question of how a fossil fuel Company will become carbon neutral by mid-century. Mr. Rieske offers up Spire's Corporate Social Responsibility Report, which can be summarized as follows: the Company plans on increasing capital expense to prevent methane leaks in its distribution system.

Q. Will captive customers be asked to shoulder those costs?

A. They already are.

Q. Would patching up all distribution pipe leaks accomplish the goal of carbon neutrality?

A. I would say no. There are two inherent problems in such a philosophy. The first, is that Spire is omitting the carbon emissions created by burning natural gas at each of its customer premises from its calculation towards carbon neutrality. That is *the* "elephant in the room" in terms of declaring emission neutrality from an environmental perspective. Second, there is a very real concern that such a strategy is akin to gold plating the distribution system and creating future legacy costs that become too large for existing/remaining customers. Stated differently, this is analogous to finding yourself in a hole but continuing to dig. In this case, the "hole" is the increasing unamortized utility plant that may no longer be used and useful due to future emissions concerns and potential customer withdrawal.

Q. What is your recommendation?

A. The Company should engage regulators and OPC in discussions on how such investments are prudent moving forward. My fear is that this meter issue is a symptom of a much larger problem as it pertains to building out rate base under the premise of chasing hypothetical fugitive emissions with no concern for the potential legacy cost liability for captive/stranded customers in the future.

III. AMI OPT-OUT

Q. What are the opt-out fees associated with Spire's proposed Automated Meter Reading Opt-Out Tariff?

A. Spire proposed an initial one-time meter setup fee of $185 and a $40 monthly non-standard meter read charge.

Q. Did Staff support this?

A. Yes. In addition to supporting the changes, Staff witness Claire Eubanks recommended clarifying language within the compliance tariff as well as a recommendation that the Commission order the Company to notify customers prior to installation of the advanced meters. In support of the amounts, Ms. Eubanks provided one-time and monthly opt-out meter fees of other Missouri utilities for comparison. They are as follows:

Utility	One-Time Fee	Monthly Fee
Spire	$185	$40
Evergy West	$150	$45
Empire	$150	$45
Empire Water	$150	$45
Liberty Water	$150	$45
Ameren Missouri	$100	$40

Q. Do you have any comparable state information on AMI opt-out & monthly reoccurring fees for the Commission's reference.

A. Yes. The following opt-out information was obtained from the National Conference of State Legislatures website and includes the following AMI Opt-Out Policies:[17]

State	AMI Opt-Out Policy
North Carolina	• $150 one-time fee • $11.75 monthly charge • Can waive fees with notarized doctor's note confirming health issues related to smart meter technology
Georgia	• $19 monthly charge
Florida	• Various plans approved • $89 to $96 one-time fees • $13 to $21 monthly charge
Maryland	• $75 one-time fee • $11 to $17 monthly charge
Pennsylvania	• Law requires that customers cannot opt-out
New Jersey	• $45 one-time fee • $15 monthly charge

[17] Shea, D. & K. Bell (2019) "Smart Meter Opt-Out Policies" National Conference of State Legislatures. https://www.ncsl.org/research/energy/smart-meter-opt-out-policies.aspx

New York	• $105 one-time fee • $9.50 monthly charge
Massachusetts	• Need an approved opt-out plan if you want AMI approval
Rhode Island	• $27 one-time fee • $13 monthly charge
Vermont	• Law requires customers get a written notification prior to installation • Customers can remove an existing smart meter or opt-out
New Hampshire	• Law requires written consent from customers prior to installation • No fees assessed on customers who choose to keep their analog meters
Maine	• $40 one-time fee • $15.66 monthly charge to retain analog meter • $20 one-time fee and $13.98 monthly charge to install a smart meter with two-way transmitter turned off
Ohio	• Requires utility offer opt-out programs and include a process for how utilities assess any associated fees
Oklahoma	• $110 one-time fee • $28 monthly charge
Arizona	• $38-$50 one-time fee • $5 to $26 monthly charge
Wyoming	• $50 one-time fee
Nevada	• $52 one-time fee • $9 monthly charge
Michigan	• $67 to $124 one-time fee • $9.80 monthly charge (a utility gives reduced fees for customers who give notice of their decision to opt-out prior to installation
California	• $75 one-time fee • $10 monthly charge (for three years) • $10 one-time fee (Low-Income) • $5 monthly charge (Low-Income for three years)
Indiana	• $75 one-time fee • $17.50 monthly charge • One-time fee is waived if customers notify the utility of their intent to opt-out prior to installation.
Illinois	• $20 monthly charge

Oregon	• $9 tri-annual meter reads
Hawaii	• $50 one-time fee • $15.30 (or less) monthly charge
Iowa	• $4.11 monthly charge
Louisiana	• $12.42 monthly charge in New Orleans • $14.35 monthly charge
Washington	• $50 to $90 one-time fee • $5 to $15 monthly charge
Kentucky	• $100 one-time fee • $25 monthly charge
Texas	• Fees vary

Q. What should the Commission note from this information?

A. That Missouri utilities are an outlier.

No state commission has approved fees as high as $185 that Spire is requesting and no state commission has approved monthly fees as high as $40 that Spire is requesting except Missouri ($45 and $40 monthly AMI opt-out charge).

These costs are excessive and out-of-synch with the rest of the nation.

Q. Are you concerned that these numbers almost certainly correspond to electric AMI as opposed to gas AMI?

A. No. First, I believe that point underscores why AMI investment is not appropriate for a natural gas utility to begin with. Furthermore, I have little concern that a natural gas meter is more expensive than an electric meter based on the testimony of Spire witness James Rieske who states, "This trip [technician driving to a premise] is the largest portion of the overall replacement expense. . . . The meter swap itself is a simple process that does not require much additional time."[18]

[18] Case No: GR-2021-0108 Rebuttal Testimony of James Rieske p. 16, 11-14.

Q. What do you recommend?

A. To be clear, I do not believe Spire should be removing diaphragm meters with 2/3 of their useful life remaining from operation. Nor do I support the "tentative" move to a new Customer Information System that would support real-time natural gas usage data that would come from AMI investment. These excessive costs do not outweigh the benefits.

That being said, Missouri regulators and stakeholders have clearly been given a different cost of service estimate compared to every other utility in the US when it comes to both one-time AMI opt-out fees and reoccurring monthly fees.

I recommend that the Commission order the following provisions as it pertains to Spire's AMI opt-out tariff policy:

- Customers should be notified at least two weeks in advance of replacement;
- Customer consent should be obtained prior to installation of a new meter for any non-planned replacements (e.g.,. a "dig right" employee visit affords an opportunity);
- The one-time opt-out fee should be set at $50 if the customer fails to notify the Company prior to the installation date that they want to opt-out;
- Monthly fees of opt-out customers should be set at $5; alternatively
- Customers should be allowed to self-report their usage on a monthly basis with a $10 annual charge for meter reading verification.

Adoption of the aforementioned recommendations would place Spire roughly in the middle relative to other approved state commission opt-out policies.

Q. If the Commission approves this option do you believe many customers would take advantage of it?

A. No. Based on conversations with regulators and consumer advocates in other states, I believe the numbers would be very, very small. The likely primary concern for any Spire customers would center on future investments of two-way customer-usage information system ("CIS") investments that could be made. As there are essentially no benefits in knowing "real-time" gas usage for most customers, I would consider any future investment

in such software as imprudent and not necessary for safe and adequate service. If the Company still elects to move forward with such investment I would recommend that customers be given the option to turn off the two-way customer usage information. Under such a scenario, customers would not need to pay the one-time opt-out fee.

IV. CORPORATE GOVERNANCE: WORKPLACE DISCRIMINATION

Q. What was your recommendation in direct testimony regarding Spire's litigated racial discrimination costs?

A. I recommended that the $300K in legal fees caused by Spire management as a result of the Danielle McGaughy racial discriminatory lawsuits be disallowed from the Company's revenue requirement.

Q. Did Spire agree?

A. No. Spire witness Lobser argues that legal fees for "meritorious" lawsuits limit the Company's exposure and therefore should be included in the Company's revenue requirement.

Q. What was the Company's "exposure" as a result of the McGaughy judgment?

A. At least $8.5 million. I say at least, because there was a second lawsuit immediately following the Supreme Court judgement that was settled for an undisclosed amount.

Q. Are there any additional fees above and beyond the $300K legal fees that ratepayers are being asked to shoulder as a result of Spire's management in the McGaughy judgment?

A. My understanding is that the totality of the judgment costs, minus the legal fees, were covered by the Company's excess liability insurance.

Q. Did Mr. Lobser provide any other rebuttal to your recommendation?

A. Yes. Mr. Lobser pointed out that all of the damage costs (minus the external legal fees) were covered by the Company's insurance. Additionally, he pointed out that future meritorious human rights violation judgments will be subject to "damage caps" at $500K due to recent Missouri legislative amendments. Furthermore, because of the amended legislative damage

cap, the Commission should not view any increase to the Company's insurance premium as a reflection of the McGaughy lawsuit but rather the normal costs of doing business today as an energy company. Mr. Lobser states:

> As such, the McGaughy [*sic*] claim is not irrelevant, but it is not material. In brief, it has not been our losses that are the driver for our premium increases, but rather the historically difficult insurance market, as well as some other notable energy industry events.[19]

Q. What is your response?

A. If all costs created by this meritorious lawsuit were covered by *excess* insurance (minus the external legal fees), then how exactly did external counsel mitigate the company's exposure of this lawsuit and result in customer benefits? It strikes me that the customers would have been no worse off if the Company had not spent a dime to defend itself and been awarded an even larger damage award because the insurance would have covered those costs.

Regarding the excess insurance premium, the sheer size of the McGaughy case would have to be factored into the future increase in premiums, because the premium is determined on the risk assessed, which the insurance company must now consider greater notwithstanding the amount awarded.

Q. What is your position in light of Spire's response?

A. Spire should have dropped this issue. Arguing that future meritorious racial discrimination lawsuits will not be as financially punitive as the McGaughy case is frankly a tone deaf response.

Spire management alone caused the hostile work environment that resulted in the lawsuit. Spire management and Spire external legal alone continued to unsuccessfully appeal the McGaughy case up to and including the Missouri Supreme Court. Spire management and Spire public relations alone caused the second lawsuit that resulted in the out-of-court settlement. And, even now, Spire management alone is continuing to push the issue of the

[19] GR-2021-0108 Rebuttal Testimony of C. Eric Lobser p. 4, 8-12.

McGaughy lawsuit by attempting to recover $300K in legal expenses from ratepayers. The Commission should not grant recovery, even if challenging "meritorious" discrimination claims could theoretically limit the Company's exposure, because the Company alone caused the cost exposure in the first place. Simply put, a regulated natural monopoly utility should never be allowed to recover the cost of defending "meritorious" claims because those costs are purely a product of the company's own malfeasance.

Q. Do you have any additional comments to make?

A. Spire should have had the common decency to drop (what amounts to a rounding error in its cost of service) these costs in its rebuttal testimony. Instead, I find myself, yet again, not only explaining why ratepayers should be held harmless for Spire's inexcusable management practices but now why Spire management should be held accountable for all future human rights violations—regardless of damage caps—that it alone causes.

In a competitive market, buyers can exercise their protest of a Company's management actions/inactions by shopping somewhere else. Spire's customers are captive customers. They do not have the luxury of choosing a different natural gas provider. Therefore, it is incumbent upon the Commission to hold the Company accountable for the costs it alone caused and not pass along past or any future discriminatory transgressions despite Mr. Lobser's argument that future "meritorious" lawsuits won't financially be as bad.

Q. What is Staff's position on the legal fees?

A. Staff did not take a position.

Staff witness Jeremy Juliette provided the following testimony on the issue:

> Staff is currently evaluating these costs and will make a determination in surrebuttal testimony.[20]

[20] GR-2021-0108 Rebuttal Testimony of Jeremy Juliette p. 13, 4-5.

Q. Do you have a response?

A. Above and beyond the comments I have already made, I would encourage Mr. Juliette and the Commission to read the Eastern District Appeals Court judgment. I have included it as an attachment in GM-7.

V. PROPANE STORAGE

Q. What does Spire's "propane storage system" consist of?

A. Spire Missouri's propane system comprises the following facilities:

- A vaporization plant (Lange) in north St. Louis County with a vaporization capability of 76 MMcf/d; this facility includes a pre-heater, three vaporizers and seven pumps;
- A vaporization plant (Catalan) in south St. Louis County with a vaporization capability of 84 MMcv/d; this facility includes a pre-heater and four vaporizers;
- A propane storage cavern with a capacity of over 32 million gallons; and
- A natural gas liquids pipeline, Spire NGL.

Q. Are these assets fully depreciated?

A. Yes.

Q. What was Staff's position on Spire's propane storage in direct testimony?

A. Staff recommended that the propane assets be included in the Company's cost of service because they could still serve the Company's Spire East customers in an emergency.

Q. What was the Company's response?

A. Spire witness Noelker disagreed. He pointed out that the system is no longer is service because Spire's STL pipeline will be used to meet peak demand.

Q. Have any events occurred since the rebuttal testimony was filed that call into question Spire's argument?

A. Yes. Five days after rebuttal testimony was filed, on June 22, a three-judge panel for the U.S. Court of Appeals for the D.C. Circuit on Tuesday vacated a federal order granting the $287 million STL gas pipeline license to operate. The court ruled in favor of the Environmental Defense Fund, finding that the Federal Energy Regulatory Commission ("FERC") "ignored record evidence of self-dealing and failed to seriously and thoroughly conduct the interest-balancing required by its own Certificate Policy Statement" in its 2018 order allowing the Spire STL pipeline project to move forward. The Court's summary is as follows:

> In sum, it was arbitrary and capricious for the Commission to rely solely on a precedent agreement to establish market need for a proposed pipeline when (1) there was a single precedent agreement for the pipeline; (2) that precedent agreement was with an affiliated shipper; (3) all parties agreed that projected demand for natural gas in the area to be served by the new pipeline was flat for the foreseeable future; and (4) the Commission neglected to make a finding as to whether the construction of the proposed pipeline would result in cost savings or otherwise represented a more economical alternative to existing pipelines. In addition, the Commission's cursory balancing of public benefits and adverse impacts was arbitrary and capricious.[21]

With the Court's remedy as follows:

> Based on these considerations, we believe that vacatur is appropriate. Given the identified deficiencies in the Commission's orders, it is far from certain that FERC "chose correctly," *see Allied-Signal*, 988 F.2d at 150 (citation omitted), in issuing a Certificate to Spire STL. **We understand that the pipeline is**

[21] See GM-8.

> **operational, and thus there may be some disruption as a result of the "interim change**," *see id.* at 150-51 (citation omitted), *i.e.*, **de-issuance of the Certificate, caused by vacatur. However, we have identified serious deficiencies in the Certificate Order and Rehearing Order**. **And "the second *Allied–Signal* factor is weighty only insofar as the agency may be able to rehabilitate its rationale**." *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009) (citation omitted). **The Commission's ability to do so is not at all clear to us at this juncture.** (emphasis added)[22]

Q. Have you sent discovery to check on the status of the pipeline?

A. Yes. OPC DR-2155 asked the following question and received the following response:

> **Request**: Is the Spire STL pipeline currently in operation in light of the DC Circuit Court of Appeals ruling on the Spire STL pipeline?
>
> **Response**: No.

Q. What is your recommendation in light of that response?

A. I fully support Staff's position as the STL pipeline is not currently in operation. It would be imprudent and irresponsible to retire the fully depreciated propane storage assets with the heightened uncertainty surrounding the Spire STL pipeline. I recommend that the propane storage facilities not be retired and be included in the Company's cost of service until they can be reexamined in the Company's next rate case.

VI. RESEARCH AND DEVELOPMENT

Q. Did Staff support Spire's request to have ratepayers fund $1 million in annual research and development ("R&D")?

A. No. Staff witness Karen Lyons recommended that the R&D funding be rejected due to lack of details surrounding the proposal.

[22] Ibid.

Q. Did you inquire what Spire plans to do with the $1 million?

A. Yes. OPC DR-2156 asked the following question and received the following response:

> **Request**: Does Spire have a plan for how it intends to use the $1 million in requested research and development included in its filed case? If yes, please provide said plan and a narrative explanation of the R&D objectives.
>
> **Response**: Spire plans to utilize research and development funding to invest in customer-focused deliverables aimed at promoting energy and environmental solutions including investments in market analysis, technology analysis, product development, lab and field testing, demonstration and commercialization. This type of allowance has been approved in over 30 jurisdictions across the U.S.

Q. Do you agree with Staff's position?

A. Yes. Spire provides no specific context for what research and development they are currently undertaking or planning on taking in the future. Spire is effectively asking for a $1 million ratepayer funded check "to do something." There are no explicit benefits to customers, only costs in this proposal. The Commission should reject this proposal out-of-hand. I was given no further context on similar "allowances" approved by Commissions in the other 30 states as referenced in the discovery.

VIII. RATE DESIGN

Q. Has OPC's position on rate design changed since rebuttal testimony?

A. No. The delta in revenue requirement between parties and the uncertainty surrounding true-up costs that need to be included provide a large degree of uncertainty surrounding whether or not there will be an increase/decrease in rates and whether a revenue neutral shift between rate classes is warranted if there is a rate decrease. Additionally, the uncertainty surrounding overall meter numbers and proper allocation between Staff and the Company's CCOS as well as the differences between a Spire-wide CCOS compared to a Spire East and Spire

West CCOS create a very confusing and opaque setting for considering cost allocation. As such, after factoring in the economic uncertainty surrounding all customer classes due to the COVID pandemic I would not advocate for any individual decrease in revenue responsibility if rates resulted in an increase in the revenue requirement.

If rates result in a decrease I would advocate for an equal decrease across rate classes. If there is an excessive rate decrease I would not be opposed to a greater decrease overall to transportation customers.

Q. Do you oppose any specific position Spire witness Mr. Weitzel took on rate design?

A. Yes. Mr. Weitzel advocates for symmetry in the residential customer charge of $22.50 between Spire East and West I advocated for the exact opposite symmetric set-up favoring a $20.00 customer charge for both Spire East and Spire West. Our rationales are similar but our outcomes differ with Mr. Weitzel favoring revenue certainty while I would recommend greater customer bill control/empowerment.

Q. Do you support any specific position Spire witness Mr. Weitzel took on rate design?

A. Yes. Both Mr. Weitzel and I support eliminating the residential summer inclining block rate for similar reasons. It would be best to eliminate this option from future consideration.

Q. Do you support Mr. Weitzel's position to reject Staff's proposed inclining block rate for SGS customers for Spire West?

A. Perhaps. I am concerned that this may be a crude away to keep certain customers from rate switching but I will keep an open mind and review Staff's response in surrebuttal testimony.

Q. Does this conclude your testimony?

A. Yes.

Spire Missouri
GR-2021-0108

Response to Office of Public Counsel Data Request 2142

Request: The rebuttal testimony of James Rieske p. 4, lines 12-13 states:

> *Finally, the Company's installation strategy minimizes the potential for stranded assets by focusing on diaphragm meters that are already scheduled for replacement.*

- Please provide a copy of "the Company's installation strategy" referenced above.
- Please define "replacement" in the above referenced statement. Is Spire removing and retiring meters (i.e., no longer in service) with thirty-five year useful lives every ten years?

DR Requested by Geoff Marke (Geoff.marke@opc.mo.gov).

Response:
The Company has worked to build detailed analysis tools that incorporate meter types, ages, and test results from meter removed into an analysis database that scores the replacement priority of every Spire meter for each region. This analysis tool is available to select meters and match them to opportunities where a Spire technician is scheduled to be at a customer's premise. This allows the workload planning group to leverage daily capacity to replace meters.

This strategy is outlined in the attached deployment strategy for Ultrasonic meters. The strategy has been in operation in Missouri West since July 2020. The strategy is ready to be deployed in Missouri East. The strategy is designed to be flexible as to the type of work and resources that have the capacity to perform the work.

I assume the 35-year useful life referenced in the request is in relation to a depreciation rate. The useful life of a meter is entirely dictated by the load it serves and the conditions of the gas that is traveling through the meter. The metrology is based on a mechanical movement that will deteriorate over time and the length of time will depend on how hard the meter is driven and the presence of moisture or foreign constituents in the meter. How hard a meter is driven will impact the mechanical mechanism that controls the consistency of the expansion and contraction of the diaphragm. Moisture or the presence of contaminants will affect how fully a diaphragm will expand. Either of these conditions will occur and begin to deteriorate accuracy, the question is always how rapidly. The movement of the diaphragm is recorded through a stem or axel connected to gears that translate the movement to the mechanical index that records the usage in cubic feet. The physical turning of the index is connected to the network module that records the revolutions and is programmed to simultaneously record this as usage in cubic feet in the network module. The index itself or the connection to the network module or both are prone to breakage.

When a meter is selected for the accuracy testing beginning at 10 years, it is removed from service and shipped back to the Company's testing facility. The meter is tested for accuracy and the external condition is evaluated against its age. However, the working mechanisms of the meter are inside the sealed body of the meter core. To examine or repair these internal parts the body must be opened. The process to open the core, replace the gaskets and reseal it would take far longer than the meter is worth for reuse. The Company, as most other companies in the industry, have found that reconditioning or refurbishing a used meter is nearly as expensive or more expensive than buying a new one. We are not able to physically inspect the condition of the internal components of the meter or perform replacement or repair cost effectively. This means reusing a removed meter increases the occurrence of mechanical failure or metrology inaccuracies.

This is common occurrence in the industry that has existed for years. For these reasons, for years the Company has condemned most meters that are removed for accuracy testing, particularly if that age exceeds more than 15 years. At times the Company will retire a meter as old as 10 years old based on the actual condition and useful life of that particular meter.

Signed by: James Rieske

See highlighted text
On pages 2-4

Ultrasonic Meter and Advanced Module Deployment Strategy

Overall strategy

The purpose is to perform targeted deployment of ultrasonic meters and rapid, mass deployment of advanced modules to move from manual meter reading and AMR to AMI.

Phased implementation by regions

Implementations will be phased by region based on need, current state capabilities, and capital deployment strategy.

There are two distinct types of rollout that will occur within Spire. A complete module and meter deployment within the regions of MOE and Gulf Coast, where there is not an existing population of meters and modules with Itron AMI capabilities. The alternative is a targeted deployment of ultrasonic meters within the regions of MOW and AL, where AMI capable advanced modules are currently installed on the majority of service points.

Analyze existing meter and module configurations and populations by region

In each region, the existing meter and module populations will be analyzed, and a model will be developed to prioritize the replacement of existing meters with ultrasonic meters. The majority of the criteria included in this model is applicable to all regions however the formula will need to be adjusted for regional considerations. The results of this analysis will allow us to identify which population of meters will be targeted for ultrasonic meter replacement, advanced module retrofitting, or those that have the capabilities to remain in use with AMI technologies.

For areas with AMI capable modules (AL and MOW), Workload Planning (WLP) will utilize the results of the above analysis to harvest existing opportunities to install ultrasonic meters and to target ultrasonic meter replacement above and beyond the organic opportunities.

For the Gulf Coast, where there are no existing AMI capable modules, the results of the analysis will determine a population of meters that will be retained for **ultrasonic** meter replacement. The remaining population will be retrofitted with advanced modules in mass-deployment. Analyzing the existing meter population is also necessary for determining the specific modules, indexes, and screws (for broken screw repair) that will be needed for each deployment route.

The MOE deployment will also result in a complete meter/module replacement strategy. The results from the analysis will determine which meters will be targeted for replacement with an ultrasonic meter. In addition to identifying populations of meters for targeted replacement, the scoring will be used to identify a population of meters that would be replaced if an opportunity arises for replacement. Anytime we have a meter in hand we would replace it with an ultrasonic meter. However, depending on

the impact to the customer, meter age, and meter characteristics, we would use the score prioritize meter replacement opportunities when they arise. Eventually the deployment will incorporate mass installation of 500G modules on existing meters. The results of the analysis will help prioritize meters for replacement so that installation of modules on existing meters will occur on the population of meters that are in less need of replacement than those targeted for ultrasonic installs. Priority will be placed on those meters that are located inside a house. Any time we have an appointment with a customer to visit a meter located indoors we will use this opportunity to replace the existing meter with an Ultrasonic meter. This could include Ultrasonic meter replacements as part of our Atmospheric Corrosion Inspection program.

Technical test

Prior to deployment of modules in Gulf Coast and MOE, a technical test was completed to ensure the technology delivers the expected functionality and to affirm that the data is flowing as expected. This also gives us the opportunity to learn from issues encountered before we encounter these issues in mass. For the Gulf, the test will involve installing modules on a small population of meters and analyzing the results of capturing the reads of these meters by handheld, by mobile collector (van), and by network. For MOE, the test will involve a full end-to-end test on meters that will test functionality from procurement to install and finally through billing. Issues discovered in these technical tests will need to be investigated and the resolution documented so it can be avoided when mass-deployment begins.

Execution strategy

For MOW, AL, and Gulf Coast the deployment execution will be organized and scheduled by meter reading routes and billing schedules. It is critical to recognize these windows in order to ensure the deployment does not interfere with obtaining billing reads.

For MOE, the initial deployment of ultrasonic meters will be driven by organic opportunities for replacement. This includes but not limited to any new meter installations, meter replacements, main replacement projects, scheduled ACI inspections, or other opportunities where a meter could be replaced with minimal impact to the customer. In order to capitalize on any opportunity available, initial deployment would be independent of the meter reading route and billing schedule. It is critical to recognize the billing windows and be prepared to react to updates that need to be made because changes were made within the billing window; however, they should not limit the deployment schedule.

A complete implementation plan will be developed and made available for review by all leaders impacted by the deployment prior to the execution of the strategy.

Process standardization

All processes involved in the deployment of AMI technology will be standardized and documented to ensure alignment in AMI technology across the Spire footprint. The Continuous Improvement team will lead the standardization efforts to drive consistency by detailing repeatable processes that can be executed in any of the regions of the company.

Organizational readiness

Prior to deployment, an organizational readiness checklist will be performed to ensure internal operations are organizationally prepared. The checklist will include confirming that Field Operations, Workload Planning, Customer Experience, Communications and Billing are all aware of their

responsibilities and are organizationally ready to support the deployment. This will also include a "tabletop" exercise where we will walk through a day in the life of deployment to confirm all parties have the tools and capacity to handle the situations that will arise as part of a mass deployment. Following this exercise, a process flow of the deployment activities will be created that will document the flow of work throughout the deployment process. Prior to deployment, business owner signoff will be required to acknowledge that the business units are prepared to meet their deployment responsibilities.

Training

A training plan will be created for both internal and third-party resources on the advanced module and meter installation procedures, module/meter programing tools, customer communication guidelines and troubleshooting and maintenance of equipment and any additional training needs that are identified. The training documentation will live on and evolve as the AMI deployment progresses through the stages of deployment. Ultimately the training documentation created will be institutionalized as our enterprise training content for internal resources.

Customer communication

A customer communication plan will be developed that will detail the communication to customers before, during, and after AMI deployment. This communication plan will detail the communication provided by internally as well as guidelines for third party customer communication. It will also cover the process to be followed for customer complaints that arise as part of AMI deployment and the transition from manual meter reading to AMI or from Landis+Gyr meter reads to Itron meter reads.

Work Scheduling

Workload Planning will be responsible for scheduling any of the internal ultrasonic meter/advanced module deployments. For installations performed by a third party, an internal employee will manage the assignment of work daily to the third party based on the deployment schedule.

Removed Meters

Diaphragm meters removed will follow the normal process for meters removed from a service point. Meters will be collected and returned to the meter shop in St. Louis for testing. Additional meter storage will be acquired in St. Louis to meet the demand for the influx in removed meters. Additionally, the Next Generation Measurement workstream will develop a long-term strategy for expanded meter testing capacity due to increased meter equipment replacement.

Change Management

Change management will be responsible for supporting the people side of the changes and creating the strategies and plans to support the stakeholders with the adoption of AMI. They will assist by building the Change Advocate Network, a network of leaders and employees from across Spire who will help champion the AMI Program and drive successful change. Impact analyses will be conducted to understand how the different audiences / stakeholder groups will be impacted by the AMI program and

to inform a change strategy for each region's deployment. The change strategy and plans will include the following components: sponsorship, communication, training, coaching and support, as well as feedback and reinforcement.

*The following two provisions do not apply to MO-East at this time. We will revisit these once we get closer to our network deploy (2023 on the 5-year plan)

*Return to utility (RTU) (Gulf)

For any module installations performed by a third party, an RTU process will be established and agreed upon by both parties. An RTU is when a third party is not able to perform an installation due to access constraints, safety concerns, compatibility with modules, evidence of tamper, or broken screws. A detailed plan must be developed for the handling of each of these uses cases as the RTU rate can be as high as 5%. Additionally, a review process will be set up to ensure RTUs are legitimate and RTU rate does not exceed the rate agreed upon in the deployment SOW.

*Create mobile and network mode acceptance criteria (Gulf)

An endpoint acceptance process will be defined and agreed upon by all parties prior to mass deployment. The process will detail what is considered accepted for an endpoint installation in mobile mode and again when transitioned to network mode. Once an endpoint is accepted, third party installation payment can be made, and the maintenance of that endpoint is the responsibility of Spire. A formal acceptance process will be approved by Spire and deployment contractors that will track the acceptance and rejection of all endpoints.

Marke, Geoff

From: Michael Smith <masmith@gascoonline.com>
Sent: Tuesday, July 6, 2021 4:28 PM
To: Marke, Geoff
Subject: RE: diaphragm natural gas meters

Hi Geoff,

Yes, we have ¾", 1", & 1-1/4" in R275's. In the R415's we have 1-1/4" & 1-1/2" connections in-stock. No, there is no fears of these not being available next year or five years even if we did not sell them anymore, they would still be available. There are no plans for us to stop selling them within the next five years. Depending on the needed meter we have hundreds in stock and thousands on order with Sensus.

I hope this is helpful. Please don't hesitate to give us a call.

Michael A. Smith

Gasco
Gas Regulators • Meters • Accessories
An Equipment Controls Company

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From: Marke, Geoff <Geoff.Marke@opc.mo.gov>
Sent: Tuesday, July 6, 2021 3:31 PM
To: Gasco Sales <sales@gascoonline.com>
Subject: diaphragm natural gas meters

Thanks for taking my call and inquiry regarding diaphragm natural gas meters. If you could please answer the following questions regarding diaphragm natural gas meters it would be greatly appreciated.

1.) Are diaphragm natural gas meters currently in stock and available? If yes, what sizes do you have?
2.) Is there any legitimate fear that diaphragm natural gas meters from Gasco will not be available in the next year? Next five years?
3.) Is there any legitimate fear that diaphragm natural gas meters will not be available from any Company (if Gasco were to stop carrying diaphragm natural gas meters) in the next year? Next five years?

Any information on the current status and availability of diaphragm natural gas meters would be greatly appreciated.

Geoff Marke
Chief Economist

Spire Missouri
GR-2021-0108

Response to Office of Public Counsel Data Request 2144

Request: The rebuttal testimony of James Rieske p. 10, lines 3-5 states:

> *Q. Has the Company ever experienced an employee fatality as a result of such circumstances?*
>
> *A. Yes, unfortunately.*

- Please indicate all Spire fatalities to date that would have been prevented by ultrasonic meters.
- At a minimum, please include the affiliate and year said fatality occurred.

DR Requested by Geoff Marke (Geoff.marke@opc.mo.gov).

Response: In Spire Missouri, Kenny Ferguson died in an incident in Barnhardt, Missouri which would very likely have been prevented by an ultrasonic meter. Several other employees have been seriously injured in similar circumstances in my memory at the Company. Further research is needed to identify other incidents involving former Laclede Gas or MGE employees. The Company will supplement its response to this data request as it locates records of additional incidents.

Signed by: James Rieske

Spire Missouri
GR-2021-0108

Response to Office of Public Counsel Data Request 2145

The rebuttal testimony of James Rieske p. 11 lines 7-10 states:

> *Ultrasonic meters are twenty times more accurate than traditional diaphragm meters. An ultrasonic meter is delivered with accuracy to +/- 0.1% versus the accuracy of +/- 2.0% in diaphragm meter technology. Spire has performed numerous accuracy tests on ultrasonic meters during the technology evaluations.*

- Please provide the aggregate results of the accuracy tests during the technology evaluations referenced in the quote above.
- Please provide any and all other empirical work that the Company may have relied on to substantiate Mr. Reiske's statement.

DR Requested by Geoff Marke (Geoff.marke@opc.mo.gov).

Response:
Every ultrasonic meter that has been deployed has a pre installation accuracy test. This accuracy testing more than validates the accuracy claims made in my Rebuttal Testimony. Below is a summary of the accuracy testing results for 5400 meters purchased in Missouri West. I have also attached an excel file with the individual records and the summary provided below. This testing data demonstrates that 82.7% of the 5400 ultrasonic meters tested with .05% of exact accuracy. 99.7% of the 5400 meters tested within .1% of exact accuracy. The remaining 14 or 0.03% of the 5400 meters tested within .15% accuracy. What is further revealed in this testing is that the ultrasonic meter maintains its accuracy regardless of the flow through the meter. This is shown by the consistency of the check test (20% capacity) to the open check (80% accuracy) across this meter population. Having reviewed the results of hundreds of thousands of accuracy tests for diaphragm meters for Spire, this is a remarkable improvement in the consistency and accuracy of residential metering.

Pre-installation Accuracy Test of Ultrasonic Meters – June 2021

Deviation

Accuracy	Count of Meters		Accuracy	
99.85		14	Exact	12.4%
99.9		920	Within .05%	82.7%
99.95		1	Within .1%	99.7%
99.95		3763	Within .15%	100.0%
100		672		
100.05		30		

Total	5400

Signed by: James Rieske

Spire Missouri
GR-2021-0108

Response to Staff Data Request 0443

Please refer to Mr. Rieske's rebuttal testimony in this case for the following questions and information requests. To respond, Spire has included the data request with subsequent response. We

1. Cite the exact rule language that supports the statement that "At the beginning of calendar year 2020, 337,000 meters are replacement eligible per Commission rules at Missouri West alone."
2. Define "replacement eligible."
3. Provide the documentation that supports the statement that "Only 84.6% of legacy meters in Missouri West are currently meeting the 19 accuracy testing—the worst performance of all Spire regions."
4. (1) Provide the number of diaphragm meters in each service territory in total, and also provide the number of diaphragm meters in each service territory that are (2) more than 30 years old, that are (3) between 15 and 30 years old, that are (4) between ten and 15 years old, that are between (5) five and ten years old, and (6) that are less than 5 years old.
5. Provide the documentation that supports the statement that "Of the 41,373 ultrasonic meters we have installed to date, 74% of replacements were meters that were already mandated for replacement by Commission rules."
6. Cite the exact rule language that supports the statement that "74% of replacements were meters that were already mandated for replacement by Commission rules."
7. Provide documentation that supports the statement that "Presently, across Missouri, more than 60% of all residential meters are more than 10 years old, and should be replaced pursuant to Commission rules."
8. What percentage and what total of meters removed during Spire's meter sampling process were replaced with new diaphragm meters prior to June 2020?
9. What percentage and what total of meters removed during Spire's meter sampling process were replaced with tested and repurposed diaphragm meters prior to June 2020?
10. Provide an estimated cost to test and refurbish sampled meters for redeployment. Provide supporting documentation for all assumptions relied upon within the estimate.
11. When did Mr. Rieske become aware that "the ultrasonic meter is already the standard technology in Europe and has been in use for nearly 20 years"?
12. Did Spire Missouri consider replacing existing meters with ultrasonic meters prior to 2020? If so, explain why Spire Missouri chose not to begin replacing the existing meters with ultrasonic meters.
13. Does Spire Missouri intend to request a change to the applicable variances it's been granted from 20 CSR 4240-10.030(19)? If so, describe the intended changes and an expected timeline for such request.

During the AMI / AMR RFP for Spire Gulf the vendors gave overviews of the product lines that were available for use. During this time we became aware of the ultrasonic meter being developed by multiple vendors. After the RFP process we began exploring future technologies in more detail. Meetings were held with meter vendors multiple times to understand what their technology capabilities were and what their development timelines were. In summer 2019 a vendor had us meet with representatives from their European division to go over the solution that had been deployed using ultrasonic meters and network meter reading in Western Europe. That vendor had deployed over 10 million ultrasonic meters and had developed many customer facing capabilities over a period of nearly 20 years.

12. Did Spire Missouri consider replacing existing meters with ultrasonic meters prior to 2020? If so, explain why Spire Missouri chose not to begin replacing the existing meters with ultrasonic meters.

The process of considering future meter technologies began in Fall of 2018. This was a very important decision and we entered into a very detailed and thoughtful process. Ultrasonic residential meters did not become commercially available until 2019 in the United States. The Company did not establish a new meter standard until we had completed a review of our current equipment, what our future capability needs may be and had completed a thorough review of equipment possibilities and their capabilities. In order to transition to ultrasonic meters the Company needed to test and validate capabilities, prepare new standards, modify software applications and processes, procure inventory, develop training and deliver it.

13. Does Spire Missouri intend to request a change to the applicable variances it's been granted from 20 CSR 4240-10.030(19)? If so, describe the intended changes and an expected timeline for such request.

20 CSR 4240-10.030 (18) and (19) are written specifically to address the inaccuracies that can exist and develop over time with the mechanical metrology of diaphragm meters that use gear driven indexes. The entire context of this rule has no application to ultrasonic measurement which does not rely on any moving parts and has no components that would be subject to deterioration over time, therefore we do not anticipate a waiver would be necessary. The basic premise of this rule applies when a meter has been in service for 120 months. Ultrasonic meters have been in service for no longer that 12 months. In Spire's opinion this rule needs to be reviewed and examined, including consideration of how it might be apply to the ultrasonic technology. Spire recognizes the need to discuss how to update this regulation with interested parties, but also recognizes we have time for a thorough and thoughtful discussion about modernizing this requirement.

14. Has Spire Missouri retired the existing diaphragm meters that were removed for testing within the meter sampling process which meet the accuracy standard? Explain and cite any adjustments Spire Missouri made within this case to account for the retirements.

In the Missouri Court of Appeals
Eastern District

DIVISION ONE

DANIELLE MCGAUGHY,	)	No. ED107498
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
vs.	)	
	)	Honorable Steven R. Ohmer
LACLEDE GAS COMPANY, et al.,	)	
	)	
Appellants.	)	FILED: April 14, 2020

Laclede Gas Co. ("Appellant") appeals from the judgment of the Circuit Court of the City of St. Louis, following a jury trial, awarding Danielle McGaughy ("Respondent") $1.3 million in actual damages and $7.2 million in punitive damages on her claims for race discrimination and retaliation. We affirm. We also remand to the trial court to determine the appropriate attorneys' fees award.

I. Background

Based on our applicable standard of review, we review the evidene "in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." Giddens v. Kansas City S. Ry. Co., 29 S.W.3d 813, 818 (Mo. banc 2000).

Respondent is an African-American woman born and raised in St. Joseph, Missouri. After finishing high school in 1989, she alternated between going to college and working before

eventually graduating from what is now Missouri Western State University with a paralegal certificate and two-year associate degree in legal studies, in 1996.

After graduating, Respondent began a career in the legal field. First, she went to work for the Jackson County Prosecutor's Office, working in the anti-drug "COMBAT" unit. In this position she performed administrative duties, drafted interrogatories, served search warrants, performed searches in the field, and prepared documents for discovery. After five years with the prosecutor's office, Respondent went to work as a legal assistant for the Jackson County Family Court. In that position she obtained information from confidential informants, prepared documents for discovery, performed legal research and writing, prepared witnesses for testimony, and issued subpoenas for hospital records. Next, an attorney Respondent knew at the Kansas City Public School District ("KCPSD") recruited her to work there. In that role she conducted on-site investigations, investigated complaints about teachers, spoke with witnesses, wrote reports, and debriefed her attorney supervisor. Respondent later went to work with a trademark firm in Atlanta, Georgia, handling discovery matters, before returning to Missouri to work as a municipal court clerk, where she managed pretrial and traffic dockets.

In 2004 Respondent went to work for Missouri Gas Energy ("MGE"), which was later acquired by Appellant. Respondent testified at trial that she took that position because she felt this was "a company that I would retire at." Initially she worked in the legal department at the Kansas City office as a legal assistant. In 2006 she became a full-time gas supply specialist, participating in Sarbanes-Oxley audits, monitoring federal gas tariffs, storage contracts, gas pipeline and supplier contracts, and performing administrative duties. However, the long commute between St. Joseph and Kansas City took away from the time Respondent could spend with her son, whom she raised as a single-mother. Thus, in 2008 she transferred to the St. Joseph office and became an engineering technician.

Once Respondent started working in the St. Joseph office, she immediately began experiencing what she would eventually describe as the "toxic" work environment in that office. She was the only African-American in the St. Joseph office. Her first day in the office, she heard two Caucasian co-workers discussing how "blacks don't take pride in their work, where they live, or anything." The woman who was supposed to train her, Diane Munsell ("Munsell"), provided only minimal training. Respondent testified that when she was out of the office, Munsell would go through her desk, making it "her mission . . . to find something to go tell and complain about." When Respondent's co-worker Steve Gard ("Gard"), a Caucasian man, confronted Munsell about why she was not adequately training Respondent, Munsell replied, "I don't want my job taken by a n****r."

Things only got worse for Respondent when Robert Hart ("Hart"), became her supervisor roughly two years after she transferred to St. Joseph. Hart reported to Gary Williams ("Williams"), who presided over both the Kansas City and St. Joseph offices. Respondent called multiple witnesses at trial who testified, over Appellant's objection, to hearing Hart repeatedly use the word "n*****r," and using the terms "n****r-rigged" and "jigaboo." In addition to Hart, fellow employees Barb Labass ("Labass") and Bill Martin ("Martin") contributed to the toxic environment. Respondent testified that Labass, whose office was next door to hers, prominently displayed Paula Deen magazines on her desk after the scandal leaked that Deen had used the word "n****r" in reference to an African-American employee. The magazines were not there before the scandal broke. Additionally, Respondent once found an email Labass was photocopying and circulating in the office. She testified that the email said "that the blacks and Mexicans were taking over," and that "Obama was going to bankrupt and close all the banks . . . ."

Bill Martin ("Martin") was also a central figure in the racially charged environment in the St. Joseph office. Martin would mockingly sing in the office, "Free at last, free at last, thank God Almighty, we're free at last like these m****r f*****s are." One of Respondent's witnesses at trial also testified that he heard Martin use the n-word "too many times to count."

Eventually, Respondent had enough. In 2013 she filed a human resources complaint about racial discrimination in the St. Joseph office with Clarence Moran ("Moran"), a Human Resources officer. Her HR complaint pointed to, *inter alia*, Hart and Martin's conduct in the office. Respondent met with Williams, Moran, and Hart the following Monday. Instead of addressing Respondent's complaint, Williams accused her of having an intimate relationship with Gard, a Caucasian co-worker. Moran followed Williams by telling Respondent that she needed to look at herself and see why people treated her the way they did. The panel then alleged that Respondent was not helpful to her co-workers, and that a number of them were complaining about her. Respondent noted that her recent performance review had not mentioned anything about co-workers complaining about her.

After that meeting, Respondent called the company's HR hotline and filed a complaint with the third-party Appellant used to administer HR complaints. On April 17, 2013, Respondent drafted a formal memo outlining her complaint in further detail, and sent the Memo to Williams, Moran, Hart, and HR Vice President, Deborah Hayes (HR VP). Williams then called her, said "you got their f*****g attention" and hung up the phone. The third-party investigator who spoke with Respondent confirmed there was no evidence of her co-workers complaining about her performance, but the investigation eventually concluded that there was no discrimination. Hart was eventually transferred to Kansas City, where he remained in a management role, and continued the conduct about which Respondent complained. He was also allowed to keep his company car. Before his transfer, Hart told Williams that Respondent did

not have enough work to keep her busy, so Respondent was given an additional workload without an increase in pay.

The toxic environment in the St. Joseph office continued after Respondent's HR complaint, despite the company ordering a diversity training. In February 2014, Martin barged into Respondent's office, joined by two other men, and began shouting at Respondent. Martin yelled "[y]ou don't know a f*****g thing and you don't do a f*****g thing. You're a nothing and a nobody." Martin also warned Respondent that she needed to "f*****g leave me off your radar." Respondent complained to Moran, but again, nothing was done.

The Claims Supervisor Position

Around the time of the incident with Martin, Appellant posted an opening for a claims supervisor position. By that time Respondent had a bachelor's degree in legal studies and was pursuing a master's degree. Because she had prior experience in the legal field, and this position would provide a substantial raise, Respondent applied for the position. Respondent was eventually interviewed by a panel consisting of Nicole Fondren ("Fondren"), an African-American HR employee, Mike Smith ("Smith") one of Appellant's in-house lawyers, and Joe Gallagher ("Gallagher"), the Claims Manager. When Respondent emerged from this interview as the top candidate, Gallagher decided he wanted to interview more people. Smith then approached Laura Garcia ("Garcia"), who is Caucasian and worked for Williams, to apply despite the fact that she had not applied for the position. A new round of interviews was held, except this time Fondren, the lone African-American on the original panel, was replaced by Cindy Dove ("Dove"), a Caucasian woman who performed HR investigations for Appellant in Kansas City. Garcia was hired for the position.

Transfer to Kansas City

In May 2014, with roughly one week's notice, Williams ordered Respondent to begin commuting the 63 miles to the Kansas City office three days a week. Respondent was disappointed, because she had transferred from the Kansas City office to St. Joseph due to the long commute, and the fact it took away time with her son. Williams testified at trial that she was transferred to assist with the increased workload brought on by Appellant's acquisition of MGE. Despite the allegedly increased workload and a budget increase of millions of dollars, Respondent was the only employee transferred. Respondent testified that she had never seen another employee transferred for non-disciplinary reasons. Additionally, her office in St. Joseph was confiscated, and she was forced to work in a cubicle for the two days per week that she remained working there. All of the other office staff worked from private offices.

On February 11, 2016, Respondent filed this suit in the Circuit Court of the City of St. Louis, alleging race discrimination and retaliation. Following a two-week trial, the jury unanimously returned a verdict in Respondent's favor, awarding her $1.3 million in actual damages and $7.2 million in punitive damages. The trial court entered judgment on September 6, 2018. On October 5, 2018, Appellant filed a motion for a new trial and for judgment notwithstanding the verdict, as well as a motion to amend the judgment to enforce the damage cap imposed by the 2017 amendments to the Missouri Human Rights Act ("MHRA"). The circuit court denied those motions on January 4, 2019, and Appellant filed a notice of appeal on January 8, 2019.

II. Discussion

Appellant raises six points on appeal. First, Appellant argues the trial court erred in denying its motion to amend the judgment to enforce the damage cap because the court was obliged to follow the law as it existed on the date of judgment, in that Respondent had no vested

right to punitive damages until judgment was entered. For large companies like itself, Appellant argues the 2017 amendments to the MHRA cap all damages, other than back pay and interest thereon, at $500 thousand. Appellant reasons that while Respondent's actual damages were much more than $1 million, no one has a vested right to punitive damages until the entry of judgment, and thus the trial court should have applied the law in effect at the time of judgment and eliminated the punitive damages award.

Second, Appellant argues the trial court erred in allowing Respondent's "me too" evidence in support of her hostile work environment claim, because such evidence was irrelevant. Appellant reasons that because none of the "allegedly hostile remarks" were directed to, nor heard by, Respondent, the evidence from other current and former employees regarding their own experiences was irrelevant, and its prejudicial effect far outweighed any probative value.

Third, Appellant argues the trial court erred in denying its motion for a directed verdict on Respondent's claim for race discrimination for several reasons. Appellant first reasons that Respondent did not have a submissible case of discriminatory failure to promote, in that there was no substantial evidence her race played any role in that decision. Next, Appellant reasons that Respondent did not have a submissible case of a hostile work environment because the evidence specific to her was isolated and incidental, rather than severe or pervasive. Appellant also reasons that if the Court grants any relief on the merits, Appellant is entitled to a new trial on all issues.

Fourth, Appellant argues the trial court erred in denying its motion for a directed verdict on Respondent's retaliation claim. Appellant argues Respondent did not have a submissible case of retaliation on her failure to promote claim because there was no substantial evidence that her complaint played a causal role in the decision not to promote her. Appellant also reasons that

Respondent did not have a submissible case of retaliation on her other retaliation claims because there was no substantial evidence that her complaint played a causal role in those decisions. As Appellant argues in point three, it also argues in point four that any relief on the merits entitles Appellant to a new trial on all issues.

Fifth, Appellant argues the trial court erred in giving jury instruction No. 6 ("Instruction 6") because it did not submit all of the elements of a hostile work environment, in that it did not require a finding that the alleged harassment was so severe or pervasive that it affected a term, condition, or privilege of her employment, or that Appellant knew or should have known of it.

Sixth and finally, Appellant argues the trial court erred in awarding Respondent attorneys' fees. Appellant reasons that the award was premature, because an outright reversal would require denial of any attorneys' fees, and a reversal on any ground other than the damage cap would require a new trial.

Points I, III, IV, & V

Because Appellant's first, third, fourth, and fifth points are all analyzed under the *de novo* standard of review, we will analyze them separately from Appellant's second and sixth points.

A. Standard of Review

Issues of statutory interpretation, whether there was sufficient evidence to submit an issue to the jury, and the propriety of instructions given to the jury are all questions of law that this Court reviews *de novo*. Hervey v. Mo. Dept. of Corrections, 379 S.W.3d 156, 163 (Mo. banc 2012); Vintila v. Drassen, 52 S.W.3d 28, 40 (Mo. App. S.D. 2001); Hopfer v. Neenah Foundry Co., 477 S.W.3d 116, 124 (Mo. App. E.D. 2015). Appellate review of the sufficiency of the evidence to support the giving of an instruction is made "in the light most favorable to its submission," and if the instruction is supportable by any theory, its submission is proper. Vintila, 52 S.W.3d at 28; see also Hopfer, 477 S.W.3d at 124.

B. Analysis

Point I: The Trial Court did not Err in Refusing to Cap the Punitive Damages Award

In its first point on appeal, Appellant argues the trial court erred in denying its motion to amend the judgment to enforce the damage cap because the court was obliged to follow the law as it existed on the date of judgment, in that Respondent had no vested right to punitive damages until the judgment was entered. We disagree.

The primary rule of statutory interpretation is to "ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning." Hervey, 379 S.W.3d at 163. Where the language of a statute is "unambiguous and clear," this Court will give effect to the language as written, and will not engage in statutory interpretation. Dubinsky v. St. Louis Blues Hockey Club, 229 S.W.3d 126, 130 (Mo. App. E.D. 2007). Effective August 2017, the Missouri Legislature Amended Section 213.111, RSMo,[1] to provide for a cap on punitive and actual damages via Senate Bill 43 ("S.B. 43"). The amended statute states, in pertinent part:

> 4. The sum of the amount of **actual damages . . . and punitive damages** awarded under this section shall not exceed for each complaining party:
>
> (1) Actual back pay and interest on back pay; and
>
> . . .
>
> (2)(d) In the case of a respondent who has **more than five hundred employees** in each of twenty or more calendar weeks in the current or preceding calendar year, **five hundred thousand dollars**.

Section 213.111.4 (emphasis added). The prior version of Section 213.111 contained no such cap.

[1] Unless otherwise indicated, all statutory references are to the Revised Statutes of Missouri in effect in February 2016, when Respondent filed this case.

The Western District of this Court recently decided this same issue in Dixson v. Missouri Dep't Corr., and we find that case dispositive of Appellant's first point. 586 S.W.3d 816 (Mo. App. W.D. 2019). In August 2016, Dixson filed a petition for damages against the Missouri Department of Corrections ("DOC"), alleging race discrimination, hostile work environment, and retaliation. Id. at 822. A jury trial was held in December 2017, where several of Dixson's co-workers corroborated Dixson's account of his work experiences. The jury returned a verdict in Dixson's favor on his retaliation claim, awarding him $280 thousand in actual damages and $1.2 million in punitive damages. Id. On appeal, the DOC argued that the court erred in failing to apply the damages cap imposed by the S.B. 43 amendments to the MHRA, in that the damages cap was "merely procedural or remedial," and could thus be applied retrospectively. Id. at 825.

The Western District disagreed, holding that the damages cap applied only prospectively and to retroactively apply the cap would be unconstitutional. Id. at 826-27. Crucial to the Western District's decision was the fact that the damages cap "has the effect of limiting the ***total damages*** that a plaintiff may recover, including compensatory damages." Id. at 826. The Western District also rejected the DOC's argument that the damages cap could be retroactively applied solely to the punitive damages award, reasoning that such an argument "asks this court to effectively rewrite Section 213.111.4, to create a separate cap on punitive damages, where none was enacted by the legislature." Id. Further, the court likened the DOC's argument to "an argument that we should sever a portion of Section 213.111.4 that cannot constitutionally be applied retroactively . . . from the limitation on punitive damages," and found that doing so would be "rewriting a statute to do something different than what the legislature intended." Id. Interestingly, Appellant joined in the DOC's argument, as *amicus curiae*, and was mentioned by name in the Dixson court's opinion. Id. at 825. Appellant's argument fails for many of the same reasons as the DOC's argument in Dixson.

First, Appellant's argument fails because, like in Dixson, applying the damages cap in this case would violate the prohibition against retrospective laws. The Missouri Constitution states, "no . . . law . . . retrospective in its operation . . . can be enacted." Mo. Const. Art., I Section 13. Statutory amendments are presumed to operate prospectively, and the only exceptions to that rule are (1) where the legislature "clearly expresses an intent that the amendment be given retroactive application," or (2) the statute is merely procedural or remedial, rather than substantive. Dixson, 586 S.W.3d at 825. Respondent filed her case on February 11, 2016. The amended Section 213.111.4 took effect in August 2017, more than a year later. Section 213.111.4. Because the legislature expressed no such intent that the amendment to this statute apply retroactively, the first exception does not apply here. Further, the second exception does not apply because the statute is not merely procedural or remedial. As the Dixson court explained, Section 213.111.4 enacted one aggregate cap, which caps not only the actual damages, but also punitive damages. Id. at 826.

Appellant also argues that the trial court could have simply applied the cap to the punitive damages award, relying on Vaughan v. Taft Broad. Co., and a litany of other inapposite service letter cases. 708 S.W.2d 656 (Mo. banc 1986); see also Ball v. Am. Greetings Corp., 752 S.W.2d 814 (Mo. App. W.D. 1988), Dippel v. Taco Bell Corp., 716 S.W.2d 342 (Mo. App. E.D. 1986). In Vaughan, the Missouri Supreme Court ruled that "punitive damages are remedial and a plaintiff has no vested right to such damages prior to the entry of judgment." 708 S.W.2d at 660. The Vaughan Court held further that "punitive damages are never allowable as a matter of right and their award lies wholly within the discretion of the trier of fact." Id. However, Vaughan is wholly inapposite because it dealt with a statute only addressing punitive damages, and only in service letter cases. Id. at 659. Further, Appellant's argument ignores the fact that the Dixson court, addressing this same issue, found this argument "akin to an argument that we

should sever a portion of Section 213.111.4," and refused to rewrite the statute "to do something different than what the legislature enacted." Dixson, 586 S.W.3d at 826. We also refuse to do so.

Appellant's argument also fails in light of the Missouri Supreme Court's decision in Klotz v. St. Anthony's Med. Ctr., 311. S.W.3d 752 (Mo. banc 2010). In Klotz, the Court held "the legislature cannot change the substantive law for a category of damages after a cause of action has accrued," and applying that rule, the Court held that the statute at issue, which placed a cap on non-economic damages, could not be retroactively applied to a claim accruing prior to the statute's effective date. Id. at 760. Here, the damages cap in Section 213.111.4 limits the total number of damages a plaintiff may recover, including compensatory damages. Thus, under Klotz, Section 213.111.4 must be interpreted to apply only prospectively to actions that accrued on or after its effective date of August 28, 2017. See Dixson, 586 S.W.3d at 826. Respondent filed her case more than a year before that date.

Our holding is further supported by the Missouri Supreme Court's adoption of new Missouri Approved Jury Instructions ("MAI") concerning the MHRA. In May 2018, the Supreme Court adopted new MAIs concerning the new standard to be applied when assessing MHRA claims and the new damages cap. See Bram v. AT&T Mobility Services, LLC, 564 S.W.3d 787, 795 (Mo. App. W.D. 2018). With regard to damages, the Supreme Court approved MAI 38.09, which states:

> If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any actual damages including back pay, other past [and future[economic losses, and any past [and future] emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-economic losses as a direct result of the occurrence mentioned in the evidence.

MAI 38.09; see also Dixson, 586 S.W.3d at 827 (quoting MAI 38.09). The Court also approved a new verdict form, MAI 38.10, which requires the jury to individually list the dollar amount of

damages it awards for each category of actual damages, back pay, past economic losses not including back pay, future economic losses, and non-economic losses. MAI 38.10; see also id.

Both MAI 38.09 and 38.10 are necessary for the jury to apply the damages cap in Section 213.111.4, "as the statute requires the court to determine the sum of the amount of all of the separate categories of actual damages plus punitive damages . . . ." Id. Most important to our purposes here, the Supreme Court specifically stated that these new instructions only apply to "actions accruing on or after August 28, 2017." MAI 38.09; MAI 38.10. Further, the Committee Comments and Notes on Use to each of these approved instructions direct practitioners to older instructions regarding damages and verdict forms "[f]or MHRA actions accruing before August 28, 2017. . . ." MAI 38.09 Committee Comment G; MAI 38.10, Notes on Use 6. As we have discussed at numerous points in our analysis of Appellant's first point, Respondent filed her case more than a year before the S.B. 43 amendments to Section 213.111.4 took effect.

Whereas retroactively applying the Section 213.111.4 damages cap to Respondent's damages award would be unconstitutional, Appellant's first point is denied.

Point III: Respondent Made a Submissible Case of Discriminatory Failure to Promote and of a Hostile Work Environment[2]

In its third point on appeal, Appellant alleges the trial court erred in denying its motion for a directed verdict on Respondent's claim for race discrimination because (1) Respondent did not have a submissible case of failure to promote, in that there is no substantial evidence that her race played any role in that decision, and (2) Respondent did not have a submissible case of a hostile work environment, in that the evidence specific to her was isolated and incidental rather

[2] On October 23, 2019, Appellant filed a Motion to Strike Section III(A)(2)(a) of Respondent's Amended Brief. Appellant faults Respondent for stating, "[Respondent] directly experienced racial hostility" and then discussing the "me too" evidence she did not personally experience. The motion was ordered taken with the case. Appellant argues that this section of Respondent's brief created the "misleading impression" that she directly experienced all of the "me too" evidence. Further, even where a party's compliance with Rule 84.04 is "less than stellar," this Court has the discretion to review the argument on the merits. See Perry v. Tiersma, 148 S.W.3d 833, 835 (Mo. App. S.D. 2004). Thus, even if Appellant is correct that this portion of Respondent's amended brief is misleading, we are not misled and review on the merits. The motion is denied.

than severe and pervasive. Further, Appellant alleges that if this Court grants any relief on the merits, it is entitled to a new trial on all issues.

Respondent presented two theories of race discrimination: (1) discriminatory failure to promote her to the claims supervisor position; and (2) hostile work environment. To present a submissible case, a plaintiff must show "each and every fact essential to liability is predicated upon legal and substantial evidence." Giddens, 29 S.W.3d at 818. We view the evidence "in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." Id.

Failure to Promote Respondent to the Claims Supervisor Position

Because we apply the MHRA as it existed prior to the S.B. 43 amendments, Respondent needed to only show that her race was "a contributing factor" in the decision not to promote her. See Bram, 564 S.W.3d at 795. A contributing factor is a condition that "contributes a share in anything or has a part in producing the effect." Jones v. Galaxy 1 Mktg., Inc., 478 S.W.3d 556, 573 (Mo. App. E.D. 2015) (quoting Lomax v. DaimlerChrysler Corp., 243 S.W.3d 474, 482 (Mo. App. E.D. 2007)) (internal quotations omitted). Further, under this standard the discrimination need not be a substantial or determining factor in the employment action. Id. at 572-73.

The MHRA defines discrimination as "any unfair treatment based on race . . . as it relates to employment. . . ." Daugherty v. City of Maryland Heights, 231 S.W.3d 814, 819 (Mo. banc 2007) (quoting Section 213.010(5)). Employment discrimination cases are inherently fact based, and "often depend on inferences rather than on direct evidence . . . because employers are shrewd enough not to leave a trail of direct evidence." Cox v. Kansas City Chiefs Football Club, Inc., 473 S.W.3d 107, 116 (Mo. banc 2015); see also Daugherty, 231 S.W.3d at 818. Further,

rejecting the defendant's justification for an employment decision "will permit the trier of fact to infer the ultimate fact of intentional discrimination," and upon such rejection, further proof of discrimination is not required. Ferguson v. Curators of Lincoln Univ., 498 S.W.3d 481, 491 (Mo. App. W.D. 2016).

Here, the issue is whether Respondent's race played **any** part in Appellant's decision not to promote her to the claims supervisor position. At trial, and now on appeal, Appellant argued the decision to promote Garcia, instead of Respondent, was based on the fact that Garcia "had prior hands-on experience in on-site investigations in the field of natural gas."[3] Viewing the evidence in the light most favorable to the result reached by the jury, we hold that Respondent presented substantial evidence showing that her race played a role in Appellant's decision not to promote her, in that she showed Appellant's reason was merely pretextual. See Giddens, 29 S.W.3d at 818.

Respondent presented evidence at trial that particularized experience in the field of natural gas was not one of the original qualifications for the claims supervisor position. The original panel that interviewed Respondent consisted of Smith, one of Appellant's in-house attorneys in Kansas City; Gallagher, the Laclede Claims Manager; and Fondren, an HR employee. Fondren was the lone African-American on the panel. Fondren testified at trial that, prior to the interview, she held a "pre-hire meeting" with Gallagher to discuss what he was looking for in the person to fill the position. Fondren testified that she took good notes at the meeting, and her notes did not say anything about a job requirement of on-site investigation experience for the company, or that on-site investigations experience was required at all. The actual job requirements listing stated only that applicants should have "two years of experience responding to . . . incidents concerning on scene investigations." The remaining job

[3] Garcia testified at trial that Garcia is her married name, and she identifies as Caucasian.

qualifications were focused on the legal aspects of the position. The job posting also asked for a bachelor's degree, or equivalent experience.

Further, Respondent presented evidence that she met many of the requirements for this position. Prior to her employment with Appellant, Respondent worked for the Kansas City Public School District ("KCPSD"), where she conducted on-site investigations. This included investigating complaints regarding teachers, speaking with witnesses, drafting reports, and discussing the issues with those investigations with her attorney supervisor. Respondent also worked at the Jackson County Prosecutor's Office, the Jackson County Family Court, and a patent and trademark law firm before her employment with Appellant. Those positions included duties drafting discovery documents, executing search warrants, field searches, legal research and writing, preparing witnesses for testimony, and issuing subpoenas. Additionally, Respondent had a Bachelor's degree and was working towards a Master's degree.

Respondent also presented evidence showing that Garcia did not actually have much experience with on-site investigations. Smith testified at trial that Garcia had only worked in the field for less than a year, and Williams testified that she was "rarely out of the office." Gallagher testified that before hiring Garcia he had never done an on-site investigation with her, that he had not spoken with anyone who had done an on-site investigation with her, and that he had not spoken with anyone who claimed to have knowledge of her doing on-site investigations. Smith testified that the skills required for the on-site investigations could be "learned on the job." Further, Garcia did not have the amount of legal experience Respondent did, and while Respondent had a Bachelor's degree and was working towards her Master's, Garcia had a cosmetology degree. Additionally, Respondent showed that Garcia did not originally apply for the claims supervisor position, applying only after Smith asked her to do so. Smith testified that after Respondent emerged from the interviews as the top candidate, Gallagher decided he wanted

to interview more people.[4] Respondent also showed that despite his policy of hiring from within, and having African-Americans working in his department over the years, Gallagher never hired an African-American in his 28 years as manager.

Finally, Respondent presented evidence that the panel that interviewed her the second time was potentially tainted. For Respondent's second interview, Appellant replaced Fondren, the lone African-American interviewer on the first panel, with Dove, a Caucasian HR employee. This resulted in an all-Caucasian panel. Respondent presented evidence, via the testimony of Allen Rumbo ("Rumbo"),[5] of Dove's discriminatory animus. Rumbo worked at Appellant's Lee's Summit location, and he testified that Dove was his contact when it came to employee issues at Appellant. Rumbo testified that he hired two African-American employees to work in Lee's Summit, and that Dove stated on a conference call that "people are starting to talk about the type of people that you're hiring in Lee's Summit." Further, Rumbo testified that when he later interacted with Dove about wanting to hire another African-American named W.W, Dove made a then-unsubstantiated claim that W.W had "anger issues," because "when we were interviewing him you could see that he had his fist clenched." Dove also knew about Respondent's HR complaint, but we will address that issue in our analysis of Appellant's fourth point. Adding Dove to the interview panel created an all-Caucasian panel with one person who likely had a discriminatory animus, and one person who had not hired an African-American in his 28 years as a manager.

Thus, Respondent presented a submissible case of a discriminatory failure to promote her to the claims supervisor position by showing (1) experience with on-site investigations in the

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[4] At trial, Respondent's counsel and Smith had the following exchange:

> Counsel: Okay. So what happened was [Respondent] emerged as the top contender and [Gallagher] said to you, hey, I actually want to interview other people, correct?
>
> Smith: Correct.

[5] We will discuss Appellant's issues with Rumbo's testimony, as well as the testimony of many of Respondent's other witnesses, in our analysis of Appellant's second point.

field of natural gas was not an original qualification for the claims supervisor position; (2) she met many of the qualifications for the position; (3) that Garcia was not as qualified for the position as Appellant suggested, and that Garcia only applied because Smith asked her to after Respondent emerged from the interviews as the top candidate; and (4) that replacing Fondren on the interview panel with Dove resulted in an all-Caucasian panel, comprised of Dove's likely discriminatory animus, and Gallagher, who had not hired an African-American in his 28 years as a manager. The jury could find Appellant's reason for not promoting Respondent was pretextual. See Ferguson, 498 S.W.3d at 491 (finding that rejecting the defendant's justification for an employment decision will permit the trier of fact to infer the ultimate fact of intentional discrimination, and upon such rejection, further proof of discrimination is not required); see also McGhee v. Schreiber Foods, Inc., 502 S.W.3d 658, 673 (Mo. App. W.D. 2016) ("Evidence that an employer's explanation for its decision is unworthy of credence is one factor that "may well suffice to support liability") (internal citation omitted) (internal quotation omitted). The jury heard this evidence, and disregarded Appellant's reason for not promoting Respondent. See McGhee, 502 S.W.3d at 673.

The Hostile Work Environment

Respondent also presented a submissible case of a hostile work environment. A successful claim of a hostile work environment requires the plaintiff to show: (1) she is a member of a group protected under the MHRA; (2) she was subjected to "unwelcome . . . harassment"; (3) the plaintiff's membership in the protected group was a contributing factor in the harassment; and (4) a term, condition, or privilege of the plaintiff's employment was affected by the harassment. Bram, 564 S.W.3d at 797. Racial discrimination creates a hostile work environment when "discriminatory conduct either creates an intimidating, hostile, or offensive work environment, or has the purpose or effect of unreasonably interfering with an individual's

work performance." Alhalabi v. Mo. Dept. Nat. Res., 300 S.W.3d 518, 526 (Mo. App. E.D. 2009). Further, in most claims of a hostile work environment, the discriminatory acts are "not of a nature that can be identified individually as significant events; instead, the day-to-day harassment is primarily significant . . . in its ***cumulative*** effect." Id. at 526 (citing Pollock v. Wetterau Food Distribution Group, 11 S.W.3d 754, 763 (Mo. App. E.D. 1999)).

Appellant only challenges Respondent's showing that a term, condition, or privilege of her employment was affected, arguing that "the balance of [Respondent's] evidence consists of generalities, offensive remarks unrelated to race, and isolated incidents involving her." Discriminatory harassment affects a term condition, or privilege of employment if it is "sufficiently severe or pervasive enough to alter the conditions of the plaintiff's employment and create an abusive working environment." Id. at 527. The harassing conduct must be severe and pervasive "as viewed subjectively by the plaintiff and as viewed objectively by a reasonable person." Fuchs v. Dept. of Revenue, 447 S.W.3d 727, 734 (Mo. App. W.D. 2014) (citing Cooper v. Albacore Holdings, Inc., 204 S.W.3d 238, 244-45 (Mo. App. E.D. 2006). A plaintiff can show that harassment affected a term, condition, or privilege of her employment by showing a tangible employment action, or an abusive working environment. Hill v. Ford Motor Co., 277 S.W.3d 659, 666 (Mo. banc 2009); Fuchs, 447 S.W.3d at 732-33. Further, in assessing the hostility of an environment, this Court has previously stated that we look to the totality of the circumstances. See Cooper, 204 S.W.3d at 245. Here, Respondent showed both a tangible employment action, and an abusive working environment.

A tangible employment action is "a significant change in employment status," and "the means by which the supervisor brings official power of the enterprise to bear on subordinates." Hill, 277 S.W.3d at 666. Some examples of tangible employment actions include "failure to promote . . . undesired reassignment . . . [and] a decision causing a significant change in . . .

work assignments." Id. at 667. We discussed at length above how Respondent has shown Appellant discriminatorily failed to promote her, and will discuss it further in our analysis of Appellant's fourth point, thus we will not discuss it further here. But Respondent also presented evidence that she was transferred to Kansas City, and that she was given additional work without additional pay. With one week's notice in May of 2014, Williams notified Respondent that she would be required to work in Kansas City three days a week. Respondent had moved from Kansas City to St. Joseph in order to spend more time with her son. Kansas City is more than 60 miles away from St. Joseph. Respondent testified that she was unaware of any other person who was ever transferred for non-disciplinary reasons, and Williams testified that Respondent was the only person transferred. Further, Respondent was given additional work without a pay increase, and for the two days per week that she worked in Kansas City, her office was confiscated and she was forced to work in a cubicle in the middle of the workplace. All of the other office staff had offices to work from, and prior to her transfer, Respondent had an office in which she could work. Thus, Respondent presented substantial evidence of a tangible employment action.

Respondent also presented substantial evidence of an abusive working environment. As discussed above, racial discrimination creates a hostile work environment when "discriminatory conduct either creates an intimidating, hostile, or offensive work environment, or has the purpose or effect of unreasonably interfering with an individual's work performance." Alhalabi, 300 S.W.3d at 526. Respondent presented substantial evidence that the discrimination at Appellant's St. Joseph office interfered with her job performance, testifying "I continue to look over my shoulders," and stating that the environment "makes me feel as though being African-American, I'm not worthy to work in this office because that's just not what they're used to." Respondent testified further that the environment made her "second guess my own self," and "keep myself a little guarded" at work.

Additionally, Respondent testified to multiple instances of racial hostility. Her very first day on the job, Respondent heard a Caucasian construction foreman and a lead survey foreman discussing how "blacks don't take pride in their work, where they live, or anything." Additionally, there was the instance where a Caucasian co-worker referred to President Obama as a "monkey." And when news broke that celebrity Chef Paula Deen used the word "n****r" to an African-American employee, Labass displayed several Paula Deen magazines on her desk. Another time Respondent went into the copy room and found an email Labass was photocopying. The email stated, "that the blacks and Mexicans were taking over and the Caucasians needed to take their money out of the banks because Obama was going to bankrupt and close all the banks and that they needed to take their money and invest it in gold bars." Appellant attempts to dismiss Respondent's evidence by arguing that these remarks were isolated and incidental, rather than severe and pervasive. However, Appellant's argument ignores the fact that in most claims of a hostile work environment, the discriminatory acts are "not of a nature that can be identified individually as significant events; instead, the day-to-day harassment is primarily significant . . . in its ***cumulative*** effect." Id. at 526.

It is important to note that in assessing the hostility of an environment this Court looks to the totality of the circumstances. Cooper, 204 S.W.3d at 245. Respondent testified that her supervisor, Robert Hart, would make snide comments whenever she asked a question, that he would make her feel like "the village idiot," and that she felt he was trying to degrade her in front of her co-workers, and minimize her capabilities. In 2013 Respondent made an HR complaint to Moran, an HR officer, regarding Hart's conduct and the racial environment in the office. In response, Respondent was called to a meeting with Moran, Williams, and Hart. Moran mentioned that he had discussed her concerns with Williams and Hart, and then Williams alleged that Respondent was having an intimate relationship with Gard, a Caucasian co-worker.

Moran then told her, "I think you need to take a look at yourself; sometimes we have to take a look at ourselves and see why people treat us the way they do," and Hart accused her of not being helpful to her co-workers.

Respondent also presented evidence that her issues were not limited to Hart, Williams, Moran, and Labass. Respondent testified Martin would come into the office and mockingly sing "negro spirituals," singing "free at last, free at last, thank God almighty we're free at last like these mother f-----s are." Respondent's 2013 HR complaint also alluded to some of Martin's conduct, leading to Martin angrily entering her office with two other Caucasian co-workers telling her to "keep me off your radar," and "[y]ou don't know a f-----g thing and you don't do a f-----g thing. You're a nothing and a nobody." Respondent would later participate in an investigation of this incident.

Additionally, Respondent called Gard to testify at trial. He testified that he heard Martin use the term "n****r" "too many times to count," and that he heard Martin refer to Respondent as a "dumb jig" one time in the office. Gard also testified he heard Martin refer to Respondent as a "dumb black bitch" on another occasion. Further, the woman who was supposed to train Respondent, Munsell, refused to adequately do so. Gard testified that when he asked Munsell why she did not want to train Respondent, Munsell told him it was because "I don't want my job taken by a n****r."

In McKinney v. City of Kansas City, another case decided by the Western District, the plaintiff sued the city for race discrimination, a hostile work environment, and retaliation. 576 S.W.3d 194, 197 (Mo. App. W.D. 2019). The plaintiff's lone explicitly racial incident was a Caucasian supervisor beginning her tenure by announcing in the presence of several African-American employees "that she was driving the bus and if the employees didn't like the way she was driving they could sit in the back or get off." Id. The court found that this evidence,

combined with other race neutral acts, was sufficient for the plaintiff to have a submissible claim of a hostile work environment. Id. at 200-01.

In Respondent's case, she had more than one explicitly racial piece of evidence about the environment at Appellant's St. Joseph office. Further, she also submitted the evidence of Hart demeaning her in front of her colleagues, Martin aggressively yelling at her in her office in front of two other employees, and the fact that she was accused of having an intimate relationship with a Caucasian employee when she filed an official HR complaint. Looking at the totality of the circumstances, we hold Respondent provided substantial evidence that the cumulative effect of all of these incidents created a hostile work environment. Cooper, 204 S.W.3d at 245; Alhalabi, 300 S.W.3d at 526. As discussed above, the harassing conduct must be severe and pervasive "as viewed subjectively by the plaintiff and as viewed objectively by a reasonable person." Fuchs, 447 S.W.3d at 734 (citing Cooper, 204 S.W.3d at 244-45). Respondent showed that she was personally offended. Further, once there is evidence of improper conduct and subjective offense, the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury. Id. Here, the jury found that a reasonable person would have been offended by the conduct at issue in this case, and we will not invade that finding.

Therefore, Respondent had a submissible case of a hostile work environment in that she showed a term, condition, or privilege of her employment was affected, and that the hostility was severe and pervasive. Because Respondent made a submissible case of both discriminatory failure to promote, and a hostile work environment, point three is denied.

Point IV: Respondent Made a Submissible Case of Retaliation

In its fourth point on appeal, Appellant alleges the trial court erred in denying its motion for a directed verdict on Respondent's retaliation claim. Appellant argues Respondent did not have a submissible case of retaliation on her retaliatory failure to promote claim, or on her other

retaliation claims, because she did not show that her HR complaint played a causal role in those decisions. We disagree.

As we discussed in our analysis of Appellant's third point, to present a submissible case a plaintiff must show "each and every fact essential to liability is predicated upon legal and substantial evidence." Giddens, 29 S.W.3d at 818. We view the evidence "in the light most favorable to the result reached by the jury, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." Id.

To present a prima facie case of retaliation, the plaintiff must show "(1) she complained of discrimination; (2) the employer took adverse action against her; and (3) a causal relationship existed between the complaint of discrimination and the adverse employment action." Cooper, 204 S.W.3d at 245 (citing Thompson v. W.-S. Life Assur., 82 S.W.3d 203, 207 (Mo. App. E.D. 2002). To retaliate is to "inflict in return," and retaliation includes "any act done for the purpose of reprisal that results in damage to the plaintiff . . . ." Walsh v City of Kansas, 481 S.W.3d 97, 106 (Mo. App. W.D. 2016) (citing Keeney v. Hereford Concrete Prods., Inc., 911 S.W.2d 622, 625 (Mo. banc 1995)). Further, the plaintiff must satisfy that causation standard by showing the complaint of discrimination was a "contributing factor" to Employer's adverse employment action. Templemire v. W&M Welding, Inc., 433 S.W.3d 371, 383 (Mo. banc 2014). A contributing factor is a "condition that contributes a share in anything or has a part in producing the effect." Soto v. Costco Wholesale Corp., 502 S.W.3d 38, 48 (Mo. App. W.D. 2016). If the plaintiff's protected activity was "even one contributing factor" in the employer's decision to act in reprisal, then there was an unlawful retaliation. Id.

Failure to Promote Respondent to the Claims Supervisor Position

Appellant argues there cannot be any causal connection between Respondent's 2013 HR complaint and Appellant's failure to promote her in 2014, "because no one who made that decision even knew about the complaint." However, this argument is belied by the record.

While Respondent did not present direct evidence that Appellant decided not to promote her because of her HR complaint, she presented circumstantial evidence. Because cases involving claims of retaliatory motive are inherently fact-based, usually depending on inferences rather than direct evidence, circumstantial evidence that "tends to support an inference" of retaliatory motive is sufficient. Holmes v. Kansas City Pub. Sch. Dist., 571 S.W.3d 602, 611 (Mo. App. W.D. 2018). Some examples for circumstantial evidence of causation include good work record prior to the adverse employment action, close temporal proximity between the complaint and the adverse action, atypical treatment, and facts showing the employer's explanation for the action is unworthy of credence. Soto, 502 S.W.3d at 49-50. To begin with, Respondent presented evidence in the form of her testimony that she received annual performance evaluations, and she always met or exceeded expectations. Further, we discussed in our analysis supra that Appellant's justification for not promoting Respondent—that she did not have enough experience with on-site investigations in the field of natural gas—was unworthy of credence. Thus, Respondent presented circumstantial evidence of a causal relationship between her complaint and the decision not to promote her. See id.

Additionally, Respondent presented even more circumstantial evidence that Appellant's failure to promote her was retaliatory. Gallagher testified on cross-examination that the hiring decision was made by him, Smith, Fondren, and Dove. We discussed Dove's racial biases in our analysis of Appellant's third point, supra. Further, Moran testified that he informed Dove about Respondent's complaint. Thus, someone aware of Respondent's HR complaint was in a position

to influence the decision on whether to promote Respondent to the claims supervisor position. See *Cf.* Ferguson, 498 S.W.3d at 490 (finding that bias by someone in the position to influence the ultimate decision maker relevant in an age-discrimination claim). Respondent needed to show only that her complaint was a contributing factor in Appellant's decision not to promote her. Templemire, 433 S.W.3d at 383. Further, we view all of the evidence in the light most favorable to the verdict, and here the jury found Respondent had met her burden. We will not disturb that finding. Giddens, 29 S.W.3d at 818.

Additional Duties and Transfer to Kansas City

Respondent also presented a submissible case that Appellant retaliated against her by adding additional duties to her workload and transferring her to Kansas City three days a week. As discussed above, Respondent only needed to show that her complaint was a contributing factor in Appellant's decision to add additional duties to her workload, and to transfer her to Kansas City three days a week, in order to meet her causation burden. Templemire, 433 S.W.3d at 383. As discussed above, because cases involving claims of retaliatory motive are inherently fact-based, usually depending on inferences rather than direct evidence, circumstantial evidence that "tends to support an inference" of retaliatory motive is sufficient. Holmes, 571 S.W.3d at 611. Some examples for circumstantial evidence of causation include good work record prior to the adverse employment action, close temporal proximity between the complaint and the adverse action, atypical treatment, and facts showing the employer's explanation for the action is unworthy of credence. Soto, 502 S.W.3d at 49-50.

Regarding Appellant's assigning additional duties to Respondent, the evidence at trial showed this was done at Hart's behest, after Respondent had filed her HR complaint against Hart. Moran testified on cross-examination that as part of the conclusion of the investigation into Hart's conduct, additional duties were added to Respondent's workload. Thus, there was

evidence of close temporal proximity between Respondent's first HR complaint and Appellant's decision to give her additional work duties. See id. Further, Williams testified that at the end of the investigation he spoke with Hart about Respondent's job responsibilities, and it was Hart's suggestion that Respondent did not have enough work to keep her busy. Williams testified further that as a result of that conversation, "more work was added to [Respondent's] plate." Both Moran and Williams testified that Respondent was not provided additional pay along with this increase in her workload. While Appellant argues that duties were also taken away from Respondent's workload, our standard of review requires we view the evidence in the light most favorable to the verdict reached by the jury, "giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict." Giddens, 29 S.W.3d at 818. Here, the jury found Respondent showed Appellant's decision to add duties to her workload was in retaliation for her first HR complaint, and we decline to disturb that finding.

Respondent also provided a submissible case that her transfer to Kansas City was retaliatory. Appellant argues Respondent cannot prove a causal relationship between her HR complaint and her transfer to Kansas City because there was not a "close temporal relationship" between her complaint and her transfer. However, a close temporal relationship between a protected activity and the retaliatory act is only one of the ways a plaintiff can show causation. Here, regardless of whether Respondent showed a close temporal relationship between her complaint and transfer, she showed that Appellant's business reasons for the transfer were unworthy of credence.

Appellant's justification for transferring Respondent to Kanas City three days a week was that they needed her there to assist two supervisors in the construction department at the Kansas City office. Respondent called Williams to testify at trial, and he stated, "[Appellant] . . . wanted to accelerate our gas main program . . . We were averaging eight to ten miles a year until the

transition. They wanted us to immediately double and triple that . . . ." Williams testified further that "the construction foreman needed help with all the paperwork that was involved," and that was why Respondent was transferred to Kansas City. However, Williams also testified that Appellant dramatically increased the budget for this work, from $14 million to more than $40 million. Despite this budget increase and alleged need for support in the Kansas City office, Respondent was the only employee forced to commute to Appellant's Kansas City office. Additionally, Respondent testified that "there's no need for me to be in Kansas City. I can retrieve paperwork, emails, documents or a fax. We can get emailed to us the work order packet and not have to retrieve them off our database," and further that there is no aspect of her job duties in Kansas city requiring face-to-face interaction, or hands-on work. That Appellant had retaliatory intent in making this decision is further supported by the fact that Respondent was transferred after making her HR complaint, even though she was told before that complaint that her job would not change after Appellant's purchase of the company. The jury heard all of this testimony and then found in favor of Respondent. We will not disturb that finding. See Giddens, 29 S.W.3d at 818.

Additionally, Respondent showed that transfer is an atypical treatment at Appellant's offices. Soto, 502 S.W.3d at 49-50. Respondent testified that she had never heard of anyone being transferred from one of Appellant's offices for non-disciplinary reasons. In fact, as part of his punishment for his discriminatory conduct in the St. Joseph office, Hart was involuntarily transferred to Kansas City. Thus, Respondent also provided a submissible case that her transfer to Kansas City was in retaliation for her HR complaint.

Therefore, we hold that Respondent presented a submissible case that Appellant did not promote her to the claims supervisor position, added to her workload, and transferred her to Kansas City, all in retaliation for her HR complaint. As we discussed supra, because cases

involving claims of retaliatory motive are inherently fact-based, usually depending on inferences rather than direct evidence, circumstantial evidence that "tends to support an inference" of retaliatory motive is sufficient. Holmes, 571 S.W.3d at 611. Respondent's evidence tends to support an inference of retaliatory intent, in that she showed Dove was part of the group of decision-makers for the claims supervisor position and knew about her HR complaint, that she was only assigned additional duties at the behest of the same man against whom she filed her HR complaint, and that Appellant's justification for her transfer to Kansas City was pretextual. Point four is denied.

Point V: Instruction No. 6 Was Proper

In its fifth point on appeal, Appellant argues the trial court erred in giving Instruction No. 6 because it did not submit all of the elements of a hostile work environment claim. Appellant asserts that the instruction should have required a finding that the alleged harassment was so severe or pervasive that it affected a term, condition, or privilege of Respondent's employment, and also a finding that Appellant knew or should have known of it. We disagree.

When analyzing whether a jury was properly instructed, our review is conducted "in the light most favorable to the record," and if the instruction is supported by any theory its submission is proper. Hervey, 379 S.W.3d at 159. We reverse only if the instructional error resulted in prejudice that "materially affects the merits of the action." The party challenging the instruction bears the burden of showing the instruction "misdirected, misled, or confused the jury, resulting in prejudice . . . ." Id. (citing Fleshner v. Pepose, 304 S.W.3d 81, 90-91 (Mo. banc 2010)).

The Missouri Rules of Civil Procedure provide rules for the instruction of juries in Rule 70.02. That rule states, "whenever [MAI] contains an instruction applicable in a particular case . . . such instruction ***shall*** be given ***to the exclusion of any other instructions on the same***

subject." Mo. R. Civ. Pro. 70.02(b) (emphasis added). Rule 70.02 states further that "the giving of an instruction in violation of the provisions of [this rule] shall constitute error, its prejudicial effect to be judicially determined . . . ." Rule 70.02(c). A proper instruction submits "only the ultimate facts, not evidentiary details, to avoid undue emphasis of certain evidence, confusion, and the danger of favoring one party over another." Twin Chimneys Homeowners Ass'n v. J.E. Jones Const. Co., 168 S.W.3d 488, 497-98 (Mo. App. E.D. 2005). Further, the test is "whether the instruction follows the substantive law and can be readily understood by the jury." Id. at 498.

Appellant faults Instruction No. 6 for numerous reasons. First, Appellant argues that the instruction failed to provide all of the elements of a hostile work environment claim, specifically that the trial court failed to provide the element that the harassment was sufficiently severe or pervasive that it affected a term, condition, or privilege of Respondent's employment, and also that the court failed to provide the element that Appellant knew or should have known of the harassment and failed to take proper action. We hold that this argument fails because Instruction No. 6 was proper in that it followed the applicable MAI, it submitted only the ultimate facts to the jury, and it followed the substantive law.

Employment discrimination actions brought before the S.B. 43 amendments utilize MAI 38.01(A). That MAI reads as follows:

> Your verdict must be for plaintiff if you believe:
>
> First, defendant (here insert the alleged discriminatory act, such as 'failed to hire' 'discharged' or other act within the scope of [Section] 213.055, RSMo) plaintiff, and
>
> Second, (here insert one or more of the protected classifications supported by the evidence such as race, color, religion, national origin, sex, ancestry, age, or disability) was a contributing factor in such (here repeat alleged discriminatory act . . .), and
>
> Third, as a direct result of such conduct, plaintiff sustained damage.

MAI 38.01(A). Instruction No. 6 read in pertinent part:

> Your verdict must be for Plaintiff on her race discrimination claim if you believe:
>
> First, Defendants either
>
> Subjected Plaintiff to unwelcome harassment that either created an intimidating, hostile, or offensive work environment or unreasonably interfered with her work performance, or
>
> Failed to promote Plaintiff to Claims Supervisor, and
>
> Second, Plaintiff's race was a contributing factor in such conduct, and
>
> Third, as a direct result of such conduct, Plaintiff sustained damage.

Looking at the MAI language and the language from Instruction No. 6, it is clear the trial court religiously followed the MAI instruction, as it was required to do. See Clark v. Missouri & N. Ark. R.R. Co., Inc., 157 S.W.3d 665, 671 (Mo. App. W.D. 2004) (finding that it is well settled that when a MAI instruction is applicable, its use is mandatory) (quoting Bueche v. Kansas City, 492 S.W.2d 835, 840 (Mo. banc 1973)); see also Brown v. St. Louis Pub. Serv. Co., 421 S.W.2d 255, 258 (Mo. banc 1967) ("if this court is to make this system work, and preserve its integrity and very existence, we must insist that mandatory directions be followed and that the pattern instructions be used as written").

Instruction No. 6 was also proper because it submitted only the ultimate facts to the jury. J.E. Jones Const. Co., 168 S.W.3d at 497-98. MAI 38.01(A) instructs the trial court to "insert the alleged discriminatory act . . . within the scope of [Section] 213.055" in Paragraph First of the instruction. MAI 38.01(A). Further, the Notes on Use provide that the trial court can appropriately modify Paragraph First of the instruction "if the evidence . . . demonstrates a course of conduct or harassment constituting discrimination on any grounds contained in [Section] 213.055 . . . ." MAI 38.01(A); Clark, 157 S.W.3d at 671 (finding that notes on use should be religiously followed). Thus, the Notes on Use to MAI 38.01(A) provide that in hostile

work environment claims, the trial court must insert language in Paragraph First providing the ultimate facts the jury must find.

We have already discussed in our analysis of Appellant's third and fourth points, supra, why its conduct was sufficiently severe and pervasive to create a hostile work environment. In Missouri, "discrimination creates an actionable hostile work environment when discriminatory conduct either creates an intimidating, hostile, or offensive work environment or has the purpose or effect of unreasonably interfering with an individual's work performance." Fuchs, 447 S.W.3d at 733. Under Missouri law, then, an intimidating work environment, a hostile work environment, an offensive work environment, or an environment that unreasonably interferes with someone's work performance are all actionable forms of discrimination, and by their very nature constitute discrimination that is severe and pervasive. Thus, these were the ultimate facts that needed to be submitted to the jury. See id. Instruction No. 6 submitted all of these to the jury, and thus submitted the ultimate facts to the jury.

For similar reasons, Instruction No. 6 was also proper because it followed the substantive law. The court followed the Notes on Use from MAI 38.01(A) to fill in the ultimate facts in Paragraph First of Instruction No. 6. Further, the court took the language directly from the Fuchs case. See id. When discussing the jury instructions with the attorneys, the court mentioned that there was "not a definition of hostile work environment," so ". . .we took the language directly from that case and inserted into the verdict director . . . [t]hat is right from that case, and that's as close a definition as I could find . . . so I think that is the proper guidance for the jury . . . ." Thus, the trial court followed the substantive law, in that it followed the applicable MAI and Notes on Use, and took the definition of a hostile work environment directly from an applicable case.

Even assuming *arguendo* Instruction No. 6 was improper for failing to submit all of the elements of a hostile work environment, Appellant still cannot show prejudice because the jury awarded punitive damages. A jury's decision to award punitive damages on a hostile work environment claim "indicates the discriminatory harassment was severe and pervasive, and indicates that the addition of [the words severe and pervasive] in [the] jury instruction . . . would not have made a difference." Alhalabi, 300 S.W.3d at 528. Thus, Appellant was not prejudiced by the lack of such language in Instruction No. 6.

Next, Appellant faults Instruction No. 6 for not requiring the jury to find Appellant "knew or should have known of the alleged hostile environment and did nothing about it." Appellant asserts this is a valid defense to claims of harassment by supervisors and co-employees. To begin with, the argument was waived. Rule 70.03 addresses objections to instructions, stating "[c]ounsel **shall** make specific objections to instructions considered erroneous," and requiring counsel "objects thereto on the record **during the instructions conference**, stating distinctly the matter objected to and the grounds of the objection." Rule 70.03 (emphasis added). Failure to make such an objection means that argument is waived on appeal. See Williams v. Mercy Clinic Springfield Cmtys., 568 S.W.3d 396, 415 (Mo. banc 2019). Appellant failed to make this specific objection at the instructions conference, instead objecting to the lack of the "severe and pervasive" language in the instruction, and the trial court's rejection of its affirmative defense instruction. Further, Appellant's proposed hostile work environment instruction did not include such a defense. Additionally, Appellant failed to include this argument in its motion for a new trial. Thus, Appellant waived this argument.

Even if Appellant properly preserved this argument for our review, it still fails because this proposed element is applicable only to cases involving sexual harassment, and only when the plaintiff seeks to hold the employer liable under a negligence theory of liability. See Diaz v.

Autozoners, LLC, 484 S.W.3d 64, 76 (Mo. App. W.D. 2015). This is a case of racial discrimination, thus Appellant's argument that Instruction No. 6 failed to include such an element fails.

Appellant also faults the trial court for rejecting Appellant's affirmative defense instruction. This proposed instruction read in pertinent part:

> You must find for Defendants on Plaintiff's racial [sic] hostile work environment claim if you believe:
>
> First, Defendants exercised reasonable care to prevent harassment in the workplace on the basis of race, and also exercised reasonable care to promptly correct any harassing behavior that does [sic] occur, and
>
> Second, Plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities approved by Defendants.

This defense is available only where "**no tangible employment action occurs**," and requires "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff . . . unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm . . . ." Diaz, 484 S.W.3d at 76 (emphasis added).

Appellant's argument fails for two reasons. First, this affirmative defense is only available in sexual harassment cases. The MHRA does not "explicitly provide for . . . any . . . affirmative defense." Wells v. Lester E. Cox Med. Ctrs., 379 S.W.3d 919, 926 (Mo. App. S.D. 2012); see also MAI 38.01(A) Notes on Use 4 ("in including guidance on how to instruct in instances where an affirmative defense is submitted, the Committee takes no position as to the availability of affirmative defenses in [MHRA] cases") (citing id.) However, the Missouri Code of State Regulations provides that this affirmative defense is available in sexual harassment cases. 8 CSR Section 60-3.040(17)(D)(1). There is no such regulation providing for such a defense in the context of a racial discrimination case. Further, this affirmative defense is only

available where there is no tangible employment action. See Diaz, 484 S.W.3d at 76 ("this defense is **not available**, however, when the supervisor's harassment culminates in a tangible employment action") (internal quotations omitted) (emphasis added). We have already discussed how Appellant's actions culminated in multiple tangible employment actions. Thus, the trial court was correct when it denied Appellant's proposed affirmative defense instruction because it was inapplicable to this case.

For these reasons, we hold that Instruction No. 6 was proper and the trial court properly rejected Appellant's affirmative defense. Appellant's fifth point is denied.

Points II and VI

Appellant's second and sixth points are reviewed for an abuse of discretion, thus we review them separately from the rest of Appellant's points.

A. Standard of Review

The trial court has "broad discretion" in determining whether to admit or exclude evidence. Kerr v. Mo. Veterans Comm'n, 537 S.W.3d 865, 876 (Mo. App. W.D. 2017) (internal quotations omitted) (citing Ferguson, 498 S.W.3d at 489). Thus, we review the trial court's decisions regarding the admission of evidence for an abuse of discretion. Id. at 877. Additionally, to successfully challenge the trial court's award of attorneys' fees on appeal, the appellant must show the award was an abuse of discretion. Cullison v. Thiessen, 51 S.W.3d 508, 513 (Mo. App. W.D. 2001). The trial court abuses its discretion "if its ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." Kerr, 537 S.W.3d at 876. (internal quotations omitted).

B. Analysis

Point II: The Trial Court did not Abuse its Discretion in Admitting Respondent's "Me too" Evidence

In its second point on appeal, Appellant argues the trial court erred in admitting Respondent's "me too" evidence in support of her hostile work environment claim. Appellant reasons that such evidence was irrelevant because the allegedly hostile remarks were neither directed to, nor heard by plaintiff, and the prejudicial effect of such evidence far outweighed any probative value. We disagree.

Employment discrimination cases are inherently fact based, and "often depend on inferences rather than on direct evidence . . . because employers are shrewd enough not to leave a trail of direct evidence." Cox, 473 S.W.3d at 116. Thus, "individual plaintiffs claiming discriminatory employment action on the basis of . . . any . . . protected classification, generally must rely on circumstantial evidence." Id. As with all other forms of evidence, circumstantial evidence of employment discrimination must be both logically and legally relevant to be admissible. Id. Evidence is logically relevant if "it tends to make the existence of any consequential fact more or less probable, or if it tends to corroborate evidence which itself is relevant and bears on the principal issue of the case." Hesse v. Mo. Dept. Corr., 530 S.W.3d 1, 5 (Mo. App. W.D. 2017). Evidence is legally relevant if "its probative value outweighs any prejudicial effect on the jury." Id.

Appellant challenges the admission of the following evidence: (1) Rumbo's testimony that Hart told him to "turn that jigaboo music off" in the St. Joseph facility; (2) Rumbo's testimony recounting a conversation with Mark Olvera ("Olvera") in which he stated that St. Joseph "don't do blacks and women"; (3) Katie Jones Shirey's ("Shirey") testimony regarding Hart's jigaboo comment, and that Hart used the word "n****r" more than once; (4) Gard's testimony that he heard Martin refer to President Obama as a "f*****g monkey," and that Martin had used the n-word on multiple occasions; (5) Phil Campbell's ("Campbell") testimony that Hart told other employees that they "n****r-rigged the cards"; and (6) D'Angelo Ferguson's

("Ferguson") testimony that Shane Mitchell ("Mitchell"), who worked under Hart's supervision, referred to "jigaboo music" many times. The crux of Appellant's argument is that because Respondent did not hear many of the statements which these "me too" witnesses testified, they are irrelevant to her hostile work environment claim. This is not the law.

To be sure, the testimony of these witnesses was logically relevant to Respondent's hostile work environment claim. She was alleging that the racism of her supervisor and colleagues created a racially hostile work environment. The fact that Hart, Martin, and other Caucasian employees repeatedly used racial slurs makes it more probable that this was the case. Hesse, 530 S.W.3d at 5 (noting that evidence is logically relevant if it makes any consequential fact more or less probable). Further, this corroborated Respondent's own testimony about the racial hostility she experienced in the workplace. Respondent described the workplace as "toxic," and that the environment "made it difficult to work." She testified about her first day in the St. Joseph office, where she overheard two Caucasian employees talking about how "blacks don't take pride in their work, where they live, or anything," that she heard co-employees refer to President Obama as a "f*****g monkey," and that Martin would walk into the office mockingly singing "negro spirituals." Respondent also testified that Hart tried to make her appear incompetent, alleging her co-workers were complaining, and that Hart never degraded any of the Caucasian employees like he did Respondent. Additionally, Respondent testified that when she filed her HR complaint she was questioned about whether she was having an intimate relationship with Gard, a Caucasian co-worker. Thus, the testimony of these "me too witnesses" was logically relevant to Respondent's hostile work environment claim. The principal issue is whether this testimony was legally relevant.

When considering "me too" evidence, "courts look to and weigh aspects of similarity between party and non-party employees given the facts, context, and theory of the specific case

at issue." Id. (quoting Cox, 473 S.W.3d at 123). Further, "there is no one set of agreed-upon factors, and no one factor is dispositive." Dixson, 586 S.W.3d at 830 (internal quotations omitted) (quoting Cox, 473 S.W.3d at 122). We find the case of Cox v. Kansas City Chiefs Football Club, Inc., instructive to our analysis on this issue. 473 S.W.3d at 107. In that case, Cox ("Mr. Cox") was a former Chiefs employee who filed an age-discrimination suit against the team after he and a number of employees over the age of fifty were fired and replaced with younger people. Id. at 111-12. The trial court ruled that the testimony of other former employees as to their ages and the circumstances surrounding their termination was inadmissible because the other employees "were . . . fired or forced out by different managers and worked in different departments, among other distinctions," and were therefore not similarly situated to Mr. Cox. Id. at 111.

On transfer from the Western District, the Missouri Supreme Court held that the trial court abused its discretion in excluding this circumstantial evidence, noting that the "standard for admitting such testimony as circumstantial evidence of the employer's discriminatory intent . . . depends on may factors, including the plaintiffs [sic] circumstances and theory of the case." Id. Further, the Court discussed that the admissibility of such evidence should be determined "on a case-by-case basis." Id. at 121. The Court also held that evidence of discriminatory actions at the hands of other decisionmakers is admissible if "relevant to the plaintiffs [sic] circumstances and theory of the case . . . ." Id. at 123. Then, looking at Mr. Cox's theory of the case, the court found the trial court abused its discretion in not admitting the "me too" evidence at issue. Id.

Looking to the facts and circumstances of this case, and in light of Respondent's theory of the case, we hold the trial court did not abuse its broad discretion in admitting the testimony of the "me too" witnesses. While the circumstances for Rumbo, Shirey, Gard, Campbell, and Ferguson were not similar in every way to Respondent's situation, their differences were "less

relevant than their commonalities." See Dixson, 586 S.W.3d at 831 (quoting Hesse, 530 S.W.3d at 5). Rumbo, Campbell, and Ferguson were all African-Americans employed at the same company, who all experienced racially hostile conduct, including actions by Hart, those under his supervision, and Martin. Further, while Campbell and Shirey were Caucasian, they also experienced much of the same conduct by the same parties, and Gard was even viewed as being too friendly with Respondent, to the extent that the parties at fault accused Respondent of having an intimate relationship with him. As the court in Cox held, these similarities made this "me too" evidence "relevant and admissible in this case even when the other . . . employees are not similarly situated in all respects." 473 S.W.3d at 111. Therefore, in addition to being logically relevant, this evidence was also legally relevant and admissible.

That the trial court did not abuse its discretion in admitting this evidence is further supported by examination of the evidence it found inadmissible. First, the trial court sustained Appellant's counsel's objection to Shirey's testimony that Campbell's Caucasian co-workers viewed him as lazy. Further, the court refused to admit Campbell's evidence about his claim to the Equal Employment Opportunity Commission regarding seniority issues, finding "this is certainly an insufficient connection." Thus, it cannot be said that the trial court's decision was "so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." Kerr, 537 S.W.3d at 876.

Therefore, the trial court did not abuse its discretion in admitting this "me too" evidence, and point two is denied.

Point IV: The Trial Court did not Abuse its Discretion in Awarding Respondent Attorneys' Fees

In its sixth and final point on appeal, Appellant alleges the trial court erred in awarding Respondent attorneys' fees, because the award was premature. Appellant reasons that because an outright reversal on appeal would require a denial of attorneys' fees, and a reversal on any

ground other than the damage cap would require a new trial, the trial court abused its discretion in awarding Respondent attorneys' fees. We disagree.

The MHRA provides that "the court may . . . as it deems appropriate . . . award court costs and reasonable attorney fees to the prevailing party other than a state agency or commission or a local commission . . . ." Section 213.111.2. The determination of reasonable attorneys' fees is "in the sound discretion of the trial court," and we will reverse only where the amount is "arbitrarily arrived at or is so unreasonable as to indicate indifference and a lack of proper judicial consideration." Brady v. Curators of Univ. of Mo., 213 S.W.3d 101, 114 (Mo. App. E.D. 2006). Further, if the trial court determines a plaintiff has prevailed, it should award attorneys' fees "unless special circumstances would render such an award unjust." Id. at 115 (quoting Lippman v. Bridgecrest Estates I Unit Owners Ass'n, Inc., 4 S.W.3d 596, 598 (Mo. App. E.D. 1999)). Such an exception is "extremely narrow," and is applied only "in unusual circumstances and then only upon a strong showing by the party asserting it." Id.

In its principal brief on appeal, Appellant indicates that the award of attorneys' fees was improper only if this Court reverses on other grounds. From pages 73-74 of that brief, Appellant states, "if [Appellant] prevails on any of its arguments that plaintiff lacked a submissible case on any theory, [Appellant] is entitled to a new trial on all issues. **In those circumstances**, any award of attorneys' fees would have to await the outcome of a new trial." Further, in its reply brief, Appellant states, "[t]he parties are in agreement that the issue of attorneys' fees depends on the outcome of the appeal." Seeing no errors warranting reversal, we cannot hold that the trial court abused its broad discretion in awarding attorneys' fees to Respondent. Point six is denied.

Respondent's Motion for Attorneys' Fees on Appeal

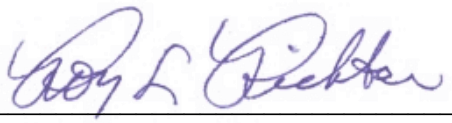
We now address Respondent's Motion for Attorneys' Fees on Appeal. Respondent filed this Motion on September 27, 2019, requesting this Court "award her attorney's fees, expenses,

and costs on appeal should the Court deem her a prevailing party." The Motion did not request a specific amount of fees, but requested that this Court "permit her to provide supplemental documentation in support of this motion when the work on the appeal is complete." On October 7, 2019, this Motion was ordered taken with the case.

Section 213.111 authorizes a court to award "court costs and reasonable attorney fees to the prevailing party." Section 213.111.2; Dixson, 586 S.W.3d at 831. This includes fees incurred on appeal from the trial court's judgment. Mignone v. Mo. Dep't of Corr., 546 S.W.3d 23, 45 (Mo. App. W.D. 2018). The prevailing party is "one that succeeds on any significant issue in the litigation which achieved some of the benefit the parties sought in bringing the suit." Id. Because we affirm the trial court's judgment in Respondent's favor, she is the prevailing party and is entitled to an award of costs and reasonable attorneys' fees incurred on appeal. See id.; see also Dixson, 586 S.W.3d at 831. While this Court has the authority to allow and fix the amount of attorneys' fees on appeal, "we exercise this power with caution believing in most cases that the trial court is better equipped to hear evidence and argument on this issue and determine the reasonableness of the fee requested." Accordingly, we grant Respondent's Motion for Attorneys' Fees on Appeal, and remand the case to the trial court to hear evidence and argument on this issue, and to determine the appropriate fee.

III. Conclusion

The judgment of the trial court is affirmed. In granting Respondent's motion for attorneys' fees, we remand to the trial court to determine the appropriate fee.



ROY L. RICHTER, Judge

Robert M. Clayton III, P.J., concurs
Robert G. Dowd, Jr., J., concurs

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 8, 2021 Decided June 22, 2021

No. 20-1016

ENVIRONMENTAL DEFENSE FUND,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

SPIRE MISSOURI INC. AND SPIRE STL PIPELINE LLC,
INTERVENORS

Consolidated with 20-1017

On Petitions for Review of Orders
of the Federal Energy Regulatory Commission

Natalie M. Karas argued the cause for petitioner Environmental Defense Fund. With her on the briefs were *Erin Murphy*, *Jason T. Gray*, *Kathleen L. Mazure*, *Matthew L. Bly*, and *Sean H. Donahue.*

Henry B. Robertson argued the cause and filed the briefs for petitioner Juli Steck.

Jennifer Danis and *Edward Lloyd* were on the brief for *amicus curiae* Dr. Susan Tierney in support of petitioners.

Randy M. Stutz was on the brief for *amicus curiae* the American Antitrust Institute in support of petitioners.

Anand R. Viswanathan, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With him on the brief were *David L. Morenoff*, Acting General Counsel, and *Robert H. Solomon*, Solicitor.

Jonathan S. Franklin argued the cause for intervenors Spire STL Pipeline LLC and Spire Missouri Inc. in support of respondent. With him on the brief were *Christopher J. Barr*, *Jessica R. Rogers*, *Matthew J. Aplington*, *Thomas E. Hirsch III*, *David T. Kearns*, *Daniel Archuleta*, and *Sean P. Jamieson.*

Paul Korman, *Michael R. Pincus*, and *Michael Diamond* were on the brief for *amicus curiae* Interstate Natural Gas Association of America in support of respondent.

Before: TATEL and MILLETT, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.

EDWARDS, *Senior Circuit Judge*: In the action leading to this petition for review, the Federal Energy Regulatory Commission (the "Commission" or "FERC") issued a certificate of public convenience and necessity ("Certificate") under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c)(1)(A), to Intervenor-Respondent Spire STL Pipeline LLC ("Spire STL") to construct a new natural gas pipeline in the St. Louis area. The Commission may issue such a

Certificate only if it finds that construction of the new pipeline "is or will be required by the present or future public convenience and necessity." *Id.* § 717f(e).

Pursuant to the Commission's "Certificate Policy Statement," *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094 (July 28, 2000), FERC first considers whether there is a market need for the proposed project. If there is a need for the pipeline, FERC then determines whether there will be adverse impacts on "existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline." *Id*. at 61,745. If adverse impacts on these stakeholders will result, the Commission "balanc[es] the evidence of public benefits to be achieved against the residual adverse effects." *Id.* In analyzing the need for a particular project, the Certificate Policy Statement makes it clear that the Commission will "consider *all* relevant factors." *See id.* at 61,747 (emphasis added).

The issue in this case arose in 2016, when Spire STL announced its intent to build a pipeline in the St. Louis metropolitan area. In August of that year, Spire STL held an "open season" during which it invited natural gas "shippers" to enter into preconstruction contracts, also known as "precedent agreements," for the natural gas the pipeline would transport. But no shippers committed to the project during the open season. Instead, after the open season finished without any takers, Spire STL privately entered into a precedent agreement with one of its affiliates, Laclede Gas Company – now known as Intervenor-Respondent Spire Missouri Inc. ("Spire

Missouri") – for just 87.5 percent of the pipeline's projected capacity.

In January 2017, Spire STL applied to the Commission for a Certificate. It conceded that the proposed pipeline was not being built to serve new load, as natural gas demand in the St. Louis area is projected to stay relatively flat for the foreseeable future. Rather, Spire STL claimed that the pipeline would result in other benefits, such as enhancing reliability and supply security, providing access to new sources of natural gas supply, and eliminating reliance on propane "peak-shaving" during periods of high demand. As evidence of need, Spire STL principally relied on its precedent agreement with Spire Missouri. In September 2017, the Commission – pursuant to its obligations under the National Environmental Policy Act ("NEPA") – released an Environmental Assessment ("EA") for construction and operation of the proposed pipeline, finding that they would have no significant environmental impact.

Petitioner Environmental Defense Fund ("EDF"), along with several other parties, challenged Spire STL's Certificate application. EDF contended, *inter alia*, that the precedent agreement between Spire STL and Spire Missouri should have only limited probative value in FERC's assessment of Spire STL's application because the two companies were corporate affiliates. In addition, Petitioner Juli Steck, then known as Juli Viel, contested the efficacy of the EA.

On August 3, 2018, in an Order Issuing Certificates ("Certificate Order"), FERC granted the authorizations for the new pipeline. *See* Joint Appendix ("J.A.") 932. FERC's decision acknowledged that the pipeline was not meant to serve new load demand. Nevertheless, FERC rejected arguments that a market study should be undertaken to establish the need for the project. Rather, the Commission's decision principally

focused on the precedent agreement between Spire STL and Spire Missouri in finding that there was market need for the project. And the Commission stated that it would not "second guess" Spire Missouri's purported "business decision" in entering into the precedent agreement with Spire STL, even though the shipper and the pipeline were affiliates. J.A. 968. In November 2019, by a 2-1 vote, FERC denied requests for rehearing filed by EDF and Steck. These two parties now seek review in this court.

EDF asserts that the Commission's decision to award a Certificate to Spire STL was arbitrary and capricious because the Commission uncritically and exclusively relied on the affiliated precedent agreement to find need and because the Commission failed to sufficiently justify its conclusion that the new pipeline's benefits would outweigh its adverse effects. Steck, in turn, renews many of her challenges to the Commission's environmental analysis, including its EA.

For the reasons explained below, we find that Petitioner Steck lacks standing to pursue her claims. However, we find no jurisdictional infirmities in EDF's petition for review. On the merits, we agree with EDF that the Commission's refusal to seriously engage with nonfrivolous arguments challenging the probative weight of the affiliated precedent agreement under the circumstances of this case did not evince reasoned and principled decisionmaking. In addition, we find that the Commission ignored record evidence of self-dealing and failed to seriously and thoroughly conduct the interest-balancing required by its own Certificate Policy Statement. Therefore, FERC's Certificate Order and Order on Rehearing do not survive scrutiny under the applicable arbitrary and capricious standard of review. *See Minisink Residents for Env't Pres. & Safety v. FERC* ("*Minisink*"), 762 F.3d 97, 105-06 (D.C. Cir. 2014). Because "vacatur is the normal remedy" in

circumstances such as we find in this case, we vacate FERC's Orders and remand the case to the Commission for appropriate action. *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014).

I. BACKGROUND

A. Statutory and Regulatory Background

The Natural Gas Act provides the Commission with authority "to regulate the transportation and sale of natural gas in interstate commerce." *City of Oberlin v. FERC*, 937 F.3d 599, 602 (D.C. Cir. 2019). To safeguard the public, "Section 7 of the Act requires an entity seeking to construct or extend an interstate pipeline for the transportation of natural gas to obtain [a Certificate] from the Commission." *Id.* (citing 15 U.S.C. § 717f(c)(1)(A)). The Commission may issue Certificates only if, among other things, it finds that the proposed construction or extension "is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied." 15 U.S.C. § 717f(e). In deciding whether to issue Certificates under this standard, the Commission must "evaluate *all* factors bearing on the public interest." *Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959) (emphasis added). And there is good reason for the thoroughness and caution mandated by this approach: A Certificate-holder may exercise eminent domain against any holdouts in acquiring property rights necessary to complete the pipeline. 15 U.S.C. § 717f(h).

In its Certificate Policy Statement, the Commission has set forth the "analytical steps" that guide its dispositions of Certificate applications. *See* 88 FERC at 61,745. The first question the Commission considers is "whether the project can proceed without subsidies from [the applicant's] existing customers." *Id.* "To ensure that a project will not be subsidized

by existing customers, the applicant must show that there is market need for the project." *Myersville Citizens for a Rural Cmty., Inc. v. FERC* ("*Myersville*"), 783 F.3d 1301, 1309 (D.C. Cir. 2015).

If there is market need, the Commission then determines whether there are likely to be adverse impacts on "existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline." 88 FERC at 61,745. If adverse impacts on these stakeholders will result, "the Commission balances the adverse effects with the public benefits of the project, as measured by an 'economic test.'" *Myersville*, 783 F.3d at 1309 (quoting 88 FERC at 61,745). "Adverse effects may include increased rates for preexisting customers, degradation in service, unfair competition, or negative impact on the environment or landowners' property." *Id.* (citing 88 FERC at 61,747-48). Public benefits generally include "meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives." *Id.* (quoting 88 FERC at 61,748).

As to market need and interest-balancing, the Certificate Policy Statement further provides:

> Rather than relying only on one test for need, the Commission will consider *all relevant factors* reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving

> the market. The objective would be for the applicant to make a sufficient showing of the public benefits of its proposed project to outweigh any residual adverse effects . . . .
>
> The amount of evidence necessary to establish the need for a proposed project will depend on the potential adverse effects of the proposed project on the relevant interests. Thus, *projects to serve new demand might be approved on a lesser showing of need and public benefits than those to serve markets already served by another pipeline. However, the evidence necessary to establish the need for the project will usually include a market study. . . . Vague assertions of public benefits will not be sufficient.*

88 FERC at 61,747-48 (emphases added).

The Certificate Policy Statement also specifically addresses the significance of precedent agreements in demonstrating need:

> Although the Commission traditionally has required an applicant to present [preconstruction] contracts to demonstrate need, that policy . . . no longer reflects the reality of the natural gas industry's structure, nor does it appear to minimize the adverse impacts on any of the relevant interests. Therefore, although contracts or precedent agreements always will be important evidence of demand for a project, *the Commission will no longer require an applicant to present contracts for any specific percentage of the new capacity*. Of course, if an applicant has entered into contracts or precedent agreements for the capacity, . . . they would constitute significant evidence of demand for the project.

> *Eliminating a specific contract requirement reduces the significance of whether the contracts are with affiliated or unaffiliated shippers*, which was the subject of a number of comments. *A project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate*. The new focus, however, will be on the impact of the project on the relevant interests balanced against the benefits to be gained from the project. As long as the project is built without subsidies from the existing ratepayers, the fact that it would be used by affiliated shippers is unlikely to create a rate impact on existing ratepayers.

Id. at 61,748-49 (emphases added).

B. The Instant Case

For the last two decades, natural gas consumption in the St. Louis area has been roughly flat. And when the Commission issued the Certificate Order in this case, all parties agreed that future demand projections were not expected to increase. *See* Certificate Order, J.A. 979 (noting that "[a]ll parties" agreed that natural gas demand forecasts "for the region are flat for the foreseeable future"); *see also, e.g.*, J.A. 583 (July 2017 report prepared by Concentric Energy Advisors on behalf of Spire Missouri and submitted to the Commission stating that Spire Missouri "does not expect any significant growth or decline in . . . forecasted demand over time"); Spire STL Pipeline LLC Docket Nos. CP17-40-000 and 001 Response to Data Request at 9, Accession No. 20180313-5193 (Mar. 13, 2018) (Spire STL submission to the Commission stating that its "gas supply annual demand requirement" was projected to "remain

relatively constant" at "average historical usage" levels for the next 20 years).

As of 2016, five natural gas pipelines served the St. Louis region. At that time, a majority of Spire Missouri's natural gas supply was provided via pipelines owned and operated by Enable Mississippi River Transmission, LLC ("Enable MRT"). It is undisputed that, prior to Spire STL's application in this case, Spire Missouri had declined to subscribe to proposals for new natural gas pipelines in the region, stating that the proposed new pipelines did not make operational and economic sense for its customers.

In 2016, Spire STL announced its intent to construct a new natural gas pipeline to serve homes and businesses in the St. Louis area. Following an amendment to its Certificate application, the final length of the proposed pipeline was approximately 65 miles. The initial estimated cost of the project was approximately $220 million, with a proposed overall rate of return of 10.5 percent – a return on equity of 14 percent and a cost of debt of seven percent.

Between August 1, 2016 and August 19, 2016, Spire STL held an "open season," during which it sought to enter into precedent agreements with natural gas shippers. After an unsuccessful open season, Spire STL then entered into a single precedent agreement with its affiliate, Spire Missouri, for 87.5 percent of the pipeline's 400,000 dekatherm-per-day transport capacity. Spire STL indicated that other shippers expressed interest, but it did not enter precedent agreements with any of them.

On January 26, 2017, Spire STL applied to the Commission for a Certificate to begin construction of the proposed pipeline. The stated purpose of the pipeline was to "enhance reliability and supply security; reduce reliance upon

older natural gas pipelines; reduce reliance upon mature natural gas basins . . . ; and eliminate reliance on propane peak-shaving infrastructure." J.A. 89. In particular, the new pipeline would provide gas from newly accessed sources in the Rocky Mountains and Appalachian Basin; avoid transecting the New Madrid Seismic Zone, unlike other pipelines in the area; and reduce use of propane for "peaking" during periods of high demand, which purportedly has negative environmental, operational, and cost-related impacts.

Spire STL made it clear that its new pipeline "was not [being] developed to serve new demand." J.A. 265. It further stated that "conjecture" as to whether Spire Missouri might "reduce its contract entitlements on other pipelines" as a result of contracting for capacity on the proposed pipeline "would be inappropriate." J.A. 104. The application also asserted that the proposed project was "the result of a fair process undertaken by [Spire Missouri] to examine competitive alternatives and select the one that would best meet its needs." J.A. 105. In materials it later submitted to the Commission, Spire Missouri acknowledged that it used propane peaking on only three days between 2013 and 2018 – a consecutive three-day period in January 2014.

Several parties either protested or conditionally protested Spire STL's application, including the Missouri Public Service Commission (the "Missouri Commission") – a state body that regulates natural gas shippers – and Enable MRT. In its conditional protest, the Missouri Commission expressed skepticism as to the "need for the project," J.A. 143, while also urging FERC to undertake a particularly thorough review of the impact the project might have on customers of existing pipelines given that "the St. Louis market is static and there is no demonstrated need . . . for . . . new capacity," *see* J.A. 152. In its protest, Enable MRT claimed that the project "ha[d] been

shielded from a truly competitive market," J.A. 155, and that "where a proposed project does not have precedent agreements for all of the capacity of the project and the project's only precedent agreement is with a single affiliated shipper with predominantly captive retail customers, the mere existence of such a precedent agreement is insufficient to show adequate market demand," J.A. 161. *See also* J.A. 181 ("As a[] [shipper] with captive retail customers, [Spire Missouri] can pass through to those customers the costs associated with its contract with Spire [STL]. Rather than pay lower rates to receive gas from an unaffiliated pipeline, Spire [STL] and [Spire Missouri] can maximize the revenue and return earned by their corporate parent by having [Spire Missouri] pay to receive service from Spire's Project."). Enable MRT also highlighted certain public-facing comments by Spire Missouri and Spire STL's corporate parent indicating that construction of the pipeline would increase shareholder earnings. And in later submissions to the Commission, Enable MRT asserted "that the affiliate relationship between [Spire Missouri] and Spire STL [had] thwarted fair competition," J.A. 812, and that economic risks of the pipeline would be shifted onto Spire Missouri's "captive ratepayers [for natural gas] and the ratepayers of pipelines that would experience decontracting due to" the new pipeline, J.A. 813.

In May 2017, EDF sought to intervene and filed a protest. It raised several arguments regarding the probative weight of the precedent agreement between Spire STL and Spire Missouri in demonstrating market need for the proposed pipeline, given their affiliated relationship. In particular, EDF expressed concerns regarding the growing trend for

> utility holding companies [to] enter[] into affiliate transactions whereby the retail utility affiliate commits to new long term capacity with its pipeline

> developer affiliate. The essence of this financing structure is to take a cost pass-through for a retail gas or electric distribution utility – a contract for natural gas transportation services – and pay those transportation fees to an affiliated pipeline developer entitled to accrue return on its investment from that same revenue. Thus ratepayer costs which may not be justified by ratepayer demand are being converted into shareholder return.

J.A. 550 (footnote omitted). EDF also requested that the Commission "apply heightened scrutiny" to the Certificate application given the affiliated relationship between Spire STL and Spire Missouri. *See* J.A. 556-58; *see also* J.A. 856 (asserting that "there is a gap . . . between state and federal regulatory oversight of affiliate precedent agreements, such as the one Spire STL has submitted in this proceeding to demonstrate market need"). And it asserted that "[w]here, as here, there is evidence of self-dealing calling into question the need for a project, th[e] Commission should take steps to ensure that customers are protected." J.A. 558; *see also* J.A. 559 (explaining why "record evidence" should have resulted in "enhanced regulatory scrutiny" in this case); J.A. 855 (reiterating "that the pursuit of earnings growth must be balanced against the inherent risk to customers embedded in [this] affiliate transaction").

In September 2017, Commission staff published an Environmental Assessment for the proposed pipeline, including their finding of no significant impact from constructing and operating the pipeline. In reaching that conclusion, the EA noted that the pipeline "was not developed to serve new demand." J.A. 765, 768.

On October 30, 2017, Petitioner Steck moved to intervene. In comments to the Commission, she alleged that there were several deficiencies in the EA, "particularly in its treatment of the purpose and need for the project and of climate change." J.A. 791. She therefore requested preparation of either a full Environmental Impact Statement or a revised EA.

On August 3, 2018, by a 3-2 vote, the Commission issued the Certificate Order, granting a Certificate to Spire STL. Therein, the Commission referenced the concerns of the protestors and intervenors regarding the affiliated precedent agreement, *see, e.g.*, J.A. 938-40, 944-47, 950-51, and noted that "[a]ll parties, including Spire, agree that the new capacity is not meant to serve new demand, as load forecasts for the region are flat for the foreseeable future," J.A. 979. The Commission also found that data provided by Spire STL and Enable MRT "show[ed] that the difference in the cost of gas delivered to Spire Missouri via the proposed [pipeline] as compared with gas accessed via" current pipelines "was not materially significant." J.A. 980.

The Commission purported to apply the Certificate Policy Statement in reaching its decision. *See* J.A. 940-41; *see also* J.A. 941 n.31 ("[T]he current Certificate Policy Statement remains in effect and will be applied to natural gas certificate proceedings pending before the Commission as appropriate." (citation omitted)). However, the Commission's decision appeared to rely entirely on the precedent agreement between Spire STL and Spire Missouri in finding that there was market need for the project. *See* J.A. 963 ("The fact that Spire Missouri is affiliated with the project's sponsor does not require the Commission to look behind the precedent agreements to evaluate project need. . . . [T]he Commission may reasonably accept the market need reflected by the applicant's existing contracts with shippers and not look behind those contracts to

establish need." (footnotes omitted)); J.A. 967 ("We disagree with [Enable] MRT's stance that the mere existence of a precedent agreement is insufficient to show adequate market demand when a project is subscribed by affiliates for less than the full project capacity." (footnote and internal quotation marks omitted)). FERC also explicitly rejected calls for a market study to assess the need for a new pipeline. *See* J.A. 966-67. And it dismissed arguments that Spire STL had engaged in anticompetitive behavior, while finding that whether Spire Missouri or its corporate parent had engaged in anticompetitive behavior was irrelevant to its determination. Rather, according to the Commission, any concerns regarding anticompetitive behavior could only be addressed by the Missouri Commission, as "Spire Missouri is not regulated by this Commission and thus we have no authority to dictate its practices for procuring services." J.A. 964.

The Commission explained that it was generally unwilling to consider arguments raising "issues fall[ing] within the scope of the business decision of a shipper," even if the shipper and the pipeline were affiliates. J.A. 968; *see also* J.A. 943 ("The Commission is not in the position to evaluate Spire Missouri's business decision to enter a contract with Spire [STL] for natural gas transportation, which . . . will be evaluated by the [Missouri Commission]."). In particular, FERC was unwilling to assess the challenges that protestors had raised questioning the purported justifications that Spire STL had offered in support of the proposed new pipeline. As the Commission phrased it:

> The lengthy arguments the protestors make regarding whether Spire Missouri should have chosen to utilize existing infrastructure to meet the project purposes or committed to capacity on previously proposed projects, whether retiring Spire Missouri's propane

> peaking facilities and replacing them with capacity from the [proposed pipeline] is a cost effective approach, whether choosing a transportation path that avoids the New Madrid fault is unnecessarily cautious, and even, in the first instance, the extent to which the [proposed pipeline] will provide economic and rate benefits to Spire Missouri's customers, all go to the reasonableness and prudence of Spire Missouri's decision to switch transportation providers.

J.A. 968. As to why Spire Missouri had declined to subscribe to, or otherwise endorse, "prior failed [pipeline] projects" in the area, the Commission found that such questions were "not necessarily relevant to [its] decision" and explicitly declined to resolve any related factual questions. *See* J.A. 968-69.

Regarding its balancing of the benefits and adverse impacts of the project, the Commission, without deeper analysis, simply concluded

> that the benefits that the [proposed pipeline] will provide to the market, including enhanced access to diverse supply sources and the fostering of competitive alternatives, outweigh the potential adverse effects on existing shippers, other pipelines and their captive customers, and landowners or surrounding communities. Consistent with the criteria discussed in the Certificate Policy Statement and [Natural Gas Act] section 7(e), . . . we find that the public convenience and necessity requires approval of Spire [STL]'s proposal.

J.A. 986.

Finally, the Commission rejected the vast majority of challenges to its Environmental Assessment, including those of Petitioner Steck.

Commissioners LaFleur and Glick dissented. Both believed that the Commission should have looked behind and beyond the precedent agreement in evaluating market need, given the facts of the case and the affiliated nature of the two Spire entities. Commissioner Glick noted that "[t]here are several potential business reasons why [Spire STL]'s corporate parent might prefer to own a pipeline rather than simply take service on it, such as the prospect of earning a 14 percent return on equity rather than paying rates to [Enable] MRT or another pipeline company." J.A. 1058. In addition, both dissenting Commissioners would have found that adverse impacts of the proposed pipeline outweighed benefits.

Several parties filed rehearing requests, including Steck on August 31, 2018 and EDF on September 4, 2018. In her request, Steck renewed several of her challenges to the EA and also objected to the Commission's environmental analysis in the Certificate Order. EDF argued that the precedent agreement was not dispositive evidence of market need. It also challenged Spire STL's contentions as to the benefits of the new pipeline, including possible cost savings to Spire Missouri and whether the new pipeline was needed to allow Spire Missouri to cease using propane peaking facilities. And more generally, EDF argued that the Commission had failed to adequately balance costs and benefits in the Certificate Order.

On October 1, 2018, the Secretary of the Commission issued a tolling order solely "to afford additional time for consideration of the matters raised." J.A. 1107. It appears that during the period between the issuance of the Certificate Order and September 2019, Spire STL completed virtually all

construction of the pipeline. *See* J.A. 1135 (notice of Enable MRT withdrawing its petition for rehearing and asserting that "[i]n the year in which the [rehearing requests] ha[d] been pending, Spire STL . . . ha[d] nearly completed construction of the proposed pipeline"). During that period, Spire STL also submitted a revised cost estimate to the Commission of almost $287 million, or approximately $67 million more than it had originally estimated.

On November 21, 2019, the Commission issued an Order on Rehearing (the "Rehearing Order"), denying the requests for rehearing on the merits. The Commission reaffirmed its belief that it "is not required to look behind precedent agreements to evaluate project need, regardless of the affiliate status of the . . . shipper." J.A. 1149 (footnote omitted). It also asserted that it had "evaluated the record and did not find evidence of impropriety or self-dealing to indicate anti-competitive behavior or affiliate abuse." J.A. 1152 (footnote omitted). And it reiterated that, in its view, it was "not in the position to evaluate Spire Missouri's business decision to enter a contract with Spire STL for natural gas transportation." J.A. 1152 (footnote omitted).

The Commission also stated that several of the benefits Spire STL touted in its application and subsequent submissions to the Commission were "sufficient to overcome any concerns of overbuilding." J.A. 1155. As to cost, the Commission clarified that the Certificate Order had "evaluated cost differences of gas delivered to Spire Missouri from both the" proposed new pipeline and Enable MRT's existing system and found that they "were not materially significant." J.A. 1159 (citing J.A. 980). Finally, the Rehearing Order found that the EA, and the Commission's resulting environmental analysis, were sound.

Commissioner Glick again dissented. He argued that the Commission had acted arbitrarily and capriciously by refusing to engage with counterevidence or seriously consider countervailing arguments as to market need and benefits of the pipeline. *See, e.g.*, J.A. 1183 ("Whatever probative weight that [precedent] agreement has, the Commission cannot simply point to the agreement's existence and then ignore the evidence that undermines the agreement's probative value."); J.A. 1185 ("The Spire companies' obvious financial motive coupled with the abundant record evidence casting doubt on the need for the project ought to have caused the Commission to carefully scrutinize the record to determine whether the [proposed pipeline] is actually needed or just financially advantageous to the Spire companies."). In his view, the issuing of the Certificate to Spire STL had also represented "an unreasonable application of the . . . Certificate Policy Statement." J.A. 1188.

Steck and EDF filed their petitions for review in this court on January 21, 2020.

II. ANALYSIS

A. Standard of Review

The Commission's award of a Certificate is reviewed under the Administrative Procedure Act's arbitrary and capricious standard. *See Minisink*, 762 F.3d at 105-06 (citations omitted); 5 U.S.C. § 706(2)(A). Under this standard, an action by the Commission may be set aside "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Thus, the

overarching question in this case is whether "the Commission's 'decisionmaking [wa]s reasoned, principled, and based upon the record.'" *Myersville*, 783 F.3d at 1308 (quoting *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010)). "A passing reference to relevant factors . . . is not sufficient to satisfy the Commission's obligation to carry out 'reasoned' and 'principled' decisionmaking"; this means that "[t]he Commission must 'fully articulate the basis for its decision.'" *Am. Gas Ass'n*, 593 F.3d at 19 (quoting *Mo. Pub. Serv. Comm'n v. FERC*, 234 F.3d 36, 41 (D.C. Cir. 2000)). When the Commission's explanation for a contested action is lacking or inadequate, it will not survive judicial review and the matter will be returned to FERC for appropriate action. *See, e.g.*, *Mo. Pub. Serv. Comm'n*, 234 F.3d at 42.

B. Standing

The "irreducible constitutional minimum" of standing requires three elements. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citation omitted). The party invoking federal jurisdiction bears the burden of demonstrating standing. *Id.* (citation omitted). Generally, "[t]o establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent." *Id.* at 1548 (citation and internal quotation marks omitted). However, where a party alleges procedural injury, "courts relax the normal standards of redressability and imminence." *Sierra Club v. FERC*, 827 F.3d 59, 65 (D.C. Cir. 2016) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496-97 (2009)).

In a NEPA procedural injury case, the causation requirement is met when a "causal chain" contains "at least two links: one connecting the omitted [NEPA analysis] to some substantive government decision that may have been wrongly decided because of the lack of [proper NEPA analysis] and one connecting that substantive decision to the plaintiff's particularized injury." *Id.* (alterations in original) (citation omitted). In other words, "[i]t must be substantially probable that the substantive agency action that disregarded a procedural requirement created a demonstrable risk, or caused a demonstrable increase in an existing risk, of injury to the particularized interests of the plaintiff." *Id.* (citation and internal quotation marks omitted).

1. Steck's Standing

Steck does not have standing to pursue her claims against FERC in this court. She does not own land transected by Spire STL's pipeline and has not had property rights taken via eminent domain. Instead, Steck asserts in a declaration that she lives "half a mile from" the new Chain of Rocks meter and regulation station (the "Chain of Rocks Station") at "the southern end of the pipeline," Final Br. of Pet'r Juli Steck Addendum 1 (hereinafter "Steck Decl.") ¶ 4; that the metering station "sits between . . . blind curves," *id.* ¶ 5; that the station "is a looming eyesore and a traffic hazard" which "is not in keeping with the character of [her] neighborhood," and which she passes approximately three times per week, *id.* ¶ 7; and that the now-completed construction of the pipeline "interfered with [her] use and enjoyment of" a local park through which part of the pipeline was built, *id.* ¶¶ 9-10, and that she "experienced the noise, dust, diesel fumes, and traffic stops from construction both at home and in" the park, *id.* ¶ 8.

Steck claims that the "blind curves" near the metering station are a "traffic hazard" to which she objects. Even if this is sufficient to show a cognizable injury-in-fact, Steck has not met her burden on causation as to this alleged injury. This is so because she does not claim that the blind curves resulted from the construction of the Chain of Rocks Station. Therefore, she has not shown that issuance of a Certificate to Spire STL caused any "traffic hazard" that now exists.

In addition, any alleged injuries that Steck suffered during the now-completed construction of the pipeline and metering station cannot support standing for want of redressability. Those alleged injuries, including that Spire's "drill[ing] under [a] lake" to construct the pipeline interfered with her "use and enjoyment of the [nearby] park," *id.* ¶ 9, ended when the construction was completed. Nor does Steck assert that there is any lasting impact from these prior injuries. Therefore, a favorable judicial decision will not redress her alleged injuries.

Steck also alleges that the metering station "is a looming eyesore," *id.* ¶ 7, as if to suggest that this constitutes a cognizable injury-in-fact. It is true that some intangible injuries may be concrete enough to support standing. *See Spokeo*, 136 S.Ct. at 1549. And "[t]he Supreme Court has recognized that harm to 'the mere esthetic interests of [a] plaintiff . . . will suffice' to establish a concrete and particularized injury" sufficient to support standing. *Sierra Club v. Jewell*, 764 F.3d 1, 5 (D.C. Cir. 2014) (third alteration in original) (quoting *Summers*, 555 U.S. at 494). However, Steck's claims that allude to aesthetic injuries do not correspond with the types of aesthetic interests that the Supreme Court has said will suffice to establish concrete and particularized injuries.

At no point in her declaration does Steck indicate any ways in which the new metering station injures her specific aesthetic

interests, beyond labeling it a "looming eyesore" that "is not in keeping with the character of [her] neighborhood." *See* Steck Decl. ¶ 7. She never alleges that she used and enjoyed the land on which the station now exists; that she intended to use the land in the future; or that her planned future uses of the land have been foreclosed by the construction. In other words, she never indicates how she derived aesthetic value from the land as it had existed before the construction. *See, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (holding that environmental group lacked standing because "[n]owhere in the pleadings or affidavits did the [group] state that its members *use* [the affected area] for any purpose, much less that they *use* it in any way that would be significantly affected by the proposed actions of the respondents" (emphases added)); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 565-66 (1992) (explaining that "a plaintiff claiming injury from environmental damage *must use the area affected* by the challenged activity" (emphasis added)); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181-83 (2000) (explaining that organizations' members would have had standing as a result of the detailed ways in which the challenged actions had led them to modify their prospective behavior, reduced their property values, or otherwise diminished their enjoyment of the affected areas); *Jewell*, 764 F.3d at 5-6 (recounting detailed declarations explaining the ways in which the challenged action would diminish declarants' ability to "use, enjoy, and appreciate," or "ability to visit and enjoy," affected areas (citations omitted)).

Steck does not even allege that she can see the new station from her property. Rather, the only aesthetic injury that might be implied from her declaration is that she must look at an "eyesore" several times per week while driving past. Viewed in full frame, Steck's alleged aesthetic injuries reflect nothing more than generalized grievances, which cannot support

standing. *See Lujan*, 504 U.S. at 573-74 (explaining that generalized grievances do not raise Article III cases or controversies for standing purposes).

At oral argument, Steck's counsel was unable to identify any authority that would allow mere incidental viewership of something unappealing to qualify as an injury-in-fact for standing purposes. *See* Oral Arg. Tr. at 27:21-28:23. This is not surprising, for we can find nothing in the existing case law to suggest that a person who incidentally views something unpleasant has suffered an injury-in-fact for purposes of standing. In her brief, Steck cites *Sierra Club v. FERC* for the proposition that "[a]esthetic and recreational harm [may] bestow[] standing." Final Br. of Pet'r Juli Steck 10 (citing 827 F.3d 59, 66 (D.C. Cir. 2016)). However, the declaration in support of standing in *Sierra Club* is strikingly different from Steck's declaration in this case. The declarant in *Sierra Club* "fishe[d], boat[ed], and seasonal duck hunt[ed] frequently around" the affected areas. 827 F.3d at 66 (citation and alterations omitted). The declarant further averred that the resulting "'increase in liquefied natural gas vessel traffic' . . . w[ould]: (1) harm his aesthetic interests in the [nearby] waterways . . . ; (2) inconvenience him, given the 'large exclusion zone the Coast Guard maintains around tankers'; and (3) 'diminish his use and enjoyment of the waterways.'" *Id.* (citation and alterations omitted). He also noted that, because of the "existing levels of operation" in the affected areas, he had "moved his 'primary boat'" away from them. *Id.* (citation omitted). These concrete injuries, including those to his aesthetic interests, are a far cry from those asserted by Steck, who has neither altered her behavior nor explained why she has any particularized connection to the land on which the metering station now sits.

Finally, Steck claims that she has suffered a procedural injury as a result of the Commission's alleged failure to comply with its NEPA obligations. *See* Final Br. of Pet'r Juli Steck 10; Steck Decl. ¶ 10; *see also* Oral Arg. Tr. at 27:18-20, 33:19-25. Steck argues that this procedural injury is "an independent source of standing." Oral Arg. Tr. at 33:24-25. "But deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers*, 555 U.S. at 496; *see also Spokeo*, 136 S. Ct. at 1550 (explaining that a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation"). Because Steck has failed to allege a concrete injury that is "tethered to" the Commission's issuance of the Certificate, she has not shown a viable Article III injury. *Sierra Club v. FERC*, 827 F.3d 36, 43 (D.C. Cir. 2016) (quoting *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013)).

In sum, on the record before us, we hold that Steck has failed to satisfy her burden of demonstrating standing. We therefore dismiss her petition for review.

2. EDF's Standing

EDF clearly has standing to pursue its claims. "An association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Nat'l Lifeline Ass'n v. FCC*, 983 F.3d 498, 507-08 (D.C. Cir. 2020) (citation and internal quotation marks omitted). EDF's members include at least four individuals who own land transected by Spire STL's pipeline, each of whom have had

property rights taken via eminent domain. These EDF members also allege various ways in which the presence of the pipeline has harmed, and continues to harm, their property, economic, aesthetic, and emotional interests.

"[A] landowner made subject to eminent domain by a decision of the Commission has been injured in fact because the landowner will be forced either to sell its property to the pipeline company or to suffer the property to be taken through eminent domain. . . . [I]t is enough that [eminent domain proceedings] have been deemed authorized and will proceed absent a sale by the owner." *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 271-72 (D.C. Cir. 2015) (citing *B&J Oil & Gas v. FERC*, 353 F.3d 71, 74-75 (D.C. Cir. 2004)). Moreover, "credible claims of exposure to increased noise and . . . disruption of daily activities . . . are sufficient to satisfy Article III's injury-in-fact requirement." *Sierra Club v. FERC*, 867 F.3d 1357, 1366 (D.C. Cir. 2017) (quoting *Sierra Club*, 827 F.3d at 44). Those injuries were caused by the Commission's orders, which allowed for the exercise of eminent domain against the EDF members' land, and vacatur of those orders likely will allow those injuries to be redressed. *See City of Oberlin*, 937 F.3d at 604-05. "And nobody disputes that the prevention of this sort of injury is germane to [EDF]'s conservation-oriented purposes, or cites any reason why these individual members would need to join the petition in their own names." *Sierra Club*, 867 F.3d at 1366. Thus, EDF has associational standing.

C. EDF's Petition Was Timely

The Natural Gas Act requires that, prior to obtaining judicial review, an aggrieved party must have sought rehearing before the Commission "unless there [wa]s reasonable ground for failure so to do." 15 U.S.C. § 717r(b). The Act also states

that "[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application *may be deemed to have been denied*." *Id.* § 717r(a) (emphasis added). As to the timing of judicial review, the act provides that an aggrieved party "may obtain a review" of a Commission order "by filing" a petition for review "within sixty days after the order of the Commission upon the application for rehearing." *Id.* § 717r(b).

In *Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc), we confronted the Commission's then-consistent practice of issuing "tolling orders" following rehearing requests. *See id.* at 9-11. The tolling orders were fashioned so that they "d[id] nothing more than prevent [rehearing requests] from being deemed denied by agency inaction and preclude . . . applicant[s] from seeking judicial review until the Commission act[ed]" on the merits. *Id.* at 9. This court found that such tolling orders were insufficient for FERC to avoid a "deemed denial" per 15 U.S.C. § 717r(a). *Id.* at 18-19.

In this case, EDF filed a request for rehearing with the Commission on September 4, 2018. On October 1, 2018, the Secretary issued a tolling order that did nothing more than "afford additional time for consideration of the matters raised" in rehearing requests. J.A. 1107; *see Allegheny Def. Project*, 964 F.3d at 6-7 (same language in tolling order at issue). The Commission did not dispose of the merits of the rehearing requests in this case until November 21, 2019, when it issued the Rehearing Order. *See* J.A. 1144. EDF then filed its petition for review in this court on January 21, 2020. According to the Spire Intervenor-Respondents (but not the Commission), EDF's petition for review was untimely because, under *Allegheny Defense Project*, the requests for rehearing were "deemed denied" as of October 4, 2018. And, since the petition

for review was submitted more than 60 days thereafter, the court lacks jurisdiction. *See* Br. for Intervenors-Resp'ts Spire STL Pipeline LLC and Spire Missouri Inc. 1-2. We reject this argument.

In *Texas-Ohio Gas Co. v. Federal Power Commission*, 207 F.2d 615 (D.C. Cir. 1953), we held that the 60-day requirement of Section 717r(b) did not preclude our consideration of a petition for review from a final denial of relief, even if there had been a deemed denial in the interim and the petition for review was filed more than 60 days following that deemed denial. *See id.* at 616-17. *Allegheny Defense Project* did not disturb this binding precedent, which is squarely controlling in this case.

Moreover, in *Allegheny Defense Project*, the petitioners filed two sets of petitions for review. *See* 964 F.3d at 6-9. The first set was filed in March and May 2017, within 60 days of the March 2017 tolling order, *see id.* at 6-7, while the second was filed in December 2017 and January 2018, after the Commission rejected the merits of the rehearing requests, *see id.* at 8-9. Though this court found that the tolling order failed to prevent a deemed denial as of March 2017, the court proceeded to evaluate the merits of *both* sets of petitions for review, including the later set of petitions filed more than 60 days following the date of "deemed denial." *See id.* at 19.

EDF filed its petition for review on January 21, 2020, within the period allowed by statute "after the order of the Commission upon the application for rehearing." 15 U.S.C. § 717r(b). The petition for review was therefore timely and we may consider the merits of EDF's contentions.

D. FERC's Grant of a Certificate of Public Convenience and Necessity Was Arbitrary and Capricious

Under established law, precedent agreements are "always . . . important evidence of demand for a project." *Minisink*, 762 F.3d at 111 n.10 (quoting 88 FERC at 61,748). And, in some cases, such agreements may demonstrate both market need and benefits that outweigh adverse effects of a new pipeline. *See City of Oberlin*, 937 F.3d at 605-06; *Myersville*, 783 F.3d at 1311. But there is a difference between saying that precedent agreements are always *important* versus saying that they are always *sufficient* to show that construction of a proposed new pipeline "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e).

According to the Commission's Certificate Policy Statement, "the evidence necessary to establish the need for [a] project will usually include a market study. . . . Vague assertions of public benefits will not be sufficient." 88 FERC at 61,748. In addition, the Certificate Policy Statement indicates that pipelines built for reasons other than demand growth might require greater showings of need and public benefits. *See id.* ("[P]rojects to serve new demand might be approved on a lesser showing of need and public benefits than those to serve markets already served by another pipeline."). The Policy Statement also explicitly states that "[a] project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate." *Id.* In addressing why it is unnecessary for the Commission to categorically discount the value of affiliated precedent agreements when assessing applications to construct new pipelines, the Policy Statement explains that, in all cases, the Commission invariably focuses

on "the impact of the project on the relevant interests balanced against the benefits to be gained from the project." *Id.* Finally, it is noteworthy that nothing in the Certificate Policy Statement suggests that a precedent agreement is conclusive proof of need in a situation in which there is no new load demand, no Commission finding that a new pipeline would reduce costs, only a single precedent agreement in which the pipeline and shipper are corporate affiliates, the affiliate precedent agreement was entered into privately after no shipper subscribed during an open season, and the agreement is not for the full capacity of the pipeline.

In this case, the Commission was presented with strong arguments as to why the precedent agreement between Spire STL and Spire Missouri was insufficiently probative of market need and benefits of the proposed pipeline. Indeed, those arguments drew on the Commission's own Certificate Policy Statement for support. But rather than engaging with these arguments, the Commission seemed to count the single precedent agreement between corporate affiliates as conclusive proof of need. Nothing in the Certificate Policy Statement endorses this approach.

Furthermore, we can find no judicial authority endorsing a Commission Certificate in a situation in which the proposed pipeline was not meant to serve any new load demand, there was no Commission finding that a new pipeline would reduce costs, the application was supported by only a single precedent agreement, and the one shipper who was party to the precedent agreement was a corporate affiliate of the applicant who was proposing to build the new pipeline. This is hardly surprising because evidence of "market need" is too easy to manipulate when there is a corporate affiliation between the proponent of a new pipeline and a single shipper who have entered into a precedent agreement. *See Chinook Power Transmission, LLC*,

126 FERC ¶ 61,134, 61,767 (2009) (explaining that, in a different context, the Commission "will apply a higher level of scrutiny" to certain affiliate transactions "due to the absence of arms' length negotiations as a basis for the commitment, concerns that the affiliate would receive unduly preferential treatment, further concerns that a utility affiliate contract could shift costs to captive ratepayers of the affiliate and subsidize the . . . project inappropriately, and the lack of transparency that would surround the arrangement").

Moreover, in this case the Commission failed to adequately balance public benefits and adverse impacts. This is a serious problem in a case in which there is no new load demand and only one affiliated shipper. In the Certificate Order, the Commission's balancing of costs and benefits consisted largely of its *ipse dixit* "that the benefits that the [proposed pipeline] will provide to the market, including enhanced access to diverse supply sources and the fostering of competitive alternatives, outweigh the potential adverse effects on existing shippers, other pipelines and their captive customers, and landowners or surrounding communities." J.A. 986. The Commission pointed to no concrete evidence to support these assertions.

In the Rehearing Order, the Commission made a superficial effort to remedy the obvious deficits of the Certificate Order by noting that Spire Missouri had articulated several public benefits for the proposed pipeline. *See* J.A. 1155-56. However, the Commission never addressed the claims raised by EDF and others challenging whether these purported benefits were likely to occur. Instead of evaluating the legitimate claims that had been raised, the Commission simply stated that it had "no reason to second guess the business decision of" Spire Missouri as reflected in the precedent agreement. Rehearing Order, J.A. 1155; *see also*

Rehearing Order, J.A. 1159 (declining to evaluate extent to which Spire Missouri's customers would experience economic benefit from pipeline construction because doing so would "second guess the business decisions of an end user"). Before this court, EDF has continued to challenge the Commission's failure to appropriately scrutinize the costs and alleged benefits of the project. *See* Final Opening Br. of Pet'r EDF 39-40; *see also* Final Reply Br. of Pet'r EDF 15-18 (asserting that purported benefits of proposed pipeline were invoked post hoc by the Commission, unlikely to be realized, or pretextual). Under the circumstances presented in this case – with flat demand as conceded by all parties, no Commission finding that a new pipeline would reduce costs, and a single precedent agreement between affiliates – we agree with EDF that the Commission's approach did not reflect reasoned and principled decisionmaking.

The Commission and the Spire Intervenor-Respondents advance several arguments in response, but none carry the day. First, they rely on isolated statements this court has made while reviewing previous Commission grants of Certificates. In *Minisink*, we echoed the Certificate Policy Statement in explaining that precedent "agreements 'always will be important evidence of demand for a project.'" 762 F.3d at 111 n.10 (quoting 88 FERC at 61,748). Similarly, in *Myersville*, we noted that the petitioners had "'identif[ied] nothing in the policy statement or in any precedent construing it to suggest that it requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers.'" 783 F.3d at 1311 (quoting *Minisink*, 762 F.3d at 111 n.10). In *City of Oberlin*, we upheld the Commission's decision to treat both affiliated and unaffiliated precedent agreements as evidence of market need, as "it is Commission policy to not look behind precedent or service agreements to make

judgments about the needs of individual shippers." 937 F.3d at 606 (quoting *Myersville*, 783 F.3d at 1311). And in *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, (D.C. Cir. Feb. 19, 2019) (per curiam) (unpublished), the court upheld the Commission's decision not to distinguish between affiliated and unaffiliated precedent agreements under the facts of that case. *See id.* at *1. According to the Commission and the Spire Intervenor-Respondents, these cases stand for two broad propositions: (1) that the Commission generally need not look behind precedent agreements in determining whether there is market demand; and (2) that affiliated precedent agreements should almost always be treated the same as unaffiliated precedent agreements. We disagree, because it is quite clear that our case law does not go so far as Respondents claim.

In both *Minisink* and *Myersville*, the precedent agreements at issue were not alleged to be between affiliated entities. *See Minisink*, 762 F.3d at 111 n.10; *Myersville*, 783 F.3d at 1307, 1309-10. Thus, those cases presented significantly different facts than the instant Certificate application. *Appalachian Voices* was an unpublished opinion, meaning that the panel found its opinion to be of "no precedential value" when disposing of the case. *See* D.C. CIR. R. 36(e)(2). Moreover, unlike in this case, the Certificate applicant in that case had submitted a market study to the Commission to show the need for, and benefits of, the proposed project. *See Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, 61,297 (2017).

In *City of Oberlin*, the pipeline applicant had entered into four precedent agreements with affiliate shippers but had entered eight precedent agreements in total. *See* 937 F.3d at 603. The facts of that case are therefore easily distinguishable, and the evidence of market demand was much stronger than in the instant case, where there is but a single precedent

agreement and it is with an affiliated shipper. It is true that *City of Oberlin* says that FERC can put precedent agreements with affiliates on the same footing as non-affiliate precedent agreements (*i.e.*, it may "fully credit[]" them), but only so long as FERC finds "no evidence of self-dealing" or affiliate abuse and the pipeline operator "bears the risk for any unsubscribed capacity." *Id.* at 605. And tellingly, the Commission made an uncontested finding that there was "no evidence of self-dealing" or affiliate abuse in *City of Oberlin*. *See id.*

Here, by contrast, EDF and others have identified plausible evidence of self-dealing. This evidence includes that the proposed pipeline is not being built to serve increasing load demand and that there is no indication the new pipeline will lead to cost savings. FERC's failure to engage with this evidence did not satisfy the requirements of reasoned decisionmaking. Indeed, as noted above, FERC's ostrich-like approach flies in the face of the guidelines set forth in the Certificate Policy Statement. The challenges raised by EDF and others were more than enough to require the Commission to "look behind" the precedent agreement in determining whether there was market need. If it was not necessary for the Commission to do so under these circumstances, it is hard to imagine a set of facts for which it would ever be required. Because the Commission declined to engage with EDF's arguments and the underlying evidence regarding self-dealing, its decisionmaking was arbitrary and capricious.

Next, the Commission contends that its balancing of benefits and adverse impacts was sufficient because the Natural Gas Act "vests the Commission with 'broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines.'" Br. for Resp't FERC 42 (quoting *Minisink*, 762 F.3d at 111). The Commission's discretion in this sphere is, indeed, broad, but it may not go

entirely unchecked. The Commission must provide a cogent explanation for how it reached its conclusions. As discussed, FERC failed to balance the benefits and costs in both the Certificate Order and Rehearing Order.

Finally, Respondents claim that there is evidence in the record supporting their assertions as to the benefits of the pipeline, even in the absence of increasing demand or potential cost savings. However, it is not enough that such evidence may exist within the record; the question is whether the Commission's decisionmaking, as reflected in its orders, will allow us to conclude that the Commission has sufficiently evaluated that evidence in reaching a reasoned and principled decision. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87-88, 93-95 (1943); *SEC v. Chenery Corp*, 332 U.S. 194, 196 (1947). Based on the Certificate Order and Rehearing Order, we cannot say that the Commission has done so. It is not surprising that the Commission failed to seriously engage with the question of whether these benefits were real or illusory given that it took the position that it would "not second guess the business decisions" of the pipeline shipper in this case. Certificate Order, J.A. 968.

In sum, it was arbitrary and capricious for the Commission to rely solely on a precedent agreement to establish market need for a proposed pipeline when (1) there was a single precedent agreement for the pipeline; (2) that precedent agreement was with an affiliated shipper; (3) all parties agreed that projected demand for natural gas in the area to be served by the new pipeline was flat for the foreseeable future; and (4) the Commission neglected to make a finding as to whether the construction of the proposed pipeline would result in cost savings or otherwise represented a more economical alternative to existing pipelines. In addition, the Commission's cursory

balancing of public benefits and adverse impacts was arbitrary and capricious.

III. REMEDY

The final question that we must address concerns remedy. The Spire Intervenor-Respondents urge that, if we set aside FERC's certification, we should remand without vacatur. EDF, in turn, contends that vacatur is appropriate. "The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (citation and internal quotation marks omitted). However, "[v]acatur 'is the normal remedy' when we are faced with unsustainable agency action." *Brotherhood of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 117 (D.C. Cir. 2020) (quoting *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014)).

Based on these considerations, we believe that vacatur is appropriate. Given the identified deficiencies in the Commission's orders, it is far from certain that FERC "chose correctly," *see Allied-Signal*, 988 F.2d at 150 (citation omitted), in issuing a Certificate to Spire STL. We understand that the pipeline is operational, and thus there may be some disruption as a result of the "interim change," *see id.* at 150-51 (citation omitted), *i.e.*, de-issuance of the Certificate, caused by vacatur. However, we have identified serious deficiencies in the Certificate Order and Rehearing Order. And "the second *Allied–Signal* factor is weighty only insofar as the agency may be able to rehabilitate its rationale." *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009) (citation omitted).

The Commission's ability to do so is not at all clear to us at this juncture.

Furthermore, remanding without vacatur under these circumstances would give the Commission incentive to allow "build[ing] first and conduct[ing] comprehensive reviews later." *Standing Rock Sioux Tribe v. Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021). We certainly do not wish to encourage such an approach given the significant powers that accompany a certificate of public convenience and necessity. *See* 15 U.S.C. § 717f(h) (allowing holder of Certificate to exercise eminent domain); *see also* Rehearing Order, J.A. 1195-96 (Glick, Comm'r, dissenting) (noting that "Spire STL prosecuted eminent domain actions against over 100 distinct entities . . . involving well over 200 acres of privately owned land"). *See generally* Rehearing Order, J.A. 1202 (Glick, Comm'r, dissenting) ("A regulatory construct that allows a pipeline developer to build its entire project while simultaneously preventing opponents of that pipeline from having their day in court ensures that irreparable harm will occur before any party has access to judicial relief.").

IV. CONCLUSION

For the foregoing reasons, we dismiss Juli Steck's petition for review and grant EDF's petition for review. We vacate the Certificate Order and Rehearing Order and remand to the Commission for further proceedings.