

IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT

STATE EX REL. OFFICE OF THE )  
PUBLIC COUNSEL, )  
 )  
 APPELLANT, )  
 )  
vs. )  
 )  
MISSOURI PUBLIC SERVICE )  
COMMISSION, )  
 )  
 RESPONDENT. )

Appeal No. WD80544

Appeal from the Missouri Public Service Commission

INITIAL BRIEF OF THE  
OFFICE OF THE PUBLIC COUNSEL

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**JURISDICTIONAL STATEMENT**

This appeal is a challenge to the Missouri Public Service Commission’s (“PSC”) January 18, 2017 Report and Order issued in Case Number GO-2016-0332, *In the Matter of the Application of Laclede Gas Company to Change its Infrastructure System Replacement Surcharge in its Missouri Gas Energy Service Territory*, and Case Number GO-2016-0333, *In the Matter of the Application of Laclede Gas Company to Change its Infrastructure System Replacement Surcharge in its Laclede Gas Service Territory*.<sup>1</sup> The Court of Appeals has jurisdiction of this appeal pursuant to its general appellate jurisdiction, and the issues raised on appeal are not within the exclusive jurisdiction of the Missouri Supreme Court, as set forth in Article V, Section 3 of the Missouri Constitution.

**STANDARD OF REVIEW**

The standard of review applied by Courts reviewing a PSC decision is a two-pronged analysis. First, the Court must determine whether the PSC’s decision was lawful. The PSC’s order is lawful if it is authorized by statute. In determining this prong of the review, the Court exercises unrestricted, independent judgment and must correct erroneous interpretations of the law. *Friendship Village of South County v. P.S.C.*, 907 S.W.2d 339 (Mo. App. 1995).

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<sup>1</sup> Legal File (L.F.) Case GO-2016-0332 (“0332”), p. 330.

All questions of law involving PSC orders are reviewed *de novo*. *State ex rel. AG Processing, Inc. v. P.S.C.*, 120 S.W.3d 732 (Mo. 2003). The second step in reviewing a PSC decision is determining whether the PSC's decision was reasonable. *Id.* This is accomplished by determining whether the order is supported by competent and substantial evidence on the whole record, and whether the decision was arbitrary, capricious, or constitutes an abuse of the PSC's discretion. *Id.*

### SUMMARY OF ARGUMENT

The Office of the Public Counsel ("OPC") respectfully requests the Court reverse the PSC's Order because it unlawfully and unreasonably concluded that costs incurred replacing plastic mains and services lines that were not worn out or in deteriorated condition, and that were not replaced to comply with any state or federal gas safety requirement, are eligible for Infrastructure System Replacement Surcharge ("ISRS") recovery.

ISRS eligibility for replacement costs are limited to facilities that are worn out or deteriorated and where the replacement is required to comply with a gas safety requirement. Neither criterion was satisfied by the extensive costs incurred replacing perfectly functioning plastic pipe with newer plastic pipe. The PSC's Order should be reversed and the case remanded back to the PSC with direction that the PSC approve temporary

rate adjustments designed to flow through to Laclede Gas Company's ("Laclede") customers the excess amounts that were collected plus interest. Such refunds are required pursuant to § 386.520.2(2) RSMo.<sup>2</sup>

### STATEMENT OF FACTS

The PSC is a state administrative agency with the authority and duty to regulate public utilities, including gas companies, under Chapters 386 and 393 of the Revised Statutes of Missouri. The PSC's Staff acts separately from the PSC and is a party in all PSC cases. OPC represents the public in all utility proceedings before the PSC and in all appeals of PSC orders under §§ 386.700 and 386.710 RSMo.

Laclede is a gas corporation under § 386.020(18) RSMo and a regulated monopoly provider of natural gas service under § 386.020(43) RSMo. Laclede operates two service territories in Missouri: its original Laclede Gas service territory in the eastern part of Missouri and its Missouri Gas Energy ("MGE") service territory in the western part of Missouri.

The ISRS is a special surcharge gas utilities charge their customers to provide the utility with a more immediate recovery of significant increases in certain capital costs. §§ 393.1009 – 393.1015 RSMo. The ISRS provides cost

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<sup>2</sup> Unless otherwise noted, all statutory citations are to the Revised Statutes of Missouri as currently supplemented.

recovery for three categories of eligible capital costs imposed upon the utility by a governing entity. The utility incurs these eligible costs due to regulatory compliance with gas safety requirements for infrastructure replacements and system enhancements, and through compliance with infrastructure relocations required by an entity with eminent domain authority. *Id.*

As the “replacement” surcharge title indicates, the ISRS was enacted mainly in response to significant cost increases incurred by gas utilities complying with the PSC’s 1994 replacement program rules. 4 C.S.R. 240-40.030(15). These rules mandated the systematic inspection, replacement and/or repair of all steel service lines per 4 C.S.R. 40.030(15)(C); all cast iron transmission lines, feeder lines, and mains per 4 C.S.R. 40.030(15)(D); and all unprotected steel transmission lines, feeder lines and mains per 4 C.S.R. 240-40.030(15)(E).<sup>3</sup>

During the nine-year period between the 1994 gas safety rules and the enactment of the ISRS statutes in 2003, the costs incurred by a gas utility complying with the new safety requirements could not be included in rates until after the company’s next general rate case. This limitation was due to the statutory prohibition against *single-issue ratemaking*.

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<sup>3</sup> Mo. Reg., Vol. 14, No. 23, p. 1582 (December 1, 1989)

In *State ex rel. Utility Consumers Council of Missouri, Inc. v. P.S.C.*, 585 S.W.2d 41 (Mo. 1979), the Missouri Supreme Court concluded § 393.270(4) RSMo requires the PSC to consider *all relevant factors* when determining whether or not a rate is to be increased, and prohibits raising rates based upon a single expense item. The prohibition against single-issue ratemaking is a consumer protection that recognizes all relevant factors (i.e. all operating expenses and revenues) must be considered to know whether the company is already earning sufficient revenues to recover its operating expenses and a reasonable return without increasing rates. *Id.*

The ISRS statutes created an exception to the prohibition against single-issue ratemaking by permitting single-issue rate increases for three categories of eligible infrastructure projects: government-mandated safety-related *replacements* of certain infrastructure that is worn out or in deteriorated condition, government-mandated safety-related *enhancements* that prolong the life of existing infrastructure, and government-mandated facility *relocations* such as those necessitated by a road expansion project.<sup>4</sup>

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<sup>4</sup> Missouri House Bill 208 (2003), §§ 393.1009, 393.1012 and 393.1015 RSMo

Laclede began charging its customers an ISRS surcharge in 2004 for both operating units.<sup>5</sup> For years Laclede followed a practice where it identified impaired segments of service lines or mains and replaced just the impaired segments in order to make the pipeline safe again and in compliance with PSC rules.<sup>6</sup> This meant Laclede's replacement costs recovered through the ISRS included only costs incurred replacing impaired infrastructure. In 2011, Laclede adopted a new infrastructure replacement strategy.<sup>7</sup> No longer does Laclede focus on replacing the most unsafe pipe. Now Laclede devotes its attention and time towards replacing entire neighborhoods at the same time, regardless of whether portions of the neighborhood include recently installed and safely functioning plastic or polyethylene pipe.<sup>8</sup> Laclede adopted this new strategy on its own and without PSC approval.

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<sup>5</sup> Case No. GO-2004-0443, *Order Approving Stipulation and Agreement*, June 1, 2004; and Case No. GO-2004-0242, *Order Approving an Infrastructure System Replacement Surcharge But Rejecting Submitted Tariff*, February 26, 2004. At the time, MGE was owned by Southern Union Company.

<sup>6</sup> Transcript ("Tr."), pp. 65, 128

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

On September 20, 2016, Laclede filed the ISRS petitions now on review.<sup>9</sup> The Laclede Gas ISRS petition requested a \$4.9 million annual rate increase to bring Laclede Gas' total annual ISRS recovery to \$29.9 million.<sup>10</sup> The MGE ISRS petition requested a \$3.4 million annual rate increase to bring MGE's total annual ISRS recovery to \$13.7 million.<sup>11</sup> In total, Laclede's requests sought an \$8.3 million single-issue rate increase to bring the total annual ISRS rate recovery to \$43.6 million.

OPC challenged two types of costs included in Laclede's petitions. First, OPC challenged the lawfulness of including costs incurred replacing plastic mains and service lines that were not worn out or deteriorated, and that were not required to be replaced by any gas safety requirement. Second, OPC challenged the lawfulness of including certain hydrostatic testing costs incurred by Laclede to determine the condition of mains. OPC argued recovery of such testing costs through the ISRS is not lawful. OPC did not oppose ISRS recovery for the large majority of costs included in the petitions. Laclede and the PSC's Staff both argued in support of allowing all costs

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<sup>9</sup> L.F. 0332, p. 8; L.F. Case No. GO-2016-0333 ("0333"), p. 8

<sup>10</sup> Exhibits ("Ex.") p. 504

<sup>11</sup> *Id.*

requested by Laclede to be included in the ISRS, including the plastic main and service line replacements and hydrostatic testing costs.

The PSC held an evidentiary hearing on January 3, 2017 where expert witnesses from each party provided testimony in support of each party's positions on the issues. The parties filed post-hearing briefs three days later on January 6, 2017. On January 18, 2017, the PSC issues its Report and Order allowing Laclede to include the costs incurred replacing plastic mains and service lines that were not impaired.<sup>12</sup> The PSC rejected Laclede's attempts to recover hydrostatic testing costs in the ISRS.

In its Order finding in Laclede's favor on the plastic pipe issue, the PSC concluded "that because the plastic pipe in this case was an integral component of the worn out and deteriorated cast iron and steel pipe...the cost of replacing it can be recovered."<sup>13</sup> OPC filed an Application for Rehearing on January 27, 2017, and the PSC denied OPC's application on February 1, 2017. OPC filed its Notice of Appeal on March 3, 2017.

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<sup>12</sup> L.F. 0332, p. 330

<sup>13</sup> *Id.*, p. 350

**POINTS RELIED ON**

**POINT 1**

**THE PSC ERRED IN ITS ORDER INCREASING LACLEDE GAS COMPANY'S INFRASTRUCTURE SYSTEM REPLACEMENT SURCHARGES, BECAUSE THE ORDER IS UNLAWFUL AND UNREASONABLE AND SUBJECT TO REVIEW UNDER § 386.510 RSMO, IN THAT THE PSC'S ORDER: (1) UNLAWFULLY INCLUDES COSTS NOT AUTHORIZED FOR RECOVERY BY §§ 393.1009-393.1015 RSMO; AND (2) IS UNREASONABLY ARBITRARY, CAPRICIOUS, NOT BASED ON COMPETENT AND SUBSTANTIAL EVIDENCE, AND CONSTITUTES AN ABUSE OF THE PSC'S DISCRETION.**

**Authorities:**

Section 393.1009 RSMo

*Liberty Energy (Midstates) Corp. d/b/a Liberty Utilities, P.S.C. v. Office of the Public Counsel*, 464 S.W.3d 520, 525 (Mo. 2015)

## ARGUMENT

### POINT 1

THE PSC ERRED IN ITS ORDER INCREASING LACLEDE GAS COMPANY'S INFRASTRUCTURE SYSTEM REPLACEMENT SURCHARGES, BECAUSE THE ORDER IS UNLAWFUL AND UNREASONABLE AND SUBJECT TO REVIEW UNDER § 386.510 RSMO, IN THAT THE PSC'S ORDER: (1) UNLAWFULLY INCLUDES COSTS NOT AUTHORIZED FOR RECOVERY BY §§ 393.1009-393.1015 RSMO; AND (2) IS UNREASONABLY ARBITRARY, CAPRICIOUS, NOT BASED ON COMPETENT AND SUBSTANTIAL EVIDENCE, AND CONSTITUTES AN ABUSE OF THE PSC'S DISCRETION.

The issue of this appeal is whether the PSC's Order lawfully applied the ISRS Statutes, §§ 393.1009 through 393.1015 RSMo, when it authorized Laclede to recover costs through the ISRS that Laclede incurred replacing facilities that were not worn out or in deteriorated condition, and for permitting recovery of replacement costs that Laclede did not incur complying with a gas safety requirement.

The ISRS is specifically designed to allow single-issue recovery of replacements *mandated* by a federal or state gas safety requirement and

where the existing facilities being replaced pose a threat to public safety because they are *worn out or in deteriorated condition*. Section 393.1012.1 RSMo provides the PSC with the authority to approve an increase to an ISRS rate for “eligible infrastructure system replacements.” Eligible infrastructure system replacements are limited by § 393.1009(5) RSMo to three categories of “gas utility plant projects.”

At issue in this appeal is the first category, *replacements*, which may consist only of “[m]ains, valves, service lines, regulator stations, vaults, and other pipeline system components installed to comply with state or federal safety requirements as replacements for existing facilities that have worn out or are in deteriorated condition.”<sup>14</sup> Due to this statutory limitation on eligible replacements,<sup>15</sup> the PSC’s Order must be reversed because the PSC

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<sup>14</sup> Section 393.1009(5) RSMo also authorizes the ISRS to recover certain infrastructure *enhancement* costs per §393.1009(5)(b) and facility *relocations* mandated by a governing entity per §393.1009(5)(c). These latter two utility plant projects are not at issue in this appeal because the practice being challenged – replacing safe plastic pipe with new plastic pipe - involves total pipe segment replacements and not enhancements or relocations.

<sup>15</sup> Since the PSC is purely a creature of statute, its powers are limited to those conferred either expressly or by clear implication as necessary to carry

unlawfully authorized Laclede's ISRS to recover costs incurred replacing plastic mains and service lines that were not worn out or in deteriorated condition when replaced, and that were not replaced to comply with state or federal safety requirements.

**A. Replaced infrastructure must be worn out or deteriorated to be eligible for ISRS**

Eligible replacement costs are limited to costs incurred replacing facilities that are worn out or in deteriorated condition. § 393.1009(5)(a) RSMo. The facilities at question in this appeal are existing plastic mains and service lines that were replaced with newer plastic mains and service lines despite the fact that the existing plastic pipe was not worn out or in deteriorated condition. The replaced plastic segments of pipe were originally installed in the 1970s, 1980s, 1990s, 2000s, and 2010s.<sup>16</sup> This includes pipe segments originally installed as recently as 2016.<sup>17</sup> There should be no question that the majority of the miles of plastic mains and services lines

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out the powers specifically granted. *State ex rel. Utility Consumers Council of Missouri, Inc. v. P.S.C.*, 585 S.W.2d 41 (Mo. 1979).

<sup>16</sup> Ex. 0332, pp. 522-572, and 587-588

<sup>17</sup> *Id.*

replaced by Laclede were not worn out or deteriorated. Laclede Gas' average depreciable life of plastic mains and plastic service lines is 70 years and 44 years, respectively, indicating the vast majority of the replaced plastic pipe was nowhere near the end of its useful service life.<sup>18</sup>

Laclede readily admits the replaced plastic pipe had no wear or deterioration when it was replaced. When asked during the hearing whether Laclede provided any evidence that the replaced plastic pipe was worn out or in deteriorated condition, Laclede's witness Mr. Glenn Buck testified:

Q. Have you provided any evidence to suggest that any of the replaced plastic mains or service lines were worn out or in deteriorated condition?

A. For those discrete pieces that were replaced, no.<sup>19</sup>

Mr. Buck also testified in regard to OPC Exhibit No. 3, an example of actual retirements from Laclede's ISRS petition.<sup>20</sup> The exhibit shows Laclede replaced a wide range of pipe segments that varied by material, footage, and vintage. Referencing this example, Mr. Buck acknowledged Laclede's ISRS includes plant that was not worn or deteriorated:

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<sup>18</sup> Ex. 0332, pp. 520-521

<sup>19</sup> Tr., p.81

<sup>20</sup> Ex. 0332, pp. 587-588

Q. And if you turn to the second page, you'll see at the bottom of that page it shows the vintage and footage of the replaced plastic mains, correct?

A. That's correct.

Q. And these replaced mains were initially installed between 1997 and 2011; is that correct?

A. That's correct.

Q. Would you agree with me that these mains were not worn out or in deteriorated condition?

A. I personally didn't look at any of them, but I would assume based on their vintage that, in and of themselves, the plastic main was probably not worn out or in deteriorated condition.<sup>21</sup>

The question of eligibility on the plastic replacements should end here since the replacements fail the statutory requirement that the replaced infrastructure be worn out or in a deteriorated condition.

To overcome this disqualifier, Laclede argued the plastic pipe segments qualify as worn out or deteriorated because nearby segments of cast iron or steel pipe being replaced were worn out or deteriorated. In other words, so

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<sup>21</sup> Tr. 87-88

long as Laclede also replaced pipe in the neighborhood that was worn out or deteriorated, *all* replacements within the neighborhood were eligible for ISRS recovery. Laclede framed this argument as one where the replacement of perfectly functioning plastic pipe qualifies for ISRS recovery because Laclede *now* characterizes the existing plastic pipe as temporary “patches” to Laclede’s distribution system. The PSC explained, “Laclede considered that the patches of plastic pipe and the plastic service lines were part of a larger system of pipeline and replaced entire neighborhoods of mains and service lines by running new plastic lines.”<sup>22</sup> The PSC accepted this new theory and concluded, “replacing the plastic pipe was an essential and indispensable step in completing the cast iron and steel main replacement projects.”<sup>23</sup> The PSC concluded “the plastic pipes that are being replaced were installed to fix an immediate problem and intended to remain until Laclede or MGE could schedule the entire main replacement.”<sup>24</sup>

Laclede’s explanation and the PSC’s findings are not supported by the fact that the plastic being replaced was put into service over a span of over 40 years beginning in the mid 1970s. There is no evidence to suggest plastic

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<sup>22</sup> L.F. 0332, p. 341

<sup>23</sup> L.F. 0332, p. 342

<sup>24</sup> L.F. 0332, p. 351

pipe put into the ground in the 1970s was intended to be a temporary patch to a replacement project that 40 years later would finally be completed. When those plastic mains and service lines were originally replaced, they were replaced as long-term fixes to a segment of pipe that had become unsafe. Laclede has not provided a single piece of evidence showing that it ever characterized the last forty-six years of plastic pipe installations, or the last thirteen years of ISRS-eligible replacements, as “patches” before it raised this explanation in the present case. Laclede’s new claim is unsupported. True “patches” are expense items that are unrecoverable through the ISRS because the ISRS recovers only capital costs. Laclede has been including all of its plastic replacements in the ISRS for years. The Company’s attempt to now re-characterize its prior intentions is unsupported because it is clear that Laclede did not change its position on this until its strategy changed in 2011.

The PSC’s Order also downplayed the extent of the plastic being replaced when it stated, “when Laclede and MGE replace the deteriorated and worn out cast iron and steel, some plastic pipe is also incidentally replaced.”<sup>25</sup> A review of the footage of plastic pipe involved reveals that this is hardly an incidental replacement of “interspersed” plastic. Laclede’s witness Mr. Glenn Buck included a schedule in his rebuttal testimony to

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<sup>25</sup> L.F. 0332, p. 350

show the extent of actual plastic replaced in nine select Laclede work orders.<sup>26</sup> Mr. Buck's schedule shows the total footage of service lines installed in the work orders was 44,868 feet, while the total amount of plastic service lines retired was 34,223 feet, or seventy-six percent (76%) of the total replacements.<sup>27</sup> That's six and a half miles of retired plastic, including plastic originally installed in 2012, 2013, 2014, 2015 and 2016.<sup>28</sup> These amounts of retired plastic are not just small "incidental" replacements, and instead amount to approximately \$4,500,000 in replacement costs for just these nine work orders.<sup>29</sup> Seventy-six percent of replaced plastic service lines is a significant portion of the total replacements included in the ISRS, contrary to Laclede's and the PSC's characterizations. If anything, it would appear that the replacement of eligible ISRS pipes were "incidental" to Laclede's removal of useful plastic pipes.

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<sup>26</sup> Buck Rebuttal Schedule GWB-1, Ex. 156, as *modified* during the hearing by Mr. Buck at Tr. pp. 55-57, replacing "copper" with "plastic" and adjusting the footage installed for "Services" Work Order 900882 and the Totals.

<sup>27</sup> *Id.*

<sup>28</sup> Ex. 0332, p. 507

<sup>29</sup> *Id.*

Laclede has a significant financial incentive to inflate its ISRS. The more dollars Laclede invests in infrastructure, the more Laclede profits, which increases the dividends paid to shareholders. Every dollar invested in infrastructure is returned to Laclede along with an additional cost of capital return of 9.7% for Laclede Gas,<sup>30</sup> and 9.75% for MGE.<sup>31</sup>

There is little downside to Laclede for early retirements since Laclede is allowed to recover its investment and return on that investment for *both* the seventeen year old, 506 foot plastic pipe being abandoned, and the brand new plastic pipe that replaces it.<sup>32</sup> There is no disincentive to Laclede such as requiring it to absorb the cost of an early retirement. The PSC allows Laclede to recover the full costs and a profit for both plastic pipes, according to the testimony of Laclede's accounting witness Mr. Glenn Buck, despite the fact that only one pipe serves customers.<sup>33</sup>

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<sup>30</sup> Case No. GR-2013-0171, *Order Approving Unanimous Stipulation and Agreement*, Stipulation and Agreement Attachment 2, June 26, 2013.

<sup>31</sup> Case No. GR-2014-0007, *Order Approving Stipulation and Agreement*, Stipulation and Agreement, p. 18, April 23, 2014.

<sup>32</sup> Tr. 106-107

<sup>33</sup> *Id.*

The PSC's Order significantly expanded the scope of what constitutes an eligible replacement due simply to Laclede's new 2011 strategy to replace all pipe, corroded or not, and due to Laclede's re-characterization of all existing plastic pipe as nothing more than temporary patches. This unlawful expansion of ISRS eligibility is inconsistent with the plain and ordinary meaning of the language in § 393.1009(5)(a) RSMo, limiting recovery to "mains, valves, service lines, regulator stations, vaults, and other pipeline system components installed...as replacements for existing facilities that have worn out or are in deteriorated condition."

The ISRS statutes do not contemplate allowing surcharge recovery of costs incurred replacing nearby or connected facilities that do not require replacement. The only eligible replacement cost contemplated by the ISRS statutes is one where the pipe being replaced is worn out or in deteriorated condition. The Laclede/PSC attempt to expand the ISRS should be rejected just as other attempts to expand the ISRS have been rejected.

In a 2015 Missouri Supreme Court case, the PSC approved an ISRS petition that sought to recover costs for damages to Liberty Utilities' facilities caused accidentally or negligently by a contractor or another third party.<sup>34</sup>

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<sup>34</sup> *In the Matter of the Verified Application and Petition of Liberty Energy (Midstates) Corp. d/b/a Liberty Utilities to Change Its Infrastructure System*

The Missouri Supreme Court reversed the PSC's order because such costs did not satisfy the statutory mandate that eligible costs are limited to replacements for plant that is worn out or in deteriorated condition. The Court concluded:

The PSC's interpretation conflicts with the clear legislative intent as demonstrated by the plain language of the statute. The PSC erred in relying upon its presumption that any change to a gas utility plant project qualifies for an ISRS surcharge. Only infrastructure which is in a worn out or deteriorated condition, as stated herein, is eligible for an ISRS surcharge. Hence, the PSC's order is not lawful because it is contrary to the plain language of the statute, which limits projects that qualify for an ISRS surcharge.<sup>35</sup>

The Supreme Court rejected the PSC's attempt to adopt an "expansive view" of pipe replacements that satisfy the "worn out or deteriorated condition" requirement.<sup>36</sup> Instead, the only replacements authorized by the ISRS statute

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*Replacement Surcharge, Public Service Commission v. Office of the Public Counsel*, 464 S.W.3d 520, 525 (Mo. 2015) ("*Liberty Utilities*").

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

are those replacing plant that is deteriorated through “a gradual process that happens over a period of time.”<sup>37</sup>

In another example, the PSC referenced the Supreme Court’s 2015 decision in *Liberty Utilities* and denied Laclede’s request to include ineligible replacement costs in an ISRS. The PSC explained the costs in question:

The telemetric equipment in work orders 604180 and 604190 were replaced while Laclede was replacing low-pressure regulator stations with new higher pressure stations. While there were failures at different times on different pieces of similar equipment, the telemetric equipment removed in those two work orders were operating as expected at the time they were replaced. There were no signs of corrosion on the exposed portions of the replaced equipment.<sup>38</sup>

The PSC applied the Missouri Supreme Court’s opinion in *Liberty Utilities* and held:

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<sup>37</sup> *Id.*

<sup>38</sup> Case Nos. GO-2015-0341 and GO-2015-0343, *Report and Order*, p.10, November 12, 2015 (footnotes omitted)

The [*Liberty Utilities*] court's decision makes clear that the Commission should evaluate the eligibility of gas utility plant projects narrowly in order to ensure compliance with the legislature's intent. When evaluating the telemetry equipment Laclede replaced, which are pipeline system components installed to comply with state or federal safety requirements, the evidence shows that the specific units at issue in work orders 604180 and 604190 were still operable at the time of the replacements. There were no signs of deterioration, such as corrosion.

While it is clear that telemetry equipment plays a vital role in monitoring and ensuring the safe distribution of gas, Laclede failed to show the specific parts replaced were in an impaired condition... Since the telemetry equipment replacement occurred at the same time as regulator station upgrades, it appears the timing of the replacement was more likely motivated by the efficiency of changing both at the same time than the age of the equipment or any actual impairment.<sup>39</sup>

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<sup>39</sup> *Id.*, pp. 16-17 (emphasis added)

In the 2015 case, the PSC rejected Laclede's petition to recover telemetry equipment because "the specific parts replaced" were not impaired and were still operable.

The PSC's 2015 opinion above has similarities to the issue now on appeal. Both cases involve an attempt to recover costs incurred replacing infrastructure where "Laclede failed to show the specific parts replaced were in an impaired condition." Both replacements were "motivated by the efficiency of changing both [eligible plant and ineligible plant] at the same time than the age of the equipment or any actual impairment." However, in the present case the PSC allowed the plastic replacement costs in the ISRS despite the fact that the specific parts replaced were not impaired and were still operable.

OPC recognizes "Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable." *State ex rel. GTE North, Inc. v. P.S.C.*, 835 S.W.2d 356, 371, (Mo. Ct. App. May 26, 1992), citing *Columbia v. Missouri State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo. App. 1980). However, the PSC's findings in the present case are arbitrary and unreasonable because the PSC concluded all the existing plastic was nothing but temporary patches for larger replacements, and because the PSC

concluded the plastic replacements were only “incidental” to the cast iron and steel replacements – findings not supported by the record of the case.

OPC urges the Court to reverse the PSC’s Order and conclude that the replaced plastic mains and service lines are not eligible for ISRS recovery under § 393.1009(5)(a) RSMo because they were not worn out or in deteriorated condition.

**B. Replaced infrastructure must be installed to comply with state or federal safety requirements**

To be a replacement eligible for recovery through the ISRS, the replacement must also be made "to comply with state or federal safety requirements" that mandate the replacement of facilities that are worn out or deteriorated. Section 393.1009(5)(a) RSMo. Laclede identified no state or federal gas safety requirements compelling Laclede to replace plastic pipe that was not worn out or deteriorated. Laclede cites vaguely to four laws, but upon inspection none of the safety requirements cited by Laclede requires a gas utility to replace safe segments of plastic pipe.

OPC’s post-hearing brief before the PSC addressed each gas safety requirement separately and how each requirement does not require Laclede to replace functioning plastic pipe. Inexplicably, the PSC does not address OPC’s argument that the plastic replacements are not required by any gas

safety requirement. Instead, the PSC confused the argument when it stated, “*First, Public Counsel argues that Laclede and MGE have not shown that replacing plastic pipe was done “to comply with state or federal safety requirements” because the existing facilities were “worn out or deteriorated.”*” This is a clear misstatement of OPC’s argument. As such, the PSC failed to address OPC’s argument all together. Laclede’s failure to identify any gas safety requirement compelling the plastic replacements is a separate argument from the argument that the existing facilities were worn out or deteriorated. OPC challenged eligibility based on two criteria, not one as the PSC’s Order suggests. The PSC failed to recognize § 393.1009(5)(a) RSMo includes multiple limiting criteria. Accordingly, remand of this case is necessary to direct the PSC to address the missing analysis and conclusion on whether any federal or state regulation requires Laclede to replace plastic pipe that is not impaired in any way.

Despite the fact that the PSC did not identify a gas safety requirement being satisfied by the plastic pipe replacements, this brief will address and dispel Laclede’s conclusions on where that authority can be found. But before addressing each gas safety requirement identified by Laclede, it is important to first put Laclede’s argument in context. Laclede claims its *new* 2011 strategy of replacing more than just the impaired pipe satisfies the requirement that the replacement be made to comply with a gas safety

requirement. However, Laclede's entire argument falls apart when one considers Laclede's position is that prior to 2011 its practices were also lawful when it replaced only the segment of pipe that was worn or deteriorated, leaving the adjoining segments of pipe in place.<sup>40</sup> There has been no change in the PSC's gas safety laws to warrant such a change in interpretation. The gas safety requirements in 2011 are essentially the same gas safety requirements in place today.

Laclede cites to § 393.130 RSMo, 4 CSR 240-40.030(13), 4 CSR 240-40.030(15), and 4 CSR 240-40.030(17) for the gas safety requirements it was complying with when it made the plastic pipe replacements.<sup>41</sup> There is no language within the requirements cited by Laclede that can be interpreted to require Laclede to follow this new strategy it has singlehandedly placed upon itself. As further explained below, there is no requirement, direct or indirect, that Laclede replace safely operating plastic pipe.

### 1. § 393.130 - Safe and Adequate Service

The first authority cited by Laclede is § 393.130 RSMo - the general safety law requiring a gas utility's facilities to be "safe and adequate."<sup>42</sup> The

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<sup>40</sup> Tr. 67-68

<sup>41</sup> Ex. p. 580, and Tr. 62-64

<sup>42</sup> *Id.*

statute makes no mention of pipe replacements or replacement practices, and includes the same general language now as it did when Laclede began charging an ISRS in 2004. This law does not require the replacement of safe and properly functioning plastic pipe any more than it requires the replacement of work trucks purchased in 2016 with all new work trucks.

The ISRS Statutes were enacted in response to increased costs caused by the PSC's gas safety rule, 4 C.S.R. 240-40.030(15), requiring each gas company to adopt a replacement program for the systematic identification and replacement or repair of unsafe pipeline components.<sup>43</sup> The ISRS Statutes were not enacted in response to another statute, § 393.130, that has been in the statutes for the past 100 years. Such a broad interpretation of eligibility under the ISRS statute essentially nullifies the requirement that eligible replacement costs are limited to those incurred complying with gas safety requirements that mandate replacements. Accordingly, § 393.130 does not mandate replacements as contemplated by § 393.1009(5)(a).

## **2. 4 C.S.R. 240-40.030(13) - Maintenance**

Laclede next cites to 4 CSR 240-40.030(13) for the gas safety requirement that compelled Laclede to replace safely-functioning plastic

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<sup>43</sup> Mo. Reg., Vol. 14, No. 23, p. 1582 (December 1, 1989)

pipe.<sup>44</sup> PSC rule 40.030(13)(B)(2) states in relevant part, "*[e]ach segment of pipeline that becomes unsafe must be replaced, repaired, or removed from service.*" "Segment" is not defined in the PSC's rules, but its usage in 40.030(13)(B)(2) establishes that it is a continuous and un-jointed portion of pipe since a leak threatens only the integrity of that un-jointed segment. This is consistent with the dictionary definition of "segment," which the American Heritage Dictionary defines as, "*Any of the parts into which something can be divided.*"<sup>45</sup> The most obvious parts by which Laclede's distribution system can be divided are the parts between joints, either when adjoining plastic with plastic, or when adjoining pipe of an entirely different material (cast iron, steel, copper, or plastic) and vintage. PSC Rule 40.030(13)(B)(2) requires replacement or repair of the impaired segment only since replacing the adjoining segments would unnecessarily raise rates.

Further guidance on what constitutes a "segment" can also be found in how the word is used elsewhere in the PSC's gas safety rules. PSC rule 4 CSR 240-40.030(10)(F)1 states, "*Each segment of a service line (other than plastic) must be leak tested in accordance with this subsection before being placed in service.*" This rule establishes that within a single service line there can be

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<sup>44</sup> Ex. p. 580, and Tr. 62-64

<sup>45</sup> <https://ahdictionary.com/word/search.html?q=segment>

multiple segments. In addition, PSC rule 4 CSR 240-40.030(10)(G)1 states, “*Each segment of a plastic pipeline must be tested in accordance with this subsection,*” also indicating there are multiple segments in a pipeline.

Another telling usage of “segment” appears in 4 CSR 240-40.030(7)(F), “Repair of Plastic Pipe During Constriction,” regarding plastic pipe imperfections or damages found during construction – “*Each pipe segment containing imperfection or damage that would impair the serviceability of plastic pipe must be removed.*” This rule establishes that a segment is defined as a segment before installation, and before being connected to other segments already in the ground. Laclede’s witness testified that when Laclede replaces an eight-inch plastic main, for example, that main comes in segments that are typically 40 feet in length.<sup>46</sup> These 40 foot segments are what the rule contemplates when it requires removal of the impaired segment – not the removal of all segments to be installed by the project.

Logically, “segment” as used in 4 CSR 240-40.030(13) of the PSC’s gas safety rules should be defined as a continuous unbroken or un-jointed portion of pipe as originally installed, or as further segmented after installation to make repairs as necessary. It is the stretch of pipe between two joints. Laclede’s new strategy of replacing safe plastic segments simply because they

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<sup>46</sup> Tr. 136-137

adjoin cast iron or steel segments is not required by 4 C.S.R. 240-40.030(13), and does not satisfy the important ISRS eligibility criterion that replacements be installed to comply with state or federal safety requirements. § 393.1009(5)(a).

### **3. 4 CSR 240-40.030(15) - Replacement Programs**

Laclede also relies on 4 CSR 240-40.030(15) for the authority it alleges requires it to replace safe pipe at the same time it replaces adjoining unsafe pipe.<sup>47</sup> The language of the regulation dispels Laclede's argument because it refers specifically to "cast iron" and "steel" with no mention of plastic pipe. Laclede has ended all of its pipeline replacement programs with the exception of its cast iron main replacement program, which explains Laclede's attempt to tie its plastic replacements to cast iron. But when asked to point to any language in PSC Rule 40.030(15), or anywhere else requiring Laclede to replace plastic or polyethylene pipe, Laclede's witness could not.<sup>48</sup> This rule cannot be relied upon as a requirement to replace safe plastic pipe.

### **4. 4 CSR 240-40.030(17) - Gas Distribution Pipeline Integrity Management**

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<sup>47</sup> Ex. p. 580, and Tr. 62-64

<sup>48</sup> Tr. 77

Laclede's last claim of authority requiring the plastic replacements is 4 CSR 240-40.030(17),<sup>49</sup> which requires gas companies to develop a written integrity management plan to identify threats to a gas distribution system in the following categories: "corrosion, natural forces, excavation damage, other outside force damage, material or welds, equipment failure, incorrect operation, and other concerns that could threaten the integrity of its pipeline." 4 CSR 240-40.030(17)(D)2. Laclede has identified no credible threat to its system that would require it to take the drastic step of replacing miles and miles of plastic pipe that is operating safely and in compliance with all gas safety requirements as intended.

Threats identified under an integrity management plan are to be based on verifiable data sources such as "incident and leak history, corrosion control records, continuing surveillance records, patrolling records, maintenance history, and excavation damage experience." *Id.* In response to Laclede witness Mr. Lauber's testimony that Laclede's pipe joints created a safety concern, OPC attempted to determine if there were any safety concerns regarding Laclede's pipe joint fittings when it requested Laclede's Mechanical Fitting Failure Reports required to be filed with the PSC annually by 4 CSR

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<sup>49</sup> Ex. p. 580, and Tr. 62-64

240-40.030(7).<sup>50</sup> Laclede has not provided those reports or any other record to corroborate its new plastic pipe replacement strategy as having anything to do with a true integrity management plan or any safety threat to its distribution system. In fact, Mr. Lauber testified that Laclede's pipe joints were in compliance with all gas safety rules.<sup>51</sup>

Laclede has not identified a single state or federal safety requirement that mandates the widespread replacements contemplated by Laclede's new strategy. Laclede's ISRS petitions with regard to the replacement of safe plastic pipe do not satisfy the ISRS-eligibility requirement that the replacements be required by state or federal law. OPC urges the Court to reverse the PSC's Order as unlawful under § 393.1009(5)(a).

#### **D. Costs Incurred Due to Self-Imposed Main Relocations**

It is clear from testimony and the PSC's Order that many of the costs incurred replacing mains and service lines were due simply to Laclede's decision to relocate mains, and not due to any gas safety requirement mandating the replacements. The PSC's Order states:

...because of the scope of the project, entire neighborhoods had mains and service lines replaced and relocated with the old pipes

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<sup>50</sup> Tr. 143

<sup>51</sup> *Id.*

abandoned in place. The relocation of the mains further necessitated the replacement of the service lines.<sup>52</sup>

The reasons Laclede replaced service lines were because Laclede relocated the mains, which itself was due to reasons regarding Laclede's decision to change system pressure and other reasons that are not qualifying reasons under the ISRS statutes.<sup>53</sup> This is not a qualifying criterion for eligible replacements. The only eligible *relocation* expenses are those mandated by an entity with eminent domain authority as may occur with a road expansion project. Laclede's decision to relocate the mains was a business decision Laclede made on its own, and was not a reaction to any gas safety requirement mandating such relocation. As such, the costs incurred replacing service lines due to the relocation are not eligible for ISRS recovery.

## CONCLUSION

The Office of the Public Counsel respectfully requests the Court of Appeals reverse the PSC's Report and Order because it unlawfully permitted Laclede to recover costs incurred replacing plastic mains and service lines that were not eligible for ISRS recovery under § 393.1009(5)(a). OPC also requests the Court remand the case back to the PSC with instructions to

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<sup>52</sup> L.F. 0332, p. 350

<sup>53</sup> Ex. 0332, p. 172

approve temporary rate adjustments designed to flow through to Laclede's customers the excess amounts that were collected by Laclede plus interest at the higher of the prime bank lending rate minus two percentage points or zero per § 386.520.2(2) RSMo.

Respectfully submitted,

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### Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record this 29<sup>th</sup> day of June 2017.

/s/ Marc Poston  
Marc D. Poston

**CERTIFICATE PURSUANT TO RULE 84.06(b), 84.06(c), 84.06(g), AND  
WESTERN DISTRICT LOCAL RULE XXXII**

I hereby certify that the foregoing Brief complies with the limitations contained in Rule 84.06(b) and, according to the word count of the word-processing system used to prepare this Brief (excepting the cover, certificate of service, this certificate, and the signature block), contains 7,016 words. I hereby further certify that the file submitted to the Court has been scanned for viruses and that the scan indicated that it is virus free.

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