

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

FILED

10:16 am, Sep 22, 2017
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

REPLY BRIEF OF THE
OFFICE OF THE PUBLIC COUNSEL

Marc Poston (# 45722)
Chief Deputy Counsel
Office of the Public Counsel
P. O. Box 2230
Jefferson City, MO 65102
(573) 751-5558 (Telephone)
(573) 751-5562 (Fax)
marc.poston@ded.mo.gov

September 21, 2017

Commission Exhibit No. B
Date 8/21/18 Reporter JLB
File No. GO-2016-0332-0333
GO-2017-0291-0207
GO-2018-0309
0310

TABLE OF CONTENTS

<u>Table of Authorities</u>	2
<u>Reply Argument</u>	3
I. POINT 1	3
1. <u>Safe Plastic Does Not Qualify as Unsafe Cast Iron</u>	6
a. Irrelevant “Patches” Argument	11
b. Arbitrary to Assume All Mains Replaced Cast Iron	14
c. Service Lines Need to Be Considered Separately	16
d. PSC’s Fact Errors and Confusion on Prudence Reviews...	18
e. Pressure Change Motivated the Replacements.....	19
2. <u>Calling it Safety-Related Does Not Make it Eligible</u>	21
a. ISRS Purpose is to Address Regulatory Lag	21
b. Reducing Tie-Ins, Fittings, and Joints	22
c. Reducing Costs or Efficiencies	24
3. Double Recovery of Investments	24
4. “ <u>There are a lot of ways</u> ” to Calculate Replacement Costs	25
<u>Conclusion</u>	27
<u>Certificate of Compliance with Supreme Court Rule 84.06(c)</u>	29

TABLE OF AUTHORITIES

Cases

Gulf Transport Co. v. P.S.C., 658 S.W.2d 448 (Mo. Ct. App. 1983).....6

In re Laclede Gas Co., 417 S.W.3d 815 (Mo. App. 2014)22

Liberty Utilities v. Public Counsel, 464 S.W.3d 520 (Mo. 2015)4, 5, 6

Straube v. Bowling Green Gas Co., 227 S.W.2d 666 (Mo. 1950).....6

Utility Consumers Council v. P.S.C., 585 S.W.2d 41 (Mo. 1979).....5, 7

Statutes and Rules:

§386.510 RSMo3

§393.1009 RSMo3, 4, 6, 7, 9, 11, 21, 22

§393.1015 RSMo3, 5

4 C.S.R. 240-40.030(9)..... 9

4 C.S.R. 240-40.030(11).....20

4 C.S.R. 240-40.030(13).....14, 16

4 C.S.R. 240-40.030(15).....9, 10, 16, 18

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 necessary question to ask is whether each argument by Respondents is consistent with the plain and ordinary meaning of two very clear limitations on costs recoverable through the Infrastructure System Replacement Surcharge ("ISRS"). Eligible *replacement* costs are limited to infrastructure replacements made "*to comply with state or federal safety requirements as replacements for existing facilities that have worn out or are in deteriorated condition.*" § 393.1009(5)(a) RSMo.¹ Respondents did not

¹ Statutory citations are to Missouri Revised Statutes.

identify any law requiring Laclede to replace unimpaired infrastructure.² Respondents concede the replaced infrastructure was not worn out or in deteriorated condition, and this concession alone should end the Court's analysis.³ If a cost fails either of these limitations, the cost is ineligible. Laclede's plastic replacements fail both.

By conceding the replaced plastic pipe was not worn out or deteriorated, the Respondents are forced to argue § 393.1009(5)(a) authorizes the PSC to include costs incurred replacing infrastructure that is not worn out or deteriorated. Respondents argue: (1) unimpaired plastic pipes are eligible whenever Laclede replaces an adjacent or nearby cast iron main; and (2) any cost incurred to make the system safer qualifies for ISRS. Respondents' arguments are not supported by the plain language of Section 393.1009(5)(a)⁴ or the facts.

² "Respondents" refers to Respondent Public Service Commission ("PSC") and Intervener/Respondent Laclede Gas Company ("Laclede").

³ Transcript (Tr) pp. 79-81, 87-88.

⁴ "Because the PSC failed to follow the plain language of its statutory mandates, its order is unlawful." *Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520, 522 (Mo. 2015) ("*Liberty Utilities*").

Not all replacements qualify for the ISRS.⁵ The Legislature narrowly defined eligible costs because increasing rates through a surcharge without a full rate review fails to consider whether the company is already recovering its operating costs and earning a reasonable return for its shareholders.⁶ Surcharges between rate case audits increase the likelihood the company's rates are unjust and unreasonable.⁷ This concern is compounded when costs inflate the surcharge beyond the Legislature's intent, resulting in ratepayer harm through higher rates and a greater potential for over-earning. The impact to Laclede for inflating its ISRS is increased profits since each ISRS dollar earns Laclede a 9.7%-9.75% return.⁸ If costs are disallowed from the ISRS, the impact is a delay in cost recovery until the upcoming rate case.⁹

⁵ *Liberty Utilities*, 464 S.W.3d 520, 525 (Mo. 2015).

⁶ *State ex rel. Utility Consumers Council of Missouri, Inc. v. P.S.C.*, 585 S.W.2d 41 (Mo. banc 1979) ("*UCCM*")

⁷ *Id.*

⁸ See § 393.1015.4(4); see also Appellant's Initial Brief, footnotes 30-31.

⁹ Both Laclede operating units are currently undergoing a rate case audit where all prudently-incurred infrastructure costs will be included in rates, Case Nos. GR-2017-0215 and GR-2017-0216.

The PSC's purpose is to protect the public interest. *State ex rel. Gulf Transport Co. v. P.S.C.*, 658 S.W.2d 448, 461 (Mo. Ct. App. 1983). “[T]he Act establishing the Public Service Commission was designated to protect the public and only incidentally, the utility.” *Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666, 669 (Mo. 1950). The public protections established by the ISRS statute include the narrow scope of projects qualifying for ISRS, and are ineffective unless enforced.

The PSC's Order is unlawful “[b]ecause the PSC failed to follow the plain language of its statutory mandates.”¹⁰ The PSC's Order is unreasonable because its reasons for allowing costs replacing unimpaired pipe are arbitrary, capricious, are not based on competent and substantial evidence, and constitute an abuse of the PSC's discretion.

1. Safe Plastic Does Not Qualify as Unsafe Cast Iron

Respondents argue unimpaired plastic pipe qualifies for ISRS recovery because Laclede's new practice is to replace all pipe throughout entire neighborhoods rather than just the impaired pipe; and because Laclede now installs mains at a different depth. Respondents interpret § 393.1009(5)(a) to allow Laclede to single-handedly expand the costs eligible for the ISRS by

¹⁰ *Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520, 522 (Mo. 2015) (“*Liberty Utilities*”).

simply replacing otherwise ineligible segments of unimpaired infrastructure at the same time it replaces eligible segments of impaired infrastructure. But the timing of the replacement and whether the infrastructure is adjacent to or within the neighborhood of an eligible replacement does not change the limitation of § 393.1009(5)(a). There is no language in the ISRS statutes allowing a company to piggy-back ineligible project costs into the surcharge by adding them to a work order with eligible expenses. “Since it is purely a creature of statute, the [PSC’s] powers are limited to those conferred by the...statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted.” *UCCM*, 585 S.W.2d 41, 49 (Mo. 1979).

Respondents refer to the plastic replacements as “incidental to” the cast iron replacements. “Incidental” is defined as “*occurring or likely to occur as an unpredictable or minor consequence.*”¹¹ Replacing large plastic mains is not a minor consequence of replacing cast iron mains. It is instead a major consequence of Laclede’s self-imposed decision to replace all mains regardless of condition throughout entire neighborhoods and to install new mains above

¹¹ American Heritage Dictionary, 5th Ed., 2017, Houghton Mifflin Harcourt Publishing Co., <https://ahdictionary.com/word/search.html?q=incidental>.

the existing mains.¹² Before 2011, Laclede's practice was to replace only the corroded cast iron and there were no incidental plastic replacements.¹³

The PSC's brief erroneously states it was "necessary" to replace the unimpaired plastic pipe. However, Laclede acknowledged nothing prevented Laclede from replacing only the corroded segments of pipe.¹⁴ MGE's work orders show MGE sometimes follows the practice of replacing mains at the same depth and tying-over existing service lines. In Work Order #0006659, for example, MGE abandoned 15,005' of cast iron main and installed 16,080 feet of plastic main.¹⁵ Rather than replace all service lines, the work order shows MGE used the "tie-over" method to attach 402 service lines to the new main, and replaced only seven steel service lines.¹⁶

If Laclede is allowed to pull ineligible pipe into ISRS eligibility by simply expanding the scope of what it considers "incidental to" each replacement, it would allow Laclede to deem *anything* it replaced at the same time as nearby corroded pipe as eligible. However, each main and each

¹² Tr. 65

¹³ Tr. 65, 68

¹⁴ Tr. 29

¹⁵ Legal File (LF), p. 58

¹⁶ *Id.*

service line must independently qualify to effectuate the language and intent of § 393.1009(5)(a). If Laclede replaced only the plastic pipe without also replacing the neighboring cast iron, those replacements could not qualify as cast iron replacements under Respondents' interpretation. Plastic pipe is ineligible because the statute clearly ties eligibility to the pipe being replaced, not other nearby pipe. The only replacement practice known and anticipated by the Legislature when it enacted the ISRS statutes was the pre-2011 practice where new plastic was not incidentally replaced.

Adjacent pipe must independently qualify for ISRS. PSC Rule 4 C.S.R. 240-40.030(9)(N) requires Laclede to inspect the interior of removed pipes, and if corrosion is found to also check the adjacent pipes for interior corrosion. Replacement of the adjacent pipe is required only "[i]f internal corrosion is found." 4 C.S.R. 240-40.030(9)(N). This is the gas safety *requirement* on replacing adjacent pipe, and compliance costs are incurred only when the adjacent pipe independently qualifies for replacement.

Respondents' briefs did not cite to any government mandate to replace entire neighborhoods, or any gas safety requirement to replace unimpaired plastic pipe. Instead, Respondents rely on the cast iron replacement program as requiring Laclede to replace plastic pipe. However, 4 CSR 240-40.030(15)(D) requires no more than a program for replacing "*cast iron*

transmission lines, feeder lines, or mains.” No plastic, copper, or steel is required to be replaced by 4 CSR 240-40.030(15)(D).

In addition, 4 CSR 240-40.030(15)(B) states, “*The requirements of this section apply to pipelines as they existed on December 15, 1989.*”¹⁷ Replacing pipe installed after December 15, 1989 is not required by the replacement program rules, which would account for substantial amounts of pipe that cannot be claimed as a cost incurred complying with 4 C.S.R. 240-40.030(15). For example, 22 of the 39 plastic service lines replaced in Work Order #900547 were installed after 1989.¹⁸

Laclede’s plastic replacements are the result of a self-imposed strategy to invest tens of millions of dollars annually in infrastructure that did not need to be replaced. The fact that neither Laclede nor MGE followed this new practice prior to 2011 is proof that replacing just the impaired portion of cast-iron is entirely possible and consistent with all gas safety requirements.

The PSC’s Order enables Laclede to recover all replacement costs through the ISRS with little limitation, rendering the statutory limitations

¹⁷ The correct adoption year of the gas safety rules was 1989, not 1994 as stated in Appellant’s initial brief.

¹⁸ Ex. pp. 587-589

meaningless. This is not what the Legislature envisioned when it limited eligibility to worn out or deteriorated infrastructure.

a. Irrelevant “Patches” Argument

Respondents’ argue the miles of unimpaired plastic pipe replacements made over the last 45 years were meant to be temporary “patches.” But there is no “temporary patch” exception to the ISRS statutes. The clear language of § 393.1009(5)(a) requires the pipe being replaced to be worn out or deteriorated, and the relevant factor regarding the pipe in question is its *condition*. Respondents’ patch arguments are irrelevant because ISRS eligibility is not based upon whether years ago an installation was intended as a temporary fix or a permanent fix. Eligibility is determined by whether the utility is legally required to make the replacement and whether the replaced pipe is worn out or deteriorated. § 393.1009(5)(a).

Even if the patch characterization was relevant, patches are defined as, “*A small piece of material affixed to another, larger piece to conceal, reinforce, or repair a worn area, hole, or tear.*”¹⁹ Patches are small. The evidence in this case shows numerous long segments of replaced plastic pipe. Work Order #900882 replaced a 1,021’ segment of 4” plastic main originally installed in

¹⁹ American Heritage Dictionary, 5th Ed., 2017, Houghton Mifflin Harcourt Publishing Co., <https://ahdictionary.com/word/search.html?q=patch>.

2011 and a 1,493' plastic service line originally installed in 1993.²⁰ The longest segment of cast iron replaced in Work Order #900882 was 1,267', which was *shorter* than the longest plastic segment that Respondents now re-characterize as a patch.²¹ Laclede replaced far more plastic than cast iron in Work Order #900882 as shown below:²²

#900882 Retirements	Vintage Range	Total Length
Plastic Service Lines	1971-2016	6,661'
Cast Iron Mains	1914-1941	3,301'
Plastic Mains	1995-2011	1,642'
Steel Service Lines	1927-1940	586'
Copper Service Lines	1956-1971	565'

Sixty-five percent of the replacement footage in Work Order #900882 was plastic, while only twenty-six percent was cast iron, five percent was steel, and four percent was copper.²³

²⁰ Buck Rebuttal, Sch. GWB-1, Ex. p. 159; Hyneman Direct, Ex. pp. 538-540.

²¹ *Id.*

²² *Id.*

²³ *Id.*

Another Laclede Work Order, # 900547, replaced plastic main segments of 460' (vintage 2009), 506' (vintage 2011), 444' (vintage 1997), and 544' (vintage 2000); and plastic service line segments of 579' (vintage 1997), 306' (vintage 2009), and 1,374' (vintage 1972).²⁴ Work Order # 900547 included more plastic replacements than cast iron, as shown by the table below:²⁵

#900547 Retirements	Vintage Range	Total Length
Cast Iron Mains	1904-1940	6,896'
Plastic Service Lines	1970-2014	6,654'
Plastic Mains	1997-2011	2,075'
Copper Service Lines	1954-1987	1,866'
Steel Service Lines	1904-1980	738'
Steel Mains	All 2000	50'

Cast iron replacements accounted for only thirty-seven percent of the replacements made under Work Order #900547, while plastic replacements accounted for forty-eight percent.²⁶ The total plastic footage replaced in Work Order #900547 was 8,779', well over a mile and a half of plastic in just one

²⁴ Buck Rebuttal, Sch. GWB-1, Ex. p. 159; Hyneman Direct, Ex. pp. 523-526.

²⁵ *Id.*

²⁶ *Id.*

work order. Replacing the safely-functioning plastic pipe is not what the Legislature envisioned when it authorized a single-issue surcharge for costs incurred replacing worn out or deteriorated infrastructure.

“Patch” is used in the gas safety rules to refer to two permissible patches – steel plate patches over corrosion leaks (4 C.S.R. 240-40.030(13)(J)(2)(C)), and heat fusion patching saddles used to repair holes in plastic pipe (4 C.S.R. 240-40.030(13)(AA)). What Respondents are now re-characterizing as a patch is inconsistent with the PSC’s rules.

The segments of plastic pipe in question were installed as permanent capitalized replacements under the PSC’s replacement rules. There are no facts to support the assertion that Laclede, MGE, or the PSC ever referred to entire pipe segment replacements as patches until now. Laclede’s new practice was not developed until 2011; all replacements made before 2011 were clearly intended to be permanent capitalized replacements.²⁷

b. Arbitrary to Assume All Installed Mains Replaced the Abandoned Cast Iron and Not the Abandoned Plastic

Respondents argue Laclede installed less plastic than the amount of cast iron abandoned in “some” work orders, and urge the Court to assume all newly installed plastic replaced the abandoned cast iron rather than the

²⁷ Tr. 65

abandoned plastic. Respondents' conclusion is arbitrary and not supported by evidence,²⁸ nor is it a qualifying criteria for eligibility. Before such assumption can be made, each project must be analyzed independently. Cast iron mains are just as likely to have been a portion of the mains that were no longer needed. To claim all pipe installed as a cast iron replacement and not a plastic replacement, Laclede would need to determine with more precision what segments were abandoned and not replaced and what segments were replaced at a different depth. As explained by the PSC Staff's witness, "*it's not clear exactly how much of that is a direct replacement for whatever the amount of plastic was in the retired pipe.*"²⁹

Laclede's claim the footage of cast iron mains abandoned exceeded the footage of new plastic installed is limited to totals for nine Laclede Gas main replacements, includes no MGE main replacements, and includes no service

²⁸ Each work order is different; some install more plastic than cast iron and some less. Work Order #007532, for example, installed more plastic (12,254') than cast iron abandoned (11,043'). Ex. 61.

²⁹ Tr. 198

line replacements for either company.³⁰ Some of the work orders cited by Laclede include *more* plastic mains installed than cast iron mains retired.³¹

c. Service Lines Need to Be Considered Separately

Respondents have not shown a single plastic service line qualified for ISRS. All cast iron service lines were replaced years ago,³² which means no service lines Laclede claims under its cast iron program were made of cast iron. Since the gas safety rules require only the replacement of corroded pipe – in this case the cast iron main is alleged to be corroded – compliance only requires Laclede to replace the corroded main, and not the service lines.³³ When replacing just the segment of corroded main, the service lines can be reconnected to the new main without replacement because there has been no change in depth. By installing new mains across entire neighborhoods and changing the depth, Laclede created a self-imposed need to either use a “tie-

³⁰ Ex. p. 159

³¹ *Id.*

³² All cast iron service lines were required to be replaced by December 31, 1991. 4 CSR 240-40.030(15)(D)(3).

³³ 4 C.S.R. 240-40.030(13)(B)(2)

over” method to connect the existing service lines to the new main, or replace the service lines in their entirety.³⁴

Service lines also fail the Respondents’ “patch” argument since service lines were replaced due to their depth and not because there were impaired segments within a service line. Calling complete service line replacements “patches” is akin to claiming to have “patched” a tire with no holes by replacing it with another tire with no holes.

There is a notable difference between MGE’s and Laclede’s replacement practices. MGE often uses tie-overs to connect new mains to existing service lines.³⁵ Laclede Gas replaces all service lines rather than use tie-overs, which is to be expected when changing the pressure for a service area. Using a tie-over method does not uprate the service line and allows the line to be used on an intermediate pressure system.

³⁴ Laclede’s witness testified Laclede can use a “tie-over” method to connect the existing service line to a new main installed at a different depth (Tr. 144).

³⁵ For example, MGE tied over service lines in the following Work Orders: #800083 (58 tie-overs), #800084 (71 tie-overs), #800072 (121 tie-overs), #800178 (82 tie-overs), #800085 (34 tie-overs), and #800086 (51 tie-overs). Ex. 527-572.

d. PSC's Fact Errors and Confusion on Prudence Reviews

Respondent PSC's brief erroneously states OPC "agreed the cast iron and bare steel mains were worn out and in deteriorated condition" and "were eligible for ISRS recovery."³⁶ The PSC's brief also erroneously states "All parties agreed that the bare steel and cast iron system components were worn out or in deteriorated due to their age."³⁷ OPC never agreed any segment of cast iron or steel was eligible for ISRS recovery or was in a worn out or deteriorated condition. All three PSC citations are to its own Report and Order concluding the condition of the cast iron mains was "undisputed," and to the testimony of a Laclede witness.³⁸ OPC has not verified any segment of replaced pipe was worn out or in deteriorated condition.

The PSC also asserts "Public Counsel did not challenge the prudence" of Laclede's new replacement practice. Prudence is an issue to be addressed in Laclede's rate cases, and OPC's focus in the present case was ISRS eligibility as contemplated by § 393.1015.2(4). OPC's witness testified, "*OPC*

³⁶ PSC Brief, p.6.

³⁷ *Id.*, p.21.

³⁸ The Order's cite references p. 149 of the transcript where *Laclede's witness* testified the cast iron mains were worn out or deteriorated "in general."

*is not taking any position on how Laclede is operationally replacing its service lines or its mains*³⁹ and that OPC may challenge prudence in the rate case.⁴⁰

e. Pressure Change Motivated the Replacements

Respondents did not deny Laclede's strategy to change its system pressure from low-pressure to intermediate-pressure is the reason for much of Laclede's plastic pipe replacements. Respondents also chose not to directly respond to the assertion. Laclede indirectly addressed the point when it argued "not one shred of evidence has been presented that would suggest these projects were undertaken for any other purpose" than replacing aging cast iron or steel pipeline facilities. Evidence of this fact, however, came from Laclede's own engineering witness when he explained the plastic pipe in the higher pressure systems was "reusable," but the replaced plastic pipe "for the most part" was low pressure.⁴¹

Laclede's witness also testified the cast iron mains are on the low-pressure system,⁴² which means if adjacent mains and service lines are also rated for a low-pressure system, replacing just the cast iron main with an

³⁹ Tr. 211

⁴⁰ Tr. 248

⁴¹ Tr. 138-139

⁴² Tr. 140

intermediate pressure main would not enable Laclede to increase system pressure. All plastic, steel or copper mains and service lines within that same system would either need to be uprated to the high pressure, or replaced.⁴³ Laclede's work orders show extensive amounts of uprating and replacing low pressure plastic pipe with high pressure plastic pipe.⁴⁴ These facts were corroborated by OPC's witness.⁴⁵

Converting its entire system from low pressure to intermediate pressure is the motivation behind Laclede's 2011 strategy to replace entire neighborhoods. This self-imposed pressure change is not required by any gas safety statute or rule. Laclede is attempting to tie the costs incurred

⁴³ *Uprating* is "increasing maximum allowable operating pressure" to a segment of pipe, 4 C.S.R. 240-40.030(11)(A) and (B)(1)(A).

⁴⁴ Laclede's work order authorization sheets show Laclede routinely replacing low pressure ("LP") pipe with intermediate pressure ("IP") pipe, and uprating mains to intermediate pressure. Exhibits pp. 527, 530, 534, 538, 540, 545, 548, 552, 555, 560, 561, 565-572.

⁴⁵ Mr. Hyneman testified, "*they're going from a low pressure, which required more plastic pipe in the ground, to an intermediate pressure pipe which requires less pipe, and that's the reason why so much plastic pipe is being replaced*" (Tr. 237).

changing its pressure to a lawful ISRS replacement of cast iron pipe to enable it to recover costs to change its pressure through the ISRS. However, changing pressure is not a qualifying reason for ISRS eligibility.

2. Calling it Safety-Related Does Not Make it Eligible

Respondents' briefs avoid addressing the language of § 393.1009(5)(a) requiring eligible costs to be incurred complying with a gas safety requirement. Instead, Respondents argue any safety-related infrastructure replacement is eligible for ISRS recovery because the purpose of the ISRS is to encourage more investments in infrastructure. This argument is unpersuasive because *all* infrastructure replacements serve a safety *purpose*, but not all replacements can claim a safety *requirement* mandating the replacement. Respondents were unable to point to any gas safety rule or statute requiring Laclede to replace miles of unimpaired plastic pipe, and simply alleging a safer system is not an eligibility criterion.

a. ISRS Purpose is to Address Regulatory Lag

The language of the ISRS statutes show the purpose was to address cost increases occurring between rate cases that are *mandated* by government. All three qualifying projects under §393.1009(5) share one element in common – all eligible costs are mandated by government. History shows the true purpose of allowing *replacement* costs to be recovered through

the ISRS was because the PSC's gas safety rules caused gas companies to incur significant replacement costs that could not be recovered in rates until the next general rate case. The Court of Appeals explained, "the ISRS statutes permit the gas company to make single-issue rate increases between general rate cases in order to timely recover its costs for certain government-mandated infrastructure projects without the time and expense required to prepare and file a general rate case." *In re Laclede Gas Co.*, 417 S.W.3d 815, 821 (Mo. App. 2014). The ISRS is not meant to encourage more investments because it limits recovery to only those investments *already required* by a state or federal safety regulation. § 393.1009(5)(a).

b. Reducing Tie-Ins, Fittings, and Joints Does Not Make Unimpaired Pipe Replacements Eligible

Respondents argue costs incurred making the system safer qualifies for ISRS recovery. However, reducing tie-ins, reducing fitting, and reducing the number of joints are not required by any gas safety requirement, and do not replace infrastructure that is worn out or in deteriorated condition unless the joint or fitting is corroded.

Laclede also tries to paint a picture of OPC advocating for an absurd "Rube Goldberg" distribution system. But OPC has not suggested Laclede follow any particular practice – OPC's position is limited to cost recovery only

and the limitations established by the Legislature. The customary practice of replacing only the corroded pipe does not create any absurdities unless Laclede considers all replacements before 2011, and many replacement costs in this very ISRS petition,⁴⁶ to have been made under an absurd practice. Laclede's "Rube Goldberg" argument is premised entirely upon Laclede's decision to install higher pressure mains in a shallower location, and the resulting connections if Laclede were to try to use tie-ins to connect the new main to the existing service lines. Again, OPC is not advocating for any particular replacement practice in this case, and is only addressing the costs authorized to be recovered through the surcharge.

Laclede's bridge contractor analogy is not applicable because Laclede does not operate as an outside contractor. A better analogy involves a privately owned 2-lane toll-bridge where the government reimburses the bridge owner for costs incurred replacing corroded girders. Replacing a handful of girders would make the bridge in compliance with all safety laws, but instead the owner abandons it and builds a new 4-lane bridge. Laclede's attempt to recover the plastic replacement costs is akin to the bridge owner seeking reimbursement for the entire cost of the new bridge.

⁴⁶ Ex. p. 58

**c. Reducing Costs or Efficiencies Does Not Make
Unimpaired Pipe Replacements Eligible**

Respondents' assertion that Laclede's new replacement practice is more economical or more efficient is irrelevant to the qualifying criteria established by the Legislature. The condition of the pipe and a requirement to replace are the relevant criterion. Even if reduced costs were a consideration established by the ISRS statutes, Laclede provides no figures, no cost study, and no indication that it actually performed a cost study to reach its conclusion. The testimonies it cites to provide nothing but generalities. It is also not clear whether Laclede considered only main replacement costs, or whether they also considered the significant costs of replacing every service line in an entire neighborhood. To truly reach Laclede's conclusions, each project would need to be independently considered as to whether it was more or less costly to replace everything or follow the customary approach of replacing only the impaired segment of pipe.

3. Double Recovery of Investments

When Laclede abandons a mile of plastic pipe, it still recovers the full cost of the abandoned pipe. Respondents argue a depreciation offset takes care of this concern. However, even with the offset, it is clear Laclede's

accounting allows it to fully recover the costs of *both* the new pipe and the abandoned pipe. Laclede's accounting witness testified:

Q. [Y]ou're able to recognize the full value of that plant that was retired?

A. Depreciation is supposed to be self-reconciling, yes.

Q. And so when you retire plant that was installed in 2010 with brand-new plant, you're going to get to recover the full value of both of those?

A. Anything that's under or retired early or retired too late is all self-reconciling, correct.⁴⁷

Accordingly, the more plant Laclede installs, the more Laclede profits and customers are left paying for *both* the replaced plastic and new plastic.

4. "There are a lot of ways" to Calculate Replacement Costs

The PSC's brief spends ten pages of its sixteen-page fact section asserting there is "no good or accurate way" to calculate the costs incurred replacing the plastic pipe, as if that would somehow make the plastic replacements eligible. The ISRS statutes do not provide an exception whenever the company fails to separate the ineligible from the eligible costs, as Laclede did here, or where separating ineligible from eligible costs poses a

⁴⁷ Tr. 106-107

challenge. This is a surprising assertion from the PSC given that its Order did not base any finding on whether the disallowance could or could not be calculated; only the PSC's brief makes these assertions.

When asked if it would be easy to calculate the total amount of replaced plastic, Laclede's witness testified, "*It obviously can be done.*"⁴⁸ When the PSC's Chairman asked Laclede's counsel a similar question, he responded, "*It would take a lot of work, but I think that we have numbers about how much plastic was replaced at the time we replaced cast iron... we could figure it out.*"⁴⁹ This was later confirmed by Laclede's witness Mr. Buck when he testified, "*I'm sure there are a lot of different ways it could be done.*"⁵⁰

Mr. Buck also agreed it would be "*possible*" to determine the ineligible plastic by using a simple average.⁵¹ A simple average approach was supported by OPC's witness.⁵² If the plastic replacements were 10% of the total replacements, the PSC could reduce the total cost of a work order by 10% for ISRS. Since cost allocation methods have different levels of

⁴⁸ Tr. 93

⁴⁹ Tr. 30-31

⁵⁰ Tr. 101

⁵¹ Tr. 102

⁵² Tr. 230-231

precision,⁵³ public utility accounting often uses allocation factors such as the Massachusetts Formula when costs cannot be allocated in an exact manner.⁵⁴ A similar formula could be used in the present instance to determine the ineligible costs.

CONCLUSION

The Office of the Public Counsel respectfully requests the Court reverse the PSC's Report and Order and remand the case back to the PSC with instructions to approve rate adjustments to flow through to Laclede's customers the excess amounts that were collected plus interest.

⁵³ Tr. 231-232

⁵⁴ *Id.*; "The Massachusetts formula is...used to allocate costs when no better cost causative factors can be identified." *Report and Order*, Case ER-97-374, 1998 Mo. PSC LEXIS 16, March 6, 1998.

Respectfully submitted,

/s/ Marc Poston
Marc Poston (# 45722)
Chief Deputy Counsel
Office of the Public Counsel
P. O. Box 2230
Jefferson City, MO 65102
(573) 751-5558 (Telephone)
(573) 751-5562 (Fax)
e-mail: marc.poston@ded.mo.gov

Certificate of Service

I hereby certify that copies of the foregoing was placed for delivery through the Missouri e-Filing System to all counsel of record, on this day, September 21, 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 4,934 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.

/s/ Marc Poston _____
Marc Poston (# 45722)
Chief Deputy Counsel
Office of the Public Counsel
P. O. Box 2230
Jefferson City, MO 65102
(573) 751-5558 (Telephone)
(573) 751-5562 (Fax)
e-mail: marc.poston@ded.mo.gov