IN THE SUPREME COURT OF MISSOURI

SPIRE MISSOURI INC, f/k/a LACLEDE GAS COMPANY Appellant, v. PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Respondent and THE OFFICE OF THE PUBLIC COUNSEL, .	No. SC97834

SUBSTITUTE BRIEF OF RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

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November 25, 2019

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JURISDICTIONAL STATEMENT

This appeal of the Public Service Commission of Missouri's Amended Orders establishing new general rates for Spire Missouri Inc. is before the Court on transfer from the Court of Appeals for the Southern District. This case is a review of Commission orders under Section 386.510, RSMo (2016) (Supp. 2019). This Court granted transfer after opinion by the Court of Appeals under Section 386.540, RSMo (2016) and Rule 83.04 of the Rules of Civil Procedure.

STATEMENT OF FACTS

The Commission is dissatisfied with Appellant's statement of the facts, and provides its own statement of facts in accordance with Rule 84.04(f).

Parties

Respondent Public Service Commission of the State of Missouri (Commission) is the state agency responsible for the regulation of public utilities in Missouri, including gas corporations. Section 386.130, RSMo (2016); Section 386.250(1), RSMo (2016).

Appellant Spire Missouri Inc. (Spire Missouri) is an investor-owned gas corporation regulated by the Commission. (LF 3765).[1] Spire Missouri has two retail service areas in the state. (LF 3765). Spire Missouri East (Spire East)[2] was formerly known as Laclede Gas Company. (LF 3765). Spire East serves approximately 630,000 customers on the eastern side of Missouri. (LF 3766). Spire Missouri West (Spire West) was formerly known as Missouri Gas Energy or MGE. Spire West serves approximately 500,000 customers on the western side of Missouri. (LF 3765; LF 4241).

Intervenor-Respondent Office of Public Counsel (Public Counsel) represents the public in cases before the Commission and on appeal from Commission orders and

[1] Spire Missouri is a wholly-owned subsidiary of Spire Inc. (LF 3765).

[2] At various places in the record, Spire Missouri Inc. and its operating divisions are referred to as Laclede, LAC, MGE, Spire East, and Spire West. For simplicity, the former Laclede operating division is referred to as Spire East throughout this brief. The former MGE operating division is referred to as Spire West. The two operating divisions are collectively referred to as Spire Missouri.

decisions. Section 386.710.1(2), RSMo (2016). Public Counsel participated in the Spire Missouri rate cases before the Commission. (LF 3758; LF 4234). Public Counsel filed a brief in the Court of Appeals, but did not participate in the oral argument.

Commission Proceedings

Spire Missouri filed tariffs with the Commission intended to implement general rate increases for its Spire East and Spire West service areas. (LF 3759; LF 4235). Along with the proposed tariffs, Spire Missouri also submitted written testimony and other supporting documentation. (LF 4240; LF 3764).

In addition to Staff[3] and Public Counsel, several parties sought and were granted intervention. (LF 4236; LF 3760). Applications to intervene were granted for the following parties: Missouri Industrial Energy Consumers, Midwest Energy Consumers Group, Missouri Department of Economic Development-Division of Energy, Missouri School Boards Association, the City of St. Joseph, Missouri, National Housing Trust, Environmental Defense Fund, MoGas Pipeline, LLC, USW Local 11-6, Kansas City Power & Light Co., and KCP&L Greater Missouri Operations Co. (LF 4236; LF 3760).

The test year established for this case was the 12-month period ending on December 31, 2016, to be updated for known and measurable changes through June 30, 2017. (LF 4236; LF 3760). The updated test year would be further trued up for known and measurable revenue, rate base, and expense items through September 30, 2017. (LF 4236; LF 3760).

The Commission consolidated the Spire East rate case and the Spire West rate case for hearing purposes, but the cases remained otherwise separate because the two service areas do not have the same rates. (LF 4236; LF 3760).[4] The parties filed written

[3] The Commission employs a staff of technical and subject matter experts (Staff). Staff consists of professionals such as accountants, auditors, and engineers. Staff is represented by attorneys in the Staff Counsel Office in proceedings before the Commission, but Staff is not a party to appeals from Commission orders and decisions.

[4] The Commission issued separate rate orders for each service area. Of the issues on appeal, only the rate case expense issues relate to Spire West. The legal file citations in the rate case expense sections of the facts and argument are to both the Spire East order

direct, rebuttal, and surrebuttal testimony for the case in chief and direct and rebuttal true-up testimony. (LF 4237; LF 3761).

The Commission held local public hearings in the service areas of both Spire East and Spire West.[5] (LF 4237; LF 3761). The Commission held an evidentiary hearing at its office in Jefferson City. (LF 4237; LF 3761).

Several issues in this case were resolved through various partial stipulations and agreements that were unopposed by any of the non-signatory parties. (LF 4238-9; LF 3762-3). The Commission approved those partial stipulations. (LF 4239; LF 3763). A non-unanimous stipulation and agreement that Spire Missouri opposed was litigated at the evidentiary hearing. (LF 4239; LF 3763). At the evidentiary hearings, 15 witnesses testified, and 242 exhibits were admitted.

Amended Orders

The Commission issued an Amended Report and Order establishing new rates for the Spire East service area on March 7, 2018. (LF 4231). On the same day, the Commission issued an Amended Report and Order establishing new rates for the Spire West service area. (LF 3755). Both amended orders became effective on March 17, 2018. (LF 3755; LF 4231). In those orders, the Commission made factual findings regarding each of the issues on appeal.

Rate Case Expense

Rate case expense is the sum of the costs a utility incurs in preparing, filing, and litigating a rate case. (LF 4275; LF 3799). Rate case expense does not include the payroll or benefits of utility employees who charge time to rate case expense. (LF 4275; LF 3799). Employee salaries and benefits are included in payroll and benefit expense and are not allocated between ratepayers and shareholders. (LF 4275-6; LF 3799-3800).

(GR-2017-0215) and the Spire West order (GR-2017-0216). The remaining citations are to the Spire East order only.

[5] Local public hearings were held in Joplin, Independence, St. Joseph, Arnold, St. Louis, Sunset Hills, St. Charles, Kansas City, and Gladstone.

Prudence is not the sole consideration in determining what costs should be included in rates. (LF 4276; LF 3800). The benefits to customers must also be considered when deciding what costs are reasonable to include in rates. (LF 4276; LF 3800). Rate case expense can benefit both ratepayers and shareholders, although in different ways. (LF 4267; LF 3800). The utility and its shareholders benefit directly from rate case expense because those costs are generally incurred to ensure that the utility and its shareholders have an opportunity to receive a reasonable return on the investment in the utility through the rates that the utility is authorized to charge. (LF 4276; LF 3800). Customers generally benefit from being served by a financially healthy utility with the ability to provide safe and adequate service at just and reasonable rates. (LF 4276; LF 3800).

To initiate a rate increase request, a utility files proposed tariffs along with direct testimony to support its request. Section 393.150, RSMo (2016); 20 CSR 4240-3.030. When the utility filed its direct cases, Spire Missouri had budgeted rate case expenses of $994,447. (LF 4276; LF 3800). Of that total, Spire East's rate case expenses were budgeted at $596,668 and Spire West's rate case expenses were budgeted at $397,779. (LF 4276; LF 3800). The annual expense to be recovered over the proposed amortization period for Spire East was $198,869 and the annual expense to be recovered over the proposed amortization period for Spire West was $132,593. (LF 4277; LF 3801). Spire East and Spire West have historically incurred relatively low levels of rate case expense compared to other Missouri utilities. (LF 4277; LF 3801). In three prior Spire East rate cases and four prior Spire West rate cases, total rate case expense exceeded $1 million only once. (LF 4277; LF 3801).

By the time of the evidentiary hearing, Spire Missouri's estimated rate case expense had risen to $1.3 million, but it had already exceeded that estimate. (LF 4277; LF 3801). The estimate was increasing because more issues than the utility expected had gone to hearing. (LF 4277; LF 3801). Approximately half of the issues in this case were raised by Spire Missouri, which has a high level of discretion over the content and the methodologies proposed in the rate case. (LF 4277; LF 3801).

Awarding a utility all of its incurred rate case expense could provide that utility with a significant financial advantage over the other participants in the rate case process who may be constrained by budgetary and other financial restrictions. (LF 4277; LF 3801). The Commission found that this practice does not encourage reasonable levels of cost containment in the utility's rate case expense decisions. (LF 4277; LF 3801). One incentive for a utility to limit its rate case expense is for its shareholders to share rate case expenses. (LF 4277; LF 3801).

Spire Missouri requested a three-year amortization of all prudently incurred rate case expenses with the exception of the current depreciation study. (LF 4278; LF 3802). Spire Missouri requested a five-year amortization of the expenses associated with that depreciation study. (LF 4278; LF 3802).

Staff recommended that the proposed rate case expense be recovered through a sharing mechanism between the ratepayers and the shareholders based on the ratio of Spire East and Spire West's Commission-authorized revenue requirement increase to the utility's requested revenue requirement increase, net of Staff's adjustments. (LF 4248; LF 3802). Staff's recommendation is similar to the sharing mechanism used in a recent Kansas City Power & Light Company rate case. (LF 4278; LF 3802).

Staff recommended that the allowed rate case expense be split between Spire East and Spire West 53.5% and 46.5% respectively, based on each division's requested revenue requirement increase. (LF 4278; LF 3802). Staff also recommended that rate case expense be normalized[6] over four years, which is the approximate time between rate cases for both Spire East and Spire West. (LF 4278; LF 3802). Staff proposed one disallowance[7] for the procurement of an outside consulting firm to conduct a Cash Working Capital study. (LF 4278; LF 3802). Staff proposed that the cost of the study

[6] A normalization adjustment is an adjustment made to reflect normal, ongoing operations of the utility. (LF 4242).

[7] The disallowance proposed by Staff would have excluded this component of rate case expense entirely from recovery in rates. Shareholders are responsible for expenses that are disallowed in rates.

should be borne entirely by the shareholders because it was not a prudent expense. (LF 4278; LF 3802).

Spire Missouri's witness testified that the utility purposely takes more "aggressive" positions and builds "a little bit of cushion" into its rate increase requests. (LF 4279; LF 3803). Spire Missouri's rate case expense witness testified that the company never expected to receive the full amount that was requested. (LF 4280; LF 3804). The Commission found that the request for recovery of rate case expense is for the benefit of shareholders and that some of the issues litigated and rate case expenses incurred were solely for the benefit of shareholders. (LF 4279-80; LF 3803-04).

Examples of issues Spire Missouri pursued largely for the benefit of shareholders include employing an outside expert witness to support its recommended return on equity of 10.35%, which is the highest of any large utility in Missouri, and litigating the Forest Park property issue. (LF 4279; LF 3803). Spire Missouri's witness testified that the goal of the rate case is to be awarded its requested return on equity. (LF 4280; LF 3804). Spire Missouri also pursued other unique shareholder-focused ratemaking tools intended to insulate shareholders from risk, including three new tracking mechanisms and a revenue stabilization mechanism.[8] (LF 4279; LF 3803). Spire Missouri also sought utility expenses that are highly discretionary and do not benefit customers, such as incentive compensation for employees tied to earnings per share, a retention mechanism, a one-time adder to return on equity for claimed benefits of acquisitions in Alabama and Mississippi, and for meeting or exceeding performance metrics. (LF 4279-80; LF 3803-04). Such expenses are typically allocated entirely to shareholders. (LF 4279).

The Commission found that it is appropriate for customers to pay some part of rate case expense because customers have an interest in and benefit from just and reasonable rates. (LF 4282; LF 3806). But the Commission also found that in many ways, rate case expense is different from the utility's other operating expenses. (LF 4282; LF 3806). One

[8] The revenue stabilization mechanism proposed by Spire Missouri would have allowed rate adjustments outside of a general rate case to account for changes in customer usage of natural gas. (LF 4313).

reason that rate case expense differs from other expenses is the adversarial nature of the rate case process, where the utility is on one side and the representatives for ratepayers are on another. (LF 4282; LF 3806). Another reason is that rate case expense provides some direct benefits to shareholders that are not shared by ratepayers, such as seeking a higher return on equity. (LF 4282; LF 3806). A third reason for the sharing of rate case expense is that allowing complete recovery of rate case expense from ratepayers allows the utility an inequitable financial advantage over the other parties to the rate case. (LF 4282; LF 3806). The final reason for sharing rate case expense is that allowing the utility full reimbursement of the expense does nothing to encourage reasonable levels of cost containment. (LF 4282; LF 3806).

The Commission found that the company controlled approximately half of the issues that went to hearing. (LF 4283; LF 3807). The Commission determined that the shareholders who controlled 50% of the rate case issues should share 50% of the rate case expense. (LF 4283; LF 3807). The Commission made an exception for the cost of the depreciation study and the cost of the customer notices that were required by rule or by order. (LF 4283; LF 3807). Those costs were allocated entirely to the ratepayers. (LF 4283; LF 3807). The remainder of the rate case expense would be allocated half to ratepayers and half to shareholders. (LF 4284; LF 3804).

Before these rate cases were filed, Public Counsel had filed overearnings complaints against Spire East and Spire West. (LF 4280; LF 3804). The complaints were stayed pending the filing of these rate cases. (LF 4280; LF 3804). The complaints were then consolidated into these rate cases. (LF 4280; LF 3804).

Spire Missouri argued that sharing rate case expense is inappropriate because it was required to file these rate cases by the overearnings complaints and by the Infrastructure System Replacement Surcharge (ISRS) statute. (LF 4284; LF 3808). The Commission found that, while the utility would have been required to participate in the overearnings complaints, it was within the utility's discretion to file the rate cases. (LF 4284; LF 3808). The complaints were ultimately consolidated into the rate cases. (LF 4284; LF 3808). The Commission also found that the ISRS statute did not require Spire

Missouri to file these rate cases. (LF 4284; LF 3808). Spire Missouri was required to file a rate case only if wanted to continue to collect an ISRS surcharge from ratepayers. (LF 4284; LF 3808). Spire Missouri determined that it wanted to continue to collect an ISRS, and it filed these rate cases as a result. (LF 4284; LF 3808).

Staff and Public Counsel each argued that certain rate case expenses incurred by Spire Missouri should be excluded from rates and borne exclusively by shareholders because those expenses were not prudently incurred. (LF 4284; LF 3808). The Commission rejected those proposals and declined to find that any specific item of rate case expense was imprudent. (LF 4284; LF 3808).

Rather than finding specific imprudence, the Commission found that a rate case expense sharing mechanism would act as a sufficient incentive for the utility to manage its costs. (LF 4284-5; LF 3808-9). The Commission ordered that Spire Missouri should recover the full cost of the depreciation study over five years. (LF 4285; LF 3809).

Part of the rate case expense was the cost of Commission-ordered customer notices. (LF 4279; LF 3803). The cost of providing the notices was $436,000. (LF 4279; LF 3803). Gas utilities are required to file a depreciation study every five years. (LF 4279; LF 3803). These rate cases coincided with the filing of the required depreciation study. (LF 4279; LF 3803). The cost of the depreciation study was $54,114. (LF 4279; LF 3803). The Commission determined that the cost of the depreciation study and the cost of the customer notices should not be shared because expenses were required by order or by rule. (LF 4284; LF 3803). The Commission found that these expenses should be borne entirely by the ratepayers. (LF 4282; LF 3803).

The Commission ordered the cost of the customer notices to be normalized over four years. (LF 4285; LF 3809). The Commission ordered that 50% of the remainder of Spire Missouri's rate case expense should be recovered in rates. (LF 4285; LF 3809). The recoverable rate case expense will be recovered over four years, which is the rough equivalent of the length of time between the utility's rate cases. (LF 4285; LF 3809).

Ratemaking treatment of Forest Park property transaction

For several decades before the acquisition of the Spire West service area, Spire East owned and operated three large service centers. (LF 4248). One of the service centers was located near Forest Park in the City of St. Louis. (LF 4248). The Forest Park location provided some services, such as gas procurement, gas controls, and diversion services that were not provided by the other service center locations. (LF 4248).

After the acquisition of the Spire West service area, the company undertook certain restructuring. (LF 4248). The major elements of the restructuring in the St. Louis area were the sale of the Forest Park service center relocation, the termination of the lease for the main corporate office at 720 Olive Street, the lease of the new offices at 700 and 800 Market Street, and the construction of a new satellite operation facility on Manchester Avenue. (LF 4248-9).

To obtain additional negotiation leverage for the potential sale of the Forest Park location, Spire East acquired two adjacent parcels in January 2013. (LF 4249). The cost of the adjacent parcels was $450,000 plus some additional expenses. (LF 4249). These properties were included in the sale of the Forest Park location. (LF 4249).

Spire East entered into an agreement to sell the Forest Park property to The Cortex Innovation Community in St. Louis (Cortex). (LF 4249). Cortex is an urban redevelopment corporation. (LF 4249). Cortex purchased the property for an IKEA retail store that is now located on the site. (LF 4249). As part of the process, Cortex obtained an appraisal of the property. (LF 4249). The appraised value found that the market value of the property with all of its buildings and structures was $6.89 million. (LF 4249). The appraised market value of the property with all of the buildings demolished and removed was $7.44 million. (LF 4249).

Cortex purchased the Forest Park property, including the buildings and other improvements and land, for $8.3 million. (LF 4249). Cortex paid an additional $5.3 million for employee and equipment expenses. (LF 4249). The sale transaction closed in May of 2014. (LF 4249). As part of the agreement, Spire East retained the right to occupy the premises while it coordinated its move to other facilities. (LF 4249-50). The move

from the Forest Park property was coordinated with moves to other facilities and the consolidation of "shared services" employees and functions after the acquisition of Spire West. (LF 4250).

Spire East continued to use portions of the Forest Park property for nearly a year after the sale closed. (LF 4250). Eventually, the company relocated management employees to its Shrewsbury and Berkeley service centers. (LF 4250). Other Forest Park employees were moved to a temporary location nearby.

Spire East placed its newly constructed Manchester Avenue facility into service in November 2016. (LF 4250). The Manchester Avenue facility has approximately 100 employees responsible for construction and maintenance, leak detection and repair, and other functions. (LF 4250). The Manchester Avenue service center allows the company to provide quick emergency response time to the city and also allows it to continue with the accelerated pipe replacement work that it previously performed at the Forest Park location. (LF 4250).

The Manchester Avenue facility was a partial replacement for the Forest Park facility. (LF 4250). It has an approximate $7.7 million rate base value. (LF 4250). The Manchester Avenue facility was the only capital expenditure used to replace the functions of the Forest Park facility. (LF 4250). Its capital cost is substantially greater than that of the Forest Park facility. (LF 4250). The Manchester Avenue facility is more efficient to operate than the Forest Park facility. (LF 4250).

Spire East owned the Forest Park facility for several decades before the sale to Cortex. (LF 4251).The original buildings were fully depreciated many years ago. (LF 4251). However, more recent capital improvements to the property resulted in gross plant additions of approximately $3.3 million, offset by a depreciation reserve of $1.5 million, representing the money that had already been collected from ratepayers, leaving a net rate base asset for the capital improvements of $1.8 million at the time of the sale. (LF 4251).

When the Forest Park buildings were retired for accounting purposes, Spire East credited the Forest Park building asset account by $3.3 million and debited the depreciation account by the same amount. (LF 4251). Because the depreciation reserve

balance associated with the buildings was $1.5 million prior to retirement, a negative reserve debit of $1.8 million now exists. (LF 4251). As a result, ratepayers will continue to pay rates that include the payment of a return on the remaining $1.8 million balance for the Forest Park buildings while at the same time paying for the new Manchester Avenue facility until the rates set in this rate case goes into effect. (LF 4251).

Spire East's gain or profit from the $8.3 million sale price of property previously included in rate base after subtracting the $1.8 million net book value of the buildings and $700,000 for the land was $5.8 million. (LF 4251). Spire East used $1.5 million from the gain on the sale of the Forest Park property to make civic contributions for downtown St. Louis rehabilitation. (LF 4251). Spire East used $1.95 million of relocation proceeds for the purchase of furniture and fixtures at the new offices at 700 and 800 Market Street. (LF 4251-2). However, Spire East recorded these purchases at a "zero" net book value. (LF 4252).

Spire East reported its moving and relocation expenses, but the expenses were not tracked by particular move. (LF 4252). With the exception of a lease expense for one of the temporary locations at a cost of $200,000, it was not clear which expenses were used for moving Forest Park employees and equipment and which were used for moving employees and equipment from Olive Street to Market Street. (LF 4252).

Spire East did not seek Commission authorization prior to the sale of the Forest Park property. (LF 4252).[9] At the time of the sale, the Forest Park property was necessary and useful to the provision of utility service. (LF 4252). At the Commission level, Staff argued that the gain from the sale of the Forest Park should be shared with ratepayers because Spire East sold utility property that was needed for the provision of service that had to be replaced with a new facility at a higher cost. (LF 4252).

Staff proposed that $3.6 million (the $5.7 million relocation proceeds less the documented moving expenses and less the $1.95 million in capital expenditures for

[9] Utilities are required to obtain Commission approval for the sale of assets that are necessary to the provision of the service they provide. Section 393.190, RSMo (2016).

furniture and fixtures) be used to offset the cost of the more expensive Manchester Avenue facility. (LF 4252). The Commission found that Staff's proposal was just and reasonable. (LF 4252).

The Commission found that ratepayers should not continue to pay for property that was replaced with a more expensive property. (LF 4254). The Commission found that the sale of the Forest Park property was not purely a land transaction. (LF 4254). The Forest Park property was necessary for the provision of utility service. (LF 4254). The appraisal that Cortex received was given from the perspective of a client that had no use for the existing structures and would need to clear the land. (LF 4254). At the time of the sale, the buildings on the land were in the utility's rate base and had an undepreciated net book value of $1.8 million. (LF 4254). The Commission found that any return on or of the building costs should have been removed from rates at the time of the sale. (LF 4254).

The Uniform System of Accounts (USoA) used by the Federal Energy Regulatory Commission (FERC) specifies the accounting treatment for the sale of utility assets that constitute an operating unit or system. (LF 4254). Spire East's recording of the sale transaction reduced the building asset account by $3.3. million. (LF 4254). However, the Commission found that the reduction of the depreciation reserve by the same amount does not allow for the recognition of the $1.8 million loss on the retirement of the Forest Park buildings and misrepresents the effect of the sale on the utility's depreciation reserve. (LF 4254).

The Commission ordered Spire East to account for the sale of the Forest Park property in accordance with the USoA by increasing its accumulated depreciation reserve by the $1.8 million loss on the retirement of the Forest Park buildings. (LF 4254). The Commission ordered that neither a return of the $1.8 million undepreciated value of the Forest Park buildings, nor any return on the $1.8 million shall be included in rates going forward. (LF 4254). The Commission found that the remainder of the gain on the sale belongs to the shareholders. (LF 4254).

Spire East partially replaced the Forest Park buildings with the Manchester Avenue facility. (LF 4255). Spire East also received $5.7 million in moving expenses as

part of the sale. (LF 4255). Spire East had to continue using the Forest Park buildings after the sale, and it was necessary to replace a portion of the Forest Park facilities with the more expensive Manchester Avenue facilities. (LF 4255). The Commission found that while the Manchester Avenue facility may be less expensive to operate than the Forest Park facility, it is a much more expensive capital asset than the Forest Park facility and the rates established in this case include this more expensive capital asset. (LF 4255). The Commission found that under these facts, it was appropriate for the Commission to order a portion of the $5.7 million in relocation costs be used to offset the higher costs of this partial replacement facility. (LF 4255).

The Commission found that the actual expenses incurred to relocate Forest Park employees could not be determined from the evidence presented, but that the $200,000 lease expense and the $1.95 million capital contributions should be deducted from the $5.7 million total before the remainder is used to offset the construction cost of the new Manchester Avenue facility. (LF 4255). The Commission adopted the Staff's proposal for Spire East to create a regulatory liability account to record the rate base offset of the relocation expense, which shall be amortized over five years beginning with the effective date of the rates set in this rate case. (LF 4255).

Ratemaking Treatment of Prepaid Pension Asset

Spire East has a collective bargaining agreement with its union employees under which it will offer those employees the option of a lump sum payment at retirement. (LF 4329). Spire East has made pension contributions in excess of those required by federal statutory minimums. (LF 4329). Those contributions were made to avoid the benefit restrictions of the Pension Protection Act and to avoid variable premiums to the Pension Benefit Guaranty Corporation (PBGC). (LF 4329). PBGC is a federal agency created by the Employee Retirement Income Security Act (ERISA) that provides a form of insurance to protect pension benefits in the event of a default by a sponsor of a pension plan. (LF 4322).

The pension asset is a regulatory asset that represents an amount owed by ratepayers for Spire East and Spire West's contributions to the company pension funds

that have not been recovered in rates. (LF 4324). A pension liability is the opposite of a pension asset in that a pension liability is created when the company has recovered more from ratepayers than it has paid in to the pension funds with regard to the authorized regulatory payments. (LF 4324).

Staff, Public Counsel, and Spire East disagree with regard to the amount of Spire East's prepaid pension asset. (LF 4324).

FAS 87 and FAS 88 are financial accounting standards used in generally accepted accounting principles (GAAP). (Ex. 231, Young Rebuttal, p. 9). FAS 87 and FAS 88 accounting standards are used for financial reporting, but they have not always been applied to ratemaking. (Ex. 231, Young Rebuttal, pp. 9-10).

FAS 87 was not used for ratemaking purposes until the effective date of the rates set in Spire East's 1994 rate case. (LF 4327). The Spire East pension asset amount has not been fully litigated for over 20 years. (LF 4325). Staff and Spire East agree that approximately $131.4 million has accumulated in Spire East's pension asset since 1996. (LF 4325). Staff and Spire East disagree as to the amount ratepayers paid in pension expense between 1990 and 1994 for both FAS 87 and FAS 88 , and from 1994 to 1996 for the FAS 88 account.

Spire East argued that between the time it adopted FAS 87 in 1987 and its rate case in 1994, its pension asset accumulated $19.8 million. (LF 4325). Spire East argued that its pension asset accumulated $9 million under FAS 88 between its 1994 rate case and its 1996 rate case. In total, Spire East argues that its prepaid pension asset is $28.8 million higher than Staff's position. (LF 4325).

The Commission adopted many of the findings of Staff witness Matthew Young. (LF 4325). Those findings include the following:

a. Pension expense is an item that is examined and adjusted in every large rate case. Until the current rate case, however, Spire East had not written testimony responsive to Staff's adjustment to the utility's proposed pre-1994 prepaid pension asset. (LF 4325).

b. Spire East did not seek to include a pension asset in its accounting schedules for rate base in any rate case between October 1, 1987 and September 1, 1994. (Ex. 263, Young Surrebuttal, p. 8).

c. In Spire East's various rate cases between October 1, 1987 and September 1, 1994, neither the utility nor Staff's accounting schedules itemized a pension asset in rate base. (LF 4326).

d. Spire East first proposed to include a prepaid pension asset in its rate base in [1996 in] Commission docket number GR-96-193. In that case, Spire East witness Waltermire supported a prepaid pension asset in the utility's rate base estimated at April 30, 1996, to include accrued pension liability and prepaid pension asset account balances for all company-sponsored retirement plans (excluding the SERP[10] and Directors' plans) that had occurred since September 1, 1994, which was the effective date of the tariffs from the utility's GR-94-220 rate case. (LF 4326).

e. Spire East did not seek to include in its rate base all costs deferred after its 1987 implementation of FAS 87 for financial reporting purposes. (LF 4236).

f. Based on the testimony presented in GR-96-193, including Staff witness Doyle Gibbs's direct testimony, both Staff and the utility were in agreement on the methodology to calculate the prepaid pension asset created by the adoption of FAS 87. (LF 4326).

g. Spire East changed the methodology it used to calculate the rate base effect of the prepaid pension asset in [1998 in] its next rate case GR-98-374. The change in methodology is shown in the testimony of Spire East witness [James] Fallert, who was then the controller at Spire East. Mr. Fallert's testimony implied that Spire East no longer calculated its pension asset beginning on September 1, 1994. (LF 4326-7).

[10] Supplemental Executive Retirement Plan

h. In GR-98-374, Staff witness Traxler's direct testimony shows that Staff continued to calculate Spire East's prepaid pension asset beginning with September 1, 1994. (LF 4327).

i. Although Spire East changed its methodology to calculate the rate case effect of the prepaid asset in GR-98-374, Staff has maintained the adjustment to the booked asset in every Spire East rate case since GR-94-220. (LF 4327).

j. Spire East adopted FAS 87 for accounting purposes in 1987. However, FAS 87 was not used for regulatory purposes prior to the effective date of rates in GR-94-220. (LF 4327).

k. Additionally, in Spire East's rate case [in 1992 in] GR-92-165, both Staff and Spire East filed direct testimony supporting the use of cash contributions to set pension expense. Since Staff and Spire East had the same methodology, and other parties did not present a different position, it is likely that rates were set using the current level of cash contribution instead of FAS 87 expense. (LF 4327).

l. The testimony of Staff witness Doyle Gibbs in GR-96-193 recognizing the recording of FAS 88 gains during the review period refutes Spire East's contention that FAS 88 was used during the period prior to September 1, 1994. (LF 4327-8).

The Commission adopted the 1994 stipulation and agreement in GR-94-220 as a resolution of all issues and permitted Spire East to book its pension and other post-employment benefit (OPEB) expenses to FAS 87 and FAS 106[11] accounts, respectively. The report and order in GR-94-220 authorized the deferral of OPEB expenses, SERP, and Directors' pension plans described in paragraphs 8 and 9 of the stipulation and agreement in that case. (LF 4328). However, the report and order is silent as to a deferral of FAS 87 and FAS 88 expenses. (LF 4328). The stipulation and agreement in GR-94-220 states that the parties agree to reflect Spire East's adoption of FAS 87 for all qualified pension plans and that Commission approval of the stipulation and agreement would constitute all

[11] FAS 106 sets out GAAP accounting guidance for OPEB expenses. (Ex. 231, Young Rebuttal, p. 9).

necessary authorization for Spire East to use FAS 87 and FAS 106 for ratemaking purposes. (LF 4328).

The report and order in GR-94-220 approved a stipulation as "a resolution of all issues" in that case. (LF 4330). The report and order stated in relevant part:

3. That [Spire East] be permitted to book its pension and OPEB expenses to FAS 87 and 106 accounts respectively, and shall fund its OPEB accounts in accordance with Section 386.315, RSMo (Supp. 1994).

4. That [Spire East] be permitted to defer and book to Account 186 the OPEB expenses particularly described in paragraph 8 of the Stipulation and Agreement approved by this Report and Order. (LF 4330).

5. That [Spire East] be permitted to defer and book to Account 186 the expenses associated with its SERP and Directors' pension plans particularly described in paragraph 9 of the Stipulation and Agreement approved by this Report and Order. (LF 4330).

Prior to September 1, 1996, when rates from GR-96-193 became effective, accumulated pension assets in FAS 88 were not included in Spire East's cost of service. (LF 4328).

Paragraph 7 of the Commission-approved stipulation from Spire East's 2013 rate case GR-2013-0171 states that Spire East shall be allowed rate recovery for contributions it will make to avoid benefit restrictions specified by the Pension Protection Act of 2006 (PPA). (LF 4329). Spire East contributed funds sufficient to avoid the restrictions outlined the PPA. (LF 4329). The stipulation also states that Spire East can include pension asset contributions in excess of ERISA minimums because they were made to avoid variable premiums from the PBGC. (LF 4330).

The Commission found that the that the testimony showed that parties were using a cash contribution method, and not FAS 87 or FAS 88 accrual accounting prior to the effective date GR-94-220 on September 1, 1994. (LF 4331). The Commission found that the recording of the difference between the utility's pension fund collections and the amount collected in rates began on September 1, 1994 for ratemaking purposes. (LF 4331). The Commission found that the report and order in GR-94-220 supports Staff's

position. (LF 4331). That report and order resolved all of the issues in the case and allowed Spire East to book its pension and OPEB expenses to FAS 87 and FAS 106 accounts. (LF 4331). However, the report and order was silent as to the deferral of any FAS 87 or FAS 88 expenses. (LF 4331). The Commission found that the sworn testimony of Staff and company witnesses knowledgeable of the issues at the time in question to be more persuasive than conclusions drawn by Spire East more than 20 years later, even the conclusions drawn by a company witness who was involved in some of the earlier cases. (LF 4332).

The Commission determined that the appropriate amount of Spire East's prepaid pension asset is approximately $131.4 million. (LF 4332). Staff proposed an eight-year amortization period for the prepaid pension asset, and no other party objected to the proposal. (LF 4332). The Commission accepted the proposal. (LF 4332).

Post-Order Proceedings

Spire Missouri filed tariffs to implement the new rates for Spire East and Spire West. (LF 4235; LF 3759). Spire Missouri also filed timely applications for rehearing of the amended orders. (LF 4183; LF 3711). The Commission denied the applications for rehearing. (LF 5281; LF 5048). Spire Missouri appealed to the Court of Appeals for the Southern District. The Court of Appeals affirmed the amended orders. This Court granted transfer upon Spire Missouri's application under Rule 83.04.

STANDARD OF REVIEW

The Commission's orders and decisions are presumptively valid. *Mo. Am. Water Co. v. Office of Pub. Counsel*, 516 S.W.3d 823, 827 (Mo.banc 2017). In a challenge to a Commission order or decision, "the burden of proof shall be on the party adverse to such commission or seeking to set aside any determination. . .or order of said commission, to show by clear and satisfactory evidence" that the Commission's order or determination "is unreasonable or unlawful as the case may be." Section 386.430, RSMo (2016).

Commission orders and decisions are reviewed under Section 386.510, RSMo (2016) (Supp. 2018). The right to judicial review of the Commission's final orders under Section 386.510 arises under Article V, sec. 18 of the Missouri Constitution. *City of Park*

Hills v. Pub. Serv. Comm'n, 26 S.W.3d 401, 403-4 (Mo. Ct. App. W.D. 2000). The provisions of Section 386.510 are "exclusive and jurisdictional." *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 735 (Mo.banc 2003); Section 386.515, RSMo (2016). The Missouri Administrative Procedures Act serves only to fill in gaps where specific procedures are absent from Chapter 386. *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 344 S.W.3d 178, 184 (Mo.banc 2011).

Under Section 386.510, the Commission's orders and decisions will be affirmed if they are lawful and reasonable. *Mo.-Am. Water,* 516 S.W.3d at 827. An order or decision is lawful if the Commission acted within its statutory authority. *Id.* Legal issues are reviewed *de novo*. *Id.*

An order or decision is reasonable if it is supported by competent and substantial evidence on the record as a whole. *Id*. The Commission's orders and decisions are reasonable if they are not arbitrary or capricious or an abuse of the Commission's discretion. *Praxair, Inc.*, 344 S.W.3d at 184. "The Commission's factual findings are presumptively correct, and if substantial evidence supports either of two conflicting factual conclusions, 'the Court is bound by the findings of the administrative tribunal.'" *AG Processing, Inc*., 120 S.W.3d at 735 (quoting *State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n*, 103 S.W.3d 753, 759 (Mo.banc 2003); *Amway Corp., Inc. v. Dir. of Revenue*, 794 S.W.2d 666, 668 (Mo.banc 1990)). The reviewing court does not reweigh the evidence. *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 186 S.W.3d 376, 382 (Mo. Ct. App. W.D. 2005).

If the facts in the record support either two conflicting conclusions, the reviewing court will defer to the Commission's resolution of the conflict. *State ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n*, 356 S.W.3d 293, 297 (Mo. Ct. App. S.D. 2011). The Commission's decision will be overturned only if it is "clearly contrary to the overwhelming weight of the evidence." *Id*. If the evidence is evenly balanced, "the party having the burden of proof loses; he must sustain his case by the greater weight of the evidence." *In Matter of the Request for an Increase in Sewer Operating Revenues of Emerald Pointe Util. Co.*, 438 S.W.3d 482, 490-1 (Mo. Ct. App. W.D. 2014).

"Where ratemaking is at issue, determinations by the Commission are favored by a presumption of validity." *In the Matter of Kansas City Power & Light Co.'s Request for Authority to Implement a General Rate Increase for Elec. Serv. v. Pub. Serv. Comm'n*, 509 S.W.3d 757, 765 (Mo. Ct. App. W.D. 2016). The courts recognize that the Commission has wide discretion in the setting of just and reasonable rates. *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 328 S.W.3d 329, 341 (Mo. Ct. App. W.D. 2010). The Commission is not bound to any particular method or formula when setting rates. *State ex rel. Mo. Gas Energy*, 186 S.W.3d at 384. On judicial review, the result reached rather than the specific method employed by the Commission is controlling. *Id.* at 385. If the total effect of the rate order is just and reasonable, judicial review is at an end, even if there are infirmities in the method used. *Id.*

This standard of review is applicable to each point relied on.

ARGUMENT

I. The amended orders must be affirmed because they are lawful and reasonable within the meaning of Section 386.510 in that the Commission has the statutory authority to set just and reasonable rates for gas corporations and the Commission's decisions are supported by competent and substantial evidence on the record as a whole and the Commission did not abuse its wide discretion to set rates. (Not responsive to any point relied on).

If an application for transfer is pending in the Supreme Court, the Court of Appeals does not enter a mandate in the case. *Philmon v. Baum*, 865 S.W.2d 771, 774 (Mo. Ct. App. W.D. 1993). If the Supreme Court grants transfer, the Court may then decide the case as an original appeal. *Id.* "The decision of the court of appeals in a case subsequently transferred is of no precedential effect." *Id.* On judicial review of a Commission order, the court reviews the Commission's decision rather than that of the lower court. *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 344 S.W.3d 178, 184 (Mo.banc 2011).

The Court is reviewing the amended orders issued by the Commission in these cases, rather than the decision by the Court of Appeals for the Southern District. For this reason, this brief does not address Spire Missouri's arguments about the alleged errors in Southern District's opinion in detail. The brief instead focuses on the Commission's amended orders.

The amended orders should be affirmed based on the applicable standard of review. Commission orders are reviewed to determine whether they are lawful and reasonable under Section 386.510, RSMo (2016) (Supp. 2019). The Commission has the statutory authority to determine by order or decision what rate is just and reasonable. Section 393.130.1, RSMo (2016); Section 393.140(5), RSMo (2016); Section 393.270.4, RSMo (2016).

Under the reasonableness prong of judicial review, the Commission's orders and decisions are reviewed to determine whether they are supported by substantial and competent evidence upon the whole record. *Praxair, Inc.*, 344 S.W.3d at 184. A reasonable order of the Commission is not arbitrary and capricious, and it is not an abuse of the Commission's discretion. *Id.* The Commission's decisions on factual issues are "presumed to be correct until the contrary is shown, and we are obliged to sustain the Commission's order if it is supported by competent and substantial evidence on the record as a whole." *Love 1979 Partners v. Pub. Serv. Comm'n*, 715 S.W.2d 482, 486 (Mo.banc 1986).

As Spire Missouri points out in its brief, recitations of the standard of review in appellate court decisions often include the statement that the reviewing court views the order and all reasonable inferences in the light most favorable to the Commission's order. (App. Sub. Br. 3). In a case reviewing a decision by the Labor and Industrial Relations Commission (LIRC), this Court held that neither the Missouri Constitution nor the applicable LIRC statute required the reviewing court to "view the evidence and all reasonable inferences therefrom in the light most favorable to the award." *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo.banc 2003). Without the inference, judicial review then depends on whether the agency decision is supported by sufficient

competent and substantial evidence upon consideration of the whole record. *Id.* "This standard would not be met in the rare case when the award is clearly contrary to the overwhelming weight of the evidence." *Id.* The *Hampton* court ultimately upheld the LIRC's award because there was substantial and competent evidence to support the order. *Id.* at 224.

Hampton did not change the presumption in favor of the Commission's factual findings, or the reviewing court's obligation to affirm the Commission's order if it is supported by substantial and competent evidence on the record as a whole. This constitutional standard as codified in Section 386.510 remained the same both before and after *Hampton.* Even if this Court determines that reviewing courts do not need to view the Commission's order and all reasonable inferences in the light most favorable to the order, the amended orders must be affirmed under the *Hampton* standard.

As discussed more fully in the points below, all of the Commission decisions in this case are supported by sufficient competent and substantial evidence on the record when considered as a whole, as required by the Section 386.510 standard of review. None of the Commission's decisions are clearly contrary to the overwhelming weight of the evidence. Where Spire Missouri did not prevail on an issue, the Commission determined that the utility did not meet its burden of proof under Section 393.150.2, RSMo (2016).

Spire Missouri's contentions that the Commission ignored or disregarded evidence are also in error and misunderstand what is necessary for a Commission order to contain adequate facts for judicial review. While the Commission must avoid making merely conclusory findings, the standard for the adequacy of the Commission's factual findings is a flexible one. *State ex rel. KCP&L Greater Mo. Operations Co. v. Pub. Serv. Comm'n*, 406 S.W.3d 153, 162 (Mo. Ct. App. W.D. 2013). The facts are adequate if they are "sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence." *Id*. (internal quotation and citation omitted). The reviewing court should not have to speculate as to

which evidence the Commission believed. *Id*. It is not necessary for the Commission's order to go into evidentiary detail to be valid. *Mo. Gas Energy*, 186 S.W.3d at 382.

The amended orders in this case meet this standard. The Commission's findings are not merely conclusory. The amended orders state which evidence the Commission believed and found to be persuasive. It is not necessary for the Court to resort to the record to determine which evidence the Commission relied on to make its decision. The amended orders do not have to discuss or examine every piece of evidence or position in the case to be valid. The Commission's decision is not clearly contrary to the overwhelming weight of the evidence. The amended orders afford the Court the opportunity to undertake meaningful judicial review.

The amended orders are lawful and reasonable and should be affirmed on this point.

II. The amended orders must be affirmed because the Commission's decision to disallow of portion of Spire Missouri's rate case expense is lawful and reasonable within the meaning of Section 386.510 in that the Commission has the authority to set just and reasonable rates and to determine how a utility's operating expenses are treated for ratemaking purposes. (Responds to Point I of Appellant's points relied on).

a. The Commission has the statutory authority to determine how rate case expense should be treated in Spire Missouri's rates.

Spire Missouri's reliance on the prudence standard articulated in *Associated Natural Gas* is misplaced. It is correct that in the case of some statutory and single issue ratemaking mechanisms, the Commission is required to allow utilities to recover prudently incurred costs. Examples of such statutes and mechanisms include Section 386.266, RSMo (2016) (authorizing the Commission to approve fuel adjustment clauses and environmental cost recovery mechanisms), Section 393.1400, RSMo (2016) (Supp. 2018) (authorizing the use of plant in service accounting for certain plant additions) and the Purchased Gas Adjustment (PGA) mechanism at issue in *Associated Natural Gas.*

Unlike these statutory and tariff mechanisms, in a general rate case the Commission takes all factors that it deems to be relevant to the proper determination of rates into account when it sets general rates. Section 393.270.4, RSMo (2016). The rates set by the Commission must be "just and reasonable." Section 393.130.1, RSMo (2016). The Commission must construe these statutes liberally "with a view to. . .substantial justice between patrons and public utilities." Section 386.610, RSMo (2016). If a utility requests a rate increase, the burden of proof is always on the utility to prove that the proposed increase is just and reasonable. Section 393.150.2, RSMo (2016); *Office of Pub. Counsel v. Pub. Serv. Comm'n*, 409 S.W.3d 371, 376 (Mo.banc 2013).

In a case involving the application of the presumption of prudence in cases involving affiliate transactions between utilities, this Court has noted that the presumption of prudence "is not a creature of statute or regulation." *Id.* It is an evidentiary presumption created by the Commission. *Id.* at 379. The presumption of prudence "cannot be applied inconsistently with the PSC's governing statutes and rules." *Id.* The presumption of prudence cannot shift the burden of proving that a proposed rate increase is just and reasonable away from the utility. *Id*.

The Commission's governing statutes do not explicitly require the application of the presumption of prudence to rate cases. The existence of the presumption of prudence also does not prevent the Commission from determining that the just and reasonable treatment of rate case expense is to allocate that expense between ratepayers and shareholders. There is nothing in the relevant ratemaking statutes that requires the Commission to award a utility the total amount of any prudently incurred expense in rates. To the contrary, the Commission has the authority to determine how operating expenses are treated for ratemaking purposes. *State ex rel. City of West Plains v. Pub. Serv. Comm'n*, 310 S.W.2d 925, 928 (Mo.banc 1958). The Commission can even deny recovery of some expenses entirely. Each rate case must be decided on its own facts. *Mo. Gas Energy*, 186 S.W.3d at 387.

The Commission has the authority to entirely disallow rate recovery of expenses that benefit shareholders rather than ratepayers. The Commission identified such

expenses sought by Spire Missouri in this case, including highly discretionary expenses such as incentive compensation for employees tied to earnings per share, a retention mechanism, a one-time adder to return on equity for claimed benefits of acquisitions in Alabama and Mississippi, and meeting or exceeding performance metrics, and a revenue stabilization mechanism that would have allowed for rate adjustments outside of a general rate case. (LF 4279-80; LF 3803-04). These kinds of expenses are normally excluded from rates and are allocated entirely to shareholders. (LF 4279; LF 3803). The Commission disallows these expenses regardless of whether or not they were prudently incurred. Spire Missouri does not cite any authority for the proposition that the Commission must permit rate recovery of every prudently incurred expense. As a matter of law, the Commission must determine whether the inclusion of an expense in rates yields a just and reasonable result. Section 393.130, RSMo (2016); Section 393.150, RSMo (2016).

The Commission found that rate case expense has benefits for both ratepayers and shareholders. (LF 4276; LF 3800). The benefit to ratepayers arises from being served by a financially healthy utility. (LF 4276; LF 3800). The utility and its shareholders benefit directly from rate case expense because those costs are generally incurred to ensure that the utility and its shareholders have an opportunity to receive a reasonable return on the investment in the utility through the rates that the utility is authorized to charge. (LF 4276; LF 3800).

The Commission found that it is appropriate for customers to pay some part of rate case expense because customers have an interest in and benefit from just and reasonable rates. (LF 4282; LF 3806). But the Commission also found that in many ways, rate case expense is different from the utility's other operating expenses. (LF 4282; LF 3806). One reason that rate case expense differs from other expenses is the adversarial nature of the rate case process, where the utility is on one side and the representatives for ratepayers are on another. (LF 4282; LF 3806). Another reason is that rate case expense provides some direct benefits to shareholders that are not shared by ratepayers, such as seeking a higher return on equity. (LF 4282; LF 3806). A third reason for the sharing of rate case

expense is that allowing complete recovery of rate case expense from ratepayers allows the utility an inequitable financial advantage over the other parties to the rate case. (LF 4282; LF 3806). The final reason for sharing rate case expense is that allowing the utility full reimbursement of the expense does nothing to encourage reasonable levels of cost containment. (LF 4282; LF 3806).

The fact that Spire Missouri has had historically low levels of rate case expense is not relevant to the Commission's decision in these rate cases. (LF 4277; LF 3801). The Commission's decision here was based on the facts underlying these cases, where Spire Missouri incurred higher rate case expenses than it has done in prior rate cases. (LF 4277; LF 3801). The Commission identified several factors in support of the sharing of rate case expense in these cases.

The Commission found that Spire Missouri pursued many issues that benefit shareholders more than they benefit ratepayers. Examples of issues Spire Missouri pursued largely for the benefit of shareholders include employing an outside expert witness to support its recommended return on equity of 10.35%, which is the highest of any large utility in Missouri, and litigating the Forest Park property issue. (LF 4279; LF 3803). Spire Missouri's witness testified that the goal of the rate case is to be awarded its requested return on equity. (LF 4280; LF 3804). Spire Missouri also pursued other unique shareholder-focused ratemaking tools intended to insulate shareholders from risk, including three new tracking mechanisms and a revenue stabilization mechanism. (LF 4279; LF 3803). Spire Missouri also sought utility expenses that are highly discretionary and do not benefit customers, such as incentive compensation tied to earnings per share, a retention mechanism, a one-time adder to return on equity for claimed benefits of acquisitions in Alabama and Mississippi, and performance metrics. (LF 4279-80; LF 3803-04). Such expenses are typically allocated entirely to shareholders. (LF 4279).

The Commission also found that Spire Missouri had taken positions and adopted litigation strategies that are more beneficial to shareholders than ratepayers. Spire Missouri stated that it purposely takes more "aggressive" positions and builds "a little bit of cushion" into its rate increase requests. (LF 4279; LF 3803). Spire Missouri's rate case

expense witness testified that the company never expected to receive the full amount that was requested. (LF 4280; LF 3804). The Commission found that the request for recovery of rate case expense is for the benefit of shareholders and that some of the issues litigated and rate case expenses incurred were solely for the benefit of shareholders. (LF 4279-80; LF 3803-04).

The Commission had to determine whether Spire Missouri has met its burden of proving that the inclusion of the entire amount of rate case expense in rates was just and reasonable. It was lawful and reasonable for the Commission to conclude that Spire Missouri had not met that burden. Under the applicable statutes, it was lawful for the Commission to determine how rate case expense should be treated for ratemaking purposes. Under the specific facts of this case, it was reasonable for the Commission to determine that some sharing of rate case expense was appropriate.

b. The Commission's decision to use a sharing mechanism for rate case expense has recently been affirmed.

The Commission has recently required other utilities to share rate case expense between shareholders and ratepayers. *In the Matter of Kansas City Power & Light Co.'s Request for Authority to Implement a General Rate Increase for Elec. Serv. v. Pub. Serv. Comm'n*, 509 S.W.3d 757 (Mo. Ct. App. W.D. 2016) (*KCPL*). In that recent rate case for Kansas City Power & Light (KCPL), the Court of Appeals held that the Commission could lawfully and reasonably allocate rate case expense between shareholders and ratepayers. *Id.* at 778-9. The Commission's decision to allocate rate case expense was affirmed without a finding by the Commission that any specific rate case expenditure was imprudent. *Id.* at 778.

The facts pertinent to rate case expense in this case are similar to the facts present in *KCPL*. Here, as in *KCPL*, the Commission found that prudence alone was not the only consideration in determining the level of rate case expense to be included in rates. (LF 4276; LF 3800). It is also necessary to consider the benefits to the ratepayers in deciding the justness and reasonableness of an expense to be determined in rates. (LF 4276; LF 3800). As in *KCPL*, the Commission found that it was just and reasonable to allocate rate

case expense between shareholders and ratepayers. (LF 4282; LF 3806). Because there is no meaningful way to distinguish this case from *KCPL*, the holding in that case should be followed here.

c. Spire Missouri was not required to file this rate case.

Spire Missouri's claim that it had no choice but to file the rate case is overstated. The company voluntarily requested and had been authorized to collect a surcharge for eligible ISRS projects. (LF 4284; LF 3808). The ISRS statute provides that the authority to collect the surcharge can only be granted within three years of the company's most recent general rate case. Section 393.1012.3, RSMo (2016). The ISRS statute does not require the gas corporation to file a rate case, it only limits the length of time a surcharge can be collected.

The Commission noted that the ISRS statute did not require Spire Missouri to file these rate cases. (LF 4284; LF 3808). But even if the company had been required to file the rate cases, it would not necessarily follow that the total amount of rate case expense should be allocated to ratepayers. The Commission would still have the authority to determine that some of the rate case expense should be allocated to shareholders for the same reasons that the Commission found persuasive here, such as the fact that Spire Missouri took positions and pursued issues that were intended primarily to benefit shareholders rather than ratepayers. The provisions of the ISRS statute do not dictate a contrary result.

d. Spire Missouri has misrepresented the level of sharing of rate case expense ordered by the Commission.

Spire Missouri's repeated assertions that the Commission disallowed nearly half of its rate case expense is wrong. Spire Missouri's rate case expense at the time the amended order was issued was approximately $1.3 million.[12] (LF 4277; LF 3801). The Commission found that certain rate case expense items should be borne entirely by

[12] The actual amount of rate case expense would change slightly after the amended orders were issued to reflect additional costs associated with implementing the new rates and legal expenses associated with the judicial review process.

ratepayers and not shared between ratepayers and shareholders. (LF 4824; LF 3803). The $436,000 cost of the customer notices and the $54,114 cost of the depreciation study were not shared. (LF 4284; LF 3803).

After these expenses are deducted from the total amount of rate case expense, expenses of approximately $809,888 remain to be divided between ratepayers and shareholders. Ratepayers will pay $409,944 of this total. Combined with the cost of the depreciation study and the cost of the customer noticed, ratepayers will pay $895,058 in rate case expense. Shareholders will absorb only the remaining $409,944, a total that is much less than half of the total rate case expense allocated to ratepayers by the Commission. The decision in this case is lawful and reasonable within the meaning of Section 386.510 because it is supported by the record as a whole, whether or not all reasonable inferences supporting the order are considered.

The amended orders are lawful and reasonable and should be affirmed on this point.

e. The amended orders must be affirmed because they are lawful and reasonable within the meaning of Section 386.510 in that the Commission's factual findings support the allocation of rate case expense between ratepayers and shareholders. (Responds to Point II of Appellant's points relied on).

The Commission may take into account anything which it deems relevant to the determination of a just and reasonable rate. Section 386.270.4, RSMo (2016). Each rate case must be decided on its own facts. *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 186 S.W.3d 376, 387 (Mo. Ct. App. W.D. 2005). The Commission has wide discretion in the ratemaking process, and it is not bound by any specific method or formula. *Id*. at 384. A rate decision by the Commission will not be overturned on judicial review unless the overall result is unjust or unreasonable. *Id.* at 385.

The findings that the Commission made in favor of sharing rate case expense between ratepayers and shareholders are supported by the record. First, the rate case process is adversarial in nature. The utility has the burden of proving that its requested rate increase is just and reasonable. Section 393.150.2, RSMo (2016). Staff is tasked with

auditing the utility's request and making its own recommendation to the Commission as to what rate is just and reasonable. 20 CSR 4240-2.010(10). Public Counsel participates in rate cases on behalf of the utility's ratepayers. Section 386.710, RSMo (2016).

The parties in this case did take positions that were adversarial and contested. (LF 4283; LF 3807). The differences between the parties' positions required the Commission to hold an evidentiary hearing to resolve them. (LF 4237; LF 3761). The Commission found that Spire Missouri took aggressive positions in this case and raised issues that were primarily intended to benefit shareholders rather than ratepayers. (LF 4279; LF 3803). Spire Missouri's speculation that other parties in this case did not settle issues because of the possibility that rate case expense would be shared is not supported by the record. Spire Missouri's first reason for its contention that is was arbitrary and capricious for the Commission to order the sharing of rate case expense in this case must be rejected.

The Commission found that rate cases can benefit both shareholders and ratepayers. (LF 4282; LF 3806). The Commission did not ignore evidence of benefits to the shareholders. The Commission allocated most of the rate case expense to the ratepayers, including the full cost of the customer notices and the full cost of the depreciation studies. (LF 4284; LF 3803). But the Commission also found that some of the issues Spire Missouri brought to the hearing were primarily for the benefit of shareholders. (LF 4279-80; LF 3803-4). It was within the Commission's discretion to allocate the rate case expense between those who benefit from rate cases. Spire Missouri's second reason for its contention that the Commission's decision to allocate rate case expense between ratepayers and shareholders was arbitrary and capricious must be rejected.

The Commission found that allowing the utility to recover all of its rate case expenses put other parties at a financial disadvantage. (LF 4282; LF 3806). The company will recover the entire cost of its salaried lawyers and experts through rates. (LF 4275-6; LF 3799). Spire Missouri will have to bear some of the cost only for the outside experts and witnesses it hired for the rate case. (LF 4275; LF 3799). None of the other parties to

the case will receive any recompense for the expenses they incurred to litigate this case. (LF 4277; LF 3801). Government entities such as Public Counsel have limited budgets and resources. (LF 4277; LF 3801). Spire Missouri's third reason for its contention that the Commission's decision to allocate rate case expense between ratepayers and shareholders was arbitrary and capricious must be rejected.

The Commission found that allocating rate case expense between shareholders and ratepayers encourages the utility to contain rate case expenses. (LF 4282; LF 3806). The Commission has the authority to determine how operating expenses are treated for ratemaking purposes. *City of West Plains v. Pub. Serv. Comm'n*, 310 S.W.2d 925, 928 (Mo.banc 1958). There are some expenses that the Commission typically disallows from rates entirely. (LF 4284; LF 3803).

The Commission is not exercising control over the utility when it disallows an expense. The utility can continue to incur those expenses, although the Commission may determine that it is unjust and unreasonable for customers to pay for those expenses in rates. In this case, the Commission found that it was just and reasonable for rate case expense to be shared between ratepayers and shareholders. Spire Missouri's fourth reason for its contention that the Commission's decision to allocate rate case expense between ratepayers and shareholders was arbitrary and capricious must be rejected.

The Commission noted that Spire Missouri has typically had low levels of rate case expense compared to other utilities in Missouri. (LF 4277; LF 3801). However, Spire Missouri's past rate case expenses are not relevant to this case. Each rate case must be decided on its own facts. *Mo. Gas Energy*, 186 S.W.3d at 384.

In this case, the Commission found that the company had incurred a high level of rate case expense. Spire Missouri's witness testified that the company requested a larger rate increase than it expected to receive. (LF 4280; LF 3804). The company also took aggressive positions in the rate case and litigated several issues that were mostly intended to benefit shareholders. (LF 4279; LF 3803). Spire Missouri sought the highest ROE of any large utility in the state. (LF 4279; LF 3803). Under the facts of this case, the Commission determined that it was just and reasonable for rate case expense to be shared

between ratepayers and shareholders. Spire Missouri's fifth reason for its contention that the Commission's decision to allocate rate case expense between ratepayers and shareholders was arbitrary and capricious must be rejected.

The Commission's decision to allocate rate case expense between shareholders and ratepayers is not a penalty. The Commission made extensive findings in support of the justness and reasonableness of the rate case sharing mechanism adopted in this case. Those findings are supported by the competent and substantial evidence on the record as a whole. Spire Missouri did not meet its burden of proving that it was just and reasonable for it to recover all of its rate case expense from ratepayers. The fact that Spire Missouri did not receive everything it asked for is not the same as being penalized. Spire Missouri's final reason for its contention that the Commission's decision to allocate rate case expense between ratepayers and shareholders was arbitrary and capricious must be rejected. The decision in this case is lawful and reasonable within the meaning of Section 386.510 because it is supported by the record as a whole, whether or not all reasonable inferences supporting the order are considered.

The amended orders are lawful and reasonable and should be affirmed on this point.

III. The amended order for Spire East should be affirmed because it is lawful and reasonable within the meaning of Section 386.510 in that the Commission's treatment of the Forest Park property transaction was not retroactive ratemaking and the accounting adjustment made by the Commission was not arbitrary and capricious under the facts of this case. (Responds to Point III of Appellant's points relied on).

a. The Commission did not engage in unlawful retroactive ratemaking.

The Commission has the authority to determine the rate to be charged for gas service. Section 393.270.4, RSMo (2016). Retroactive ratemaking is generally prohibited in Missouri. *State ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n*, 356 S.W.3d 293, 317 (Mo. Ct. App. S.D. 2011). Retroactive ratemaking is "the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the

rate actually established". *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 311 S.W.3d 361, 365 (Mo. Ct. App. W.D. 2011) (internal citation omitted). The Commission may not redetermine past rates and order a refund or credit based on past excessive recovery. *State ex rel. Util. Consumers Council of Mo. v. Pub. Serv. Comm'n*, 585 S.W.2d 42, 58 (Mo.banc 1979) (*UCCM*). That backward-looking determination would be unlawful retroactive ratemaking. *Id.* Retroactive ratemaking is prohibited because it is a violation of due process. *Noranda Aluminum, Inc.*, 365 S.W.3d at 317.

The Commission may consider past excess recovery to the extent that it is relevant to what rate is just and reasonable to be recovered going forward. *UCCM*, 585 S.W.2d at 58. The consideration of past excess recovery as part of the determination of future rates is not retroactive ratemaking. *Id.*

The Commission did not engage in unlawful retroactive ratemaking. The Commission did not determine that Spire East ratepayers should get a refund or a credit for the rates they paid prior to this rate case or otherwise determine that Spire East's past rates were unjust or unreasonable. (LF 4255). Instead, the Commission determined how rates going forward should reflect the sale of the Forest Park property and the relocation of the operations that used to be performed at that property. (LF 4255).

The Commission's resolution of this issue was entirely forward-looking. As of the rates set in this rate case, the ratepayers are no longer paying for the $1.8 million cost of the undepreciated Forest Park assets that were retired (known as the return of the utility's investment in those assets), and they are no longer paying the utility a return on those assets. (LF 4251). Spire East retained the money collected from the ratepayers to pay a return on and a return of the retired assets from the time of the sale until the time of the rates set in this case went into effect. (LF 4251). The Commission made no attempt to return any of those funds to ratepayers.

The Commission's ratemaking treatment of the relocation proceeds is also forward-looking. While the Manchester Avenue facility has lower operating expenses than Forest Park, it is a much more expensive capital asset than Forest Park. (LF 4250). Ratepayers are paying those higher capital costs as part of their current rates. (LF 4255).

The Commission found that under the relevant facts of the whole transition from the old facility to the new facility, it was appropriate for a portion of the $5.7 million in relocation expenses received by Spire East to be reflected as an offset to the higher capital costs being paid by ratepayers as a result of this rate case. (LF 4255). Under Staff's proposal as adopted by the Commission, $200,000 in lease expenses and $1.95 in capital contributions were retained by the utility. The remaining $3.5 million of relocation proceeds will be used to reflect an offset to the construction costs of the Manchester Avenue facility over a five year period beginning with the rates set in this case. (LF 4255). The Commission made no findings on this issue with respect to the utility's past rates, and the Commission's ratemaking treatment of the relocation proceeds is not retroactive ratemaking. As discussed more fully below, the Commission instead properly considered an amount that occurred outside of the test year to set rates prospectively.

b. The inclusion of the Forest Park property transaction in rates is a proper exercise of the Commission's authority to include events occurring outside of the test year if certain criteria are met.

"The accepted way in which to establish future rates is to select a test year upon the basis of which past costs and revenues can be ascertained as a starting point for future projection." *State ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n*, 645 S.W.2d 44, 53 (Mo. Ct. App. W.D. 1982). "A test year is a tool used to find the relationship between investment, revenues, and expenses." *State ex rel. GTE North, Inc. v. Pub. Serv. Comm'n*, 835 S.W.2d 356, 368 (Mo. Ct. App. W.D. 1992). It is common for adjustments to be made to the test year in the ratemaking process. *Id.* Normalization adjustments are made to "eliminate non-recurring items of expenses or revenues." *Id.* Annualization adjustments are made to "reflect the end-of period level of investment, expenses and revenues." *Id.*

"Adjustments are also made for events occurring outside the test year." *GTE North, Inc.*, 835 S.W.2d at 368. An event occurring outside of a test year can be used to set rates if it meets certain criteria. *Id.* Three factors must be met for rates to include an

event outside of the test year. *Id*. First, the effect of the event must be "known and measurable." *Id.* (internal quotation omitted). Second, inclusion of the event must "promote[] the proper relationship of investments, revenues, and expenses." *Id.* Finally, the event must be representative of the conditions anticipated during the time the rates will be in effect. *GTE North, Inc.*, 835 S.W.2d at 368.

The USoA adopted by the Commission prescribes specific treatment for the sale of utility assets that are an operating unit or system as follows:

> F. When gas plant constituting an operating unit or system is sold, conveyed, or transferred to another by sale, merger, consolidation, or otherwise, the book cost of the property sold or transferred to another shall be credited to the appropriate utility plant accounts, including amounts carried in account 114, Gas Plant Acquisition Adjustments. The amounts (estimated if not known) carried with respect there-to in the accounts for accumulated provision for depreciation, depletion, and amortization and in account 252, Customer Advances for Construction, shall be charged to such accounts and the contra entries made to account 102, Gas Plant Purchased or Sold. Unless otherwise ordered by the Commission, the difference if any, between (a) the net amount of debits and credits and (b) the consideration received for the property (less commissions and other expenses of making the sale) shall be included in account 421.1, Gain or Disposition of Property, or account 421.2 Loss on Disposition of Property (see account 102, Gas Plant Purchased or sold).

18 C.F.R. § Pt. 201, Gas Plant Instructions, 5. *Gas Plant purchased or sold, F*.

The sale of the Forest Park property and the relocation of its operations meet the criteria for an event outside of the test year to be reflected in rates. The first criterion is met because the rate effects associated with the Forest Park property transaction are known and measurable. The Forest Park property's original buildings had been fully depreciated for many years. (LF 4251). However, there had been more recent capital improvements to the property. (LF 4251). Those improvements resulted in additional gross plant of approximately $3.3 million, offset by a depreciation reserve of $1.5

million. (LF 4251). The additional gross plant less the depreciation reserve made a net rate base asset for the capital improvements of $1.8 million that was still being collected in the rates in effect at the time of the sale. (LF 4251). Spire East proposed the continued inclusion of this net rate base asset in the rates it proposed to initiate this rate case. Spire East cannot claim on the one hand that this amount should continue to be included in rates while at the same time claiming that the inclusion of the net rate base asset representing the retired Forest Park plant is retroactive ratemaking or that the transaction should be disregarded for ratemaking purposes.

When the Forest Park buildings were retired for accounting purposes, Spire East credited the Forest Park building asset account by $3.3 million and debited the depreciation account by the same amount. (LF 4251). The depreciation reserve balance associated with the building was $1.5 million before retirement, leaving a negative reserve debt of $1.8 million. (LF 4251). A negative reserve debt means that ratepayers will continue to pay rates that include a rate of return on that $1.8 million rate balance while at the same time paying for the new Manchester Avenue facility. (LF 4251).

Spire East's gain or profit from the $8.3 million sale of the Forest Park property previously included in rates was $5.8 million. (LF 4251). Spire East used $1.5 million from the gain on the sale to make civic contributions to the rehabilitation of downtown St. Louis and $1.95 million of the sale proceeds on the purchase of furniture and fixtures at the new Market Street offices. (LF 4251-2). Those purchases were recorded by Spire East as having zero net book value, an action that had no benefit to customers at the time of the transaction. (LF 4252). The benefit to customers was realized only with the effective date of the rates set in this rate case. (Ex. 251, Kunst Surrebuttal, p. 6).

With the exception of $200,000 in lease expenses, it was not possible to determine exactly which moving and relocation expenses recorded by Spire East were due to the move from Forest Park to Manchester and which expenses were due to the move from the Olive Street location to the Market Street location. (LF 4255). Staff's proposed treatment of the Forest Park property transactions included a reduction for the known lease expenses and capital contributions. (LF 4255). The remainder will be placed in a

regulatory liability account and used as a rate base offset for the Manchester Avenue facility that will be amortized over five years. (LF 4255). This result is a just and reasonable treatment of the known and measurable effects of the sale of the Forest Park property, and it satisfies the first part of the test for inclusion of an event that occurred outside of the test year in rates.

The second criterion is met because including the Forest Park property transactions in rates promotes the proper relationship between Spire East's capital investments, its revenues, and its expenses. Spire East must use the Uniform System of Accounts (USoA) used by the FERC, as adopted by the Commission. (LF 4254). The USoA specifies the accounting treatment for the sale of utility assets that constitute an operating unit or system. (LF 4254). Spire East's recording of the sale transaction reduced the building asset account by $3.3 million. (LF 4254). But the Commission found that the utility's reduction of the depreciation reserve by the same amount did not allow for the recognition of the $1.8 million loss on the retirement of the Forest Park buildings and misrepresented the effect of the sale on the depreciation reserve. (LF 4254).

The Commission ordered the utility to account for the sale of the Forest Park transaction in accordance with the USoA by increasing its accumulated depreciation reserve by the $1.8 million that was still undepreciated at the time of the retirement of the Forest Park buildings. (LF 4254). Before the current rate case, ratepayers had continued to repay this $1.8 million plus a return on those plant assets in rates after the plant was retired and no longer in service. The Commission ordered that neither a return on the $1.8 million undepreciated value of the Forest Park buildings, nor any return of that $1.8 million would be included in rates going forward. (LF 4254). The Commission found that the remaining $5.8 million gain properly belonged to the shareholders. (LF 4254). The Commission's ordered treatment of the Forest Park transaction satisfies the second criterion for inclusion of a transaction occurring outside of the test year because it reflects the proper relationship between the utility's capital investments, revenues, and expenses, as required by the USoA. (LF 4254).

The third criterion for inclusion of this event in rates is met because the Forest Park property transaction and its aftermath are representative of the conditions anticipated during the time the rates will be in effect. At the time of the sale, the buildings on the Forest Park property were in Spire East's rate base and had an undepreciated net book value of $1.8 million. (LF 4254). The Commission found that any return of the building costs or the return on those costs should have been removed from rates at the time of the sale. (LF 4254).

The assets on the Forest Park property were necessary for the provision of utility service at the time of the sale. (LF 4254). Spire East continued to use portions of the Forest Park property for nearly a year after the sale closed. (LF 4250). Other Forest Park employees were temporarily moved to a nearby location. (LF 4250). Management employees were moved to the company's Shrewsbury and Berkeley service centers. (LF 4250).

Spire East partially replaced the Forest Park property with the Manchester Avenue facility. (LF 4255). The new Manchester Avenue facility has approximately 100 employees responsible for construction and maintenance, leak detection and repair, and other functions. (LF 4250). The new facility allows Spire East to provide quick emergency service response time to the city. (LF 4250). The new facility also allows the utility to continue with the accelerated pipe replacement work that it previously performed at the Forest Park location. (LF 4250).

The new Manchester Avenue facility has an approximate rate base value of $7.7 million. (LF 4250). That new facility was the only capital expenditure in this case used to replace the functions of the Forest Park facility. (LF 4250). The Manchester Avenue is more efficient to operate than the Forest Park facility. (LF 4250). Its capital cost is substantially larger than that of the Forest Park facility. (LF 4251). The Commission found that ratepayers should not continue to pay for the Forest Park assets that were replaced by the Manchester Avenue assets that are now incorporated in rates. (LF 4254). The exclusion of the undepreciated Forest Park assets from rates and the inclusion of the Manchester Avenue assets in rates reflects that situation that will exist while the rates that

are set in this case will be in effect. The third and final criterion for inclusion of this event that occurred outside of the test year has been met.

It was appropriate for the Commission to consider the effects of the Forest Park property transaction in this rate case, even though the transaction did not occur during the test year. It was especially appropriate for the Commission to consider those effects here because this is the first rate case decided since the transaction occurred and the first time the transaction could be reflected in rates. (LF 4252).

c. The Commission is not bound by *stare decisis*.

The Commission is not bound to follow its own prior decisions. *AG Processing, Inc.*, 120 S.W.3d at 736. As long as the decision is otherwise lawful and reasonable, the fact that the Commission has previously made a different decision is not grounds for reversal. *State ex rel. Aquila, Inc. v. Pub. Serv. Comm'n*, 326 S.W.3d 20, 32 (Mo. Ct. App. W.D. 2010). Nor are the courts required to follow the Commission's prior decisions. *AG Processing, Inc.*, 120 S.W.3d at 736.

The Commission's decision about how the Forest Park transaction should be treated for ratemaking purposes was reasonable based on the facts of this case. Under the Commission's decision, the shareholders retained most of the gain realized from the sale. (LF 4254). The Commission removed from rates only the $1.8 million for the undepreciated Forest Park assets that were taken out of service and $700,000 for the value of the land that is no longer owned by the utility. (LF 4254). The rates set in this case also include an offset to the relocation expenses Spire East received at the time of the sale to reflect the lease expenses and capital contributions that Spire East made as part of the relocation of functions from Forest Park to Manchester Avenue. (LF 4255). The remainder of the relocation costs will be allocated to a regulatory liability account to lower the cost of the Manchester Avenue construction over the five year period beginning with the rates set in this case.

Spire Missouri's arguments about what the Commission has done in past cases are not relevant here. The relevant question is whether or not the rates set by the Commission

in this case are just as reasonable. Because the rates are just and reasonable, the amended order must be affirmed.

c. The Commission's decision is not a penalty.

Spire East's contention that the Commission's decision in this case was made to penalize Spire East for engaging in the sale of the Forest Park facility is false. While the Commission noted that there was no approval of the sale nor any adjustment to rates made at the time of the transaction, there is nothing in the amended order to indicate that the reasons that the Commission enumerated for taking the transaction into account were punitive or retaliatory. This is a rate case in which Spire Missouri bore the burden of proof, not a complaint case in which the complainant would have had the burden of proof. The Commission found that the facts did not support Spire East's position on the Forest Park transaction.

Spire East's speculative arguments about what may or may not have happened in a complaint case are irrelevant. Its arguments about whether or not the sale of the Forest Park property was necessary or whether the facility could have continued in operation are also irrelevant because they are based on hypothetical facts and not the facts that were before the Commission. This Court does not need to reach the issue of whether or not Section 393.190 applied to the Forest Park transaction to resolve this case, so Spire East's speculations on that point can be disregarded as well. The decision in this case is lawful and reasonable within the meaning of Section 386.510 because it is supported by the record as a whole, whether or not all reasonable inferences supporting the order are considered. Spire East cannot sustain it burden of proving by "clear and satisfactory evidence" under Section 386.430, RSMo (2016) that the amended order for Spire East is unlawful or unreasonable on this point.

The amended order for Spire East should be affirmed on this point.

IV. The amended order for Spire East should be affirmed because it is lawful and reasonable within the meaning of Section 386.510 in that the Commission's treatment of Spire East's pension asset is supported by substantial and competent evidence on the record as a whole. (Responds to Point IV of appellant's Points Relied On).

Matters of witness credibility are left to the Commission. *State ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n*, 356 S.W.3d 293, 297 (Mo. Ct. App. S.D. 2011). The Commission may believe some, all, or none of a witness's testimony. *Id*. If there is evidence supporting conflicting factual conclusions, the reviewing court will defer to the Commission's factual conclusions. *Id*. The Commission's resolution of a factual issue will be overturned only if it is clearly contrary to the overwhelming weight of the evidence. *Id.* (internal citation and quotation omitted). The utility has the burden of proving that a requested rate increase is just and reasonable. Section 393.150.2, RSMo (2016). The party bearing the burden of proof must meet this burden by the greater weight of the evidence. *Emerald Pointe Util. Co.*, 438 S.W.3d at 490-1.

A Commission order must be supported by competent and substantial evidence on the record as a whole. *Friendship Vill. of S. County v. Pub. Serv. Comm'n*, 907 S.W.2d 339, 344 (Mo. Ct. App. W.D. 1995). Substantive evidence in the context of a Commission order refers to evidence which, if true, has probative force on the issue. *Id.* "Competent evidence is relevant, admissible evidence that is capable of establishing a pertinent fact." *Noranda Aluminum*, 356 S.W.3d at 309.

The Commission has the authority to prescribe the manner in which a regulated utility keeps its books and accounts. Section 393.140(4), RSMo (2016). The Commission has adopted a rule that requires utilities to use the USoA. (LF 4254). The USoA defines regulatory assets and regulatory liabilities. *KCPL*, 509 S.W.3d at 770.

> Regulatory Assets and Liabilities are assets and liabilities that result from rate actions of regulatory agencies. Regulatory assets and liabilities arise from specific revenues, expenses, gains, or losses that would have been included in net income determinations in one period under the general requirements of the

[USoA] but for it being probable:

A. that such items will be included in a different period(s) for purposes of developing the rates the utility is authorized to charge for the utility services; or

B. in the case of regulatory liabilities, that refunds to customers, not provided for in other accounts, will be required.

Id.; 18 C.F.R. Part 101. "The definition recognizes that certain expenses that would normally be included in net income for the period may become a regulatory asset or liability if it is probable that the item would be included in a different period for purposes of developing the rates the utility is authorized to charge for its services." *KCPL*, 509 S.W.3d at 770. The Commission retains the authority to determine "when an item may be included in a different accounting period for the purpose of developing authorized rates." *Id.*

Under the USoA, deferred debts are recorded in Account 186. Account 186 is defined as:

A. This account shall include all debits not elsewhere provided for, such as miscellaneous work in progress, construction certificate applications fees paid prior to final disposition of the application as provided for in gas plant instruction 15A, and unusual or extraordinary expenses not included in other accounts which are in process of amortization, and items the final disposition of which is uncertain.

B. The records supporting the entries to this account shall be kept so the utility can furnish full information as to each deferred debt included herein.

FAS 87 requires measuring costs and reporting liabilities resulting from defined benefit pension plans on company-issued financial statements. FAS 87 provides a consistent reporting of pension obligations across all industries. A utility's adoption of FAS 87 for reporting purposes has no impact on the utility's authorized rates, which must be approved by the Commission.

The issue here is the appropriate level of the regulatory prepaid pension asset that should be included in rates for Spire East. (LF 4234). This issue has not been fully litigated in a rate case for approximately 20 years. (LF 4234). Staff and Spire East agreed that approximately $131.4 million has accumulated in the utility's pension asset since 1996. (LF 4325). The disagreement between Spire East and Staff came down to how much ratepayers paid in rates for pension expenses between 1990 and 1994 for FAS 87 and FAS 88 and between 1994 and 1996 for the FAS 88 account. (LF 4325). Spire East argued that its pension asset for ratemaking purposes is $28.8 million more than Staff's position. (LF 4325).

Spire East adopted FAS 87 for financial reporting purposes in 1987. (LF 4327). In Spire East's various rate cases between October 1, 1987 and September 1, 1994, neither the utility nor Staff accounting schedules itemized a pension asset in rate base. (LF 4326). In Spire East's 1992 rate case, both Staff and Spire East filed testimony supporting the use of cash contributions to set pension expense. (LF 4327). The Commission found that it was likely that rates were set using the current level of cash contributions to pension expenses rather than the deferred FAS 87 expense used by the utility for financial reporting (as opposed to regulatory) purposes. (LF 4327).

Spire East's argument that the Commission disregarded the company's 1990 rate case is not supported by the record. The Commission noted that in the company's rate cases between the time FAS 87 was adopted for financial reporting purposes in 1987 and the 1994 rate case, neither the company nor Staff itemized a pension asset in rate base. (LF 4326). Those cases were settled, so the issue was not fully litigated in those rate cases and the issue is not specifically addressed by the settlements approved by the Commission in 1990 and 1992. (LF 4325). Spire East has conceded that it likely cannot support its contention that FAS 87 and FAS 88 were used in the 1992 rate case. (App. Sub. Br. 75). The Commission found that it was likely that rates were set using cash contributions rather than the deferred amounts used in financial reporting statements until 1994. This conclusion is supported by the evidence that is on the record in this case.

FAS 87 was not used for regulatory ratemaking purposes until the adoption of new rates in 1994 as authorized in GR-94-220. (LF 4327). Spire East first proposed a prepaid pension asset in rate base estimated at April 30, 1996, to include accrued pension liability and prepaid pension asset account balances for all of Spire East's sponsored retirement plans (excluding SERP and directors' plans) that had occurred since September 1, 1994. (LF 4326).

The testimony presented in GR-96-193 showed that both Staff and Spire East were in agreement about the methodology to be used to calculate the prepaid pension asset created by the adoption of FAS 87. (LF 4326). Spire East changed the methodology it used to calculate the rate base effect of the prepaid pension asset created by the adoption of FAS 87 in 1998 in it next rate case. (LF 4326). The direct testimony of Spire East witness James Fallert in that case indicated that Spire East no longer calculated its pension asset beginning on September 1, 1994. (LF 4326-7). The Commission found that Staff's testimony in GR-96-193 recognized the recording of FAS 88 gains during the review period and refuted Spire East's contention that during the period before September 1, 1994, FAS 88 was also used for setting rates. (LF 4327-8).

The Commission found Staff's evidence of the prior ratemaking treatment of pension expense to be more persuasive than the utility's evidence on this issue. (LF 4331). The Commission found that the report and order from GR-94-220 supported Staff's position that cash contributions rather than FAS 87 deferral amounts were used to set rates until September 1, 1994. (LF 4331).

The report and order in that 1994 case purports to resolve all issues. (LF 4331). The report and order allowed Spire East to book its pension and OPEB expenses to FAS 186 and 106 accounts, but it is silent as to a deferral of any FAS 87 or FAS 88 expenses. (LF 4331). The Commission also found that the testimony of Spire East and Staff witnesses who were knowledgeable of the issues during the era in question to be persuasive than the conclusions drawn by Spire East's witness more than 20 years later, even if the witness was involved in some of the earlier cases. (LF 4331).

The Commission found that, while FAS 87 was used for ratemaking purposes beginning with the rates set in 1994, FAS 88 was not used in ratemaking until the rates set in 1996. While FAS 87 and FAS 88 are used for financial reporting purposes, they are not necessarily used for ratemaking purposes. (LF 4327). Based on the evidence presented in this case, Spire East did not meet its burden of proving that FAS 88 was used for ratemaking purposes before 1996.

The Commission adopted the $131.4 million figure offered by Staff for Spire East's prepaid pension asset and ordered recovery of this amount amortized over an eight-year period. (LF 4331-2).

The Commission's decision was supported by competent and substantial evidence on the record. This Court must defer to the Commission's determination as to the credibility of the witnesses on this issue and to the Commission's decision as to which evidence was more persuasive. The Commission's decision is not clearly contrary to the overwhelming weight of the evidence and may not be set aside. The decision in this case is lawful and reasonable within the meaning of Section 386.510 because it is supported by the record as a whole, whether or not all reasonable inferences supporting the order are considered. Spire East's evidence on this issue was not sufficient to carry its burden of proving its position by the greater weight of the evidence. Spire East also cannot sustain its burden of proving by "clear and satisfactory evidence" under Section 386.430, RSMo (2016) that the amended order for Spire East is unlawful or unreasonable on this point.

The amended order for Spire East is lawful and reasonable and must be affirmed on this point.

CONCLUSION

For the above reasons, the Commission respectfully requests that the Amended Orders establishing new general rates for Spire East and Spire West be affirmed in their entirety. The Commission requests such other relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing Respondent's Brief of the Public Service Commission of the State of Missouri complies with the limitations contained in Rule 84.06(c) and that:

1. The signature block above contains the information required by Rule 55.03;
2. The brief complies with limitations contained in Rule 84.04(b);
3. The brief contains 16,347 words, as determined by the word count feature of Microsoft Word.

I further certify that copies of the foregoing have been served by means of electronic filing to all counsel of record this 25th day of November, 2019.

/s/ Jennifer Heintz
Jennifer Heintz