Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

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

OFFICE OF PUBLIC COUNSEL, Intervenor.

APPEAL NO. SC 97834

APPELLANT'S SUBSTITUTE BRIEF
SPIRE MISSOURI INC., f/k/a LACLEDE GAS COMPANY

Jeremiah W. (Jay) Nixon #29603 Email: jnixon@dowdbennett.com **Gabriel E. Gore #45415** Email: ggore@dowdbennett.com **John J. Rehman, II #61245** Email: jrehmann@dowdbennett.com Dowd Bennett LLP 7733 Forsyth Blvd., Ste. 1900 St. Louis, MO 63105 (314) 889-7300 (Telephone) (314) 863-2111 (Facsimile)	**Michael C. Pendergast #31763** Of Counsel, Fischer & Dority, P.C. 423R Main Street St. Charles, MO 63301 Telephone: (314) 288-8723 Email: mcp2015law@icloud.com **Rick Zucker #49211** Zucker Law, LLC 14412 White Pine Ridge Chesterfield, MO 63017 Telephone: (314) 575-5557 E-mail: zuckerlaw21@gmail.com

ATTORNEYS FOR APPELLANT
SPIRE MISSOURI INC., f/k/a LACLEDE GAS COMPANY

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

JURISDICTIONAL STATEMENT 1

SUMMARY 2

STATEMENT OF FACTS 8

STANDARD OF REVIEW...23

POINTS RELIED ON 29

ARGUMENT 33

I. POINT I...33

The PSC erred in the Amended Report and Order by denying the Company nearly half of its rate case operating expenses, because, in violation of Sections 386.510 and 536.140.2 R.S.Mo., such decision was unlawful, in that recovery was denied without a finding that any of said expenses were imprudent.

II. POINT II...44

The PSC erred in the Amended Report and Order by denying the Company nearly half of its rate case operating expenses, because, in violation of Sections 386.510 and 536.140.2 R.S.Mo., such decision was unreasonable, in that recovery was denied based on reasons that were arbitrary and

capricious, unsupported by competent and substantial evidence or were an abuse of discretion.

III. POINT III.....54

The PSC erred in the Amended Report and Order by ordering that $3.6 million in relocation proceeds received by the Company in connection with the sale of its Forest Park facility be used to reduce rates, because, in violation of Sections 386.510 and 536.140.2 R.S.Mo., such decision (a) constituted unlawful retroactive ratemaking, in that the PSC used monies received by the Company prior to the test year period to reduce future rates, and rationalized its action based on evidence that was contrary to the competent and substantial evidence on the record; and (b) was arbitrary and capricious, in that it was contrary to the traditional treatment of gains on the sale of utility property.

IV. POINT IV.....67

The PSC erred in the Amended Report and Order by eliminating $28.8 million of the Company's pension asset, because, in violation of Sections 386.510 and 536.140.2 R.S.Mo., such decision was arbitrary, unreasonable and unsupported by competent and substantial evidence on the whole record, in that it directly conflicted with the clear evidence in the record demonstrating that a pension asset accrued as a result of the rates set in the Company's 1990 and 1994 rate cases.

CONCLUSION 81

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

CERTIFICATE OF SERVICE………………………………………………………….83

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c) …………………………..84

CERTIFICATION UNDER RULE 55.03(a) ……………………………………...……85

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

TABLE OF AUTHORITIES

CASES

Albanna v. State Bd. of Registration for the Healing Arts,

293 S.W.3d 423 (Mo. 2009) 26

Davis v. Research Med. Ctr.,

903 S.W.2d 557 (Mo. Ct. App. 1995) 27

Edmonds v. McNeal,

596 S.W.2d 403 (Mo. banc 1980)... 25, 74

Hampton v. Big Boy Steel Erection,

121 S.W.3d 220 (Mo. 2003) 26

Hurricane Deck Holding Co., v. Mo. Pub. Ser. Comm'n,

289 S.W.3d 260 (Mo. App. Ct. W.D. 2009).. 27, 62

In re Kansas City Power & Light Co.,

509 S.W.3d 757 (Mo. Ct. App. W.D. 2016).. 27, 34, 37

In re Water Rate Request of Hillcrest Util. Operating Co., Inc.,

523 S.W.3d 14 (Mo. Ct. App. W.D. 2017).. 27

Lagud v. Kansas City Mo. Bd. of Police Comm'rs,

272 S.W.3d 285 (Mo. Ct. App. W.D. 2008).. 75

Lagud v. Kansas City Bd. of Police Comm'rs,

136 S.W.3d 786 (Mo. banc 2004)... 3, 25, 73

Mo. Real Estate Appraisers Comm'n v. Funk,

306 S.W.3d 101 (Mo. Ct. App. W.D. 2010).. 25

Office of Pub. Counsel v. Mo. Pub. Serv. Comm'n,

409 S.W.3d 371 (Mo. banc 2013)... 25

Pub. Serv. Comm'n v. Mo. Gas Energy,

388 S.W.3d 221 (Mo. Ct. App. W.D. 2012).. 27

Seck v. Dep't of Transp.,

434 S.W.3d 74 (Mo. banc 2014)... 2, 26

Spencer v. Zobrist,

323 S.W.3d 391 (Mo. Ct. App. W.D. 2010) 25

Spire Mo. Inc. v. Pub. Serv. Comm'n,

2019 WL 1246323 (Mo. Ct. App. S.D. 2019) 21

State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n,

120 S.W.3d 732 (Mo. banc 2003) 24–25

State ex rel. Aquila, Inc. v. Pub. Serv. Comm'n,

326 S.W.3d 20 (Mo. Ct. App. W.D. 2010) 70

State ex rel. Associated Nat. Gas Co. v. Pub. Serv. Comm'n,

954 S.W.2d 520 (Mo. Ct. App. W.D. 1997) .... passim

State ex rel. Atmos Energy Corp v. Pub. Serv. Comm'n,

103 S.W.3d 753 (Mo. banc 2003) 24

State ex rel. Chi., Rock Island & Pac. R.R. Co. v. Pub. Serv. Comm'n,

312 S.W.2d 791 (Mo. banc. 1958) 24

State ex rel. City of West Plains v. Pub. Serv. Comm'n,

310 S.W.2d 925 (Mo. 1958) 33

State ex rel. Coffman v. Pub. Serv. Comm'n,

154 S.W.3d 316 (Mo. Ct. App. 2004) 26

State ex rel. Fee Fee Trunk Sewer Inc. v. Pub. Serv. Comm'n,

550 S.W.2d 945 (Mo. Ct. App. W.D. 1977) 74

State ex rel. Harline v. Pub. Serv. Comm'n,

343 S.W.2d 177 (W.D. Mo. 1960) 42

State ex rel. KCP&L Greater Mo. Operations Co. v. Public Serv. Comm'n,

408 S.W.2d 153 (Mo. Ct. App. W.D. 2013) 34, 39

State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n,

600 S.W.2d 222 (Mo. Ct. App. W.D. 1980) 34–35, 42

State ex rel. Mobile Home Estates, Inc. v. Pub. Serv. Comm'n,

921 S.W.2d 5 (Mo. Ct. App. W.D. 1996) 24–25

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

State ex rel. MoGas Pipeline LLC v. Pub. Serv. Comm'n,
395 S.W.3d 562 (Mo. Ct. App. W.D. 2013) 27

State ex rel. Noranda Aluminum v. Pub. Serv. Comm'n,
356 S.W.3d 293 (Mo. Ct. App. S.D. 2011) 27

State ex rel. Praxair, Inc. v. Mo. Pub. Serv. Comm'n,
344 S.W.3d 178 (Mo. banc 2011) 2

State ex rel. U.S. Water/Lexington v. Pub. Serv. Comm'n,
795 S.W.2d 593 (Mo. Ct. App. W.D. 1990) 40

State ex. rel. Util. Consumers Council of Mo. v. Pub. Serv. Comm'n,
585 S.W.2d 41 (Mo. banc 1979) 58

State ex rel. Mo. Pub. Serv. Comm'n v. Joyce,
258 S.W.3d 58 (Mo. banc 2008) 63

Wolfner v. Bd. of Adjustment of City of Frontenac,
672 S.W.2d 147 (Mo. Ct. App. E.D. 1984) 75, 79

ADMINISTRATIVE CASES

Re: Assessment Against the Public Utilities in the State of Missouri for the Expenses of the Commission for the Fiscal Year Commencing July 1, 2018, Case No. AO-2018-0379, *Assessment Order for Fiscal Year 2019*, dated June 20, 2018
(Mo. P.S.C. 2018) 50

In re Kansas City Power & Light Co., Case No. ER-2014-0370, 2015 WL 5244724
Report and Order dated September 2, 2015 (Mo. P.S.C. 2015) 11, 36, 51

In re Kansas City Power & Light Co.,
75 P.U.R.4th 1 (April 23, 1986) 61

In re KCPL Greater Mo. Operations Co., Case No. ER-2010-0136, 2011 WL 1827253,
Report and Order dated May 4, 2011 (Mo. P.S.C. 2011) 36

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

MISSOURI CONSTITUTION, STATUTES AND RULES

MO. CONST., art. V, § 18 .... 1–3, 26

§ 386.370 R.S.Mo 50

§ 386.390 R.S.Mo 62

§ 386.420.R.S.Mo 10

§ 386.500 R.S.Mo. 33

§ 386.510 R.S.Mo. .... passim

§ 386.520.R.S.Mo. 81

§ 386.540 R.S.Mo. 1

§ 386.600 R.S.Mo. 63

§ 393.130 R.S.Mo. 34, 40

§ 393.150 R.S.Mo. 35

§ 393.190 R.S.Mo. .... passim

§ 393.270 R.S.Mo. 57

§ 393.1009 R.S.Mo. 38

§ 393.1010 R.S.Mo. 38

§ 393.1011 R.S.Mo. 38

§ 393.1012 R.S.Mo. 13, 35, 38

§ 393.1013 R.S.Mo. 38

§ 393.1014 R.S.Mo. 38

§ 393.1015 R.S.Mo. 38

§ 536.100 R.S.Mo. 23

§ 536.140 R.S.Mo. .... passim

Commission Rule 20 CSR 4240-40.040 17

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

JURISDICTIONAL STATEMENT

This case is an appeal by Appellant Spire Missouri Inc., formerly known as Laclede Gas Company, ("Spire" or "Company"), challenging certain rulings and decisions in the Missouri Public Service Commission's ("Commission" or "PSC") March 7, 2018 Amended Report and Order issued in Case Numbers GR-2017-0215 and GR-2017-0216, denying Appellant recovery of certain costs in two rate cases conducted for Spire's eastern and western Missouri service territories. Pursuant to Section 386.510 R.S.Mo. (2018), this case was reviewed by the Missouri Court of Appeals, Southern District, and a decision was rendered by that court in Case No. SD35485 on March 15, 2019. The Supreme Court has jurisdiction over this case pursuant to Article V, Section 18, of the Missouri Constitution, and Section 386.540 R.S.Mo.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

SUMMARY

The standard of appellate review applied to findings in a trial court is the "light most favorable" to those findings. In contrast, findings of an administrative agency are viewed in the context of the whole record, and the court must consider all evidence that was before the agency and all inferences that may be drawn from that evidence. In this case, unfortunately, the Southern District applied the wrong standard of appellate review to the findings of the Public Service Commission ("PSC") which infected the outcome of the decision prior to transfer to this Court. Reviewed under the proper objective context of the whole record, the PSC's decision must be reversed.

In ***Seck v. Dep't of Transportation***, 434 S.W.3d 74 (Mo. banc 2014), this Court reaffirmed its earlier decisions that, while trial court findings are viewed in the "light most favorable" to those findings, Article V, Section 18 of the Missouri Constitution guarantees greater judicial scrutiny of agency decisions. It requires that "agency findings be supported by competent and substantial evidence ***upon the whole record.***" A court reviewing those findings must consider all of the evidence that was before the agency, including the evidence that the agency rejected in making its findings. ***Seck***, 434 S.W.3d at 78–79.

Greater judicial scrutiny is needed because administrative agency commissioners are not judges. They are not members of the judiciary at all, and the canons of judicial conduct and decision-making do not apply to them. Rather they are members of the executive branch who sometimes act in a quasi-judicial capacity. ***State ex rel. Praxair, Inc. v. Mo. Pub. Serv. Comm'n.***, 344 S.W.3d 178, 186 (Mo. banc 2011). Therefore,

when an administrative body makes a quasi-judicial decision that affects private rights, as in this case, it is the duty of the courts to conduct judicial review and determine whether such decisions are "supported by competent and substantial evidence upon the whole record." MO. CONST., art. V, § 18.

Accordingly, in ***Lagud v. Kansas City Board of Police Commissioners***, this Court held the "light most favorable" standard does not apply to review of administrative agency decisions. 136 S.W.3d 786, 791 (Mo. banc 2004). Unfortunately, over the past ten years, a number of appeals court decisions have erroneously used the trial court standard of review in PSC cases. These decisions have excessively deferred to the PSC by viewing the evidence not objectively, but in the light most favorable to the PSC's decision. The result of the courts' permissive approach is that PSC decisions have become more arbitrary and less supported by the evidence. As a result, utilities and Missourians can no longer rely on the PSC for consistent decisions. This case presents several examples of the PSC's unlawful and unreasonable decision-making process that went wholly unchecked by the Southern District applying the wrong standard of review.

The first example of the PSC's arbitrary decisions in this appeal is the rate case expense issue. A rate case and its accompanying outside expense is a necessary operating expense for utilities that want to keep up with inflation or other cost increases. The legal standard for utilities to recover rate case expenses is the prudence standard. The PSC followed this standard for decades, making prudence determinations for expenses that were challenged by other rate case parties. Suddenly, in 2015, the PSC decided in a Kansas City Power and Light Company ("KCPL") rate case to allow rate case expense

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

recovery only in the proportion that KCPL's approved rate increase bore to its requested rate increase. This caused KCPL to lose approximately one-quarter of its rate case expenses without a finding that any specific cost was imprudent. On appeal, the Western District deferred to the PSC's judgment and excused this departure from the prudence standard.

The PSC continued its trend away from applying established legal standards when it denied Spire recovery of close to half of its rate case expense, not because the expenses were imprudent (as has been the standard for decades), but simply because Spire raised roughly half the issues in its own rate cases. Again, this decision was made without any finding of imprudence, without a connection between the amount of rate case expense and the issues raised by Spire, and without even a consideration for the merits of those issues or whether they were approved by the PSC. Moreover, the PSC had never before used this rate case expense "formula"; the formula was not advocated by any party or even mentioned in the case. Until the PSC issued its order, Spire had no idea that its prudently incurred rate case expenses were going to be subjected to the proportion of issues it raised.

On appeal, the Southern District granted even greater deference to the PSC's decision than the Western District in the KCPL case. The Southern District basically re-stated the PSC's findings, declaring that those findings "framed" its review. If this review standard stands, utilities will have no idea what arbitrary formula will be applied in future rate cases. Since expenses incurred by "in-house" employees are recovered through the normal rate process, utilities will be motivated to maximize their year-round costs that

can be recovered in rate cases, and minimize their outside rate case expense, an outcome that is likely to be more expensive for customers than the current approach taken by utilities like Spire.

A second example is the relocation proceeds Spire received and utilized from the 2014 sale of its ancient and dilapidated service center on Forest Park Avenue in St. Louis. In reorganizing its operating locations, Spire took the position that the Forest Park property was no longer necessary or useful to its utility operations. Hence, the Company did not seek PSC approval to sell this property just like it does not seek PSC approval every time it sells a vehicle or old furniture and equipment. In addition, Spire disclosed the sale to the PSC in a public presentation in 2014; nobody raised a hand in protest that the sale did not have PSC approval.

In its decision, the PSC took the proceeds that the Company had received three years before filing this rate case, proceeds that had been spent on the reorganization, and used those proceeds to reduce the rates determined in this case. This is plain and simply retroactive ratemaking in violation of basic utility law and Missouri precedent. The PSC justified its action by finding that it was appropriate to offset the cost of a small satellite facility, constructed well after Spire's departure from the Forest Park service center. The PSC claimed the satellite facility was more expensive than the service center, an assertion that is contrary to the facts.

On appeal, the Southern District not only condoned the PSC's decision, but did so on the grounds that a penalty was appropriate since Spire should have sought PSC approval prior to selling the Forest Park property. In other words, although no notice of

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

wrongdoing or complaint had ever been brought against the Company regarding the sale, and although the Company had no opportunity to defend itself against such a complaint, the Southern District pronounced the Company guilty of a violation, thus justifying the PSC's retroactive ratemaking. Spire maintains that a lax standard of review that condones unlawful and unreasonable decision-making does not comport with constitutional standards and injects further uncertainty into the utility regulatory process.

The third and final example of the arbitrary nature of the PSC's decisions is the Company's pension asset. A pension asset (or liability) is formed when customer rates are based on an accrual of pension expense and that expense differs from the Company's actual cash contributions to its pension. If customer rates are based on the Company's cash contributions to its pension, then no asset or liability is formed.

The evidence showed that, for the 1990 rate case, both the Company and Staff filed their pension expenses based on accrual accounting, causing the Company to establish an asset when the accrued expense level fell short of cash contributions. For the 1992 rate case, both the Company and Staff filed on a cash contribution basis. The PSC found that no asset arose out of the 1992 rate case because both parties filed under the cash method. In order to be consistent, the PSC should have found that a legitimate asset was formed out of the 1990 rate case since both parties calculated pension expense for rates on an accrual basis. Instead, the PSC completely ignored the 1990 proceedings and made a blanket conclusion that only the cash contribution method was used prior to 1994, so no pension asset began until that time. This conclusion wiped out the 1990 asset without an explanation.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

The Southern District wholly declined to get involved in this somewhat esoteric issue, instead inaccurately proclaiming that the PSC was entitled to have the evidence viewed in the light most favorable to its decision. Again, this low judicial bar only encourages arbitrary decision-making by non-judicial agencies like the PSC.

In this appeal, Spire asks the Missouri Supreme Court to require the appeals courts to provide the proper scrutiny of PSC decisions, as dictated by the Missouri Constitution and by this Court on several occasions. The proper standard requires an objective review that considers all of the evidence before the agency, including the evidence that the agency rejected in making its findings. Only upon such review can the court make a reasoned decision as to whether the PSC's order is supported by the competent and substantial evidence of the whole record, or is instead arbitrary and capricious. Spire believes that if the courts apply the proper standard of review, agencies like the PSC will be less likely to venture into the arbitrary and capricious decision-making that took place in this case, which will provide for a more consistent and reliable regulatory process, as it was intended.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

STATEMENT OF FACTS

Spire is an investor-owned gas utility providing retail gas service to approximately 630,000 customers in eastern Missouri through its Spire East operating unit ("Spire East"). Spire also serves approximately 500,000 customers in western Missouri, formerly under the name Missouri Gas Energy, or MGE, but now known as Spire West. (L.F. Vol. 12, pp. 4241–42). Spire is, in both service territories, subject to the jurisdiction of the PSC, a state administrative agency established by the Missouri General Assembly to regulate public utilities (including gas corporations such as Spire) pursuant to R.S.Mo. Chapters 386 and 393. (*Id.* at 4245).

On April 11, 2017, Spire filed tariffs designed to implement general rate increases for gas service in its Spire East and Spire West service areas. The general rate case for Spire East was assigned File No. GR-2017-0215 and the general rate case for Spire West was assigned File No. GR-2017-0216. The tariffs would have increased Spire East's annual gas revenues by approximately $58.1 million, exclusive of associated taxes, of which approximately $29.5 million was already being recovered through its infrastructure system replacement surcharge ("ISRS"), a surcharge Spire East is allowed by statute to recover from customers between rate cases, resulting in a net increase of $28.5 million. (*Id.* at 4235–36). The tariffs would have increased Spire West's annual gas revenues by approximately $50.4 million, exclusive of associated taxes, of which approximately $13.4 million was already being recovered through its ISRS, resulting in a net increase of $37.0 million. (*Id.*). The tariff revisions carried an effective date of May 11, 2017. (*Id.*).

By orders issued on April 19, 2017, the PSC suspended Spire's general rate increase tariffs until March 8, 2018, representing the maximum amount of time allowed by the controlling statute. (*Id.* at 4236). On May 24, 2017, the PSC established the test year[1] for these cases as the twelve-month period ending December 31, 2016, to be updated for known and measurable changes through June 30, 2017, and trued-up for known and measurable revenue, rate base, and expense items through September 30, 2017. (*Id.*). The May 24, 2017 order also established a procedural schedule leading to an evidentiary hearing. (*Id*. at 4236, 4242–43).

In compliance with the established procedural schedule, the parties pre-filed direct, rebuttal, and sur-rebuttal testimony and direct and rebuttal true-up testimony. (*Id.*). at 4237. The evidentiary hearing began on December 6, 2017, and concluded on December 15, 2017. (*Id.*). The true-up hearing was held on January 3, 2018. (*Id.*). The parties filed post-hearing briefs on January 9, 2018, and reply briefs on January 17, 2018. (*Id.*). On January 18, 2018, the PSC directed Spire to submit an affidavit explaining the specific adjustments that would be needed to include in rates any change in cost of service as a result of the federal Tax Cuts and Jobs Act for each of Spire's operating units. (*Id.*). A hearing on the matter was held on February 5, 2018, and written closing statements were filed on February 6, 2018. (*Id.*).

[1] The test year is an annual baseline period used to measure Spire East's and Spire West's costs and revenues for ratemaking purposes.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

On March 7, 2018, the PSC issued its Amended Report and Order (the "Amended Order"), effective March 17, 2018, resolving all issues in the two cases. (*Id.* at 4231–4382). On March 16, 2018, prior to the effective date of the Amended Order, Spire filed its Application for Rehearing and Request for Reconciliation with the PSC. (L.F. Vol. 12, p. 4404 – Vol. 13, p. 4430). On April 25, 2018, the PSC issued its Order approving Spire's amended Reconciliation as satisfying the requirements of Section 386.420.4 R.S.Mo. On the same date, the PSC also issued an order denying Spire's Application for Rehearing.

On April 25, 2018, Spire filed notices of appeal in first, the Southern District (SD35485), and second, the Eastern District (ED 106653). (L.F. Vol. 14, pp. 5281–85). The Eastern District case was transferred to the Southern District as Case SD35549, which was then consolidated with SD35485. In the appeal, Spire challenged the lawfulness and/or reasonableness of the Amended Order in three respects. The decision: (a) disallowed recovery of a portion of the expenses incurred by the Company to prepare and litigate the rate case without any finding by the PSC that such expenses were imprudent; (b) used relocation proceeds received by the Company prior to the test year in connection with the sale of its Forest Park facility to reduce the Company's rates in this case; and (c) eliminated a portion of the Company's pension asset that had been accumulated in a prior period, but had never been litigated.

A brief statement of the facts relevant to each of these issues is set forth below. The Forest Park Relocation Proceeds and the Pension Asset issues both pertain solely to Spire East, and all citations to the record refer to the Spire East case, Case No. GR-2017-

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

0215 (“0215”). The Rate Case Expense issue applies to both Spire East and Spire West, and, where appropriate, citations to the record will refer to both 0215 and Case No. GR-2017-0216 (“0216”).

RATE CASE EXPENSE

Rate case expense, as the term is commonly defined in PSC proceedings, includes the costs incurred by utilities for the outside attorneys, experts and consultants needed to prepare and litigate rate cases filed at the PSC. It does not include costs for attorneys and subject matter experts who are employees of the utility and perform the same functions. (L.F. Vol. 12, pp. 4275–76; Ex. Vol. 21, part 2, p. 3303 (0215); Ex. Vol. 34, p. 3171 (0216)).

The PSC Staff published a rate case expense study applicable to all utilities in August 2013 in Case No. AW-2011-0330. (Ex. Vol. 45, pp. 7160–78 (0215); Ex. Vol. 68, pp. 7002–20 (0216); *see also* Appellant’s App. pp. A178–A196). The Staff noted that, traditionally, the PSC determined the recoverability of rate case expense based on a prudence standard. (Ex. Vol. 45, p. 7161 (0215); Ex. Vol. 68, p. 7003 (0216)). In a 2015 decision in a KCPL electric rate case, Case No. ER-2014-0370, however, the PSC abandoned the prudence standard for evaluating rate case expense, and instead determined that KCPL should recover its rate case expense in the same ratio as its rate case recovery bore to its rate case increase request. ***In re Kansas City Power & Light Co.***, Case No. ER-2014-0370, 2015 WL 5244724 (Mo. P.S.C. 2015), *Report and Order* dated September 2, 2015, pp. 64–73; (Appellant’s App. pp. A261–A270).

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

The record evidence in the instant rate cases demonstrated that Spire had a long history of minimizing the level of its rate case expenditures. (Ex. Vol. 28, p. 4260 (0215); Ex. Vol. 43, p. 4128 (0216)). In its four previous rate cases combined, for example, Spire Missouri spent approximately twenty percent *less* on rate case expenses than KCPL's rate case expense in a single case, ER-2014-0370. (Ex. Vol. 28, p. 4260 (0215); Ex. Vol. 43, p. 4128 (0216)).[2]

The PSC itself recognized in its Amended Order that Spire East and Spire West have historically incurred relatively low levels of rate case expense compared to other Missouri utilities. (L.F. Vol. 12, p. 4277). Further, the results of Staff's 2013 rate case expense study in Case No. AW-2011-0330 would have confirmed Spire Missouri's comparative success in minimizing rate case expense. However, that information was excluded from the record.[3]

---

[2] Sum of rate case expense in Case Nos. GR-2007-0208, 2010-0171, 2013-0171, and 2014-0004 [sic] (should be 2014-0007 (Tr. Vol. 3, p. 1726)).

[3] At the hearing on December 13, 2017, the parties agreed that the Commission could take judicial notice of the study. However, during a hearing three weeks later, on January 3, 2018, the Commission determined that only the public version of the study would be admitted into the record. The result of that ruling was that the confidential portion of the study that would have appeared at Ex. Vol. 68, p. 7007 (0215) and Ex. Vol. 45, p. 7165 (0216), was excluded from the record. That evidence would have showed that Spire

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

The PSC also noted in its Amended Order that the rate case expense incurred by the Company in the two current rate cases under review exceeded $1.3 million on a combined basis and that approximately half of the issues litigated in the rate cases had been raised by other parties. (*Id.* at 4277). The record indicated that the timing of the Company's filing of these rate cases was prompted primarily by the requirements of the Missouri ISRS Statute (Section 393.1012.2 R.S.Mo.), which mandates that a gas corporation must file a general rate case every three years or cease recovering ISRS charges for its safety-related and governmentally-mandated investments between rate cases. (Ex. Vol. 11, p. 1751 (0215); Ex. Vol. 18, p. 1608 (0216)).

Regarding the prudence of the Company's rate case expenses, the Staff proposed a disallowance for the Company's cost to have an outside firm perform a Cash Working Capital study. Public Counsel recommended a disallowance of costs for one consultant because of his high hourly rate. (L.F. Vol. 12, pp. 4278–79). No other allegations of excess or inappropriate rate case expenditures were made.

In the Amended Order, the PSC stated that it did not find any specific item of rate case expense to have been imprudently incurred. (*Id.* at 4284). The PSC determined, however, that half of the rate case expense incurred by the Company, exclusive of expenditures for mandated customer notices and a depreciation study, should be disallowed. The PSC gave several reasons for the disallowance, including its observation

---

Missouri held the record in virtually every category for lowest rate case expense among large Missouri utilities.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

that a number of the issues pursued by the Company were designed to benefit shareholders, that such a disallowance was necessary to avoid giving the Company a financial advantage in litigating rate cases, and that sharing such expenses would give the Company an incentive to managing its rate case litigation costs. (*Id*. at 4282–85).

<u>RELOCATION PROCEEDS</u>

This issue relates to Spire's 2014 sale of its Forest Park facility in St. Louis, Missouri. (*See generally Id.* at 4248–55; Appellant's App. pp. A018–A025). The Forest Park facility had been used by the Company since 1935 as a service center for field personnel and as a satellite office for several hundred management employees. The decision to sell the Forest Park Property was part of a larger plan by the Company to restructure its offices and operating centers. (L.F. Vol. 12, pp. 4248–49). This included a move of administrative offices in downtown St. Louis from 720 Olive Street to 700 and 800 Market Street. (Ex. Vol. 17, pp. 2554–61). With respect to the Forest Park service center in mid-town St. Louis, the Company first determined that many of the management employees at that location should also be transferred to 700 Market Street to facilitate the Company's transition to a shared services model across a growing company. (*Id.* at 2570). Second, the Company had also begun a reorganization of its operations to reduce its three operating districts down to two operating districts, thereby eliminating the need to maintain the remaining field personnel at the Forest Park service center. (*Id.*). Third, after more than eight decades of use, the Forest Park facility was in a seriously deteriorated condition. (*Id.*). The facility had high maintenance and operating costs, inadequate secure parking space for utility vehicles, interior asbestos, and roofing,

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

plumbing, electric and other issues that would have required substantial investments to remediate. (*Id.*). Finally, the Forest Park facilities were located in the CORTEX redevelopment district. This created an obstacle to investing any more money in the facility since it could be taken by CORTEX through eminent domain. It also created an opportunity to obtain a favorable price when CORTEX wanted the property to attract the popular IKEA store to the St. Louis area. (*Id.*).

The Company was ultimately able to exit the Forest Park property while negotiating a sale price in 2014 that included: (a) a gain of approximately $7.6 million, excluding the $1.8 million undepreciated book value of the facilities and (b) an allowance of $5.7 million for relocation expenses. (*Id.* at 2554). Of the $5.7 million relocation proceeds, $1.95 million was used to purchase furniture and fixtures for the new offices at 700 and 800 Market Street – a capital contribution that directly benefitted customers by avoiding added rate base that would increase the Company's cost of service in the rate case. (Tr. Vol. 3, pp. 1624–25). The Company spent the remaining amount of approximately $3.75 million on various moving and relocation expenses associated with its reorganization plan, including the moves from both Forest Park and 720 Olive. (Tr. Vol. 3, pp. 1622, 1624–25; L.F. Vol. 12, pp. 4251–52).

In May 2014, Spire notified the PSC, its Staff, OPC, and others in a public on-the-record presentation that it had sold the Forest Park property and that an IKEA Store would be built on the site. (Conf. Ex., p. 471). Spire received no notice, complaint or other indication from the PSC or any party that PSC approval should have been obtained prior to sale.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

In its Amended Order – issued almost four years after the sale – the PSC determined that $3.6 million of the relocation proceeds received by the Company *in 2014*, well before the test year in this case, should be used to reduce rates in this case based on its finding that a new satellite office built by the Company subsequent to the sale of the Forest Park Facilities was more expensive to operate than the Forest Park facility. (L.F. Vol. 12, pp. 4252, 4255).

PENSION

This issue is about the amount of Spire East's prepaid pension asset, a regulatory asset that represents the difference between the amount of cash Spire East has contributed to its pension plan and the lesser amount paid by customers in rates. (L.F. Vol. 12, pp. 4324–25; Supp. Ex., p. 5; Ex. Vol. 21, part 2, p. 3260; Tr. Vol. 3, p. 2074). Because it is known how much cash Spire East has contributed to its pension, the issue comes down to how much customers paid in rates for pension expense between 1990 and 1996. (L.F. Vol. 12, pp. 4324–25).

Spire East's rates include an amount for pension expense. (*Id.* at 4321). Since 1987, Spire East has calculated its pension expense on an accrual basis in accordance with what was then known as Statement of Financial Accounting Standards ("FAS") 87 and 88. (Ex. Vol. 17, p. 2590-91; Supp. Ex., p. 4). Calculating pension expense using FAS 87 and 88 will be referred to herein as the "accrual method."

FAS 87, titled "Employers' Accounting for Pensions," gives employers guidance on accounting for pension expense. Employers use that guidance to report pension

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

expense based on the estimated pension obligation a company incurs during the service of its employees. (Ex. Vol. 21, part 2, pp. 3258–59).

FAS 88 is merely an extension of the FAS 87 measurement process. (Ex. Vol. 11, p. 1720). FAS 88 generally reduces pension expense by requiring immediate recognition of the portion of FAS 87 gains that have not been recognized as of the date certain triggering events occur, such as when Spire Missouri discharges its pension obligation to an employee in one lump sum, rather than paying an annuity. (*Id.*). In other words, the FAS 88 portion of the accrual method lowers pension expense by recognizing that, when an employee retires, some of the pension amount paid to that employee comes from gains on pension investments. These are sometimes referred to herein as "FAS 88 gains."

Ratemaking starts with a test year based on the Company's books prepared pursuant to Generally Accepted Accounting Principles ("GAAP"). (Supp. Ex., p. 6). GAAP requires the Company to book Spire East's pension accruals pursuant to FAS 87 and 88. (*Id.*). Pursuant to its own rules, however, the PSC is not committed to GAAP accounting for ratemaking purposes, and may approve a different methodology (such as the amount of Spire East's cash contributions to its pension). (20 CSR 4240-40.040(4) and (5); Supp. Ex., pp. 6–7; Ex. Vol. 17, p. 2592).

Effective October 1, 1987, Spire East began to track the difference between the accrued pension expense under FAS 87/88 and its actual cash pension contributions to the pension as an asset (if the cash pension contributions exceeded accrued expense) or liability (if accrued expense exceeded cash pension contributions). (Supp. Ex., p. 7, p. 10, ll. 20–22).

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Staff testified that no asset began to accrue for regulatory purposes until 1994 under FAS 87, and until 1996, under FAS 88. (Ex. Vol. 21, part 2, p. 3261; Supp. Ex., pp. 7–8). In effect, Staff claimed that the pension asset associated with FAS 88 started two years later (1996) than the pension asset associated with FAS 87 (1994).

The parties agreed that the Company used the accrual method for accounting purposes beginning in 1987. (*Id.*). But the Staff argued that customer rates were set based on cash contributions (the "cash method") and were not based on the FAS 87 and 88 accrual method until 1994 and 1996, respectively. Therefore, Staff argued, customers have paid the appropriate pension expense for the years 1990–1994 under FAS 87, and from 1990–1996 under FAS 88, so no pension asset should exist for these periods. (Ex. Vol. 25, p. 3892). Staff's argument was based on testimony that Staff itself filed in 1996, not the actual testimony from the 1990–1994 cases. (*Id.*).

The PSC recognized that the issue came down to how much customers paid in rates for pension expense between 1990 and 1996. (L.F. Vol. 12, p. 4325). The PSC decided that the testimony showed that customer rates were based on the cash method, and not on the accrual method prior to September 1, 1994, which was the effective date of rates coming out of the 1994 rate case. (*Id.* at 4331).

Ultimately, the case broke down into the discrete periods following the 1990, 1992 and 1994 rate cases. For the court's convenience, the table summary below identifies where the disputes lie. (Ex. Vol. 17, pp. 2593–99).

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Period	Basis	Dispute under FAS 87?	Dispute under FAS 88?	Amt. at issue	Explanation
1987–1990	n/a	No	No	0	Staff: Denies FAS 87/88 was used for regulatory purposes. Company: no balance accrued prior to 1990 (i.e., no effective difference between FAS 87/88 and cash contributions).[4]
1990–1992	1990 Rate Case	**Yes**	**Yes**	19.8M	Staff: 1990 rates were based on cash contributions, so no asset accrued. Company: 1990 rates were based on FAS 87/88, which created a regulatory asset.
1992–1994	1992 Rate Case	**Yes**	**Yes**		Staff: 1992 rates were based on cash contributions, since both parties filed their pension expense on a cash contribution basis. Company: Though pension expense was filed on a cash basis, 1992 rates were still based on FAS 87/88 since the PSC did not authorize Spire to diverge from FAS 87/88 accounting standards.
1994–1996	1994 Rate Case	No	**Yes**	9.0M	Staff: 1994 rates were based on FAS 87, but not FAS 88, so no FAS 88 asset accrued. Company: 1994 rates were based on both FAS 87 and FAS 88. It is neither practical nor sensible to separate the two related standards.
1996–2017	Several rate cases	No	No	0	Both parties agreed in the 1996 rate case to set rates based on FAS 87 and 88, and also agreed to the amount of the pension asset that has accrued during this period.

[4] Tr. Vol. 3, p. 2113; Ex. Vol. 17, p. 2593.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Regarding the period 1994–1996, both parties agreed that customer rates in the Company's 1994 rate case were based on FAS 87. (Ex. Vol. 21, part 2, p. 3261). However, the Company maintained that 1994 rates were also reduced by FAS 88 gains, and that a regulatory asset of $9.0 million should accrue for that period. The Staff disagreed; it does not dispute the calculation, but asserted that FAS 88 was not used to set rates in the Company's 1994 rate case, but was first used in the Company's 1996 case. (*Id.* at 3261–62; Ex. Vol. 25, p. 3892). Thus, by the Company's 1996 rate case, the parties had explicitly agreed to use FAS 87 and 88 to set pension rates, and to accrue a pension asset or liability accordingly. The parties all agree to the amount of pension asset that has accumulated since 1996.

In summary, the amount of pension assets that were at issue on this point totaled $28.8 million, consisting of $19.8 million for the period 1990–1994 for FAS 87 and 88, and $9.0 million for the period 1994–1996 under FAS 88. (Supp. Ex., p. 5; Ex. Vol. 21, part 2, pp. 3261–62). The question for the PSC was whether customer rates for pension expense in the 1990, 1992 and 1994 rate cases were based on the cash method or on the accrual method. (L.F. Vol. 12, p. 4325).

The PSC decided that "the sworn testimony of [Spire East] and Staff witnesses that were knowledgeable of the issue during the era in question (was) more persuasive than the conclusions drawn by [Spire East] more than 20 years later, even those conclusions drawn by the Spire witness that was involved in some of the earlier cases." (*Id.* at 4331). The PSC concluded that rates for pension expense were based on the cash method for both of the rate cases prior to 1994 (i.e., the 1990 and 1992 rate cases). (*Id.*).

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Therefore, the PSC disallowed $19.8 million in pension assets for the period 1990–1994. The PSC also disallowed $9.0 million in pension assets under FAS 88 for the period 1994–1996. (*Id.* at 4325, para. 5; 4331).

SOUTHERN DISTRICT DECISION

On March 15, 2019, the Southern District issued its opinion in Case SD35485, finding for the PSC and against Spire Missouri on all three issues. ***Spire Mo. Inc. v. Pub. Serv. Comm'n***, 2019 WL 1246323 (Mo. Ct. App. S.D. 2019) (the "Opinion"). The Court decided in favor of the PSC while viewing the evidence in the light most favorable to the PSC's order. The Court also opined that Spire violated its briefing procedures by failing to separate the claim that the PSC's decision was unsupported by competent and substantial evidence from the claim that the decision was against the overwhelming weight of the evidence. (Opinion, pp. 26–27).

With respect to the Rate Case Expense issue, the Southern District accepted the PSC's findings of fact without comment and decided that Spire failed to demonstrate that the PSC's decision was unlawful, arbitrary or capricious. (Opinion, pp. 23–26). With respect to the retroactive ratemaking issue concerning the relocation proceeds from the Forest Park property sale, the Southern District found that the PSC's actions were justified because the Company sold the property without first obtaining PSC authorization, in violation of Section 393.190.1 R.S.Mo. (Opinion, pp. 20–23). Finally, with respect to the Pension Asset issue, the Southern District characterized Spire's arguments as being that the PSC should have believed witnesses that it did not and should have adopted Spire's preferred version of the evidence.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

The Southern District denied Spire Missouri's application for transfer to the Supreme Court on April 8, 2019. On April 22, Spire Missouri requested that the Supreme Court transfer the case. After ordering and receiving a response from the PSC, this Court granted transfer on September 3, 2019.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

STANDARD OF REVIEW

This Court has articulated a clear standard for reviewing decisions by an administrative agency such as the PSC. The Southern District applied the wrong standard of review to the PSC's decision, which effectively deprived Spire of its right to a meaningful appellate review and injected further confusion into the appellate courts' already inconsistent application of the proper standard. As a result of the Southern District's decision, the standard of review has become a substantive issue in this case. Accordingly, Spire is addressing the standard of review in much greater detail than the normal recitation in this section.

Pursuant to Section 386.510 R.S.Mo., an applicant may appeal a PSC decision "for the purpose of having the reasonableness or lawfulness" of that decision reviewed. While Section 386.510 provides only this bare summary standard, more detailed guidance on determining whether a PSC decision is reasonable or lawful is provided by Section 536.140 R.S.Mo.

Section 536.140.2 states:

> The scope of judicial review in all contested cases, whether or not subject to judicial review pursuant to sections 536.100 to 536.140, and in all cases in which judicial review of decisions of administrative officers or bodies, whether state or local, is now or may hereafter be provided by law, shall in all cases be at least as broad as the scope of judicial review provided for in this subsection . . . ."

Thus, by its own terms, Section 536.140.2 sets the minimum standard for judicial review of all administrative decisions, and provides details for the general requirements of Section 386.510. This Court has specifically recognized that Section 536.140.2 is applicable to PSC cases. ***State ex rel. Chi., Rock Island & Pac. R.R. Co. v. Pub. Serv. Comm'n***, 312 S.W.2d 791, 794–95 (Mo. banc. 1958).

In evaluating a PSC or other agency decision under Section 536.140.2 R.S.Mo., the Court reviews the whole record to determine if the decision is: (1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the agency; (3) unsupported by competent and substantial evidence upon the whole record; (4) unauthorized by law for any other reason; (5) made upon unlawful procedure or without a fair trial; (6) arbitrary, capricious or unreasonable; or (7) an abuse of discretion.

The standard of review applied by Courts in reviewing a PSC decision is a two-pronged analysis: "first, the reviewing court must determine whether the order is *lawful*; and second, the court must determine whether the order is *reasonable*." ***State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n***, 120 S.W.3d 732, 734 (Mo. banc 2003) (quoting ***State ex rel. Atmos Energy Corp v. Pub. Serv. Comm'n***, 103 S.W.3d 753, 759 (Mo. banc 2003)). In the event it determines an order of the PSC is unlawful or unreasonable, the Court is authorized to reverse or set aside such order. ***State ex rel. Associated Nat. Gas Co. v. Pub. Serv. Comm'n***, 954 S.W.2d 520, 528 (Mo. Ct. App. W.D. 1997); ***State ex rel. Mobile Home Estates, Inc. v. Pub. Serv. Comm'n***, 921 S.W.2d 5, 9 (Mo. Ct. App. W.D. 1996).

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

A PSC order is lawful if it is within the scope of the PSC's authority conferred by statute, and Appellant bears the burden of showing the PSC's actions exceeded its statutory authority. ***AG Processing, Inc.***, 120 S.W.3d at 734. On questions of law, the Court does *not* defer to the PSC, but "exercises unrestricted, independent judgment and must correct erroneous interpretations of the law." ***Associated Nat. Gas***, 954 S.W.2d at 528; ***Mobile Home Estates***, 921 S.W.2d at 9.

If the PSC's order is found to be lawful, the reviewing court must also determine whether it is reasonable. A Commission order is reasonable if it is supported by substantial and competent evidence on the whole record, is not arbitrary or capricious and is not an abuse of the Commission's discretion. ***Office of Pub. Counsel v. Mo. Pub. Serv. Comm'n***, 409 S.W.3d 371, 375 (Mo. banc 2013). Substantial evidence is competent evidence that, if believed, has probative force upon the issues. ***Mo. Real Estate Appraisers Comm'n v. Funk***, 306 S.W.3d 101, 106 (Mo. Ct. App. W.D. 2010). It is evidence from which the trier of fact reasonably could find the issues in harmony therewith. ***Spencer v. Zobrist***, 323 S.W.3d 391 (Mo. Ct. App. W.D. 2010). "An administrative agency acts unreasonably and arbitrarily if its decision is not based on substantial evidence." ***Edmonds v. McNeal***, 596 S.W.2d 403, 407 (Mo. banc 1980).

The Court must determine whether, considering the whole record, there is sufficient competent and substantial evidence to support the agency's decision. ***Lagud v. Kansas City Mo. Bd. of Police Comm'rs***, 136 S.W.3d 786 (Mo. banc 2004). The Court must look to the whole record of an agency's decision, and not just the evidence supporting the decision. The Court reviews the whole record objectively, and not in the

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

light most favorable to the PSC's decision. ***Hampton v. Big Boy Steel Erection***, 121 S.W.3d 220, 223 (Mo. 2003).

In ***Lagud***, this Court applied ***Hampton***, a worker's compensation case, to other administrative agencies and removed the "light most favorable" standard from Section 536.140.2 R.S.Mo., which is applicable to PSC decisions. In ***Albanna v. State Board of Registration for the Healing Arts***, 293 S.W.3d 423 (Mo. 2009), the Supreme Court noted that "[s]ome confusion has developed regarding the appropriate level of deference" to agency decisions, and issued a reminder that the "light most favorable" standard had been abolished. 293 S.W.3d at 428. In ***Seck v. Dep't of Transportation***, 434 S.W.3d 74 (Mo. banc 2014), the Court held that, although trial court findings are viewed in the "light most favorable" to those findings, Article V, Section 18 of the Missouri Constitution guarantees greater judicial scrutiny of agency decisions. It requires that "agency findings be supported by competent and substantial evidence ***upon the whole record.***" A court reviewing those findings must consider all of the evidence that was before the agency, including the evidence that the agency rejected in making its findings. 434 S.W.3d at 78–79. In 2004, the Western District observed in a PSC case that ***Lagud*** had made ***Hampton*** applicable to other administrative proceedings. ***State ex rel. Coffman v. Pub. Serv. Comm'n***, 154 S.W.3d 316, 320 (Mo. Ct. App. 2004).

However, subsequent case law is replete with examples that cite to pre-***Hampton*** cases for the proposition that the PSC is entitled to have evidence viewed in the light most favorable to its decision. Over the past decade, no fewer than eleven Western District and three Southern District cases have recited the pre-***Hampton/Lagud*** standard,

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

including a recent opinion by the Western District (***In re Water Rate Request of Hillcrest Util. Operating Co., Inc.***, 523 S.W.3d 14 (Mo. Ct. App. W.D. 2017)), plus the Southern District's opinion in the present case. [5]

In reviewing the competent and substantial evidence on the whole record, the Court need make only a single determination as to whether such evidence is sufficient to support the agency's decision. Prior to 2003, the Western District used a two-step process wherein courts would first review agency cases for supportive competent and substantial evidence, and then second, test them for the overwhelming weight of the evidence. ***Davis v. Research Med. Ctr.***, 903 S.W.2d 557, 567 (Mo. Ct. App. 1995). In 2003, the ***Hampton*** Court found that the ***Davis*** two-step process for agency cases "can be merged into a single determination whether, considering the whole record, there is sufficient competent and substantial evidence to support the award." ***Hampton***, 121 S.W.3d at 223. In essence,

---

[5] Other examples include ***In re Kansas City Power & Light Co.***, 509 S.W.3d 757, 764 (Mo. Ct. App. W.D. 2016); ***Big River Telephone Co., LLC v. Southwestern Bell Telephone, LP***, 440 S.W.3d 503, 508–09 (Mo. Ct. App. W.D. 2014); ***State ex rel. MoGas Pipeline LLC v. Public Serv. Commission***, 395 S.W.3d 562, 565 (Mo. Ct. App. W.D. 2013); ***Public Service Commission v. Missouri Gas Energy***, 388 S.W.3d 221, 227 (Mo. Ct. App. W.D. 2012); ***State ex rel. Noranda Aluminum v. Public Service Commission***, 356 S.W.3d 293, 297 (Mo. Ct. App. S.D. 2011); ***Hurricane Deck Holding Co. v. Missouri Public Service Commission***, 289 S.W.3d 260, 263 (Mo. App. Ct. W.D. 2009).

the reviewing Court simply determines whether the agency's decision was reasonable; that is, whether it was based on sufficient evidence given the whole record. If not, then the Court should set aside that decision as arbitrary and unreasonable.

In this case, the Southern District provided too much deference to the PSC by improperly reviewing the evidence in the light most favorable to that administrative agency. The Southern District also erred in ignoring the Company's arguments based on the Court's inaccurate notion that sufficient evidence claims must be separated from against-the-weight-of-the-evidence claims.

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

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

POINTS AND AUTHORITIES RELIED ON

POINT I

I. The PSC erred in the Amended Report and Order by denying the Company nearly half of its rate case operating expenses, because, in violation of Sections 386.510 and 536.140.2 R.S.Mo., such decision was unlawful, in that recovery was denied without a finding that any of said expenses were imprudent.

Statutes

§ 393.130.1 R.S.Mo.

§ 393.150 R.S.Mo.

§§ 393.1009 – 1015 R.S.Mo.

Cases:

State ex rel. Associated Nat. Gas v. Pub. Serv. Comm'n, 954 S.W.2d 520, 528 (Mo. Ct. App. W.D. 1997)

Kansas City Power & Light Co. v. Pub. Serv. Comm'n, 509 S.W.3d 757, 778 (Mo. Ct. App. W.D. 2016)

In re KCPL Greater Mo. Operations Co., Case No. ER-2010-0136, 2011 WL 1827253, Report and Order dated May 4, 2011, pp. 184-87 (Mo. P.S.C. 2011)

State ex rel. U.S. Water/Lexington v. Pub. Serv. Comm'n, 795 S.W.2d 593, 597 (Mo. Ct. App. W.D. 1990)

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

POINT II

II. The PSC erred in the Amended Report and Order by denying the Company nearly half of its rate case operating expenses, because, in violation of Sections 386.510 and 536.140.2 R.S.Mo., such decision was unreasonable, in that recovery was denied based on reasons that were arbitrary and capricious, unsupported by competent and substantial evidence or were an abuse of discretion.

Statutes

§ 386.370 R.S.Mo.

Cases:

Kansas City Power & Light Co. v. Pub. Serv. Comm'n, 509 S.W.3d 757, 778 (Mo. Ct. App. W.D. 2016)

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

POINT III

III. The PSC erred in the Amended Report and Order by ordering that $3.6 million in relocation proceeds received by the Company in connection with the sale of its Forest Park facility be used to reduce rates, because, in violation of Sections 386.510 and 536.140.2 R.S.Mo., such decision (a) constituted unlawful retroactive ratemaking, in that the PSC used monies received by the Company prior to the test year period to reduce future rates, and rationalized its action based on evidence that was contrary to the competent and substantial evidence on the record; and (b) was arbitrary and capricious, in that it was contrary to the traditional treatment of gains on the sale of utility property.

Statutes:

§ 393.140(5) R.S.Mo.

§ 393.270(3) R.S.Mo.

Cases:

In Re Kansas City Power & Light Co., 75 P.U.R.4th 1 (April 23, 1986)

State ex. rel. Util. Consumers Council of Mo. v. Pub. Serv. Comm'n, 585 S.W.2d 41, 59 (Mo. banc 1979)

POINT IV

IV. The PSC erred in the Amended Report and Order by eliminating $28.8 million of the Company's pension asset, because, in violation of Sections 386.510 and 536.140.2 R.S.Mo., such decision was arbitrary, unreasonable and unsupported by competent and substantial evidence on the whole record, in that it directly conflicted with the clear evidence in the record demonstrating that a pension asset accrued as a result of the rates set in the Company's 1990 and 1994 rate cases.

<u>Cases</u>:

State ex rel. Aquila, Inc. v. Pub. Serv. Comm'n, 326 S.W.3d 20, 28 (Mo. Ct. App. W.D. 2010)

Lagud v. Kansas City Mo. Bd. of Police Comm'rs, 136 S.W.3d 786 (Mo. banc 2004)

Edmonds v. McNeal, 596 S.W.2d 403 (Mo. 1980)

Wolfner v. Bd. of Adjustment of City of Frontenac, 672 S.W.2d 147, 151 (Mo. Ct. App. E.D. 1984)

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

ARGUMENT

Each of the claims of error argued below were preserved for appellate review. On March 16, 2018, and prior to the effective date of the Amended Order, Spire Missouri filed its Application for Rehearing of these claims, among others. Pursuant to Section 386.500.2 R.S.Mo., the application for rehearing preserved Spire Missouri's right to appeal. The PSC issued an Order on April 25, 2018, denying Spire Missouri's Application for Rehearing, and this appeal followed.

POINT I

The PSC erred in the Amended Report and Order by denying the Company nearly half of its rate case operating expenses, because, in violation of Sections 386.510 and 536.140.2 R.S.Mo., such decision was unlawful, in that recovery was denied without a finding that any of said expenses were imprudent.

In attempting to support its disallowance of a portion of the Company's rate case expense, the PSC makes a legal conclusion that it has broad discretion to determine which expenses a utility may recover from ratepayers, and what items are properly includable in a utility's operating expenses. (L.F. Vol. 12, p. 4280–82). The implication is that the PSC can pick and choose which expenses it deems appropriate for recovery. In support of this assertion, the PSC cites ***State ex rel. City of West Plains v. Public Service Commission***, 310 S.W.2d 925 (Mo. 1958). In that case, the PSC moved municipal gross receipt taxes out of the utility's general operating expenses, which are paid by all customers, and directed the utility to instead separately charge those taxes to customers based on the specific amount of tax levied by their city. In response to an objection by

some of the cities, the Missouri Supreme Court decided that the PSC had the power to determine if a cost was "properly includable in a utility's operating expenses" or properly included elsewhere. The Court did not provide that the PSC had the power to disallow reasonable utility costs at its discretion.

The PSC's authority and duty is to set rates that are "just and reasonable." § 393.130.1 R.S.Mo. The PSC employs a "prudence" standard to determine whether a utility's costs meet this statutory requirement. If a utility's costs satisfy this standard, the utility is entitled to recover those costs from its customers. ***State ex rel. Associated Nat. Gas v. Pub. Serv. Comm'n***, 954 S.W.2d 520, 528 (Mo. Ct. App. W.D. 1997). Further, a utility's costs are presumed to be prudently incurred until another party creates a serious doubt as to the prudence of an expenditure. In that event, the utility has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent. ***State ex rel. KCP&L Greater Mo. Operations Co. v. Pub. Serv. Comm'n***., 408 S.W.2d 153, 163 (Mo. Ct. App. W.D. 2013).

The PSC, however, does have some discretion in what costs are just and reasonable and appropriate to include in rates. For example, the PSC does not approve goodwill advertising expenses or charitable donations for inclusion in rates. ***State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n***, 600 S.W.2d 222, 229 (Mo. Ct. App. W.D. 1980). These are highly discretionary costs[6] that are not directly linked to the provision of

---

[6] *See* ***Kansas City Power & Light Co. v. Pub. Serv. Comm'n***, 509 S.W.3d 757, 778 (Mo. App. W.D. 2016).

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

utility service.[7] Including charitable donations in rates would permit the utility to impose on its customers involuntary contributions to a charity of the utility's choice. It is important to note that these cost disallowance principles are well-established and consistently enforced. Utilities are well aware at the time they make these expenditures that they will not be recoverable in rates.

In contrast, rate cases and their accompanying expenses are not discretionary. Thanks to the constant march of inflation, and the requirement under Section 393.150 R.S.Mo. that tariffs be filed to initiate rate changes, most utilities must file rate cases on a periodic basis, and endure a lengthy process in order to have an opportunity to obtain the just and reasonable rates to which they are statutorily entitled. The periodic filing of rate cases makes rate case expense a normal, non-discretionary utility operating expense required to conduct an exercise (i.e., a rate case) that is indispensable to the sustainability of the utility and the service it provides to customers. Gas utilities, like Spire Missouri, must also file rate cases on a periodic basis in order to continue to recover costs under the ISRS statute, including costs that are already being collected between rate cases through an existing ISRS. *See* §§ 393.1012.2, 1012.3 R.S.Mo.

Until 2015, utilities were allowed to recover rate case expenses that were reasonable and not excessive. The utilities have been on notice that unreasonable or

[7] ***Laclede Gas Co.***, 600 S.W.2d at 229. It should be noted that the Commission does approve advertising for safety or other purposes not tied to burnishing the utility's corporate image.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

excessive rate case expenses are at risk and subject to disallowance. For example, in 2011, the PSC considered $6.1 million in rate case expense in joint electric rate cases involving affiliates KCP&L and KCPL GMO (formerly Aquila). The PSC stated that it was concerned at the magnitude of the expenses, and thought that the companies fell short in their cost containment efforts. The PSC therefore lengthened the period of rate case expense cost recovery from two years to three years. In addition, Staff challenged four specific cost items, and the PSC reviewed each of them for reasonableness, finding in favor of the companies on two of the items, and against the companies on the other two. ***In re KCPL Greater Mo. Operations Co.***, Case No. ER-2010-0136, 2011 WL 1827253, *Report and Order* dated May 4, 2011, pp. 184–87 (Mo. P.S.C. 2011).

Recently, however, the PSC abandoned the reasonableness standard for evaluating rate case expense and adopted an unpredictable and arbitrary standard unmoored to these legal principles. On September 2, 2015, the PSC issued an order disallowing roughly one-fourth of KCPL's rate case expenses, amounting to hundreds of thousands of dollars, while declining to disallow any particular cost as being unreasonable or excessive. ***In re Kansas City Power & Light Co.***, Case No. ER-2014-0370, 2015 WL 5244724, *Report and Order* dated September 2, 2015, pp. 64–73 (Mo. P.S.C. 2015).

In that case, the PSC simply decided that shareholders should share these costs with customers. The PSC opined that while rate case expense was similar to other general operating expenses, there were four distinguishing factors:

1) the rate case process is adversarial in nature, with the utility on one side and its customers on the other;

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

2) rate case expense produces some direct benefits to shareholders that are not shared with customers, such as seeking a higher return on equity;

3) requiring all rate case expense to be paid by ratepayers provides the utility with an inequitable financial advantage over other case participants; and

4) full reimbursement of all rate case expense does nothing to encourage reasonable levels of cost containment.

As a result of these factors, the PSC decided that shareholders must bear some of the rate case expense regardless of the reasonableness or prudence of the expenditure. ***Id.*** The PSC noted that KCPL had incurred rate case expense substantially higher than historical levels and higher than other utilities in Missouri. The PSC then decided that KCPL shareholders would bear rate case expense in the same proportion as its actual rate increase bore to its requested rate increase. ***Id.***

On appeal by KCPL, the Western District approved the PSC's first foray into the arbitrary disallowance of rate case expense. *See* ***Kansas City Power & Light Co.***, 509 S.W.3d 757, 775–79 (Mo. Ct. App. W.D. 2016). Emboldened by this authority, the PSC pushed the envelope of arbitrary ratemaking for rate case expense even further in the instant rate cases by deciding to have Spire absorb roughly half of its rate case expense, based on the PSC's finding that Spire had raised approximately half of the litigated issues in its rate cases.

Abandonment of Prudence Standard

It is unlawful to disallow utility expenditures required to provide utility service without a showing that (i) the costs were unreasonable or imprudent, and (ii) customers

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

were harmed as a result of the expenditure. ***Associated Nat. Gas***, 954 S.W.2d at 528–30**.** The PSC showed neither. As in the KCPL case, the PSC declined to find that any of Spire's rate case expenditures were imprudent or unnecessary or excessive. In fact, despite arguments by Staff and OPC that certain expenses were imprudent, the PSC expressly stated that it "does not find that any specific individual items of rate case expense were imprudent."(L.F. Vol. 12, p. 4284). The PSC nevertheless concluded that shareholders should share half of the rate case expenses (other than the cost of customer notices and depreciation studies) because Spire drove approximately half of the litigated issues in the cases. (*Id.* at 4285).

Spire argued that forcing it to absorb a significant portion of rate case expense was unfair because it had no choice but to file a rate case in order for Spire East to continue to collect revenues between rate cases necessary to offset four years of costs incurred to perform safety replacements and government mandated relocations. These charges had been approved by the PSC under Missouri's ISRS statute which, as a consumer protection, requires gas utilities to periodically file rate cases so that all of their costs can be reviewed. *See* §§ 393.1009–1015 R.S.Mo. Specifically, Spire Missouri filed its rate cases on April 11, 2017, one day before its right to collect would have expired. *See* § 393.1012.3 R.S.Mo. The consequence of not filing a rate case would have been an automatic rate *decrease*, as Spire East would have immediately lost the ability to collect significant costs it had incurred in performing ISRS-eligible work. Nevertheless, the PSC speciously determined that Spire East was not required to file a rate case, but had the option to allow tens of million in annual Commission-approved revenue to expire, and to

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

ignore its fiduciary responsibilities to the investors who provided the financial capital to make mandated pipeline safety replacements. (L.F. Vol. 12, p. 4284).

The PSC's decision on rate case expense is unlawful because the PSC affirmatively found that no rate case expenditures were imprudent, a matter it rendered moot by simply lopping off nearly half the expense. This violates the law, in that a utility is entitled to recover its prudently incurred costs, and a utility's costs are presumed to be prudently incurred until a serious doubt has been shown, and a finding of imprudence made. ***KCP&L Greater Mo. Operations Co***., 408 S.W.2d at 163; ***Associated Nat. Gas***, 954 S.W.2d at 528. The PSC itself notes that it may require shareholders to bear expenses the PSC finds to be unreasonable or unnecessary. (L.F. Vol. 12, p.4281). But the PSC made no such finding in the Amended Order. The PSC's decision on rate case expense should be reversed on this point alone.

No Evidence of Harm to Customers

The rate case disallowance is also unlawful as there was never a showing of any harm to customers as a result of these expenditures. After the record closed, the PSC, for the first time ever, decided to assign rate case expense based upon the number of issues raised by the Company versus other parties. (L.F. Vol. 12, pp. 4284–85). However, as discussed below, the PSC made no tie between the issues raised by Spire and the cost of rate case expense. Without a connection between the issues raised by the Company and the amount of rate case expense, no direct harm to customers can be shown, nor was any alleged. Even if the PSC had demonstrated some imprudence, if there were no cost to customers, i.e., no rate case expense was incurred in connection with the imprudent

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

action, it is unlawful to disallow half of the Company's rate case expense. ***Associated Nat. Gas***, 954 S.W.2d at 528–30.

<u>**Abdication of Duty to Set Just and Reasonable Rates**</u>

The PSC's decision to disallow rate case expense is also unlawful in that it violates Section 393.130.1 as an abdication of its duty to set just and reasonable rates. Both the Company and customers are entitled to just and reasonable rates. The PSC has for many years reviewed and evaluated rate case expense along with other expenses in rate cases. For the PSC to now decline to perform this analysis is an abdication of its duties under the statute. This is especially true given the fact that the PSC has comparative data from its own study on the topic to assess the reasonableness and prudence of the Company's rate case expense. (Ex. Vol. 45, pp. 7160–78 (0215); Ex. Vol. 68, pp. 7002–20 (0216); *see also* Appellant's App. pp. A178–A196). Simply put, the PSC may not abdicate its responsibility to set just and reasonable rates. ***State ex rel. U.S. Water/Lexington v. Pub. Serv. Comm'n***, 795 S.W.2d 593, 597 (Mo. Ct. App. W.D. 1990).

Rate case expense represents a normal operating cost, as is the cost to bill customers (i.e., the cost of paper, printing, envelopes, postage, and labor). It is as unlawful for the PSC to require shareholders to absorb half of the Company's rate case expense as it would be for shareholders to absorb half the billing expense. Hence, the PSC's decision to disallow nearly half of the Company's rate case expense without a finding of imprudence violates the Company's right to just and reasonable rates under Section 393.130.1 R.S.Mo.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Cost Containment is Not a Valid Reason to Disallow Prudent Expenses

As set forth above, the PSC offered four reasons why rate case expense is distinguishable from other operating expenses and thus may be disallowed out of hand. The fourth reason, that such disallowance encourages cost containment, is the most unlawful. First, according to the PSC's own study, Spire Missouri had been historically successful in controlling rate case expense. (L.F. Vol. 12, p. 4277). Second, since the ISRS Statute required the Company to file a rate case to incorporate ISRS costs into permanent rates, disallowing rate case expense discourages Spire's lawful right to recover these costs. Finally, disallowing a portion of any cost is going to lead to cost containment. It would be clearly confiscatory for the PSC to cut half of all of the Company's cost items. But there is no doubt that such an action would lead to severe cost containment measures, at least until the Company went out of business. It is simply unlawful for the PSC to decline to review a category of costs that are presumed to be reasonable and prudent, and instead simply lop off roughly half of them under the guise of cost containment.

Interferes with the Company's Right to Manage its Business

The PSC's treatment of rate case expense also penalizes a utility for having a litigation strategy that chooses to use outside counsel and outside experts in its rate case while permitting full recovery of in-house counsel and in-house experts who perform the same work. This interference with a utility's litigation strategy is not only contrary to long standing legal principles that vest in utility management the right to manage

business affairs,[8] but also discounts savings that might be achieved by using outside personnel only when the need arises rather than embedding them in utility costs and rates year-round.

Given the PSC's decision on rate case expense in the 2015 KCPL rate case and in these cases, utilities in future rate cases will have little idea what rate case expense disallowance awaits them at the hands of the PSC. In fact, the counterproductive result that utilities are being steered toward is to hire more full-time year-round employees to conduct rate cases in-house, rather than temporary outside consultants and attorneys who, though they may increase rate case expense, would not raise embedded annual costs. Customers will end up paying more in operating expenses for these full-time employees than the one-time rate case expense they would have otherwise incurred.

The Southern District failed to adequately address this legal point in its Opinion. It cited the complexities inherent in a rate of return determination as a reason to defer to the PSC. But this is a simple rate case expense matter, not the more complex rate of return issue. Although the courts do not defer to the PSC on matters of law, the Southern District nevertheless did just that when it ceded the field of law to the PSC on the legal question of whether rate case expense may be excluded by relying on the PSC's "considerable discretion." (Opinion, p. 23). This Court should not perpetuate the same

---

[8] ***State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n***, 600 S.W.2d 222, 226 (W.D. Mo. 1980) (Commission has no authority to take over the general management of any utility); ***State ex rel. Harline v. Pub. Serv. Comm'n***, 343 S.W.2d 177, 181–82 (W.D. Mo. 1960).

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

error and should instead reverse the PSC's unlawful disallowance of Spire's recovery of its indisputably prudent costs incurred in the prosecution and defense of its rate case.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

POINT II

The PSC erred in the Amended Report and Order by denying the Company nearly half of its rate case operating expenses, because, in violation of Sections 386.510 and 536.140.2 R.S.Mo., such decision was unreasonable, in that recovery was denied based on reasons that were arbitrary and capricious, unsupported by competent and substantial evidence, or were an abuse of discretion.

As set forth above, the PSC's duty is to determine the prudence of a rate case expenditure after a party creates a serious doubt as to such expenditure. This provides the courts a straightforward way of evaluating the lawfulness and reasonableness of a rate case expense decision. In the absence of a PSC prudence review, the court's task would be to evaluate the lawfulness and reasonableness of the various reasons given by the PSC in each case for denying differing amounts of rate case expense. Accordingly, in the event that the Court finds that it was lawful for the PSC to reject roughly half of the Company's rate case expense without a finding of imprudence, Spire submits that the PSC's decision is still unreasonable because it relied on a wholly arbitrary and after-the-fact standard that was unsupported by the record evidence.

In the Amended Order, the PSC opined that while rate case expense was similar to other general operating expenses, there were four distinguishing factors:

1) the rate case process is adversarial in nature, with the utility on one side and its customers on the other;

2) rate case expense produces some direct benefits to shareholders that are not shared with customers, such as seeking a higher return on equity;

3) requiring all rate case expense to be paid by ratepayers provides the utility with an inequitable financial advantage over other case participants; and

4) full reimbursement of all rate case expense does nothing to encourage reasonable levels of cost containment.

As a result of these factors, the PSC decided that shareholders must bear half of the rate case expenses (other than the cost of customer notices and depreciation studies) because Spire Missouri drove approximately half of the litigated issues in the rate cases, regardless of the reasonableness or prudence of any particular expense. (L.F. Vol. 12, p. 4282–84).

The PSC identified specific litigated issues raised by Spire, including shareholder-focused ratemaking tools such as a revenue stabilization mechanism ("RSM"), three new tracking mechanisms, and earnings-based incentive compensation, along with shareholder-focused issues such as a requested return on equity of 10.35%, and the Forest Park property issue. (*Id.* at 4279, 4283). The PSC also found that the Company "padded" its revenue requirement, essentially seeking more in its rate case application than it expected to receive. Finally, the PSC found that rate case expense in this case far exceeded Spire East and West estimates and their historical rate case expense levels. (*Id.* at 4283–84).

For the following reasons, the PSC's decision is unreasonable, because it is arbitrary and capricious, it is not supported by competent and substantial evidence on the whole record, and it is an abuse of discretion. Rate case expense covers the costs of,

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

among other things, outside experts and consultants and outside counsel. Rate case expense does not include the cost of employees who work on rate cases. (*Id.* at 4275–76). The PSC made no finding regarding how the issues raised by the Company in the rate case affected rate case expense. For example, the PSC was critical of the Company for requesting a revenue stabilization mechanism ("RSM"), which the PSC errantly referred to as a shareholder focused ratemaking tool.[9] (*Id.* at 4283). Despite the fact that the PSC actually *approved* a form of the RSM, it cited the RSM as an item raised by the Company, but never made any findings that it drove any rate case expense. (*Id.* at 4313–15). The same is true for the tracking mechanisms and earnings-based incentive compensation cited by the PSC.[10] (*Id.* at 4283). Since there is no link between these proposals and rate case expenditures, the PSC's decision to disallow half of these expenditures is arbitrary and capricious and not based on competent and substantial evidence.

---

[9] In reality, the RSM benefits both the Company and its customers. It primarily adjusts for weather, refunding money to customers when high charges are driven by cold winters, and charging customers when they underpay revenues in warm winters.

[10] The Commission is again incorrect when it states that it has "consistently denied" incentive compensation proposals. In the only case to be decided in the past ten years, the Commission approved an earnings-based incentive compensation program. Ex. Vol. 44, pp. 7119–21. The Commission failed to even mention this case in its Amended Order.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

The PSC's decision is further unreasonable in that it cites the Company's high rate of return on equity ("ROE") of 10.35% as a reason to disallow rate case expense. (*Id.* at 4283). The cost of capital primarily consists of ROE and the amount of equity (versus debt) in the capital structure. Cost of capital testimony is routinely supported in rate cases by outside experts on financial markets. The cost of the necessary expert support is a quintessential example of a rate case expense. In this case, the Company's rate case expert's recommendation on ROE was *as close, or closer*, to the PSC's final ROE decision as the other two witnesses who testified on ROE.[11] (*Id.* at 4258–59, 4265). When factoring in the parties' relative positions on the capital structure, the Company expert's cost of capital position was significantly closer to the final outcome than the other experts. (*Id.* at 4270–71, 4275). Regardless, the Company would have had to file ROE testimony in any event, and there is absolutely no evidence on the record to suggest that the Company's support of a ROE that was at least as close to the final outcome as any other witness resulted in any incremental rate case expense being incurred. Spire should not be penalized by having rate case expense disallowed where the Company has indisputably taken a reasonable position.

The PSC's decision is also unreasonable as it charged the Company with litigating the Forest Park property issue. (*Id.* at 4279, para. 20). As discussed in the next point on

[11] The final ROE was 9.80%. The Company's witness advocated 10.35%, while the witness representing the Industrial intervenors and OPC advocated 9.20%, and the Staff's witness advocated 9.25%.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

appeal, the Forest Park property was sold in 2014, well before the 2016 test period in the rate case. Neither the relocation proceeds nor the expenses they covered were included in the rate case filed by Spire. It was the Staff, not the Company, that insisted on reaching back in time to grab relocation proceeds that had already been spent by the Company. Spire did not raise the Forest Park issue; it defended it. It is truly unreasonable and an abuse of discretion for the PSC to retroactively take the Company's relocation proceeds from the Forest Park sale and then, without ever linking any rate case expense to the issue, disallow rate case expense because the Company defended itself against this confiscation.

As noted above, the PSC tried to distinguish rate case expenses from other operating expenses by claiming that (i) the rate case process is adversarial; (ii) rate case expense produces benefits for shareholders; (iii) the utility has an inequitable financial advantage over other case participants; (iv) disallowing some portion of rate case expense encourages cost containment. These justifications are so flawed as to be arbitrary, unreasonable and an abuse of discretion.

First, the process is not necessarily adversarial. The purpose of a rate case is to establish just and reasonable rates for safe and adequate service. It has the natural give and take of any contractual arrangement. It is important to note that, prior to these cases, Spire East reached a settlement accord in every rate case in this century.[12] After six

[12] These rate cases occurred in 2001, 2002, 2005, 2007, 2010 and 2013. Tr. Vol. 3, pp. 1727–28.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

consecutive settled cases, this fully litigated rate case occurred in Spire Missouri's first rate case since the Western District approved the PSC's rate case sharing order in the 2015 KCP&L rate case. The inference is that the sharing of rate case expense has eroded the willingness of other parties to settle, which has the counterproductive result of making rate cases *more* adversarial and driving up rate case expense for everyone. Further, a rate case certainly does not pit the Company against the customer any more than when the Company renders a bill to a customer seeking payment for utility service. Yet no one would argue that the Company should not recover its normal operating expense to bill and collect.

Second, rate case expense can benefit both the company and its customers. It is a necessary expense to maintain just and reasonable rates. In the present cases, the Company incurred rate case expense from a consultant who provided testimony on class cost of service and rate design matters. (Ex. Vol. 6, part 1, pp. 1120–23). Class cost of service is a way to allocate costs among the various customer classes, including residential, small commercial and large commercial. Rate design allocates cost between fixed and variable charges. None of the expenditures on the class cost of service and rate design witness added to the Company's revenues; they are simply expenses required as part of the rate setting process. Moreover, the PSC ignored the evidence that many Company issues were not designed to increase revenue requirement, including establishing performance benchmarks, relieving customers of a charge for credit card payments, reconciling Kansas property taxes, bringing customers lower gas costs by making an initial investment in the St. Peters lateral, and reducing meter reading costs by

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

purchasing AMR devices. (L.F. Vol. 12, pp. 4361–64, 4298–4300, 4255–57, 4372–76; Ex. Vol. 21, part 2, p. 3334). The PSC's decision was therefore arbitrary and cannot be squared with the competent and substantial evidence on the whole record.

Third, there is no record evidence to support the notion that the Company has an inequitable financial advantage. That is simply false. Most of the Company's rate case legal duties were handled by two attorneys, one inside counsel that drove no rate case expense, and one outside counsel. Meanwhile, Staff, Public Counsel and eleven other parties participated in the rate cases, each with their own attorneys and agendas. (L.F. Vol. 12, p. 4233–36). Some of the parties are state governmental entities who have no risk and no financial incentive to compromise. Moreover, the costs of Staff and Public Counsel are charged to the Company through an allocation process, and ultimately passed on to utility customers. § 386.370 R.S.Mo.; *see also* ***Re: Assessment Against the Public Utilities in the State of Missouri for the Expenses of the Commission for the Fiscal Year Commencing July 1, 2018***, Case No. AO-2018-0379, *Assessment Order for Fiscal Year 2019*, dated June 20, 2018 (Mo. P.S.C. 2018). One of these governmental entities, namely Public Counsel, hired four outside consultants for this case. The other entity, Staff, had twenty-nine witnesses, all of whom are employed by the trier of fact.[13] The Amended Order unjustly ignored these facts in finding that the Company has an inequitable financial advantage. The Company must participate in a rate case to maintain

[13] Staff had eighteen witnesses in direct testimony alone. Ex. Vol. 21, part 2, pp. 3348–65.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

reasonable rates. Staff and OPC, both governmental entities, are also automatically parties to a rate case. All other parties have the option to intervene if they choose to do so, and presumably make that decision on an economic basis. The PSC's reliance on this point is arbitrary, unsupported by the competent and substantial evidence on the whole record, and an abuse of discretion.

Fourth, as discussed above, disallowing some rate case expense based on the notion that it encourages cost containment is unlawful. It is also arbitrary and an abuse of discretion. The Staff and OPC invested their time to audit Spire's rate case expense and propose certain disallowances. Rather than do its job of hearing the arguments and considering the prudence of such expenditures, the PSC plucked out of the air a formula the parties had never seen and the PSC had never used, and decided that it could control utility costs by arbitrarily disallowing them.

Fifth, the PSC's decision is also arbitrary and capricious for the reason that it treats the Company with the historically low rate case expense worse than the Company with the historically high rate case expense. In KCPL's 2015 rate case, the PSC found that KCPL has incurred rate case expenses "substantially higher than historical levels and higher than other utilities in Missouri." ***In re Kansas City Power & Light Co***., Case No. ER-2014-0370, 2015 WL 5244724, *Report and Order* dated September 2, 2015, pp. 64–73 (Mo. P.S.C 2015); ***Kansas City Power & Light Co***., 509 S.W.3d at 776. As a result, the PSC developed a formula by which it allowed KCPL's rate case expense recovery in the same proportion as KCPL's actual rate increase bore to its requested rate increase. This resulted in KCPL receiving about three-quarters of its rate case expense. The PSC

found that Spire Missouri had historically incurred low levels of rate case expense compared to other Missouri utilities. The PSC then awarded the Company roughly half of its rate case expense based on the proportion of issues the Company raised compared to issues raised by other parties. Since the PSC finds the utility's rate case expense history important, its changing target and conflicting result is arbitrary and capricious.

Finally, the PSC also abused its discretion in converting a logical litigation strategy into a rate case expense penalty. The PSC made a finding that the Company takes the more aggressive positions and builds a little cushion into its requests. (L.F. Vol. 12, p. 4279). In its decision, the PSC bootstrapped that finding into an "admission" that the Company "padded" its revenue requirement by pursuing strong positions on issues "it did not expect to win*."(Id.* at 4283). This finding is not supported by the evidence. The transcript showed that the Company witness volunteered his opinion that more aggressive positions were taken because he understood that if circumstances change during the long rate case period, the Company's requested amount can go down but it cannot go up from its original position. (Tr. Vol. 3, pp. 1711–13). In other words, the Company was being conservative because its rate increase request could only move one direction – down. The PSC's willingness to ratchet up a finding of fact by misrepresenting the Company's testimony, and to use a logical strategy by the Company to shave hundreds of thousands of dollars of reasonable costs out of rate case expense, is another example of how the PSC has abused its discretion in this case.

In light of all these arguments attacking the reasonableness of the PSC's rate case expense decision, the Southern District's judicial review came up short. The court stated,

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

"The PSC's findings on this issue frame our review," and then simply restated the PSC's findings in the Opinion. (Opinion, pp. 24–25). That is not judicial review; it is merely a rubber stamp. The court's duty was to decide whether the PSC's decision was reasonable, which included an objective consideration of all of the competent and substantial evidence on this issue. The court did not consider the evidence objectively; it did not even consider the evidence in the light most favorable to the Commission. It simply did not consider the evidence at all. Had the Southern District conducted an objective review of the evidence, as this Court should do, the only conclusion is that the PSC's unreasonable disallowance of Spire's rate case expenses should be reversed.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

POINT III

The PSC erred in the Amended Report and Order by ordering that $3.6 million in relocation proceeds received by the Company in connection with the sale of its Forest Park facility be used to reduce rates, because, in violation of Sections 386.510 and 536.140.2 R.S.Mo., such decision (a) constituted unlawful retroactive ratemaking, in that the PSC used monies received by the Company prior to the test year period to reduce future rates, and rationalized its action based on evidence that was contrary to the competent and substantial evidence on the record; and (b) was arbitrary and capricious, in that it was contrary to the traditional treatment of gains on the sale of utility property.

In 2014, Spire sold its Forest Park facility in St. Louis, Missouri. (L.F. Vol. 12, p. 4248). The Forest Park facility had been used for eight decades as a service center for field personnel and as a satellite office for several hundred management personnel. (Ex. Vol. 17, p. 2570).The sale of the facility, and the terms under which it was accomplished, were the result of a number of factors. As testified to by Company witness Susan Kopp, Spire's Director of Facilities, the Company had decided to move the management personnel at Forest Park to the Company's new central office at 700 Market Street to facilitate its transition to a shared services model across a growing company. Around the same time, the Company had also begun a reorganization of its operations to reduce its three operating districts down to two operating districts, thereby eliminating the need to maintain the remaining field personnel at the Forest Park service center. (*Id.*).

Moving out of the Forest Park facilities had also become increasingly necessary because of serious physical and layout issues. Originally constructed in 1935, the facility had high maintenance and operating costs, inadequate secure parking space for utility vehicles, interior asbestos, roofing, plumbing, electric and other issues that would have required substantial investments to remediate. (*Id.*). Finally, the Forest Park facilities were located in the CORTEX redevelopment district. This created an obstacle to investing any more money in the facility since it could be taken by CORTEX through eminent domain. In the end, the Company concluded that the Forest Park service center was neither necessary nor useful in performing its duties to the public. (*Id.* at 2558–59, 2569–70).

The Company was able to negotiate a sale of the Forest Park property in 2014, in lieu of condemnation, to CORTEX, which wanted to use the property to attract the first IKEA store in the St. Louis area. (*Id.* at 2570). The sale price included: (a) a gain of approximately $7.6 million, excluding the $1.8 million undepreciated book value of the facilities[14] and (b) an allowance of $5.7 million for relocation expenses. (Ex. Vol. 17, p. 2554). As shown by the appraisal produced in connection with the sale, the gain related entirely to the value of the land; the asset was actually worth less with the buildings than without them. (*Id.*).

[14] In the Amended Order, the PSC effectively took $1.8 million of the $7.6 million gain. L.F. Vol. 12, p. 4254. Spire preserved this issue for appeal but decided not to pursue the issue at the Southern District, so it is not a part of this appeal.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Of the $5.7 million relocation proceeds, $1.95 million was used to purchase furniture and fixtures for the new offices at 700 and 800 Market Street – a capital contribution that directly benefitted customers by avoiding added rate base that would have increased the Company's cost of service in the rate case. The Company spent the remaining amount of approximately $3.75 million on various moving and relocation expenses associated with its facilities restructuring plan, including the moves from both Forest Park and 720 Olive Street. (Tr. Vol. 3, pp. 1602, 1622, 1624–25; L.F. Vol. 12, pp. 4251–52).

The evidence showed that all of the Forest Park relocation proceeds were received by the Company well before the test year in these cases, and were spent on relocation-related expenses associated with the Company's moves from Forest Park and 720 Olive Street. Most of these expenses also occurred prior to the rate case test year. All of the relocation proceeds were used to offset the relocation-related expenses, and none of the expenses were included in the Company's cost of service in its rate case. (Ex. Vol. 17, pp. 2559–60; Tr. Vol. 3, pp. 1622–26; 1644–45; 1650–52).

The PSC agreed that the entire $5.7 million in proceeds from the sale were spent for moving and relocation expenses associated with the Company's moves from Forest Park and 720 Olive Street. (L.F. Vol. 12, p. 4252, para. 18).The PSC nevertheless decided in its Amended Order that $3.6 million of these proceeds (that Spire had received years earlier) should be used to reduce the Company's future rates. The only justification given by the PSC for mandating this treatment was its erroneous contention that using the proceeds to reduce rates was appropriate to offset the cost of an allegedly more expensive

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

service center that was constructed by the Company subsequent to the sale of the Forest Park facility. (*Id.* at 4255). As discussed below, the PSC's decision is contrary to Missouri law, the undisputed competent and substantial evidence on the record, and the PSC's own policies for treating gains and losses realized from the sale of utility assets.

The PSC's Decision Constitutes Unlawful Retroactive Ratemaking

In reaching back prior to the test year to seize approximately $3.6 million of the relocation proceeds and use them to reduce the Company's rates on a going forward basis, the PSC clearly engaged in unlawful retroactive ratemaking. The principles underlying the prohibition against retroactive ratemaking were discussed at length by the Missouri Supreme Court in ***State ex. rel. Utility Consumers Council of Missouri v. Public Service Commission***. As the Court explained:

> The utilities take the risk that rates filed by them will be inadequate, or excessive, each time they seek rate approval. To permit them to collect additional amounts simply because they had additional past expenses not covered by either clause is retroactive rate making, i.e., 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. Past expenses are used as a basis for determining what rate is reasonable to be charged in the future in order to avoid further excess profits or future losses, but under the prospective language of the statutes, §§393.270(3) and

393.140(5), they cannot be used to set future rates to recover for past losses due to imperfect matching of rates with expenses.

585 S.W.2d 41, 59 (Mo. banc 1979) (citations omitted).

It is difficult to conceive of a more concrete example of unlawful retroactive ratemaking than the PSC using the 2014 Forest Park relocation proceeds to reduce the Company's future rates. Neither the PSC nor any party to the case argued that the relocation proceeds were reoccurring in nature and must be used to establish an ongoing level of proceeds the Company could expect to receive in the future. Instead, the PSC simply chose to retroactively seize these prior proceeds to unlawfully reduce future rates.

The PSC's attempt to justify its unlawful seizure of these proceeds on the grounds that such action was necessary to offset the "more expensive"[15] cost of a new satellite office that was subsequently built by the Company is unavailing for two main reasons. First, this tactic would effectively render the current prohibition against retroactive ratemaking meaningless, as one could always argue that it is necessary or appropriate to seize a past revenue or earnings item in order to offset or reduce the impact of a future cost. Permitting these kinds of "exceptions" would swallow up the rule.

Second, the decision is contrary to the competent and substantial evidence on the whole record, which showed that the Manchester satellite facility was ***less*** expensive to operate than the Forest Park service center, not more expensive. In claiming otherwise,

[15] As discussed below, the record evidence does not support the PSC's finding that the new satellite office was more expensive than the old service center.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

the PSC simply ignored the unimpeached and undisputed results of the comprehensive analysis that was submitted by the Company comparing the relative property tax, utilities, maintenance expenses and upgrade costs of the two facilities. That analysis demonstrated that the Forest Park facility would have actually cost over $900,000 more to own and operate from 2017 to 2020 compared to the all-in cost for the Manchester facility. (Ex. Vol. 17, pp. 2574–75).

The PSC did state at page twenty-five of the Amended Order that "[a]lthough the Manchester facility may be less expensive to operate, it is a much more expensive capital asset than the Forest Park property and rates will include this more expensive capital." (L.F. Vol. 12, p. 4255). This conclusory statement, however, in no way rebuts the accuracy of the comprehensive analysis submitted by the Company which looked at *both* operating and capital costs. At page fourteen of its Amended Order, the PSC itself set forth the formula which it states the PSC and every party uses to determine a utility's cost of service when establishing rates. Here is an abridged version of that formula:

COS = O + (V – D)R

where:

COS = Cost of Service;

O = Adjusted Operating Costs (Payroll, Maintenance, etc.)

V = Gross Valuation of Property Required for Providing Service

D = Accumulated Depreciation

R = Allowed Rate of Return

V – D = Rate Base (or Net Property Investment)

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

(V - D)R = Return Allowed on Net Property Investment

(*Id.* at 4244).

As the formula endorsed by the PSC makes clear, any attempt to assess the cost of a particular ratemaking item must look at ***both*** capital and operating costs, as the Company's comprehensive analysis did. The PSC acted arbitrarily in abandoning its own formula by looking only at capital costs to find that the new Manchester satellite facility was more expensive than the Forest Park service center. It was not. While the Company never considered the Manchester satellite office to be a replacement for the Forest Park service center in the first place, the PSC's theory that the Company should be deprived of the relocation proceeds because the Manchester facility resulted in increased costs for the Company and its customers is simply not supported by the record evidence.

The PSC's seizure of these proceeds is made even more arbitrary and capricious by the fact that, except for the $1.95 million that was used to purchase furniture and other capital items at no cost to customers, all of these proceeds were, in fact, used for their intended purpose, namely to relocate employees and pay for other related expenses such as archiving documents and moving equipment. (Ex. Vol. 17, pp. 2559–60, 2569). On cross-examination, Staff witness Kunst acknowledged that he had been provided with a massive spreadsheet with hundreds of entries showing where these proceeds were spent. (Tr. Vol. 3, p. 1639). Mr. Kunst also had memoranda from the Company's outside auditors verifying the use of these proceeds for various relocation, document retention and moving expenses associated with the Company's facility restructuring. (*Id.*).

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Instead, it appears that the PSC's seizure of these proceeds may have been motivated, at least in part, by the belief that they were not used exclusively to relocate employees from the Forest Park facilities, but were also used to offset other relocation and related expenses associated with the Company's broader facility restructuring.

There is simply no principle of law or any policy rationale that would have bound the Company to either use these relocation proceeds solely to move employees out of Forest Park, or risk forfeiting them. In fact, the Company was entirely free to use them in the manner it deemed appropriate. That said, however, Spire Missouri used all of the proceeds for legitimate relocation expenses or for capital contributions that spared its customers of any obligation to pay such costs in rates.

Inconsistency with PSC's traditional treatment of gains and losses

Finally, the PSC's treatment of these proceeds is arbitrary and capricious because it is flatly inconsistent with the PSC's traditional practice of treating gains and losses on the sale of utility assets *below* the line by excluding them from utility rates. *See* ***Re Kansas City Power & Light Co.***, 75 P.U.R.4th 1 (April 23, 1986) (citing ***Re Mo. Cities Water Co***., 26 Mo. PSC NS 1 (1983); ***Re Associated Nat. Gas Co***., 55 P.U.R.4th 702 (Sept. 19, 1983)). Notably, the PSC has found this treatment to be particularly appropriate where, as here, the transaction involves the sale of land, which is non-depreciable property, meaning that customers do not pay for it in rates as depreciation expense. As the PSC observed in the ***Kansas City Power and Light*** case, "the shareholder has not received a multiple recovery of the investment through depreciation and again through the sale of the property. ***Kansas City Power & Light***, 75 P.U.R.4th at

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

29). Accordingly, the PSC has no justification for seizing the proceeds under its traditional approach for treating gains and losses realized from the sale of utility assets.

In conclusion, the PSC's attempt to reach back to a period well before the test year and seize these one-time relocation proceeds was prohibited by the ban against retroactive ratemaking, was based on a rationale that was unsupported by the competent and substantial evidence on the whole record, and arbitrarily violated the PSC's own traditional practice of determining how gains from the sale of utility assets should be treated. The Court should reverse the PSC's decision on this point as unlawful, contrary to the competent and substantial evidence on the record, and arbitrary and capricious.

The Southern District found that the PSC's actions were justified because the Company sold the Forest Park property without first obtaining PSC authorization, in violation of Section 393.190.1 R.S.Mo. (Opinion, pp. 20–23). The Court erred in deciding that not obtaining PSC approval to sell the Forest Park property justified unlawful retroactive ratemaking. First, if a public utility like Spire is alleged to have violated a law, rule or regulation, there is a specific statutory procedure that must be followed for establishing such a violation and imposing penalties, if proved. Specifically, a Complaint must be filed against the public utility alleging such a violation,[16] a hearing must be held at which the utility is given an opportunity to challenge the allegation,[17] the

---

[16] § 386.390 R.S.Mo.; *see, e.g.*, ***Hurricane Deck Holding Co. v. Mo. Pub. Serv. Comm'n***, 289 S.W.3d 260 (Mo. Ct. App. W.D. 2009).

[17] *Id.*

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

PSC must find that a violation occurred, and it must authorize its general counsel to pursue enforcement of any ordered penalties in circuit court, where a hearing must also be afforded the utility.[18]

None of those steps were followed in this case. In fact, the PSC did not even decide in its Amended Order that the Appellant had actually violated Section 393.190 R.S.Mo., or any other provision of Missouri law for that matter, let alone calculate and seek enforcement of penalties for such a violation.

To be sure, there is a suggestion in the Amended Order that the PSC believed that the Company should have obtained PSC approval before selling the Forest Park property. (*See* L.F. Vol. 12, p. 4253, and findings 19 and 20 on p. 4252). The PSC claimed that this was its first opportunity to address the Forest Park sale. (*Id.* at 4253). But that is not true. The evidence in the case showed that in May 2014, as part of a public on-the-record presentation, Spire notified the PSC that it had sold the Forest Park property and that an IKEA Store would be built on the site. (Conf. Ex., p. 471; *see also* Tr. Vol. 3, pp. 1574, 1600–01). At no time during that presentation, or during the nearly three years that elapsed prior to Spire's filing of the 2017 rate cases, did the PSC, its Staff, OPC or any other party assert or take any formal or informal action against the Company based on any theory that PSC approval for the sale was required but not obtained. Thus, even if the PSC had made such a finding that Spire violated Section 393.190.1 R.S.Mo. (which it did

[18] § 386.600 R.S.Mo; *see also* ***State ex rel. Mo. Pub. Service Comm'n v. Joyce***, 258 S.W.3d 58, 61 (Mo. banc 2008).

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

not), not only would that be procedurally unlawful but it would also be unreasonable as it is unsupported by competent and substantial evidence.

Taken at face value, the Southern District's position means that, while Spire thought it was engaged in a general rate case in 2017, the PSC was holding a secret complaint hearing, and effectively fined the Company for actions it took in 2014, without the benefit of notice or the filing of a complaint. Had a complaint been brought in a lawful manner, Spire would have had a full opportunity to receive notice of the alleged violation and to present evidence and arguments in its defense, both at the PSC and in any enforcement action in circuit court.

There are a host of matters that could be at issue in a complaint over an alleged violation of Section 393.190 R.S.Mo. For example, one issue would be whether a service center facility is the type of asset that the legislature intended to be covered by Section 393.190 R.S.Mo.[19] Spire may have argued that, because service centers and other facilities are fungible and can be procured (and, in fact, were procured) as and when needed to serve the needs of Spire's customers, it was appropriate for Spire to declare the Forest Park property unnecessary and not useful to the Company's performance of its duties to the public, obviating the need to obtain PSC approval to dispose of it. The record is replete with other examples of where the Company, in connection with the restructuring of its facilities, ended leases on various facilities, or sold or otherwise

---

[19] The Chairman of the PSC noted that it would not be desirable for the Company to seek Commission authority each time it sold one of its vehicles. Tr. Vol. 3, pp. 1599–1600.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

disposed of property without PSC involvement.[20] In short, an office building or service center is not like a pipeline or other portion of a utility's distribution system that cannot be easily replaced because there are no readily available substitutes. As such, the Company would have argued that it did not violate Section 393.190 R.S.Mo., and consequently, relied on the fact there is no precedent for requiring receipt of PSC approval to change buildings. Moreover, if the PSC indeed thought the facility switch was wrong, it would have deemed the act imprudent and denied all costs in rates, which it did not.

Neither the Southern District nor the PSC should be permitted to arbitrarily circumvent fundamental statutory requirements by attempting to justify a retroactive seizure of millions of dollars in relocation proceeds based on an asserted violation of law that was never alleged, pursued, proved or enforced. Spire respectfully suggests that such

---

[20]Among others, these included the termination of leases on what had been the main headquarter buildings for both Missouri Gas Energy and Laclede Gas Company. Ex. Vol. 17, pp. 2555, 2562, 2563, l. 20–22. Another example arises out of the fact that the Company spent a significant amount of money on office furniture in its new locations. Tr. Vol. 3, p. 1653. The Company must have therefore sold or otherwise disposed of the old furniture. Notably, no one alleged that any aspects of the Appellant's facility restructurings, all of which took place at roughly the same time as the sale of the Forest Park property, required any kind of Commission approval.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

an argument only reinforces the unlawful and unreasonable nature of the PSC's treatment of these proceeds requiring reversal of the PSC's decision.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

POINT IV

The PSC erred in the Amended Report and Order by eliminating $28.8 million of the Company's pension asset, because, in violation of Sections 386.510 and 536.140.2 R.S.Mo., such decision was arbitrary, unreasonable and unsupported by competent and substantial evidence on the whole record, in that it directly conflicted with the clear evidence in the record demonstrating that a pension asset accrued as a result of the rates set in the Company's 1990 and 1994 rate cases.

The issue on this point is the amount of Spire East's prepaid pension asset. (L.F. Vol. 12, p. 4324). It is therefore crucial to understand how that asset arises. As explained below, the asset represents the difference between cash spent by the Company to fund its pension versus the amount of pension expense the Company charged to customers in rates. (*Id.*; Supp. Ex., p. 5; Ex. Vol. 21, part 2, p. 3260; Tr. Vol. 3, p. 2074). The amount of cash the Company paid into its pension is well known. So the issue boils down to how much customers paid in rates for pension expense between 1990 and 1996. (L.F. Vol. 12, p. 4325).

For purposes of this case, there are two main ways to calculate pension expense for rate cases. One way is to base rates on the actual cash contributions that the Company has been making to its pension (the "cash method"). So in a rate case, the parties might look at the average annual amount of cash Spire has contributed to its pension over the past three years, and adjust for any recent known and measurable changes, to arrive at an amount of annual pension expense to put into rates. The second way to calculate pension

expense for rates is to use the accrual accounting method approved by the FASB under what was known as Financial Accounting Standards ("FAS") 87 and 88 (the "accrual method").

In the long run, pension expenses should be the same between the two methods. But in the short run, pension expense based on the accrual method can differ widely from the actual cash contributions that the Company makes to its pensions. FAS 87 and 88 accrual accounting required the Company to track the difference between the accrued pension expense and its actual cash pension contributions as an asset or liability. (Supp. Ex., p. 9, ll. 21–22; Supp. Ex., p. 10, ll. 20–22). So when customer rates are based on the accrual method, to the extent those rates fall short of the Company's actual cash contributions, the Company establishes an asset to reflect the fact that customers have underpaid pension costs and owe the difference to the Company. To the extent pension expense under the accrual method exceeds actual cash contributions, the Company establishes a liability to reflect the fact that customers have overpaid pension costs and are owed the difference from the Company. Spire East has been carrying a pension asset on its books for many years, while Spire West has a pension liability. (L.F. Vol. 12, pp. 4324–25). On the other hand, when customer rates are based on the cash method, no asset or liability is accrued since the cash method is based on the Company's actual cash contributions to its pension.

The issue in this case arose out of the 1990, 1992 and 1994 rate cases. Spire believes that a $28.8 million pension asset accrued from the rates in those cases. The

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Staff disagrees that such an asset exists. The matter was deferred for many years, but finally came to a head and was decided in Spire's 2017 rate case.

The disagreement stems from the fact that in the early 1990s, Spire's cash contributions to its pension far outpaced the amount of pension expense calculated under the accrual method. Spire argued that customer rates in these rate cases were based on the accrual method, which resulted in a pension asset to account for the large gap between the higher cash contributions made by the Company and the lower accrual method pension expense that customers paid in rates. Spire adopted the accrual method for its pension expense in 1987, consistent with GAAP. The PSC Staff does not disagree that Spire adopted the accrual method in 1987, but argued that customer rates in the 1990 and 1992 rate cases were based on the cash method, not the accrual method, so no asset accrued between 1990 and 1994 because there was no difference in methodology between the cash method used to set rates and the actual cash contributions to the pension. The Staff argued that rates from the 1994 rate case were based on FAS 87 accruals, but FAS 88 gains were not used to reduce pension expense until Spire East's 1996 rate case. The parties agree to the asset that arose from Spire's 1994 rate case under FAS 87, but Staff disputes Spire East's claim that a $9.0 million asset arose between 1994 and 1996 under FAS 88.

So the issue boils down to whether pension costs in customer rates for the 1990, 1992 and 1994 rate cases were based on the cash method or the accrual method. (*Id.* at 4325).

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

On page 101 of the Amended Order, the PSC decided that the testimony showed that "parties were using a cash contribution method, and not FAS 87 or FAS 88 accrual accounting prior to September 1, 1994," which was the effective date of rates in Spire East's 1994 rate case, Case No. GR-94-220. (*Id.* at 4331). The main finding of fact supporting this decision is found at paragraph 6j on page ninety-seven of the Amended Order. It acknowledges that Spire East adopted FAS 87 in 1987, but adds that "FAS 87 was not used for regulatory purposes prior to the effective date of rates in GR-94-220." (*Id.* at 4327). This is not a finding of fact but a conclusory statement that begs the question as to how much customers paid in rates for pension expense between 1990 and 1994. The conclusory finding cites to an almost verbatim conclusory statement in the record that likewise begs the question. (Ex. Vol. 21, p. 3261).

The finding that FAS 87 was not used for regulatory purposes until the conclusion of Case No. GR-94-220 is merely Staff's position, not evidence of what customers actually paid in rates. The PSC is required to avoid making findings of fact that are completely conclusory. Such a conclusory statement is inadequate in that it does not allow the Court to review the evidence (if any) supporting the decision and ascertain if the facts afford a reasonable basis for the finding made by the PSC in its order. ***State ex rel. Aquila, Inc. v. Pub. Serv. Comm'n***, 326 S.W.3d 20, 28 (Mo. Ct. App. W.D. 2010).

The evidence needed to support such a finding would come from the 1990, 1992, and 1994 rate cases. Although the PSC did address the 1992 rate case in paragraph 6k on

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

page ninety-seven, and the 1994 rate case in paragraph 6l,[21] nowhere does the PSC address the 1990 rate case. As explained below, it was crystal clear that pension expense in the 1990 rate case was based on the accrual method. The fact that the PSC completely ducked this issue led to a decision that is arbitrary and unsupported by competent and substantial evidence on the whole record. It must be set aside.

As set forth in the table in the Facts section of this Brief, the issue revolves around the 1990 rate case for the period 1990–1992, the 1992 rate case for the period 1992–1994, and the 1994 rate case for the period 1994–1996 (FAS 88 only). These cases are addressed in turn below.

<u>1990 Rate Case (GR-90-120)</u>

In the Amended Order, the PSC decided that the sworn testimony of Spire East and Staff witnesses during the era in question was more persuasive than the testimony of Spire East's current witness. (L.F. Vol. 12, p. 4331). The evidence from the 1990 rate case overwhelmingly shows that a pension asset existed for the period 1990 to 1992, because both the Company and Staff proposed pension rates using the accrual method. The Company of course proposed the use of FAS 87 (and 88) as required under GAAP and PSC rules. (Supp. Ex., pp. 6–7; Vol. 31, p. 4673–74; Tr. 2112–13). Staff witness Rackers also clearly testified in that case that Staff used FAS 87. (Ex. Vol. 17, p. 2591; Vol. 31, p. 4673). The question and answer by Mr. Rackers on page 6 of Staff's direct testimony in the 1990 case (GR-90-120) is dispositive:

---

[21] L.F. Vol. 12, p. 4327.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Q. Has the Staff utilized the Statement of Financial Accounting Standards No. 87 (FAS 87) in its determination of pension expense?

A. Yes, with regard to funded pensions.[22]

This should have immediately ended the debate with respect to the 1990 rate case, and resulted in approval of a pension asset for any underpayments by customers for the period beginning with the effective date of rates in the 1990 rate case and ending with the effective date of rates in the 1992 rate case. This is especially true since the PSC decided in the present case to rely on, or find more credible, the testimony of the witnesses in the 1990s cases. (L.F. Vol. 12, p. 4331).

In the 1990 rate case, Staff witness Rackers not only used FAS 87, but he goes on for twelve pages describing how he chose certain assumptions allowed under the FAS 87 methodology that further reduced the amount of pension expense used to set rates in that case. A discussion of how Staff used FAS 87 in the 1990 rate case can be found in detail in Mr. Rackers' 1990 testimony, and is summarized in the Company's reply brief in the case below. (Ex. Vol. 31, pp. 4673–85; L.F. Vol. 12, pp. 3828–31). Regardless of the assumptions Staff made under FAS 87, the overriding point is that both the Company and the Staff advocated use of the accrual method to determine pension expense for the

---

[22] Since the pensions at issue in the 1990 case were funded pensions (i.e., not Board of Director Pensions or supplemental executive pensions), the answer then is simply 'yes.' Ex. Vol. 31, pp. 4673–74.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

purpose of setting rates in the 1990 rate case, rates that would be effective from September 1990 until the effective date of the 1992 rate case.

In summary, pension expense in the 1990 rate case was unquestionably based on the accrual method. The Company filed for pension expense in the 1990 case based on its version of a FAS 87 accrual, and Staff witness Rackers testified in the 1990 rate case that Staff filed its rate case pension expense based on its FAS 87 assumptions. Neither party claimed that pension expense was based on the cash method. So there can be no question that a pension asset accrued between 1990 and 1992 based on the difference between the amount of the Company's actual cash contributions to its pension and the amount of pension expense paid by customers using the accrual method.

In the face of this incontrovertible evidence in the Company's favor, the PSC completely ignored the 1990 rate case as if it never existed. The Amended Order never even mentions the Rackers testimony, which was included in full in Staff's own exhibit (Exhibit 276), and discussed in Spire witness Fallert's sur-rebuttal testimony. (Ex. Vol. 17, pp. 2591–92; Ex. Vol. 31, p. 4667 et. seq). On page 101 of the Amended Order, the PSC simply concludes that "the parties were using a cash contribution method, and not FAS 87 or FAS 88 accrual accounting prior to September 1, 1994, the effective date of Case No. GR-94-220." (L.F. Vol. 12, p. 4331). Considering the whole record, there is insufficient competent and substantial evidence to support the PSC's decision. ***Lagud v. Kansas City Mo. Bd. of Police Comm'rs***, 136 S.W.3d 786 (Mo. banc 2004). The PSC did not even address the issue of how pension expense was determined in the 1990 rate case, much less rely on competent and substantial evidence. Instead, the PSC ducked the facts

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

and decided the issue in a vague manner that was plainly contrary to the record evidence. Case law is clear that this constitutes arbitrary, capricious and unreasonable decision making and should be reversed. ***Id.***; *see also* ***State ex rel. Fee Fee Trunk Sewer Inc. v. Pub. Serv. Comm'n***, 550 S.W.2d 945 (Mo. Ct. App. W.D. 1977). Where the PSC has made a decision unsupported by facts, the court should step in and vacate the PSC's action. ***Edmonds v. McNeal***, 596 S.W.2d 403 (Mo. 1980).

1992 Rate Case (GR-92-165)

Having completely ignored the facts in the 1990 case, the PSC's recital of the facts regarding pension expense in the 1992 case – facts that are not as beneficial to the Company – is unfailingly accurate. As the PSC recited in paragraph 6k on page ninety-seven of the Amended Order, both the Company and Staff filed for pension expense in the 1992 rate case based on cash contributions.[23] (L.F. Vol. 12, p. 4327). Staff therefore claimed that rates in the 1992 case must also have been based on cash contributions. The Company noted that the parties to the 1992 case agreed that specific PSC approval was needed under FAS 71 for the Company to depart from the appropriate financial accounting standard (i.e., FAS 87/88), and that no such approval was granted in the case. Therefore, the Company argued that, in the absence of the necessary permission, the

[23] The change between 1990 and 1992 was caused by a decision in a 1991 KCPL rate case (GR-91-291) in which the Commission favored the use of cash contributions in setting pension rates. Tr. Vol. 3, p. 2118.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

allowance in rates for pension expense in 1992 must also have been based on FAS 87/88, as required by PSC rules and GAAP. (Ex. Vol. 17, pp. 2592–93).

In paragraph 6k of the Amended Order, the PSC found that "Since Staff and [Spire East] had the same methodology . . . it is likely rates were set using the current level of cash contribution instead of FAS 87 expense." (L.F. Vol. 12, p. 4327). Although the Company certainly made a logical and more legally accurate argument, the Company acknowledges that the evidence pertaining to the 1992 rate case could support a finding for either the Company or the Staff. If the evidence can support either of two findings, the Court does not interfere with the PSC's judgment. ***Lagud v. Kansas City Mo. Bd. of Police Comm'rs***, 272 S.W.3d 285 (Mo. Ct. App. W.D. 2008).

While these facts likely preclude the Company from maintaining the pension asset that accrued during the 1992–1994 period, it further strengthens the Company's argument that the PSC's decision regarding the 1990 rate case was arbitrary and unreasonable. The same logic that the PSC used to decide the basis for pension expense in the 1992 rate case – that when both parties use the same methodology, that methodology is likely the basis upon which rates were set – should apply equally to the 1990 case. Since both parties used the accrual method to determine pension expense in the 1990 rate case, it was arbitrary and unreasonable for the PSC to depart from the rationale it used to rule against the Company in the 1992 case, in order to find that the accrual method was not used to determine pension expense in the 1990 case. ***Wolfner v. Bd. of Adjustment of City of Frontenac***, 672 S.W.2d 147, 151 (Mo. Ct. App. E.D. 1984). This inconsistency may have been another reason why the PSC chose to ignore the 1990 case.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

<u>1994 Rate Case (GR-94-220)</u>

In this case, Spire East filed its pension expense based on the FAS 87/88 accrual method. The Company and Staff agree that 1994 rates were set based on FAS 87 expense, and they agree to the amount of the FAS 87 pension asset that has accrued since 1994. The Company maintained that the 1994 rates were also reduced by FAS 88 investment gains, as discussed in the Statement of Facts above. As a result, the Company is entitled to a pension asset to the extent that its cash contributions exceeded the lower rates for pension expense resulting from crediting the customers for the value of the FAS 88 gains.

Staff claimed that FAS 88 gains were not flowed to customers through lower rates in the 1994 rate case, so the Company should not have accrued a $9.0 million FAS 88 asset during the 1994–1996 time frame. Staff offered very little argument in opposing recognition of this asset. As discussed below, Staff knew that the use of FAS 87 goes hand-in-hand with FAS 88, and that a mention of FAS 87 is shorthand for FAS 87/88. In response to Company witness James Fallert asserting LAC's right to the FAS 88 asset in the 2017 rebuttal testimony,[24] Staff did not even mention the $9.0 million 1994–1996 FAS 88 asset in summarizing its position in sur-rebuttal.[25] Nor did Staff provide any meaningful argument in support of its position in the four pages of its initial brief dedicated to this issue. (Ex. Vol. 11, pp. 3295–98).

---

[24] Supp. Ex., p. 4–5.

[25] Ex. Vol. 29, pp. 4357–58.

In contrast to the Staff's silence on the issue, Spire Missouri presented several reasons in the evidentiary record as to why FAS 88 gains were used to lower rates in 1994; reasons that clearly justify reversing the PSC on this point and restoring the Company's pension asset due to FAS 88 for the period 1994–1996. The first and most devastating of these reasons is the unavoidable fact that in Case No. GR-94-220, Staff witness Boczkiewicz discussed in testimony how he normalized FAS 88 gains in Staff's rates. (Ex. Vol. 17, p. 2595–96; Tr. Vol. 3, p. 2130). To "normalize" means to take past results for a given expense and find a reasonable annual normal, or average, to use in rates. There would be no need for Staff's witness in the 1994 rate case to normalize FAS 88 gains except for the purpose of deciding how much of the gains to impute to lower pension expenses, and thus lower rates. (*Id.*). Accordingly, in the 1994 rate case, there was really no dispute between the parties over <u>whether</u> FAS 88 would be used to set rates. The only dispute was <u>how</u> FAS 88 would be used, that is, how expenses were to be normalized. (Ex. Vol. 17, p. 2595–96). Therefore, since the PSC decided that the sworn testimony of the Company and Staff witnesses during the prior era in question was more persuasive than the Company's testimony in the current case,[26] then it must find that FAS 88 was applied in the 1994 case, and that the Company is therefore entitled to the FAS 88 asset that arose therefrom during the 1994–1996 period. The PSC's finding to the contrary is arbitrary and unreasonable, as it is unsupported by the competent and substantial evidence on the whole record.

---

[26] L.F. Vol. 12, p. 4331.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

A second reason that refutes any notion that FAS 87 would be used without recognizing FAS 88 gains as an offset is that both Company witness Fallert and Staff witness Young testified in the 2017 case that FAS 87 and FAS 88 were linked for financial reporting and for GAAP accounting, and that the parties' testimony included FAS 87 in rates. Therefore, the rates must also include FAS 88. In light of these facts, Mr. Young was left with no argument other than to maintain Staff's opposition to the regulatory asset that arose from the use of FAS 88 in 1994 rates. (Supp. Ex., pp. 4–5; Tr. Vol. 3, p. 2130, l. 19 – p. 2131, l. 17).

A third reason supporting the fact that FAS 88 gains were applied to reduce pension expense in the 1994 rate case was the fact that the Report and Order in Spire East's 1996 rate case (GR-96-193) stated that the PSC was granting the Company authorization to *continue* to utilize FAS 87, 88 and 106 for regulatory purposes. This creates a clear inference that FAS 88 had been in use prior to 1996. (Supp. Ex., p. 5).

These reasons provide indisputable proof that FAS 88 gains were used for ratemaking in the 1994 case, and that LAC is entitled to the $9.0 million asset that accrued as a result of the financial benefits customers received from reflecting those gains in the form of lower rates.

Despite this evidence, the PSC nevertheless found in the Amended Order that FAS 88 gains were not applied in the 1994 rate case. (L.F. Vol. 12, p. 4331). The PSC based its position on its approval of an agreement in that case permitting the Company to book pension and other post-employment benefit (OPEB) expenses to FAS 87 (pension) and FAS 106 (OPEB). The PSC found meaning in the fact that FAS 87 was mentioned, but

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

not FAS 88. Nothing, however, changed the fact that the two standards are inextricably linked, or that the PSC itself specifically recognized in the 1996 Order that FAS 88 was, in fact, used during the 1994–1996 period,[27] or that both the Company and Staff witnesses to the 1994 rate case swore that pension rates should be based on FAS 87 and 88.[28] Spire submits that the PSC's decision that FAS 88 was not used to reduce customer rates is not supported by the competent and substantial evidence upon the whole record.

In summary, it is clear that pension expense based on the accrual method was used to set rates in the 1990 and 1994 rate cases. This includes the use of FAS 88 gains to reduce 1994 rates. It is arbitrary, capricious and unreasonable for the PSC to say it believes the parties to the 1990, 1992 and 1994 cases, to say that pension rates in the 1992 case were based on cash contributions since that was the basis for the parties' cases, but then to find these same reasonings do not apply to the 1990 and 1994 cases. ***Wolfner***, 672 S.W.2d at 151. The Company requests that the Court reverse the PSC's order for these two periods and remand the case back to the PSC with instructions to determine the appropriate amount of pension asset consistent with the Court's opinion and to authorize the Company to restore the asset, which has now been written off its books, so that Spire Missouri is not deprived of the same return on that asset that the Company was permitted to earn on the undisputed portion of its pension asset. The Court need not reach any

[27] Ex. Vol. 17, p. 2594.

[28] *Id.* at 2593; Tr. Vol. 3, p. 2130.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

decision with respect to amortizing the asset in rates, as that can be handled by the PSC in future rate cases.

In the end, the pension asset is just about keeping score. The pension asset can go up and down over time. In fact, Spire West has a pension liability, meaning it has collected more pension expense from its customers than it has paid into its pension. (L.F. Vol. 12, p. 4324). Spire's position is simply that the score must be kept accurately. To analogize, if Spire scored two runs in the second inning, it is unfair for the scorekeeper to ignore those runs, and to begin keeping score in the third inning, starting at 0-0. The Company is entitled to have its two runs count.

As discussed in the Standard of Review section, *supra*, the Southern District failed to conduct adequate judicial review on this point. The Court's duty was to take an objective look at the competent and substantial evidence upon the whole record and make a single determination as to whether that evidence provided reasonable support for the PSC's decision. Instead, the Court (i) falsely characterized Spire's argument as being that the PSC should have believed witnesses it did not believe; (ii) considered the evidence in the light most favorable to the PSC's Amended Order, and (iii) criticized the Company for failing to separate sufficient evidence claims from weight-of-the-evidence claims. All three of these actions constitute error. (Opinion, pp. 26–27) Since the Southern District used its inaccurately alleged briefing violations to sidestep judicial review, and used the wrong standard of review, the Southern District's decision on this point should not be sustained.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

CONCLUSION

For all of the foregoing reasons, Spire Missouri requests that, pursuant to Section 386.510 R.S.Mo., the Court set aside and reverse the Amended Order on the issues argued herein and remand these matters to the PSC. Pursuant to Section 386.520.2(1) and (3) R.S.Mo., Spire Missouri further requests that the Court instruct the PSC, on remand, to provide temporary rate adjustments consistent with the Reconciliation approved by the PSC on April 25, 2018, for the Forest Park Relocation Proceeds and the Rate Case Expense Sharing. With respect to the Prepaid Pension Asset Disallowance, Spire Missouri requests that the Court instruct the PSC, on remand, to confirm the amount of the Company's regulatory pension asset consistent with the Court's decision and, pursuant to Section 386.520.2(3) R.S.Mo., to approve a temporary rate adjustment designed to allow Spire Missouri to recover from its customers the amounts it should have collected in rates for a return on that asset, beginning on April 19, 2018.

Dated: October 14, 2019

Respectfully Submitted,

By: **/s/ Jeremiah W. (Jay) Nixon**

Jeremiah W. (Jay) Nixon #29603
Email: jnixon@dowdbennett.com
Gabriel E. Gore #45415
Email: ggore@dowdbennett.com
John J. Rehman, II #61245
Email: jrehmann@dowdbennett.com
Dowd Bennett LLP
7733 Forsyth Blvd., Ste. 1900
St. Louis, MO 63105
(314) 889-7300 (Telephone)
(314) 863-2111 (Facsimile)

Michael C. Pendergast, #31763
Of Counsel, Fischer & Dority, P.C.
423R Main Street
St. Charles, MO 63301
(314) 288-8723 (Telephone)
Email: mcp2015law@icloud.com

Rick Zucker, #49211
Zucker Law, LLC
14412 White Pine Ridge
Chesterfield, MO 63017
(314) 575-5557 (Telephone)
Email: zuckerlaw21@gmail.com

Attorneys for Appellant Spire Missouri Inc.

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

APPELLANT'S CERTIFICATE OF SERVICE

The undersigned hereby certify that a copy of the foregoing Appellant's Brief was filed electronically via the Missouri ECF system and thereby electronically served pursuant to Rule 103.08 on all counsel of record, on October 14, 2019.

By: **/s/ Jeremiah W. (Jay) Nixon**

Jeremiah W. (Jay) Nixon #29603
Email: jnixon@dowdbennett.com
Gabriel E. Gore #45415
Email: ggore@dowdbennett.com
John J. Rehman, II #61245
Email: jrehmann@dowdbennett.com
Dowd Bennett LLP
7733 Forsyth Blvd., Ste. 1900
St. Louis, MO 63105
(314) 889-7300 (Telephone)
(314) 863-2111 (Facsimile)

Michael C. Pendergast, #31763
Of Counsel, Fischer & Dority, P.C.
423R Main Street
St. Charles, MO 63301
(314) 288-8723 (Telephone)
Email: mcp2015law@icloud.com

Rick Zucker, #49211
Zucker Law, LLC
14412 White Pine Ridge
Chesterfield, MO 63017
(314) 575-5557 (Telephone)
Email: zuckerlaw21@gmail.com

ATTORNEYS FOR AAPPELLANT SPIRE MISSOURI INC., F/K/A/ LACLEDE GAS COMPANY

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

Comes now the undersigned and, pursuant to Rule 84.06(c), certifies as follows:

1. That this brief includes the information required by Rule 55.03.
2. That this brief complies with the limitations contained in Rule 84.06(b).
3. That there are 21,942 words contained in this brief.
4. That the brief has been scanned for viruses and is certified to be virus-free.
5. That Microsoft Word was used as the processing format for the preparation of this brief.

By: **/s/ Jeremiah W. (Jay) Nixon**

Jeremiah W. (Jay) Nixon #29603
Email: jnixon@dowdbennett.com
Dowd Bennett LLP
7733 Forsyth Blvd., Ste. 1900
St. Louis, MO 63105
(314) 889-7300 (Telephone)
(314) 863-2111 (Facsimile)

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM

CERTIFICATION UNDER RULE 55.03(a)

Comes Now Counsel for Appellant Spire, and hereby verifies that he has signed the original of this document and has retained the original pursuant to Rule 55.03(a).

By: **/s/ Jeremiah W. (Jay) Nixon**

Electronically Filed - SUPREME COURT OF MISSOURI - October 14, 2019 - 02:25 PM