

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of Spire Missouri)
Inc. to Change its Infrastructure System) **File No. GO-2018-0309**
Replacement Surcharge in its Spire Missouri)
East Service Territory)

In the Matter of the Application of Spire Missouri)
Inc. to Change its Infrastructure System) **File No. GO-2018-0310**
Replacement Surcharge in its Spire Missouri)
West Service Territory)

**MOTION IN LIMINE TO EXCLUDE CERTAIN DIRECT AND
SUPPLEMENTAL TESTIMONY FILED BY SPIRE MISSOURI INC.
IN REMAND PROCEEDINGS**

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Motion In Limine To Exclude Certain Direct And Supplemental Testimony Filed By Spire Missouri, Inc. In Remand Proceedings* (Motion), states as follows:

1. On May 13, 2020, Spire Missouri Inc. (Spire)' filed *Spire Missouri, Inc.'s Notice of Introduction of Additional Evidence* (Notice) informing the Commission that "... it was exercising its right to make an offer of proof for the Commission's consideration showing that Spire's cast iron and bare steel pipes are worn out or in a deteriorated condition..." and that "...Spire is providing this notice as a courtesy to the Commission and the parties that such evidence is being offered, as contemplated by the Commission's April 29 Order, which states '*Spire Missouri may prepare and pre-file evidence that it believes it would need to make an offer of proof ...*'"¹

¹ Spire cites the April 29, 2020, *Order Setting a Procedural Schedule Including a Limited Evidentiary Hearing on Remand* (April 29 Order) in which it permitted Spire to file evidence to make an offer of proof. (See page 3). The April 29 Order further explains "...The Court has explicitly said that the Commission should remove the cost to replace the bare steel and cast iron facilities *that were not shown to be in a worn out or deteriorated condition.* [emphasis in order] Therefore, the Commission will only hold a limited hearing to make that specific determination to calculate the cost of the bare steel and cast iron facilities that were not shown to be worn out or in a deteriorated condition and the best method to expeditiously refund the correct amount to ratepayers..." (page 3)

2. The April 29 Order clearly states the *Commission does not intend to hear new evidence that would allow Spire to re-litigate the issues* for which it did not meet its burden of proof at the first hearing and will not allow Spire to introduce new witnesses or new testimony about how its cast iron and bare steel facilities are worn out or deteriorated. *[emphasis added]* The Commission pointed parties to the evidence already in the record.

3. On May 13th Spire filed with its Notice of an offer of proof the following new testimony (collectively “New Testimonies”):

- Direct Testimony of Timothy H. Goodson
- Supplemental Direct Testimony of Craig R. Hoeflerlin
- Direct Testimony of John J. Spanos
- Direct Testimony of Robert R. Leonberger
- Direct Testimony of David M. Norfleet (Public and Confidential)
- Direct Testimony of William Honeycutt
- Photographs of Replaced Pipe
- Direct Testimony of Wesley E. Selinger p. 2, line 18 to p. 13, line 27 and p.16 line 8 to p. 18 line 5.²

4. The purpose of Staff’s Motion is to seek an order from the Commission excluding Spire’s above-listed New Testimonies from these remand proceedings on the basis that they are offered solely 1) as an offer of proof; 2) introduce new testimonies and new witnesses for the purpose of re-litigating the original issue of whether pipe facilities

² Certain portions of Spire witness Selinger’s testimony offer support for Spire’s position on the matter of how the refund due ratepayers is to be calculated and the method to be used in returning the refund to ratepayers. While Staff may disagree with Spire’s position, there are portions of Mr. Selinger’s testimony that are relevant to the limited purposes for which these remand proceedings are being held, i.e. determining refund calculation and amount and how to return the refund to ratepayers. Much of Mr. Selinger’s testimony, specifically p. 2, line 18 to p. 13, line 27 and p. 16, line 8 to p. 18, line 5 are devoted to re-arguing the original issue of whether pipe facilities are worn out or deteriorated and should be excluded from the remand proceedings in accordance with the Commission’s April 29 Order.

were worn out or deteriorated; 3) are immaterial, irrelevant, and against the Court's mandate to the Commission to determine the amount of refund due to ratepayers and how that refund is to be returned to ratepayers; and, 4) are burdensome to the record, and outside the limited purposes for which these remand proceedings are held, which culminate in a hearing set for May 26-27, 2020.

5. Again, the April 29 Order follows the instructions given by the Western District Court of Appeals in its Opinion issued on November 19, 2019:

“The Commission’s Report and Order is reversed and remanded to the extent it allowed ISRS recovery for structures not shown to be worn out or deteriorated. The case is remanded for the sole purpose of removing the cost incurred to replace cast iron and bare steel mains and service lines not shown to be worn out or deteriorated from the ISRS revenue awarded to Spire. Ratepayers shall be refunded that amount by the most expeditious and authorized means available....”³

6. The Court’s instructions to the Commission are a mandate and they are specific. The Court found the Commission’s Report and Order had allowed ISRS recovery for structures not shown to be worn out or deteriorated. These cases were remanded to the Commission “...for the *sole purpose of removing the cost incurred to replace cast iron and bare steel mains and service lines not shown to be worn out or deteriorated* from the Commission’s authorized revenue requirement awarded to Spire. Further, the Court instructed that *ratepayers shall be refunded that amount by the most expeditious and authorized means available. (emphasis added)*

7. On remand, all proceedings of the circuit court must be in accordance with the appellate court's mandate. Frost v. Liberty Mut. Ins. Co., 813 S.W.2d 302, 304 (Mo. banc 1991); see also Assoc. Indus. of Mo. v. Dir. of Revenue, 918 S.W.2d 780,

³ Matter of Spire Missouri, Inc., 593 S.W.3d 546,555 (Mo. Ct. App. 2019), reh'g and/or transfer denied (Dec. 12, 2019), transfer denied (Mar. 17, 2020).

782 (Mo. banc 1996). “There are two types of remands: (1) a general remand, which does not provide specific direction and leaves all issues open to consideration in the new trial; and (2) a remand with directions, which requires the trial court to enter a judgment in conformity with the mandate.” State ex rel. St. Charles Cnty. v. Cunningham, 401 S.W.3d 493, 495 (Mo. banc 2013). The appellate court's mandate, in conjunction with its opinion, serves to instruct the circuit court as to which type of remand has been ordered.

8. With specific instructions from the Court, the Commission must do exactly and only what the Court has directed. A remand with instructions confers no discretion on the trial court. Moving forward, the Commission may open the record only so far as to take in facts necessary for the Commission to carry out its mandate.

9. For the Commission to meet its mandate it must approve an amount of the value of the cast iron and bare steel mains and service lines that were not shown to be worn out or deteriorated for refund to ratepayers. The Commission must also approve a method of how the refund amount is to be returned to ratepayers. That said, Staff advises the Commission to limit these proceeding to taking in new facts only so far as would allow the Commission to accomplish its mandate from the Court. So that there is clarity in the record for the limited purposes of these remand proceedings, Staff recommends the Commission issue an order excluding from the record Spire’s New Testimonies (described in paragraph 2 above), which Spire has introduced in its Notice as an offer of proof.

WHEREFORE, for the above stated reasons, Staff respectfully requests the Commission issue an order excluding Spire’s New Testimonies as described above.

Respectfully submitted,

/s/ Robert S. Berlin

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to counsel of record this 18th day of May, 2020.

/s/ Robert S. Berlin