

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

In the Matter of the Application of Spire Missouri Inc. to Establish an Infrastructure System Replacement Surcharge in its Spire Missouri East Service Territory)))))))	Case No. GO-2018-0309
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In the Matter of the Application of Spire Missouri Inc. to Establish an Infrastructure System Replacement Surcharge in its Spire Missouri West Service Territory)))))))	Case No. GO-2018-0310
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**OFFICE OF THE PUBLIC COUNSEL’S POSITION ON HOW FILE NOS. GO-
2018-0309 AND GO-2018-0310 SHOULD MOVE FORWARD AND
STATEMENTS ABOUT THE NEED FOR ADDITIONAL EVIDENCE**

COMES NOW the Office of the Public Counsel (“OPC”) and for its *Position on How File Nos. GO-2018-0309 and GO-2018-0310 Should Move Forward and Statements About the Need for Additional Evidence*, states as follows:

On April 15, 2020, the Public Service Commission for the State of Missouri (“the Commission”) ordered that the parties to the above referenced cases “shall each file a proposal or position on how File Nos. GO-2018-0309 and GO-2018-0310 should move forward and statements about the need for additional evidence” no later than April 22, 2020. This filing is made pursuant to this Commission order.

I. Position on how to move forward with these cases

As the Commission noted in its April 15th order, the Western District Court of Appeals for the state of Missouri remanded case nos. GO-2018-0309 and GO-2018-0310 in an opinion that concluded as follows:

The Commission's Report and Order is reversed 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. Nothing in this opinion should be construed as expressing any view on the Commission's consideration of those costs in the context of a general ratemaking case.

Based on this language, the only information that the Commission can consider on remand is the costs Spire incurred to replace cast iron and bare steel mains and service lines that the Court of Appeals found Spire had not shown to be worn out or deteriorated but that were, nevertheless, included in Spire's ISRS revenues. In other words, the Commission has been instructed to determine what part of the previously approved ISRS revenues concerned the replacement of cast iron and bare steel mains and service lines and then remove those amounts and order Spire to refund what it already collected. The Court has directed the Commission to conduct solely these two actions: calculate a number and refund it to customers.

The easiest way for the Commission to handle this remand is to adopt the same strategy it has already employed in the other four cases.¹ The Commission should therefore order its independent Staff to calculate the dollar amount that Spire has collected through its ISRS related to the replacement of cast iron and bare steel mains and service lines found in the 2018 ISRS application. If other parties believe the Commission Staff committed some form of mathematical error in its calculation, they would then be free to submit their own valuation of the same dollar amount. The Commission could then review the submitted numerical calculations, determine which it believed was the most accurate, and then order Spire to issues refunds accordingly.

The proposed procedure outlined above represents the OPC's position on how these cases should move forward. To facilitate easier reading, the OPC has condensed the preceding into this number list:

1. The Commission orders its independent Staff to calculate the dollar amount that Spire has collected through its ISRS related to the replacement of cast iron and bare steel mains and service lines found in the 2018 ISRS application.
2. Other Parties may file objections to Staff's numerical calculations that show where Staff has committed an error and then supply their own valuation.
3. The Commission determines which of the supplied numerical calculations of the dollar amount that Spire has collected through its ISRS related to the replacement of cast iron and bare steel mains and service lines found in the 2018 ISRS application is the most accurate and orders Spire to issues refunds of that amount.

¹ See *Order Denying Motion to Consolidate, Directing Staff Filing, Setting Time for Responses, and Finding Additional Time is Needed for a Commission Decision* issued in GO-2016-0332 and GO-2016-0333 (the "2016 Cases") and GO-2017-0201 and GO-2017-0202 (the "2017 Cases").

This proposal makes the 2018 cases consistent with the methodology the Commission has approved for resolving the 2016 and 2017 cases and will also provide the most expeditious and efficient method for the Commission to adhere to the Western District's mandate.

Given the foregoing, there is no need for the Commission to engage in a full evidentiary hearing and should therefore not adopt the joint procedural schedule filed on April 21, 2020. As explained in the second half of this motion, not only is there no need for almost any additional evidence (besides possibly the calculations performed by Staff and other parties which the Court of Appeals ordered to be performed), but the inclusion of such evidence would violate well-established legal principles. The Commission should instead issue an order substantially mirroring those it has already issued in the 2016 and 2017 cases.

II. Position regarding the introduction of additional evidence

This question of whether and additional evidence may be introduced is highly significant because the OPC believes that Spire intends to attempt to fully re-litigate its entire case on remand; something that the OPC believes Spire is clearly legally barred from doing. Such action from Spire is legally prohibited for the following reasons.

A. The Introduction of new evidence regarding the condition of cast iron or bare steel pipes is not permissible following a remand with directions

The question of the eligibility of Spire's cast iron and bare steel mains and service lines found in the 2018 ISRS application has been fully litigated and decided. Should Spire seek to introduce new evidence on remand regarding the eligibility of those same pipes, then it would effectively be seeking to have a new trial to re-litigate those findings. Holding a new trial or introducing new evidence in such a manner would be permissible, **if the Court of Appeals had issued a general remand.** *Smith v. Brown & Williamson Tobacco Corp.*, 410 S.W.3d 623, 634 (Mo. banc 2013). But the Court of Appeals did not issue a general remand, it issued a remand with specific directions. This makes all the difference in the world.

In *Smith v. Brown & Williamson Tobacco Corp* the Missouri Supreme Court laid out the difference between the two types of remands: "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." *Smith*, 410 S.W.3d at 633 (quoting *State ex rel. St. Charles Cnty. v. Cunningham*, 401 S.W.3d 493, 495 (Mo. banc 2013)). The Supreme Court then went on to note the following:

The type of remand has legal consequence. A general remand leaves all issues not conclusively decided open for consideration at the new trial. *Butcher v. Main*, 426 S.W.2d 356, 358 (Mo. 1968). At retrial **following a general remand**, new evidence may be produced. *Id.* If the additional evidence introduced at the retrial presents a different case from that presented at the original trial to the appellate court, the circuit court "will be bound by the prior decision only so far as the principles of law then declared are applicable to the new state of facts." *Murphy*, 228 S.W. at 495. Moreover, a mandate is controlling only as to issues addressed

therein; a lower court is free to act as to other issues. *Associated Indus.*, 918 S.W.2d at 783. Therefore, **if the mandate of the court of appeals in *Smith I* was a general remand**, then the parties were free—in the discretion of the circuit court—to present new evidence during the retrial.

Id. at 634 (emphasis added). However, the Supreme Court also noted that “[w]here a judgment is reversed and remanded with specific directions to enter a particular judgment, the mandate is in the nature of a special power of attorney and must be followed by the trial court without deviation.” *Id.* at 633.

There should be no question that the mandate issued by the Western District in this case constitutes a remand with directions and not a general remand. First, unlike a general remand which “leaves all issues not conclusively decided open for consideration at the new trial,” the Western District mandate clearly states the case is being “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.” *Smith*, 410 S.W.3d at 634; *Spire Mo. Inc. v. Office of Pub. Counsel*, 593 S.W.3d 546, 555 (Mo. App. W.D. 2019). Second, but even more important, the mandate clearly directs that “[r]atepayers **shall** be refunded that amount by the most expeditious and authorized means available.” *Spire Mo. Inc.*, 593 S.W.3d at 555 (emphasis added). Given these attributes, the Western District’s mandate was clearly a specific remand with directions to the Commission to first calculate and the issue refunds. In fact, it can easily be surmised that the *only* reason the Western District did not order the refunds itself is simply because it cannot do so within the parameter of §386.520. The Court of Appeals instead issued “directions to

enter a particular judgment” (*i.e.* refunds), and thus provided a mandate that was “in the nature of a special power of attorney [that] must be followed by the [Commission] without deviation.” *Smith*, 410 S.W.3d at 633.

The introduction of new evidence by Spire at what would effectively be a new hearing on the issue of the ISRS eligibility of cast iron and bare steel mains and service lines is exactly the type of “deviation” that the Supreme Court identified was impermissible in *Smith v. Brown & Williamson Tobacco Corp.* The ability to hold a new trial and introduce new evidence is literally the primary “legal consequence” that the Court identified as the result of having a general remand and is thus the one thing that is most clearly barred from occurring in the event of a remand with directions. *Smith*, 410 S.W.3d at 634. The Commission should pay heed to these “legal consequences” as outlined by the Supreme Court in *Smith v. Brown & Williamson Tobacco Corp.* and recognize that this remand does not permit Spire to introduce new evidence regarding the ISRS eligibility of cast iron and bare steel mains and service lines.

The Western District Court of Appeals determined that Spire had not shown that its cast iron and bare steel mains and service lines were worn out or deteriorated and remanded the case with directions to this Commission to remove the costs Spire incurred to replace those cast iron and bare steel mains and service lines from the ISRS revenue as well as order Spire to refund what it had already collected. On remand this Commission is basically an agent entrusted with the power of attorney necessary to carry out the Court of Appeals decision. Therefore, all this Commission

can and should do is to calculate the cost Spire incurred to replace the cast iron and bare steel mains and service lines that the Court of Appeals found Spire had not shown to be worn out or deteriorated, remove those costs from Spire's current ISRS revenues, and then order Spire to refund the monies already collected for these amounts. No other evidence beyond that necessary to carry out this basic mathematical calculation should be admitted or considered.

B. The Introduction of new evidence regarding the condition of cast iron or bare steel pipes would violate the doctrine of the law of the case

In the same *Smith v. Brown & Williamson Tobacco Corp.* case discussed above, the Supreme Court also provides an explanation for what is known as the "law of the case" doctrine:

The doctrine of law of the case provides that a previous holding in a case constitutes the law of the case and precludes relitigation of the issue on remand and subsequent appeal." *Walton v. City of Berkeley*, 223 S.W.3d 126, 128-29 (Mo. banc 2007). "The doctrine insures uniformity of decisions, protects the parties' expectations, and promotes judicial economy." *Id.* at 129.

Smith, 410 S.W.3d at 632. The Court further elaborated in a footnote stating that "The general rule is that the decision of an appellate court is the law of the case on all points presented and decided and remains the law of the case throughout all subsequent proceedings, both in the trial and appellate courts, and no question involved and decided in the first appeal of the cause will be considered on a second appeal, and on a retrial should not be considered by the trial court." *Smith*, 410

S.W.3d at 634 n.4 (quoting *Feinstein v. McGuire*, 312 S.W.2d 20, 23 (Mo. 1958)). In these two ISRS cases, the Western District’s determination that the cast iron and bare steel mains and service lines Spire replaced were not ISRS eligible because Spire had not shown that they were worn out or deteriorated became the law of the case. The relitigation of this issue on remand is therefore prohibited. *Smith*, 410 S.W.3d at 632.

Missouri’s Courts have taken a somewhat broad view of the doctrine of the law of the case. There are numerous cases, for example, that say the doctrine not only applies to issues that *were* raised but also to issues that *could* have been raised. See *Halupa v. Halupa*, 980 S.W.2d 325, 330 (Mo. App. E.D. 1998) (“Pursuant to the ‘law of the case’ doctrine, a former adjudication is conclusive not only as to all questions raised directly and passed upon, but also as to matters which arose prior to the first appeal and which might have been raised thereon but were not.”); *Walihan v. St. Louis-Clayton Orthopedic Grp.*, 891 S.W.2d 545, 547 (Mo. App. E.D. 1995) (stating same); *Heineman v. Heineman*, 845 S.W.2d 37, 40 (Mo. App. W.D. 1992) (stating same). Moreover, several cases focused on the idea that the doctrine was meant to prevent parties from having “two bites at the same apple.” *Am. Eagle Waste Indus. LLC v. St. Louis Cty.*, 379 S.W.3d 813, 825 (Mo. banc 2012) (“This Court declines to consider anew this issue that the parties fully litigated to a final judgment three and a half years ago. County cannot have multiple bites at the apple in attempting to determine this issue favorably.”); *Empire Dist. Elec. Co. v. Coverdell*, 588 S.W.3d 225, 240 (Mo. App. S.D. 2019) (“Coverdell cannot have multiple bites at the apple in

attempting to determine this issue favorably. Because Coverdell's claim of error amounts to nothing more than an expression of disagreement with appellate determinations that are the law of the case, his point is without merit.” (internal citations omitted)); *Bradley v. State*, 554 S.W.3d 440, 452 (Mo. App. W.D. 2018) (“[T]he decision of a court is the law of the case for all points presented and decided, *as well as for matters that arose prior to the first adjudication and might have been raised but were not.*” Nothing precluded Bradley from presenting evidence in support of his contention regarding Schlegel's representation at the first trial. He is not now entitled to a second bite of the proverbial apple.” (quoting *Walton v. City of Berkeley*, 223 S.W.3d 126, 129 (Mo. banc 2007)); *Heineman v. Heineman*, 845 S.W.2d 37, 40 (Mo. App. W.D. 1992) (“To allow husband to now come before this court and raise an issue which should have been raised in the prior appeal would allow him to have a second bite of the apple contrary to the well established ‘law of the case’ doctrine.”). Yet this is precisely what the OPC expects Spire to attempt.

Allowing Spire to present additional evidence regarding the condition of its cast iron and steel mains on remand is equivalent to giving the company a second bite at the proverbial apple, something the Courts of Missouri have expressly rejected. Moreover, one can predict that *if* Spire is given a second bite and still fails to present sufficient evidence, then the Company will quickly come back for a third, then a fourth, and then a fifth, *ad infinitum*. It is the avoidance of this constant repetition of litigation that the doctrine of the law of the case was meant to prevent. Further, ignoring the doctrine will send a very dangerous message to the utilities and

other parties who practice before this Commission. It will essentially be an instruction that it does not matter what evidence a petitioner brings before the Commission *the first time around*, because any deficiency can always be cured on remand. In other words, the Commission will effectively be training utilities to not bother to prepare the strongest case they can muster and thereby undercut any desire the Commission may have to promote judicial economy.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission accept this *Position on How File Nos. GO-2018-0309 and GO-2018-0310 Should Move Forward and Statements About the Need for Additional Evidence*, rule in the OPC's favor on all matters of law presented herein, and take any and all other measures just and reasonable based on the arguments presented herein.

Respectfully submitted,
OFFICE OF THE PUBLIC
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CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this twenty-second day of April.

 /s/ John Clizer