BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Laclede Gas Company to Change its Infrastructure System Replacement Surcharge in its Missouri Gas Energy Service Territory	)	**File No. GO-2016-0332**
In the Matter of the Application of Laclede Gas Company to Change its Infrastructure System Replacement Surcharge in its Laclede Gas Service Territory	)	**File No. GO-2016-0333**
In the Matter of the Application of Laclede Gas Company to Change its Infrastructure System Replacement Surcharge in its Missouri Gas	)	**File No. GO-2017-0201** Energy Service Territory
In the Matter of the Application of Laclede Gas Company to Change its Infrastructure System Replacement Surcharge in its Laclede Gas Service Territory.	)	**File No. GO-2017-0202**

THE OFFICE OF THE PUBLIC COUNSEL'S

REPLY BRIEF ON REMAND

COMES NOW the Office of the Public Counsel ("Public Counsel" or "OPC"), and in accord with the Commission's June 5 Order Setting Procedural Schedule for its *Its Reply Brief on Remand* states the Western District Court of Appeals issued a mandate to the Commission after the Supreme Court declined transfer. Public Counsel appealed the Commission's Report and Order in Case Nos. GO-2016-0332 and GO-2016-0333 on the basis the Commission had approved inclusion of plastic pipe in Laclede's and Missouri Gas Energy's Infrastructure System Replacement Surcharge (ISRS) Applications. In its November 21, 2018 Opinion in *PSC v. Office of Public Counsel (In re Laclede Gas Co.)*, 539 S.W.3d 835 (Mo. App. W.D. 2017), The Western

District reversed and remanded the Commission's Orders, concluding that, "recovery for the costs for replacement of plastic components that are not worn out or in a deteriorated condition is not available under [the ISRS stature]. 539 S.W.3d at 841.

The Commission had acted beyond its statutory authority in approving Spire's ISRS Applications, "… recovery of the costs for replacement of plastic components that are not worn out or in a deteriorated condition . . . ." does not comply with the ISRS statute. "The Commission's Order is [only] lawful if it is authorized by statute, and [the Court's] review of this issue is *de novo.*" 539 S.W.3d at 837, citing *In re Liberty Energy (Midstates) Corp.*, 464 S.W.3d 520, 524 (Mo. banc 2015).

On March 7, 2018, after the Supreme Court denied transfer, the Western District issued its mandate to the Commission to act in a manner consistent with its Opinion. "We reverse the Commission's Report and Order as it relates to the inclusion of the replacement costs of the plastic components in the ISRS rate schedules, and the case is remanded for further proceedings consistent with this opinion." 539 S.W.3d at 841.

A Refund is Required

Spire questions whether the Commission must order a refund in these cases. Spire argues the evidence in the underlying cases does not support an adjustment. Spire IB at 10-12. Importantly, the Court did not rely on the underlying testimony and or the Commission's factual conclusions in making its decision. Instead the Court relied on the ISRS statute to determine the Commission's Order is unlawful.

The Court noted that there are two statutory requirements for costs for replacement projects to be ISRS-eligible:

> **"**Significant to this appeal, *section 393.1009(5)(a)* sets forth the ISRS-eligibility requirements for replacement projects. Under that provision, cost recovery

> through an ISRS surcharge is available for "[m]ains, valves, service lines, regulator stations, vaults, and other pipeline system components installed *to comply with state or federal safety requirements* as replacements for existing facilities that have *worn out* or are in *deteriorated condition*[.] *§ 393.1009(5)(a)* (emphasis added [by Court])."

539 S.W.3d at 838.

Further the Court noted the statute is to be narrowly construed to strictly limit ISRS-eligible replacements to these two categories, and Spire's plastic mains and service lines were not worn our or deteriorated:

> No party contests that the plastic mains and service lines were not in a worn out or deteriorated condition, which "is a gradual process that happens over a period of time rather than an immediate event." *Liberty Energy, 464 S.W.3d at 525*. This creates a challenge for Laclede because our Supreme Court has found this requirement to be mandatory and has interpreted it narrowly. *See id.* (holding that replacement of components damaged by a third party's negligence is not encompassed by the statute).

539 S.W.3d at 839.

The Legislature narrowly defined eligible costs because: "increasing rates through a surcharge without a full rate review fails to consider whether the company is already recovering its operating costs and earning a reasonable return for its shareholders." *State ex rel. Utility Consumers Council of Missouri, Inc. v. P.S.C.*, 585 S.W.2d 41 (Mo. banc 1979) ("UCCM") To comply with the Court's mandate,

Finally, in order for the Commission to comply with the statute and the Court's mandate the Commission must disallow: "recovery of [all] costs for the replacement of plastic components that were not in a worn out or deteriorated condition are not available under ISRS, . . . because those costs do not satisfy the requirements found in the plain language of Section 93.1009(5)(a)." 539 S.W.3d at 841. The Commission must then order a refund of that amount to Spire's customers.

Public Counsel has based its recommendation on evidence in the record.

Spire argues there is insufficient evidence for the Commission to order a refund. Spire IB at 3.

In making its recommendation of a total refund amount is $5,025,022, however, Public Counsel relied on the Rebuttal Testimony of Staff witness, Kim Bolin in Case No. GO-2016-0332. (*See* EFIS No. 51, Exh. 5, Bolin Rebuttal, 7:1-11) Further , as Public Counsel explained in its Initial Brief, OPC also relied on the evidence underlying the percentage of plastic pipe cited by the Western District in its Opinion. The Western District, in footnote 4, noted that 16% of main lines and 64% of services lines replaced were plastic. *Id*. at 839, fn 4 (In fact, a sample of work orders provided by Laclede and analyzed by the parties revealed that 53,415 feet of main lines were retired, of which 8,817 feet were plastic (approximately 16 percent), and 53,279 feet of service lines were retired, of which 34,223 feet were plastic (approximately 64 percent). 539 S.W.3d at 839, footnote 4.

In its June 29 Staff Report, Staff noted, that there is little evidence in the records of Case Nos. GO-2016-0332 and 0333 or GO-2017-0202 and 0202 "relating to *how* to calculate the costs associated with the replacement of plastic pipe." Staff Report at 7 para. 7 (emphasis added). Staff did recognize, however, the record evidence in Glenn Buck's testimony to the Chairman that "it would be possible to determine such a calculation would be able to be calculated by using a simple average." *Id. citing* Tr. Vol. 1 at 101-102. Staff concluded that it "finds it reasonable to calculate the costs associated with replacing plastic pipe, in this circumstance, by reviewing all of the Companies' relevant work papers to calculate the *actual* percentage of plastic [pipe] replaced vs. the total amount of pipe replaced." Staff Report at 8 (emphasis in original).

To accomplish its goal of reviewing all work orders Staff asked for all work orders. Spire did not, however, provide all work orders. "Spire Missouri provided some, but not all, of the requested work orders . . . ." Staff Report at 8. As a result Staff offers two proposals: the first applies the same percentage to the missing work orders as it did to the work orders provided; the Second option, disallows all "costs relating to those work orders not provided." Staff Report at 8 In its corrected calculation for remand, Appendix A to Staff's July 9 Notice, Staff offered the Commission two options. The range of the Options was $4,161,025 for Option 1 to 5,721,330 for Option 2. Staff provided two Options because Spire did not provide all the work orders for these cases. "Spire Missouri provided 128 and 113 additional work order authorizations for Cases Nos. GO-2016-0332 and GO-2016-0333, respectively. The Company work order authorizations were for projects totaling over $25,000." [Spire did not provide all work orders for these cases.] "Spire did not provide any work order authorizations for work orders less than $25,000 or open "blanket" work orders." Staff June 29, 2018 Report, Attachment A, p.1.

Spire agreed to Produce the Work Orders used by Staff

In the Unanimous Stipulation and Agreement in File Nos. GO-2017-0202 and GO-2017-0201 Spire "agree[d] to produce work order or other information in their possession necessary to determine the amount of plastic that was replaced in the Prior Cases and the Current Cases. Public Counsel refers the Commission to Section 5 (b):

> (b) If the courts make a final, non-appealable decision reversing the Commission's January 18 Order on the grounds that the Commission's decision on the Plastics Issue is unlawful or unreasonable, then the court's final decision shall be applied to the Current Cases in the same manner as it is applied to the Prior Cases, as applicable. In such event, upon remand, any one or more Signatories may request that the Commission determine

the amount of refund, if any, that shall be made in both the Prior Cases and the Current Cases as a result of such reversal. *LAC, MGE and Staff agree not to challenge OPC's right to make such request, and LAC and MGE further agree to produce work order or other information in their possession necessary to determine the amount of plastic that was replaced in the Prior Cases and the Current Cases.* All Signatories reserve their rights to make any argument they wish regarding the methodology, propriety, and quantification of such refund, if any. Until and unless the courts reverse the January 18 Order on the grounds that the Commission's decision on the Plastics Issue is unlawful or unreasonable, neither LAC nor MGE shall be required to produce further information on the Plastics Issue in the Prior Cases or the Current Cases. (emphasis added)

To the extend Spire is questioning OPC's right to request an adjustment, it is in violation of the the Stipulations and Agreement. Spire IB p. 3, 10, 11, 12, 14). For example, beginning at page 10 Spire questions Public Counsel's right to request an adjustment by arguing OPC did not dispute Mr. Lauber's testimony. Spire's argument is not only irrelevant, but contrary to the Stipulation.

Despite different methodologies, Public Counsel's recommendation is remarkably similar to the Staff's recommendation.

If Staff's and OPC's recommendations were significantly dissimilar, the Commission would have to decide the reasonableness of one of the two recommendations. While Staff and Public Counsel used different methods to calculate the amount of refund due to customers, the results of Public Counsel's calculations and Staff's are remarkably close. Public Counsel recommends a total refund amount is $5,025,022. In its Amended Staff Report Staff offered two recommended refund amounts. The range of the Options was $4,161,025 for Option 1 to 5,721,330 for Option 2. Staff Notice July 9, 2018, Appendix A.

Staff's proposal for Option 2 is to "assume that all of the mains and service lines replaced in those work orders were plastic. Without evidence to the contrary, it is impossible for Staff to disprove this assumption."

As a result of the fact that both Public Counsel's and Staff's recommendations use reasonable processes to determine the amount of overcollection, the Commission may look to these recommendations to determine the amount to return to customers. Public Counsel recommends the Commission accept OPC's calculation of $5,025,022 as a fair representation of the amount of refund Spire owes its customers.

Spire's position is telling the Commission to do something unlawful. But the Commission must take action consistent with the Court's mandate.

Throughout its Initial Brief (Spire IB) Spire argues the Commission should disregard the Western District's Opinion and disregard the Court's mandate. Spire continues its contention that its plastic pipe replacement was "incidental." (Spire IB at 2, 4, 8, 9) The Court disagreed. 539 S.W. 3d 838. Spire further contends there is no evidentiary record for an adjustment. (Spire IB at 3) If this were true, then there was no evidentiary record for the Commission to approve ISRS recovery of *any* of the infrastructure replacement Spire claimed in the first place. Spire's contention that the Commission could comply with the Court's mandate in a separate proceeding and determine in these cases that "no adjustment is warranted . . ." is demonstrably false and inaccurate. (Spire IB at 5.) The Court found that recovery of the costs of plastic pipe which did not comply with the ISRS statute was improperly included in the Companies' surcharges. 539 S.W. 3d 841.

On remand, the Commission must now take action consistent with the Court's Opinion. 539 S.W.3d at 841. More specifically the Court's mandate requires the Commission to disallow

recovery of ISRS ineligible infrastructure "as it relates to inclusion of the replacement costs of the plastic components in the ISRS rate schedules . . . ." 539 S.W.3d at 841.

"The mandate of the appellate court is not its judgment." *Lombardo v. Lombardo,* 120 S.W.3d 232 (Mo. App. 2003). "A mandate of an appellate court serves the purpose of communicating its judgment to [the Commission]. It has been described as an 'official mode' of communication. It is not a judgment or decree but a notification of a judgment.'" *Moore v. Beck*, 730 S.W.2d 538, 540 (Mo. banc 1987). In other words, the mandate "constitutes the official communication of the appellate judgment to the [Commission]." *Id.* (citation omitted). Upon remand the Commission must "take the acts directed." 730 S.W.2d 538 at 540-541 (internal citation omitted).

"It is well settled that [the Commission], on remand, with respect to the issues addressed by the appellate court on appeal, only has that authority granted to it by the appellate court in its mandate." *City of Excelsior Springs v. Elms Redevelopment Corp*., 18 S.W.3d 61, 64 (Mo. App. 2000) (internal citations omitted). In determining what actions are required by the Court, the Commission is "not only to be guided by the mandate, but the judgment or opinion of the appellate court. 120 S.W.3d at 243.

More specifically, "[t]he mandate is not to be read and applied in a vacuum." 120 S.W.3d 232 at 243. "While the mandate, *standing alone*, may not constitute the appellate court's judgment, the directions a lower court must follow are to be found in the mandate and the appellate court's opinion, *considered together.* 309 S.W.3d 855, 860 (Mo. App. 2010). "The opinion is part of the mandate and must be used in interpreting the mandate. Accordingly, proceedings on remand should be in accordance with the mandate and the result contemplated in the appellate court's opinion. Furthermore, a general remand has the effect of a direction to proceed in accordance with

the holdings entered by the opinion of the appellate court as the law of the case." 120 S.W.3d at 243.

To accept Spires assertion the Commission can find that no adjustment is warranted would be in defiance of the Court's judgment and mandate. In that regard, "[any] proceedings in the Commission contrary to the mandate are null and void." *Id*. Significant to Spire's recommendation, the Commission "also risks error in doing less than the mandate requires." *Id.* The mandate requires the Commission to make an adjustment in these cases. Accordingly, the Commission should accept Public Counsels recommendation.

Spire continues to argue issues the Court has decided.

Spire's reliance on the idea its plastic pipe replacement was incidental and, thus, could be ignored finds no support in the Court's Opinion. Spire IB at 4,6, and 7. If the Court had concurred Spire's plastic pipe replacement were *incidental*, it could have made a different decision. But the Court did not do so. As the Court described that contention: "Laclede and the Commission's Staff argue that the plastic mains and service lines were previously installed as "patches" to temporarily extend the life of larger neighborhood cast iron and unprotected steel systems, which the Commission found were worn out or deteriorated due to their age." 539 S.W.3d at 839. The Court rejected the argument that the patches were an "integral component of the worn out or deteriorated case iron and steel pipe. In footnote 4 the Court explained:

> We question the characterization of the plastic pipes as "patches" . . . the plastic main and service line replacements were not merely *de minimis* but "varied from just a *few feet to several hundred feet in length*." (emphasis added by Court). In fact, a sample of work orders provided by Laclede and analyzed by the parties revealed that 53,415 feet of main lines were retired, of which 8,817 feet were plastic (approximately 16 percent), and 53,279 feet of service lines were retired, of which 34,223 feet were plastic (approximately 64 percent).

539 S.W.3d at 839.

In desperation, Spire raises wholly unrelated issues

Spire's arguments related to cost causation are wholly irrelevant to the Commission's conformance to the Court's mandate. This case is about the ISRS statute and not whether "the Commission has recognized that a utility's ability to avoid costs through various actions is something that has a real and definable economic value." (Spire IB at 8).

Spire also asserts irrelevant statutes to support its argument. "Missouri statutes also recognizes the vibrancy of the avoided cost concept as evidenced by the Missouri General Assembly's inclusion of the concept as a key component in the statutory provisions governing the Missouri Energy Efficiency Investment Act ("MEEIA") (*See* Section 393.1075.12)." (Spire IB at 8) The MEEIA statute is not the statute under review here.

If the Commission accepts Spire's logic that there is insufficient evidence in the record, the Commission must refund the entire amount collected.

Spire's claim there is inadequate evidence in the record to support an accurate calculation of the amount of infrastructure Spire unlawfully claimed as ISRS compliant necessarily means all of $15,000,000 must be disallowed. Spire's argument of insufficient evidence in the record to calculate a refund must also lead inevitably to the conclusion there is insufficient evidence to prove Spire's claimed replacements are ISRS qualifying.

Spire has the burden of proof in its Application to show the costs they seek to recover under ISRS include only infrastructure compliant with the ISRS statute. If the Commission cannot decide what infrastructure is complaint and which is non-compliant, under the Court's mandate, the Commission must disallow all claimed infrastructure.

In Section 393.1015(10) the Legislature has required the Commission to review ISRS filings. "When a petition, along with any associated proposed rate schedules, is filed pursuant to

the provisions of sections 393.1009 to 393.1015, the commission shall conduct an examination of the proposed ISRS. Section 393.1005.2 (1). (emphasis added). If, from that examination the Commission cannot determine what claimed infrastructure conforms to the statutory requirements that the infrastructure be "worn out or deteriorated," it may not include that infrastructure in the surcharge.

> the question squarely before us is not whether [Spire's] chosen approach is prudent but rather whether the replacement of plastic components that were not in a worn out or deteriorated condition are ISRS-eligible. In analyzing that proposition, we cannot ignore the plain language of the statute for "convenience, expediency[,] or necessity" to conclude that the costs are eligible for recovery through the ISRS process. Neither convenience, expediency[,] or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by statute." (citation omitted)); [L]egislative intent is "demonstrated by the plain language of the statute").

539 S.W.3d at 840 (internal citations omitted).

In conclusion Public Counsel respectfully recommends the Commission order a refund of $5,025,022, in accord with its rules to be tracked and considered in Spire's 2018 ISRS filings.

WHEREFORE, for all the reasons noted above, Public Counsel respectfully recommends the Commission order a refund of $5,025,022, in accord with its rules to be tracked and considered in Spire's 2018 ISRS filings, and grant such further relief as is just in the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 27th day of July, 2018, I hereby certify that a true and correct copy of the foregoing reply was submitted to all relevant parties by depositing this motion into the Commission's Electronic Filing Information System ("EFIS").

/s/ Lera L. Shemwell