BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Spire Inc.'s	)	
Acquisition of EnergySouth, Inc.	)	File No. GM-2016-0342
and Related Matters	)	

SPIRE INC'S REQUEST FOR CLARIFICATION
OR, IN THE ALTERNATIVE, MOTION FOR RECONSIDERATION

COMES NOW Spire Inc. ("Spire"), formerly known as The Laclede Group, Inc. ("LG") and submits its Request for Clarification or, in the Alternative, Motion for Reconsideration. In support thereof, Spire states as follows:

1. On July 20, 2016, the Commission issued its Order Granting Motion to Open Investigation and Directing Filing in the above referenced case (the "Order"). In the Order, the Commission decided to open an investigation into certain aspects of Spire's acquisition of Alabama Gas Corporation ("Alagasco") in 2014 and its pending acquisition of EnergySouth, Inc. from a unit of Sempra Energy. At page 5 of its Order, the Commission states that "it is not determining whether the transactions are subject to the Commission's jurisdiction" but instead conducting an investigation to "determine whether the transactions threaten Missouri ratepayers." According to the Order, the issue of whether it has jurisdiction over the transactions would only be addressed and considered as a potential remedy in the event such a threat to ratepayers was established.

REQUEST FOR CLARIFICATION

2. Although the Order states that it is not reaching the issue of whether the Commission has jurisdiction over the transactions, it nevertheless purports to construe the meaning and effect of Section 5 of the Holding Company Agreement in Case No. GM-2001-342 – the very provision that the Office of the Public Counsel ("OPC') has cited to argue that the

Commission may have jurisdiction over the transactions under consideration in this investigation. Further, it specifically addresses, and appears to reject, a jurisdictional argument posited by Spire. (See Order, pp. 3-4).[1] By addressing this provision in its Order and essentially accepting at face value the construction that OPC has given to it, the Order is effectively determining in advance key elements of the jurisdictional issue.

3. While Spire vigorously disagrees with the Order's apparent conclusions regarding the meaning and effect of Section 5, it is neither necessary nor appropriate to delve into such matters at this time for a number of reasons. First, no one – including the party that asked the Commission to open this investigation – has sought to have the Commission assert jurisdiction over the transactions based on an interpretation of Section 5. Second, construing the meaning and effect of Section 5 is not a necessary element of, or prerequisite to, the Commission's action launching this investigation. Third, engaging in such an exercise directly contravenes the Commission's explicit statement in the Order that it is *not* determining the jurisdictional issue at this time. Fourth, this is not the kind of contested case or other proceeding where discrete issues must typically and properly be decided only after participation by interested parties.

4. Given these considerations, the Order's conclusions regarding the meaning, intent and effect of Section 5 seem to be nothing more than the kind of impermissible "advisory

[1] Section 5 of the Holding Company agreement states in pertinent part that:

> The Laclede Group, Inc. agrees that it will not, directly or indirectly, acquire or merge with or allow itself to be acquired by or merged with, a public utility or the affiliate of a public utility, where the affiliate has a controlling interest in a public utility, or seek to become a registered holding company, or take any action <u>which has a material possibility of making it a registered holding company or of subjecting all or a portion of its Missouri intrastate gas distribution operations to FERC jurisdiction</u>, without first requesting and, if considered by the Commission, obtaining prior approval from the Commission and a finding that the transaction is not detrimental to the public, provided that for purposes of acquisitions by the Holding Company only, public utility shall mean a natural gas or electric public utility. (emphasis supplied).

opinion" which Missouri courts have instructed the Commission not to make. *See* ***State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n of State of Missouri,*** 392 S.W.3d 24, 38 (Mo. App., W.D. 2012). It should be noted that in its recent Order Denying Motion for Reconsideration in Great Plains/Westar Energy investigation, the Commission cited many of these same reasons for denying Great Plains' request that the Commission determine the jurisdictional issue in that case prior to the submission of Staff's report. *See Order Denying Motion for Reconsideration*, File No. EM-2016-0324 (June 29, 2016). The Commission should follow the same approach here by eliminating those portions of its Order which could be construed as partially deciding key elements of the jurisdictional issue in this case.

5. For all of these reasons, the Commission should withdraw those portions of its Order that purport to address Section 5 or, at a minimum, clarify that its discussion of Section 5 in the Order should not be construed as any kind of final or binding determination by the Commission regarding the meaning, intent or effect of that Section 5.[2] Spire accordingly requests that the Commission modify and/or clarify its Order consistent with these recommendations.

MOTION FOR RECONSIDERATION

6. In the event the Commission does not modify or clarify its Order consistent with the recommendations presented above, then Spire requests that the Commission reconsider and modify its apparent conclusions regarding the meaning, intent and effect of Section 5. Simply put, Section 5 of the Holding Company Agreement (or any other agreement for that matter) does not and cannot confer Commission jurisdiction over transactions or activities that is not otherwise conferred by Missouri law. ***Livingston Manor, Inc. v. Department of Social Services***,

[2]The advisory opinion language relating to Section 5 begins with the last sentence on page 3 and ends with the last full paragraph on page 4.

809 S.W.2d 153, 156 (Mo. App. W.D. 1991). Indeed, this basic principle was recently recognized by OPC, the very party that requested the Commission open this investigation. As OPC pointed out at pages 10 to 11 of its reply brief in a Western District appellate proceeding, Appeal No. WD79349: "Agreements between parties, even those approved by the PSC, cannot expand the PSC's jurisdiction, especially when those agreements violate the plain language of the statute . . ." *citing* ***State ex rel Utility Consumers Counsel of Missouri v. Public Service Commission***, 585 S.W.2d 41, 54 (Mo. banc 1979). In suggesting that Section 5 might nevertheless have such an effect, the Order unlawfully and unreasonably overlooks or misconstrues both the law and the facts in several critical respects.

7. First, the Order juxtaposes Section 5 next to a sentence which describes the Western District Court of Appeals' opinion in ***Laclede Gas Co. v. Pub. Serv. Comm'n of State of Missouri***, 392 S.W.3d 24, 38 (Mo. App. W.D. 2012), in which the Court construed and upheld certain provisions of the Holding Company Agreement. A review of that opinion, however, establishes that the Court did not even mention Section 5 of the Agreement, let alone construe its meaning, intent or legal effect. As a consequence, any implication that the opinion somehow endorses the concept that Section 5 confers jurisdiction over transactions that would not otherwise be subject to the Commission's regulatory authority is unsupported.

8. In fact, to the extent that the Court's opinion in the ***Laclede*** case has any relevance at all to the meaning, intent and effect of Section 5, it is a graphic reminder that the Staff, OPC, and the Commission were fully aware of the provisions of the Holding Company Agreement at the time Spire acquired Alagasco, since some of its provisions had just been litigated. And yet no one raised a hand or said a word about Section 5 requiring Commission approval of that transaction when Spire voluntarily and without prompting from anyone

discussed the terms and merits of the transaction in a formal on the record presentation before the Commission in May 2014. Spire believes this is compelling evidence of the fact that those parties familiar with the Agreement fully understood and agreed that Section 5 did *not* purport to confer jurisdiction on the Commission to approve transactions involving the acquisition of other utilities except in those instances where such a transaction would make Spire a registered holding company or subject the facilities of Laclede Gas Company to FERC jurisdiction. In construing Section 5, however, the Order does not even acknowledge the occurrence of this historical event, let alone attempt to explain why it is not relevant and persuasive indicia of the parties' intent regarding the meaning and intent of Section 5. Any attempt to construe the meaning, intent and effect of Section 5 without grappling with this factor in some manner is simply inadequate on its face.

9. Moreover, the Order's apparent construction of Section 5 is not only inconsistent with the parties' prior practice regarding this provision but also with the parties' representations to the Commission at the time the Holding Company Agreement was presented for approval. As shown by the attached Staff Suggestion in Support of that Agreement it is clear that Section 5 was focused solely and exclusively on whether a particular transaction would subject Spire to federal regulation through PUHCA or subject the facilities of Laclede Gas to FERC jurisdiction. As the Staff said:

RESTRICTING LOSS OF COMMISSION JURISDICTION

> Staff was concerned with potential loss of Commission jurisdiction if the proposed transaction was approved, specifically in connection with infusion of federal regulation through the Public Utility Company Holding Act (PUHCA). Therefore, a safeguard was negotiated [Section 5] that prohibits the Holding Company from seeking to become a registered holding company, or taking any action which has a material possibility of making it a registered holding company (subject to PUHCA), or subjecting any portion of its Missouri intrastate gas distribution operations to FERC jurisdiction without first obtaining Commission authorization.

Case No. GM-2001-342, Staff Suggestions in Support of Unanimous Stipulation and Agreement, dated July 17, 2001, p. 3.

10. Clearly, this provision makes it clear that Section 5 was focused on preventing a loss of Commission jurisdiction due to activities that would make Spire a registered holding company or subject the intrastate facilities of Laclede Gas to FERC jurisdiction. It was not focused on attempting to confer unauthorized jurisdiction on the Commission to approve or disapprove the acquisition of foreign utilities that the Commission would otherwise not be authorized to consider. Indeed, any suggestion that this was the intended purpose of Section 5 would produce the absurd result of requiring a utility holding company to obtain Commission approval if it is seeking to acquire a stable, regulated utility in another state while leaving it completely free to purchase a distressed casino or troubled gold mine in a distant country. What possible sense would such an interpretation make if the objective was to protect Missouri customers from any detrimental impacts of a holding company acquisition? In fact, such a construction would be contrary to the well-established rule of contract and statutory interpretation that provisions should *not* be construed in a manner that produces an illogical or absurd result***.*** *See* ***Lakeland Tool and Engineering, Inc. v. Thermo-Serv, Inc.*** 916 F.2d 476 (8th Cir. 1990)***; Hardin v. Continental Insurance Company,*** 612 S.W.2d 392 (Mo.App. S.D. 1981); ***GTE N., Inc. v. Mo. Pub. Serv. Comm'n***, 612 S.W.2d 392 (Mo.App. S.D. 1981); ***State ex rel. Lack v. Melton***, 692 S.W.2d 302, 304 (Mo. banc 1985). It would also be inconsistent with the rule of interpretation that where an instrument is open to two constructions, one making it legal, and the other illegal, the legal construction is preferable. ***Bradley v. Buffington***, 500 S.W.2d 314 (Mo.App. K.C. 1973). In this instance, such a rule of interpretation plainly requires that Section

5 not be construed in a manner that would purport to confer on the Commission jurisdiction that the legislature has not given it.

11. Finally, such an interpretation would arbitrarily and without justification subject Spire's acquisition activities in other states to regulatory barriers that the Commission has not applied to competing holding companies that also own public utilities in Missouri. Those holding companies are free to acquire utility companies in other states without any involvement by the Commission, while holding companies headquartered in Missouri must seek and obtain approval not only in the state or states where the utility company being acquired is located, but in Missouri as well. This discriminatory treatment is an unreasonable and unlawful impediment that puts Missouri headquartered holding companies at a distinct competitive disadvantage. Such a result is bad enough on its own merits. It is even worse policy, however, given the fact that the Commission has apparently deemed such an approval condition to be completely unnecessary for the protection of Missouri consumers when other Missouri utilities are or have been acquired by foreign holding companies. Again, Section 5 should not be construed in a manner that would create this unlawful, discriminatory and unreasonable result.

12. For all of these reasons, if the Commission does not grant Spire's request to withdraw those portions of its Order that seek to construe the meaning and intent of Section 5 of the Holding Company Agreement, it should reconsider those portions of its Order. Upon reconsideration, the Commission should find and conclude that Section 5 was never intended to subject, and does not have the effect of subjecting, either the Alagasco or EnergySouth transactions to the Commission's jurisdiction since neither of those transactions would make Spire a registered holding company or subject the intrastate facilities of Laclede Gas to FERC jurisdiction.

WHEREFORE, for the foregoing reasons, Spire respectfully requests that the Commission grant its Request for Clarification or, in the alternative, its Motion for Reconsideration of the Commission's July 20, 2016, Order Granting Motion to Open Investigation and Directing Filing.

Respectfully Submitted,

/s/ Mark C. Darrell

Mark C. Darrell, Mo. Bar #57280
Senior Vice President, General Counsel &
Chief Compliance Officer
Spire Inc.
700 Market Street, 6th Floor
St. Louis, MO 63101
Telephone: (314) 342-0520
Fax: (314) 421-1979
Email: mark.darrell@spireenergy.com

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing pleading was served on the parties of record in this case on this 29th day of July, 2016 by United States mail, hand-delivery, email, or facsimile.

/s/ Mark C. Darrell