BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Midwest Energy Consumers Group, Complainant,	)	
v.	)	Case No. EC-2017-0107
Great Plains Energy Incorporated, Respondent.	)	

AMICUS BRIEF OF SPIRE INC.

COME NOW Spire Inc. ("Spire"), formerly known as The Laclede Group, Inc., a Missouri holding company and parent of, among other utilities, Laclede Gas Company, a Missouri gas corporation, and submits this brief on the issues identified by the parties in their Joint Stipulation of Facts and List of Issues filed in the above captioned case on January 18, 2016.

1. What is the meaning of the term "public utility," as found in Section II(7) of the 2001 GPE Stipulation?

For the reasons discussed herein, the term "public utility" must be given the same meaning as in Section 386.020 of the Revised Statutes of Missouri. While Spire's 2001 Holding Company Agreement differs in wording on this specific matter, Spire fully agrees with GPE's construction of Section II(7) of its Agreement.

2. Does the 2001 GPE Stipulation apply to GPE's acquisition of Westar?

No. Those who argue otherwise must rely on an unsustainable and wholly unreasonable construction of the law and the 2001 GPE Stipulation. Spire's arguments are summarized as follows:

A. By not asserting jurisdiction over Spire's recent acquisitions of foreign utilities, the Commission has demonstrated its understanding that holding company agreements do not confer jurisdiction over purchases of foreign utilities.

B. The Commission does not assert jurisdiction when the foreign parents of Missouri utilities purchase foreign utilities. Therefore, the Commission should also not assert jurisdiction when the domestic parents of Missouri utilities purchase foreign utilities because:

(i) Doing so would result in discriminatory regulatory treatment;

(ii) Doing so would impose barriers to the growth of Missouri-based companies.

C. The Commission has ample regulatory tools to protect Missouri utility customers without resorting to asserting jurisdiction over purchases of foreign utilities.

A. By not asserting jurisdiction over Spire's recent acquisitions of foreign utilities, the Commission has demonstrated its understanding that holding company agreements do not confer jurisdiction over purchases of foreign utilities.

Neither the Commission, its Staff, the Office of the Public Counsel ("OPC") nor any other stakeholder interpreted Missouri law or a similar provision in the Spire 2001 Holding Company Agreement as requiring Commission approval when Spire agreed to acquire New England Gas in 2013 as part of its Missouri Gas Energy acquisition, or when Spire actually acquired Alabama Gas Corporation in 2014. These apparent determinations to not even raise the issue of whether Commission approval was required, let alone advocate for such a position, are especially meaningfully given the fact that the existence and pending status of both transactions were openly communicated to the Commission, Staff, and OPC in pleadings, on-the-record presentations and through the media.[1] It is almost inconceivable that no Commissioner,

[1]In the Joint Application seeking Commission approval for the MGE acquisition, Southern Union and The Laclede Group, Inc clearly identified that the transaction also involved Laclede Group's acquisition of New England Gas Company and stated that no approval by the Missouri Public Service Commission was acquired for that transaction. As the Application stated:

> The [MGE] Transaction is separate and distinct from another transaction, pursuant to which SUG proposes to sell the assets of its New England Gas Company division to Plaza Massachusetts Acquisition, Inc., a newly formed, wholly-owned subsidiary of LG (the "NEG Acquisition") and, as such, the matter before this Commission is not subject to

Staff attorney or OPC attorney that was aware of these transactions even thought to mention, let alone advocate, the jurisdictional arguments that are being so vigorously asserted today. Spire submits that they did not pursue such action because there was no more basis for such a position in 2013 and 2014 than there is in 2017.

B. The Commission does not assert jurisdiction when the foreign parents of Missouri utilities purchase foreign utilities. Therefore, the Commission should also not assert jurisdiction when the domestic parents of Missouri utilities purchase foreign utilities because:

(i) Doing so would result in discriminatory regulatory treatment;

The assertion that Commission approval is required also ignores the great discriminatory impact that such a determination would have on the level of "regulatory protection" offered to utility customers throughout the State of Missouri. Those who would argue for the assertion of Commission jurisdiction in this case have never sought, let alone urged, the Commission to impose similar approval conditions on the holding companies of other Missouri utilities. The end result is that those advocating for the need for Commission approval in this case would have the Commission believe that some Missouri utility customers, such as those served by KCP&L in this instance, are entitled to and require the protection of the Commission's regulatory powers and oversight, while customers served by other Missouri utilities are simply left to fend for

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review or approval by the Massachusetts Department of Public Utilities, and, conversely, *the NEG Acquisition is not subject to review or approval by this Commission.* (*See* Joint Application dated April 4, 2013, page 5, in Case No. GM-2013-0254).

While the Laclede Group ultimately arranged to sell New England Gas Company to another entity, the salient point here is that no one in the MGE acquisition proceeding, or in any other proceeding before this Commission, asserted at the time that SUG and the Laclede Group were wrong and that Missouri Commission approval was, indeed, necessary to complete the transaction. A similar approach was taken with respect to The Laclede Group, Inc.'s acquisition of Alabama Gas Company ("Alagasco") in 2014. In that instance, Laclede, at the request of the Commission Staff, addressed the nature and rationale for the Alagasco transaction in some detail as part of a formal on-the-record presentation made to the Commission regarding the progress being made on the MGE integration. (*See* Transcript, pages 83, 91, and 115-121 of the May 27, 2014 On-the-Record Presentation in Case No. GM-2013-0254). Again, neither the Commission, its Staff, the Office of the Public Counsel nor any other party asserted at the time that Commission approval for the Alagasco acquisition was required under either Laclede's 2001 Holding Company Agreement or the provisions of Section 393.190.2.

themselves. Such a position is obviously absurd and directly at odds with the fundamental notion that all utility customers should benefit in equal measure from the Commission exercise of its protective powers – a notion that has been repeatedly expressed in the Commission's uniform application of safety, service and other rules across all utilities and customers.

(ii) Doing so would impose barriers to the growth of Missouri-based companies;

The assertion that Commission approval is required for this transaction, if adopted, would also have a significant and unwarranted discriminatory impact because it would impose additional barriers on the ability of Missouri-based holding companies to compete and grow through acquisitions. Whether those barriers are sought to be imposed through the distorted interpretation of 15 year-old holding company agreements or the construction of 100 year old statutory provisions, the fact remains that those being disadvantaged are all holding companies that are incorporated and headquartered in the State of Missouri.

By finding that approval is required in this case, the Commission would essentially be telling Missouri holding companies that there is a competitive penalty to be paid if they seek to grow and expand by acquiring utilities in other states. On the other hand, holding companies located in other states, or even other countries (e.g. Canada), are perfectly free to engage in such acquisitions without any interference by the Commission even though they own Missouri utilities as well. In a state where one corporate headquarters after another has left for other locales as a result of being acquired by foreign corporations, erecting special and unwarranted competitive barriers for those Missouri-based companies that are trying to swim against this tide of recolonization is an especially troubling and egregious public policy choice.

Moreover, this is the very kind of anti-competitive barrier that the law forbids. In ***Southern Union Co. v. Public Serv. Comm'n***., 289 F.3d 503, 508 (8th Cir. 2002), the 8th circuit

noted that it was a per se violation of the commerce clause for a state law to affect interstate commerce in a way that discriminated against foreign corporations in favor of domestic corporations. In this instance, the erroneous construction of GPE's Holding Company Agreement, if upheld, would constitute a reverse per se violation, because it would result in the Commission favoring foreign corporations over its own domestic corporations. There are few, if any, instances where a state has engaged in this kind of reverse per se violation of the commerce clause, because states do not usually act in a manner that puts their local businesses at a competitive disadvantage, and that is all the more reason not to do so here.

C. The Commission has ample regulatory tools to protect Missouri utility customers without resorting to asserting jurisdiction over purchases of foreign utilities.

The contention that Commission approval is required for this transaction also ignores the efficacy of at least three other tools that the Commission has at its disposal to ensure that Missouri ratepayers are not adversely affected by a holding company's acquisition of a foreign utility. First, in the Stipulation and Agreements filed by GPE, the Staff and OPC in File No. EE-2017-0113, they propose various safeguards that, in their view, permit the Westar acquisition to proceed without undue risk to Missouri ratepayers. Second, the tapestry of financial and operational conditions in the GPE Holding Company Agreement ensures the financial integrity of GPE, and insulates the electric utility from financial risks arising from GPE's acquisition of foreign utilities or other causes. Third, the Commission's plenary ratemaking and utility service powers permit it to take whatever reasonable measures are necessary to ensure that any acquisition by GPE does not adversely affect the cost of utility service paid by Missouri customers or degrade the quality of the services it provides. Given this robust, multi-tiered

assortment of regulatory powers and safeguards, there is no justification for claiming that Commission approval of the transaction is also necessary to protect Missouri consumers.[2]

3. <u>Is GPE required to obtain Commission approval of its proposal to acquire Westar?</u>

For the reasons discussed above, Spire submits the answer is no – GPE is not required to obtain Commission approval for its proposal to acquire Westar because the Commission does not have the statutory power or jurisdiction to approve GPE's proposed acquisition of Westar.

In addition to the points previously raised in support of this conclusion, Spire would briefly address two other considerations. First, it has been argued by some that the parties must have intended Section II(7) to apply to GPE's acquisition of a foreign utility because it must have been inserted in the Stipulation and Agreement for some purpose other than just restating the requirements of current law. It is a canard of the highest order, however, to suggest that provisions are only added to Stipulations and Agreements before the Commission in order to do something more than just restate the law. To the contrary, countless Stipulations and Agreements previously submitted to this Commission are replete with provisions that do nothing more than restate the law in its current form.

For example, the 2001 Laclede Holding Company Agreement has a provision which states that "Laclede Gas Company shall not sell, lease, assign or transfer to any affiliate or third party any of its utility assets that are used and useful in the performance of Laclede's public

[2]Governor Greitens' recent executive order on agency rulemakings, while not directly applicable to this matter, is also instructive. Contrary to the criteria specified in that order for evaluating the propriety of current and future rules, assertion of Commission jurisdiction over this transaction would not, for the reasons discussed above, be "essential to the health, safety, or welfare of Missouri residents." Nor could it be reconciled with the requirement that "less restrictive alternatives have been considered and found less desirable than the regulation". Moreover, it would directly contradict the admonition that agency action "not unduly and adversely affect Missouri citizens or customers of the State, or the competitive environment in Missouri."

utility obligations without obtaining Commission approval." (Section V.2.) This language in nothing more than a short-hand version of the statutory language set forth in Section 393.190.1 which states that no "gas corporation . . . shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public . . . without having first secured from the commission an order authorizing it so to do." It does not seek to supplement, diminish or in any way alter the current state of the law as expressed in the statutory provisions governing the Commission's powers. Given this history of Stipulation provisions that simply restate the law, there should be no presumption that the parties intended to do anything more with Section II(7) than that when crafting the language of that section.

Second, it is worth noting that Section 393.140(12) clearly contemplates that gas and electric corporations may carry on other businesses not subject to Commission jurisdiction. This permits utilities like Laclede or KCP&L to acquire or engage in any other business. What would be the sensible rationale to restrict the holding company of a gas corporation like Laclede or the holding company of an electric corporation like KCP&L from acquiring an out-of-state utility, a lower risk business in which they have considerable expertise, while at the same time allowing them to buy, without any Commission supervision or approval whatsoever, a diamond mine in Wyoming, or open a chain of restaurants in Wisconsin? There is no such rationale.

Finally, Missouri Corporation Law favors the free exercise of commerce. It grants corporations the power to do many things, including acquire any other corporation (Section 351.385.6 RSMo). Specifically, this statute states that corporations may "purchase…or otherwise acquire…shares or other interests in…domestic or foreign corporations." *Id.* Corporations may also conduct business "within and without the state." (Section 351.386.9)

Given this broad language, any restriction on the free exercise of commerce should be construed to permit normally lawful transactions to occur unimpeded by artificial and unnecessary constraints.

For all of these reasons, Spire Inc respectfully requests that the Commission decide the issues identified by the parties consistent with the recommendations set forth herein.

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

ATTORNEY FOR SPIRE INC.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing pleading was served on the Staff and the Office of the Public Counsel, on this 31st day of January, 2017 by hand-delivery, fax, electronic mail or by regular mail, postage prepaid.

/s/ Marcia Spangler