BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Laclede Gas Company for an Accounting Authority Order Authorizing the Company to Defer for Future Recovery the Costs of Complying with the Permanent Amendment to the Commission's Cold Weather Rule.	))))))	Case No. GU-2007-0138

PUBLIC COUNSEL'S
APPLICATION FOR REHEARING

COMES NOW the Missouri Office of the Public Counsel and for its Application for Rehearing states:

1. On April 17, 2008 the Missouri Public Service Commission (Commission) issued its Report and Order (Order) bearing an effective date of April 27, 2008. Public Counsel hereby seeks rehearing pursuant to Section 386.500 RSMo 2000 and 4 CSR 240-2.160 because the Report and Order is erroneous, unlawful, unjust, unreasonable, arbitrary and capricious, unsupported by substantial and competent evidence and is against the weight of the evidence.

2. Orders of the Commission are reviewed under a two-prong analysis: first, it must be determined if the order is lawful; and second, it must be determined whether the Order was reasonable. Under the reasonableness standard it must be determined whether the Order is supported by substantial and competent evidence on the whole record, whether the decision was arbitrary, capricious, or whether the Commission abused its discretion. Friendship Village of South County v. P.S.C., 90 S.W.2d 339 (Mo. App. W.D. 1995).

3. The Order overlooks, misinterprets, and misapplies material matters of fact and law in that it improperly authorizes $2.4 million to be booked under an Accounting Authority Order (AAO) as Laclede's costs of compliance with the Commission's CWR amendment. This is unlawful as a violation of the Uniform System of Accounts (USOA) and the Commission rule adopting it because any costs of compliance with the cold weather rule (CWR) amendment are not "extraordinary" under the USOA.[1] The USOA, adopted by the Commission in 4 CSR 240-40.040, defines "extraordinary items" as items related to the effects of events and transactions that:

a. Occurred during the current period;

b. Are not typical or customary business activities of the company;

c. Are of significant effect;

d. Would not be expected to recur frequently; and

e. Are more than approximately 5 percent of net income.

State of Missouri, ex rel. Missouri Office of the Public Counsel v. Public Service Commission, 858 S.W. 806 (Mo. App. W.D. 1993). The costs the Order allowed to be booked to the AAO are not extraordinary items for several reasons. First, the amounts included in Laclede's calculations and approved by the Commission include bad debts that occurred during a prior period. Second, Laclede incurs CWR expenses annually as a typical and customary business activity of Laclede. Third, as an ongoing rule, Laclede will continue to incur these costs annually every CWR period. Lastly, the record lacks evidence to support a finding that the amount claimed by Laclede is more than approximately 5 percent of net income. By allowing costs to be deferred to the AAO that

[1] The USOA for gas companies is found at 18 C.F.R. Part 201.

are not extraordinary, the Order violates the USOA and 4 CSR 240-40.040. Notwithstanding that these costs authorized by the Order are not appropriate in an AAO; the Order is also unlawful and unreasonable for the following additional reasons.

4. The Order is unlawful in that it allows Laclede to defer costs for accounts that were never reconnected or reinstated under the CWR amendment. A substantial number of accounts, possibly a third of the total claimed, were reconnected or reinstated pursuant to terms not related to or caused by the CWR amendment. These include accounts that were reconnected or reinstated for *less* than 50% of arrears or $500. Under the old CWR, Laclede has the authority to agree to a different amount for reconnection or reinstatement. 4 CSR 240-13.055(10). However, the CWR amendment includes no such provision. Laclede's decision to allow reconnection or reinstatement for an amount less than what is allowed under the CWR amendment is not a cost that is in any way caused by the CWR amendment.

The Order responds to Public Counsel's arguments concerning these ineligible accounts by simply concluding that the Public Counsel's "challenges are merely suppositions about possible flaws in Laclede's calculations, unsupported by any evidence." This conclusion is arbitrary, capricious, and against the weight of the evidence because Public Counsel adduced evidence and highlighted specific examples of Laclede's inclusion of ineligible accounts. For example, Exhibit 3HC is the first page of Laclede's spreadsheet and highlights four (4) specific accounts, labeled numbers 1 through 4 for discussion purposes. Number 1 was reconnected or reinstated with a twenty-one percent (21%) initial payment; Number 2 was reconnected or reinstated with a ten percent (10%) initial payment; and Number 3 was reconnected or reinstated with a

twenty-four percent (24%) initial payment. This specific and un-rebutted document evidence from Laclede's own records is more than mere suppositions about possible flaws, but is competent and substantial evidence. Exhibit 3HC includes seventy four (74) of the 8,440 accounts that Laclede claims caused it to incur costs under the rule. A third of these seventy-four accounts were reconnected or reinstated by a payment of less than forty-five percent (45%) of that customer's previous arrears, and one out of ten made an initial payment of less than twenty-five percent (25%) of arrears. The only evidence that can provide clear, convincing and unequivocal evidence of Laclede's inclusion of ineligible accounts is in the record before the Commission; this evidence is the accounts and calculations Laclede provided on its 8,440 account spreadsheet, and is the best evidence available to show that Laclede included ineligible accounts in its calculation. By disregarding Public Counsel's arguments, and the evidence showing Laclede included accounts that were not reconnected or reinstated under the CWR, the Commission has strayed from its own rule and violated its own standards that only allow Laclede to defer amounts caused by compliance with the terms of the CWR amendment. 4 CSR 240-13.055. The Commission's Order fails to identify and make findings of fact and conclusions of law that provides the operative facts and explanation as to why or how these accounts can legally or reasonably be considered a cost of compliance with the CWR amendment that specifically allows reconnection under different terms. Under the unexplained rationale followed by the Commission's Order, *any* reconnection or reinstatement during the cold weather rule period can be included as a cost of the CWR amendment unless the customer remained current with their payments. Laclede's decision to voluntarily allow reconnection by terms not associated with the CWR

amendment is in no way caused by the CWR amendment. Those costs are not allowed by the rule amendment, but the Order grants Laclede what the Commission said was not proper under the CWR amendment. The Order conflicts with that amendment and is not authorized by the amendment or law. As such, the Commission's Order is unlawful. Public Counsel requests rehearing for the purpose of removing these accounts from Laclede's cost calculation.

5. The Order is unlawful, unreasonable, and constitutes an abuse of discretion because the Commission significantly relied upon settlement terms from a prior case that are inadmissible in this case or in any circumstances. On pages 9-10 of the Order the Commission finds that a significant fact in Laclede's cost calculation is Public Counsel's decision to agree to a cost methodology as a black-box settlement in Laclede's last rate case. However, the prior case settlement included a unanimous agreement that no party would be deemed to have agreed to any method of cost determination, and that no party would be prejudiced or bound in any manner by that agreement. The Commission approved the terms of that settlement without modification. The agreement in that prior case included the following:

> Non of the signatories to this Stipulation and Agreement shall be deemed to have approved or acquiesced in any ratemaking or procedural principle, including, without limitation, any method of cost determination or cost allocation, depreciation or revenue related method, any service or payment standard, and non of the signatories shall be prejudiced or bound in any manner by the terms of this Stipulation and Agreement in this or any other Commission, judicial review or other proceeding, except as otherwise expressly specified herein.[2]

[2] Unanimous Stipulation and Agreement, par. 25, Case No. GR-2007-0208, *In the Matter of Laclede Gas Company's Tariff to Revise Natural Gas Rate Schedules*, filed July 9, 2007, and approved July 19, 2007.

The Commission's reliance on a method of cost determination from the Stipulation and Agreement prejudices and binds Public Counsel in violation of the Commission's Report and Order from Case Number GR-2007-0208 that approved the above term.

Violation of this prior settlement agreement is a serious trespass on the long standing public policy that settlements are not to be used as evidence in any subsequent cases for any purpose, and certainly not as any admission "in any ratemaking or procedural principle, including, without limitation, any method of cost determination or cost allocation, depreciation or revenue related method, any service or payment standard." The use of this settlement constitutes a decision based on incompetent evidence. It is not admissible evidence. The parties have created a contractual obligation to not bind or prejudice the other parties in later cases. This has been violated and the Commission's reliance and significant use or any use of the information as a "fact" in this proceeding is unlawful, unreasonable, and an abuse of discretion. Public Counsel asks that this matter be reheard and all evidence of the settlement be struck and ruled inadmissible.

The Order also violates *Missouri Constitution, Art. I, Section 13*, stating "that no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

6. The findings in the Order also suggest that the Commission was mislead by Laclede's assertions that the cost method used in the rate case was a product of Public Counsel's accounting witness Mr. Ted Robertson. That is simply not true. The method used in the rate case was proposed by Laclede's witness Mr. James Fallert and accepted

by Public Counsel with the exception of an adjustment proposed by Mr. Robertson. Commission's reliance on Laclede's disingenuous assertion is unreasonable.

7. The Order is unlawful in that it would allow Laclede to include foregone revenue from a prior period into the next rate case by mislabeling it as an expense. This constitutes retroactive ratemaking, a concept that has been well settled by the Supreme Court of Missouri as unlawful. State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 49 (Mo. 1979).

8. The Order would unlawfully allow for future rates to be set on false expenses never incurred by Laclede, which is a violation of Section 393.270.4 RSMo 2000. Amounts deferred to Account 186 become an asset to Laclede and are eligible to be placed, in the next rate case, in Laclede's rate base for the purpose of figuring a rate of return based in part on this new asset. In determining the price to be charged for gas, the Commission may only allow "a reasonable rate of return upon capital actually expended." State ex rel. Midwest Gas Users Assoc. v. P.S.C., 976 S.W.2d 470 (Mo. App. W.D. 1998). By including amounts in Account 186 that represent capital that was not "actually expended," the Order purports to allow an unlawful amount in rate base in Laclede's next rate case.

9. The Order is unlawful because it allows Laclede to include prior bad debts in its cost calculation. Including prior bad debts in Laclede's cost calculation is prohibited by 4 CSR 240-13.055(14)(F)(4) which states "no bad debts accrued prior to the effective date of this section may be included in the costs to be recovered under this section."

10. The Order is unlawful because it permits Laclede to include amounts that Laclede would have incurred in the absence of the CWR amendment. Subsection (14)(F)2 of the CWR amendment states: "No gas utility shall be permitted to recover costs under this section that would have been incurred in the absence of this section." Without the CWR amendment, Laclede's witness Mr. Fallert acknowledged that Laclede would have reconnected customers under the old CWR. (Tr. 48). A portion of these reconnected customers would have incurred additional unpaid arrearages as result of the CWR reconnection. These additional arrearages and the resulting bad debts that Laclede would have incurred without the CWR amendment should be offset from the additional arrearages incurred under the CWR amendment. The same is true for prior bad debts that are included in Laclede's cost calculation since those bad debts would also have been incurred in the absence of the CWR amendment. By allowing costs Laclede would have incurred in the absences of this section, the Order violates 4 CSR 240-13.055(14)(F)2.

11. The Order is unlawful because it permits Laclede to book to USOA Account 186 amounts that are not the incremental expenses incurred and incremental revenues caused by the CWR amendment. Subsection 4 CSR 240-13.055(14)(G)1 states: "the utility may book to Account 186 for review, audit and recovery all incremental expenses incurred and incremental revenues that are caused by this section." Prior bad debts are not incremental expenses caused by the CWR amendment and may not be booked to Account 186. Accordingly, the Order is unlawful because it is in direct violation with 4 CSR 240-13.055(14)(G)1; 4 CSR 240-40.040; the USOA; and Generally Accepted Accounting Principles (GAAP).

12. The Order authorizes an accounting treatment not allowed under the USOA and is in violation of 4 CSR 240-40.040. Account No. 186 is the USOA deferral account for debts not elsewhere provided for, such as miscellaneous work in progress and unusual or extraordinary expenses, that are *not included in other accounts*. State of Missouri, ex rel. Missouri Office of the Public Counsel v. Public Service Commission, 858 S.W. 806 (Mo. App. W.D. 1993). The Order allows Laclede to defer prior bad debts under Account 186 that were previously included in another account, FERC Account 904. USOA Account 904 is the income statement account that records uncollectible accounts. The Order allows Laclede to book past and future bad debts to Account 186, which is not permitted under the USOA. As such, the Order is unlawful and in violation of 4 CSR 240-40.040 and 4 CSR 240-13.055(14)(G)1.

13. The CWR amendment contains an ambiguity between subsections 4 CSR 240-13.055(14)(G)1, 4 CSR 240-13.055 (14)(G)2, 4 CSR 240-13.055 (14)(F)2, and 4 CSR 240-13.055(14)(F)4 *prohibiting* recovery of costs Laclede would have incurred without the CWR amendment, and 4 CSR 240-13.055(14)(F)4, *allowing* recovery of costs Laclede would have incurred without the CWR amendment. The Order finds that any ambiguity must be resolved by concluding that 4 CSR 240-13.055(14)(F)4 prevails because it is "the more specific provision." However, a lawful and reasonable interpretation of the rules can only lead to the conclusion that 4 CSR 240-13.055(14)(F)4 cannot be followed as approved in the Order without directly violating 4 CSR 240-13.055(14)(G)1, 4 CSR 240-13.055 (14)(G)2, 4 CSR 240-13.055 (14)(F)2, and 4 CSR 240-13.055(14)(F)4, and without violating the intent of the rule. The Order overlooks the specific requirements of all of the rules in question, and the specific provisions in those

rules prohibiting the treatment allowed by the Commission. When a rule is ambiguous, it is necessary to interpret the rule to determine the Commission's intention. Department of Social Services v. Senior Citizens Nursing Home District of Ray County, 224 S.W.3d 1 (Mo.App.W.D. 2007). The objective of the CWR amendment is to protect consumers and allow the utility to recover only the incremental expenses incurred by the utility when carrying out those consumer protections. When rules are ambiguous, the appropriate method to interpret those rules requires a look beyond the plain and ordinary meaning if such a reading leads to an illogical or absurd result. State ex rel. Maryland Heights Fire Protection District v. Campbell, 736 S.W.2d 383 (Mo. 1987); Budding v. SSM Healthcare Systems, 19 S.W.3d 678 (Mo. 2000). When the intention of the rule is to allow the utility to recover no more than the expenses the utility would not otherwise incur, it is unreasonable to allow a utility to recover more than its true incremental expenses because that would defeat the intent and purpose of the rule. An interpretation that conflicts with the intent and purpose of the rule and the general principles of recovery of costs must fail. Accordingly, the Order is unlawful in violation with the CWR amendment and unreasonable because the decision disregarding multiple provisions of the rule is arbitrary and an abuse of the Commission's discretion.

14. The Order is unlawful because it allows Laclede to recover arrearages that Laclede could have avoided and that were incurred by Laclede for reasons not caused by Laclede's compliance with the CWR amendment. Laclede did not offset its cost calculation for customers that could have been disconnected following non-payment, and therefore incurred additional usage not caused by the CWR amendment. If the customer violated their CWR agreement, they were no longer eligible for protection from

disconnection under the CWR amendment. The expenses caused by the CWR amendment are the incremental expenses and revenues realized up to the earliest date on which Laclede could disconnect service. If Laclede chose to keep the customer connected beyond Laclede's earliest opportunity to disconnect, the customer continued to accumulate arrearages for reasons other than compliance with the CWR amendment. At that time the additional arrearages would be the result of Laclede's business decision not to disconnect the customer. Commission rule 4 CSR 240-13.055(14)(G)2 states: "The commission shall establish the amount of costs it determines have been reasonably incurred in complying with this section." Including additional arrearages not caused by Laclede's compliance with the CWR amendment is unlawful and in violation of 4 CSR 240-13.055(14)(G)2.

15. The Order is unlawful and unreasonable because it directs "Laclede to continue to track payments and *additional arrearages* of the 8,440 affected customers after the cut-off date of September 30, 2007." [emphasis added]. Prior disconnection for nonpayment or expiration of the CWR payment plan is certainly a prerequisite for the recovery of initial payment amounts pursuant to 4 CSR 240-13.055(14)(F)4. However, Laclede's witness Mr. Fallert testified that all of the customer accounts that Laclede claims caused it to incur CWR compliance costs have been disconnected or are no longer under the terms of their CWR agreement. (Tr. 39). Either way, these customers will cause no additional arrearages or incremental expenses on Laclede as a result of the CWR amendment. Allowing Laclede to book additional arrearages to Account 186 violates the requirement that only costs caused by the CWR amendment be deferred. 4 CSR 240-13.055(14)(G)2.

16. The Order is unreasonable because it is not based on competent and substantial evidence. The evidence relied on by the Commission does not provide substantial evidence to support a decision to allow deferral of $2,494,311 as Laclede's cost of complying with the permanent amendment to the CWR. Neither Laclede nor the Commission's Staff provided evidence that corroborates this amount. The only evidence showing how this amount was determined is a spreadsheet that includes 8,440 accounts that Laclede claims were reconnected or reinstated under the CWR. The totals on Laclede's spreadsheet are not consistent with the Commission's finding that $2,494,311 is an accurate figure, a number that appears nowhere on Laclede's spreadsheet. There is no explanation or evidence explaining how such calculation was performed. For this reason, the Commission's Order is not based on competent and substantial evidence.

17. The Order is unreasonable because it reaches the unsupported conclusion on page 6 that "having more customers reconnected under the cold weather rule results in more uncollected payments for the utility." No study was performed in this case to allow the Commission to reach this conclusion. Such a study would need to consider the amount of initial payments received by reconnecting customers under the old CWR compared to initial payments under the old CWR, offset by the increased amount of arrearages under both rules. According to Laclede, Laclede received $2,201,356[3] in initial payments under the CWR amendment, but only incurred $930,221 in additional unpaid arrearages. The initial payment amount would need to be compared to the initial

[3] Public Counsel does not assert that this is an accurate reflection of the initial payments that can be tied to the CWR amendment since the $2,201,356 includes accounts that were not reconnected under the CWR amendment as explained in Paragraph 4.

payments received under the old CWR, with both numbers offset by the amount of additional arrearages under the old CWR and the CWR amendment respectively. It is possible that the increased amount of initial payments received under the CWR amendment offsets *all* additional arrearages, in which case Laclede would simply break even and incur no increase in uncollected payments. Because such a study was not performed, the Commission's conclusion is unreasonable in that it is not supported by competent and substantial evidence and is an abuse of discretion.

18. The Order is unreasonable when it concludes that a reduction in initial payments had an adverse impact on Laclede's costs. This conclusion is not supported by the record and confuses the true impact and accounting treatment of initial payments and missed initial payments, which have no impact on Laclede's costs. (Exhibit 4, p. 7).

19. Finally, allowing the Order to stand will lead to an unjust result and will fail to protect the rate-paying public that will be forced to compensate Laclede for false compliance costs. Missouri Courts have repeatedly held that the Commission's principal interest is to serve and protect ratepayers. State of Missouri ex rel. Capital City Water Company v. P.S.C., 850 S.W.2d 903 (Mo. App. W.D. 1993). The protection given to the utility is merely incidental. State of Missouri, ex rel, Crown Coach Company v. P.S.C., 179 S.W.2d 123 (Mo. App. 1944). Rehearing of the Order is warranted to provide the necessary consumer protections.

WHEREFORE, the Office of the Public Counsel respectfully requests a rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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