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April 21, 2003

Secretary
Missouri Public Service Commission
P. O. Box 360
Jefferson City, Missouri 65102

FILED²
APR 21 2003
Missouri Public
Service Commission


Re: Cases No. GR-2001-387/GR-2000-622

Dear Mr. Roberts:

Enclosed for filing on behalf of Laclede Gas Company, please find an original and eight copies of a Motion to Strike Or, Alternatively, For Leave to Respond.

Please see that this filing is brought to the attention of the appropriate Commission personnel. Copies of the attached are being provided to parties of record.

Sincerely,


James C. Swearengen

JCS/da

Enclosure

cc: Parties of Record

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

FILED²
APR 21 2003

In the Matter of Laclede Gas Company's)
Purchased Gas Tariff Revisions to Be Reviewed }
in Its 2000-2001 Actual Cost Adjustment)

Case No. GR-2001-387

Missouri Public
Service Commission

In the Matter of Laclede Gas Company's)
Purchased Gas Adjustment Factors to Be Reviewed)
in Its 1999-2000 Actual Cost Adjustment)

Case No. GR-2000-622

**MOTION TO STRIKE
OR, ALTERNATIVELY, FOR LEAVE TO RESPOND**

COMES NOW Laclede Gas Company ("Laclede" or "Company") and, in support of its Motion to Strike or, Alternatively, for Leave to Respond, states as follows:

1. On April 10, 2003, the Staff of the Missouri Public Service Commission ("Staff") filed its Proposed Conclusions of Law and Findings of Fact in the above-referenced case.

2. In its Proposed Conclusions of Law and Findings of Fact (hereinafter "Proposed Conclusions and Findings"), Staff seeks to introduce new positions and matters that have never been raised before and that, in some instances, are flatly inconsistent with the positions that Staff *has* taken throughout this proceeding. Moreover, because Laclede agreed with Staff's request that the filing date for Proposed Findings of Fact and Conclusions of Law be moved to the date Reply Briefs were filed, (*see Order Granting Motion to Reschedule Filing of Proposed Findings of Fact and Conclusions of Law* dated March 24, 2003), the Company has had and will have no opportunity to respond to these new positions and matters absent further action from the Commission.

3. In view of these considerations, Laclede requests that the Commission strike those portions of Staff's Proposed Conclusions and Findings that contain these new matters and positions, all as more fully identified below. Alternatively, Laclede requests that it be afforded a full opportunity to respond to these matters.¹

New Matters in Proposed Conclusions of Law

4. In paragraphs 3 and 4 of its proposed Conclusions of Law (*see* page 2), Staff references various court decisions that presumably support its position on various matters in this case. None of these decisions, however, were discussed or even cited by Staff in its Initial Brief. As a result, Laclede has had no opportunity to challenge either Staff's characterization of the legal meaning and significance of these court decisions or Staff's assertion regarding their applicability or inapplicability to the facts of this case.²

5. One of the very reasons that parties are afforded an opportunity to file reply briefs is so that they can respond to the legal authorities and arguments that an opposing party believes support that party's position. Obviously, this basic purpose is thwarted when the opposing party does not even attempt to provide that legal authority until the very end of the briefing process. That is exactly what the Staff has done in this case, however, and the Commission should respond by striking this untimely submission of legal authorities and argument that should have been included in Staff's Initial Brief.

New Matters in Proposed Findings of Fact

6. Staff's introduction of new matters and positions in its Proposed Findings of Fact is even more troubling. For example, paragraph 4 of the Proposed Findings of

¹Laclede has raised these concerns with the Staff and believes that they may yet be resolved with additional discussions and potential modifications to prior submissions. Pending the conclusion of those discussions, however, Laclede believes it is necessary to file this Motion so as to preserve its rights.

Fact purports to find that Laclede “was provided with incentives only to enhance the price protection afforded to ratepayers.” In effect, this proposed finding indicates that the *only* incentive component in the PSP was the Price Protection Incentive and that there never was an Overall Cost Reduction Incentive. Such a finding is simply not true, however, and cannot possibly be reconciled with the record in this case. To the contrary, Staff acknowledged over and over again during the evidentiary hearing in this case that the PSP not only included an Overall Cost Reduction Incentive but that this Incentive component remained in full force and effect during the ACA period pursuant to the terms of the September 1, 2000 Stipulation and Agreement that was signed by both the Company and Staff. (Tr. 76-77, 85-93; 239-40; 265-66).

7. Staff’s proposed finding in paragraph 3 to the effect that Laclede “disclaimed recovery of any proceeds from the PSP in the event it opted out of providing guaranteed price protection for its ratepayers” is also flatly inconsistent with Staff’s sworn representations throughout this proceeding that the Overall Cost Reduction Incentive remained in full force and effect and that the only issue was whether Laclede had achieved savings within the meaning of that Incentive mechanism. Without including a laundry list of citations, one example of such representations is Mr. Sommerer’s sworn testimony at the hearing on February 14, 2003, in which he agreed with Commissioner Gaw that “Staff *isn’t* taking the position that there is no incentive mechanism left in the tariff after the opt-out.” (See Tr. 239-40; *emphasis supplied*).

8. If Staff wished to assert a different position than the one expressed above, then it had an obligation to do so at the time it filed its initial recommendation in this case

²In contrast to the approach taken by Staff, all of the cases utilized in Laclede’s Proposed Findings of Fact and Conclusions of Law were also cited and discussed in Laclede’s Initial Brief.

on June 28, 2002. Indeed, in agreeing to a proposed procedural schedule in this case, the Staff specifically committed to including in its recommendation a “full and complete explanation of the basis for any Staff proposed adjustment.” (See page 2 of the Proposed Procedural Schedule filed in this case on April 2, 2001, and page 3 of the *Order Adopting Procedural Schedule*, issued in this case on April 18, 2001).

9. Staff included no such claim or explanation, however, in its recommendation. Nor did the Staff make such a claim in its direct testimony filed on or about September 26, 2002, in its rebuttal testimony filed on or about November 27, 2002, in its surrebuttal testimony filed on or about January 9, 2003, in its Statements of Positions filed on or about January 28, 2003, or during the evidentiary hearings held on February 13 and 14, 2003. Indeed, Staff did not even make such an assertion in its Initial Brief filed on March 25, 2003. Instead, Staff waited to make this claim until the very last day and the very last filing submitted in this case.

10. By taking this position, and by making the other assertions described above, the Staff has filed a Proposed Conclusions of Law and Findings of Fact that:

- cannot be reconciled with either the record in this case or Staff’s sworn representations to the Commission on these matters;
- violates (through suggestions to the Commission of what it may properly find in this case) the specific terms of the September 1, 2000 Stipulation and Agreement in Case No. G0-2000-394 in which the Staff, by its own admission, agreed that the Overall Cost Reduction Incentive would remain in full force and effect;

- violates Staff's agreement to provide a "full and complete explanation of the basis for any proposed adjustment";
- violates Commission rules and orders designed to prevent unfair surprise and ensure that issues are identified in advance so that they can be fairly addressed;³ and
- deprives Laclede of its due process right to have an opportunity to respond to the claims and contentions of opposing parties.

11. As this Commission itself has recognized, and as its procedural rules in this and other proceedings are designed to reflect, due process requires that notice of the claims and contentions of opposing parties be "reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections. *Re: Missouri Gas Energy*, Case nos. GR-98-140 and GT-98-237, 8 Mo.P.S.C.3d. 1, 11, *Order Granting Recommendation and Rehearing in Part, Order Denying Reconsideration and Rehearing in Part, and Order Motion to Stay and Alternative Request to Collect Subject to Refund* (December 3, 1998), citing *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950). At a minimum, this means that there must be an explanation of the basis for the charge or proposed adjustment if due process is to be satisfied. See *State ex rel. Donelon v. Division of Employment Sec.*, 971 S.W.2d 869, 876 (Mo. App. W.D. 1998). Clearly, this basic standard of fundamental fairness is irrevocably breached when a party not only waits until the final post-hearing filings are submitted in a case to state its contentions and

³ As paragraph (A) of the Commission's April 18, 2001, *Order Adopting Procedural Schedule* in this case stated: "The practice of prefiling testimony is designed to give parties notice of the claims, contentions and evidence in issue and to avoid unnecessary objections and delays caused by allegations of unfair surprise at the hearing." Obviously, the problem of unfair surprise is only exacerbated when the notice of the claims

positions, but then states contentions and positions that vary dramatically from those it has previously advanced. Unfortunately, that is precisely what the Staff has done with its Proposed Conclusions and Findings.

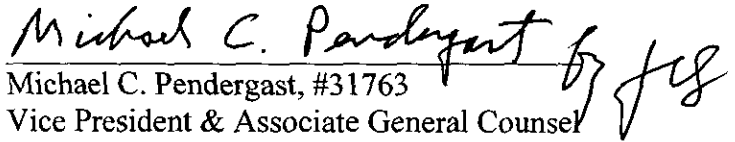
and contentions of an opposing party is not even forthcoming at the evidentiary hearing but withheld until the final due date for the post-hearing pleadings.

Relief Sought

12. Given these deficiencies, Laclede believes that the Commission should, at a minimum, strike paragraphs 3 and 4 of Staff's Proposed Conclusions of Law and paragraphs 3 and 4 of its Proposed Findings of Fact on the grounds that they improperly assert new and/or inconsistent matters or positions in this case, all in derogation of the procedural orders and controlling documents applicable to this case as well as Laclede's fundamental due process rights. In the alternative and without waiving its right to object to Staff's submission, Laclede would respectfully request that the Commission grant it leave to fully respond to new matters or positions set forth in Staff's Proposed Conclusions of Law and Findings of Fact.

WHEREFORE, for the foregoing reasons, Laclede Gas Company respectfully moves that the Commission strike paragraphs 3 and 4 of Staff's Proposed Conclusions of Law and paragraphs 3 and 4 of its Proposed Findings of Fact or, in the alternative, grant the Company leave to fully respond to new matters or positions set forth in Staff's Proposed Conclusions of Law and Findings of Fact.

Respectfully submitted,



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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing Motion to Strike or, Alternatively, for Leave to File Response on all counsel of record in this case on this 21st day of April, 2003 by hand-delivery, email, fax, or by placing a copy of such Motion, postage prepaid, in the United States mail.

