LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION
312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-0427

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

DEAN L. COOPER
MARK G. ANDERSON
GREGORY C. MITCHELL
BRIAN T. MCCARTNEY
DIANA C. FARR
JANET E. WHEELER

OF COUNSEL
RICHARD T. CIOTTONE

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Missouri Public Service Commission

Mr. Dale Hardy Roberts
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Re: Case Nos. GR-2001-387 and GR-2000-622

Dear Mr. Roberts:

On behalf of Laclede Gas Company, I deliver herewith for filing with the Missouri Public Service Commission ("Commission") in the referenced matter an original and eight (8) copies of a Request for Oral Argument in Response to Introduction and Consideration of New, Extra-Record Matters at Agenda Meeting and, if Necessary, Petition to Reopen the Record and Establish New Procedural Schedule.

Copies of this filing will be provided this date to all parties of record.

Would you please bring this filing to the attention of the appropriate Commission personnel.

Thank you very much for your assistance.

Very truly yours,

James C. Swearengen

JCS/lar
Enclosures
cc: All parties of record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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
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

REQUEST FOR ORAL ARGUMENT
IN RESPONSE TO CONSIDERATION OF AND RELIANCE
ON NEW, EXTRA-RECORD MATTERS AT AGENDA MEETING
AND, IF NECESSARY, PETITION TO REOPEN THE RECORD
AND ESTABLISH NEW PROCEDURAL SCHEDULE

COMES NOW Laclede Gas Company ("Laclede" or "Company"), pursuant to Sections 4 CSR 240-2.110(8) and 4 CSR 240-2.140(3) of the Commission's Rules of Practice and Procedure, and for its Request for Oral Argument in Response to Consideration of and Reliance on New, Extra-Record Matters at Agenda Meeting and, if Necessary, Petition to Reopen the Record and Establish New Procedural Schedule, 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 ("Proposed Conclusions and Findings") in the above-referenced case.

2. On April 21, 2003, Laclede filed its Motion to Strike or, Alternatively, for Leave to Respond (hereinafter "Motion"). In its Motion, Laclede asserted that Staff had sought to introduce positions and matters in its Proposed Conclusions and Findings that were both new and, in several key respects, flatly inconsistent with the positions that

Staff has taken throughout this proceeding. Specifically, Laclede pointed to paragraphs 3 and 4 of Staff's Proposed Conclusions of Law which referenced various court decisions that had never been discussed or even cited by Staff in its Initial Brief. Laclede also pointed to paragraphs 3 and 4 of Staff's Proposed Findings of Fact in which the Staff urged the Commission to find, respectively, that Laclede had " ... disclaimed recovery of any proceeds from the PSP in the event it opted out of providing guaranteed price protection for its ratepayers" and that Laclede " ... was provided with incentives only to enhance the price protection afforded to ratepayers."

3. Laclede noted in its Motion that such proposed findings were wholly inappropriate in that they implied, contrary to the undisputed evidence and Staff's own position and representations to the Commission in this case (*See* Tr. 76-77; 85-93; 239-40; 265-66), that the Overall Cost Reduction Incentive was no longer in effect once Laclede opted out of the Price Protection Incentive. Laclede further asserted that by introducing these new and unsupported matters in the very last post-hearing filing scheduled in this case, the Staff had violated: (a) the specific terms of the September 1, 2000 Stipulation and Agreement and implementing tariff in Case No. GO-2000-394 (in which, by its own acknowledgment, Staff had agreed that the Overall Cost Reduction Incentive under which Laclede has claimed savings in this case was to remain in full force and effect); (b) the Commission's Order in this case in which it directed the Staff to provide in its initial recommendation a "full and complete explanation of the basis for any proposed adjustment";[1] (c) the Commission rules and orders designed to prevent unfair surprise and ensure all issues are identified in advance so that they can be fairly

[1] *See* page 2 of the Commission's April 18, 2001, *Order Adopting Procedural Schedule* in this case.

addressed;[2] and (d) Laclede's due process rights to be notified of, and have an opportunity to respond to, the claims and contentions of opposing parties.

4. On April 22, 2003, the Staff filed its Reply in which it acknowledged that the proposed finding set forth in paragraph 3 of its filing did not, in fact, reflect either the position that Staff has taken in its post-hearing filings, nor the position that Staff now holds. (*See* Staff's Reply, page 2). Despite this acknowledgement, however, it now appears from comments made at the Commission's April 24, 2003 Agenda Meeting that one or more Commissioners have, in fact, relied on this new, extra-record and entirely unsupported theory in deciding how the issues in this case should be resolved.

5. For the reasons stated in its earlier Motion, Laclede respectfully submits that such reliance is improper and cannot possibly form the basis of a valid Commission Order. It appears, however, that the arguments raised in Laclede's Motion were not taken into account before these new, extra-record matters were considered and relied upon at the Agenda Meeting. The Company, therefore, requests that the Commission schedule an oral argument so that Laclede can address why the introduction of these new matters violates both the Company's due process rights as well as the Commission's statutory obligation to base its decisions on the competent and substantial evidence on the record.

6. Indeed, the violation of Laclede's due process rights resulting from the introduction and consideration of this new matter could not be any clearer or more egregious. As this Commission has previously recognized, a party's right to a "full and fair hearing" requires that it be notified of the claims and contentions made against it and be given a reasonable opportunity to rebut those claims through the presentation of evidence and the ability to cross-examine parties. *See* ***Re: Missouri Gas Energy,*** Case

[2] *See* paragraph (A) of the Commission's April 18, 2001, *Order Adopting Procedural Schedule* in this case.

Nos. GR-98-140 and GT-98-237, 8 Mo.P.S.C.3d. 2, 11, *Order Granting Recommendation and Rehearing in Part, Order Denying Reconsideration and Rehearing in Part, and Order Denying 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); ***Re: Empire District Electric Company,*** 6 Mo.P.S.C.3d. 17, 19 (February 13, 1997). *See also* ***State ex rel. Donelon v. Division of Employment Sec.,*** 971 S.W.2d 869, 876 (Mo. App. W.D. 1998).[3]

7. To that end, the Commission has adopted and implemented a number of procedural requirements to safeguard these rights in contested cases such as the one before it in this proceeding. These include, among others, procedures for the pre-filing of testimony, the submission of a list of issues, the submission of statements of positions on those issues, and the holding of an evidentiary hearing during which the full array of procedural rights are afforded the participating parties. (*See* 4 CSR 240-2.080(21); 4 CSR 240-2.110; 4 CSR 240-2.130(1),(7) and (8)). They also include procedural orders, such as the one issued more than two years ago in this case, in which the Commission directed the Staff to "provide a full explanation and complete explanation of the basis for its Proposed Adjustment." (*See Order Adopting Procedural Schedule,* dated April 18, 2001).

8. By ensuring that parties are notified of the claims against them and given a

[3]These due process rights of a party to be notified of the claims that have been made against it and to rebut them through the use of such procedural avenues have also been specifically recognized in the Administrative Procedures and Review Act. *See e.g.* §536.070 RSMo. 2000, which is referenced at 4 CSR 240.2.130(1) of the Commission's Rules of Practice and Procedure.

reasonable opportunity to rebut them, each and every one of these procedural requirements serves to protect the due process rights of the parties appearing before the Commission. For such rights to have any meaning, however, they must be enforced by the Commission. And the Commission has not hesitated to do that when the need has arisen. For example, in ***Re: Empire District Electric Company,*** 6 Mo.P.S.C.3d. 17, 19 (February 13, 1997), the Commission granted a Staff Motion to Strike the mathematical calculation of a revenue requirement deficiency that a utility had presented in its brief on the grounds that the exact derivation of the deficiency had not been addressed by a witness during the evidentiary hearing. Although the various numbers used to calculate the revenue requirement deficiency had been presented on the record, the Commission determined that the Staff's right to a "full and fair hearing" required that the calculation itself be contained in testimony which was subject to cross-examination by the Staff. *Id.* at 19. Since that did not happen, the Commission struck the calculation, thereby effectively eliminating any ability by the utility to recover the revenue deficiency. *Id.*

9. Similarly, in ***Re: Missouri Gas Energy,*** 188 P.U.R.4th 30, 79-81 (September 2, 1998), the Commission denied a Joint Motion that had been submitted by the Staff, Missouri Gas Energy, and Public Counsel to correct the revenue requirement that had been ordered in that case. Once again, the Commission noted that since the correction had not been presented during the evidentiary hearing, certain objecting parties had not had the opportunity to contest the propriety of the correction through cross examination or other means. As the Commission stated: "[i]n order to afford the appropriate due process, the evidence must be submitted, and the other parties must have an opportunity to contest that evidence." *Id.* at 81. The Commission therefore

determined that the correction could not be approved. The Commission's decisions are replete with other examples of where it has rejected "eleventh hour" attempts to introduce new matters or claims on the grounds that it would prejudice the due process rights of other parties. *See* ***Ahlstrom Development Corporation, et. al. v. The Empire District Electric Company,*** 4 Mo.P.S.C.3d 187, 201 (November 8, 1995); ***Re: Missouri Public Service,*** 7 Mo.P.S.C.3d. 178, 224-25 (March 6, 1998). *See* also the Commission's November 19, 2001 Order in ***Re: Empire District Electric Company,*** Case No. ET-2002-210, in which it said that it was without authority to correct an acknowledged $3.6 million error made by the Staff in the calculation of the utility's revenue requirement in the utility's recently concluded rate case proceeding.

10. In view of the foregoing, the only real issue remaining in this case is whether the Commission is going to enforce these due process guarantees - as it has often done in the past to the financial detriment of the utilities it regulates - or instead abridge them by introducing and relying on new, extra-record matters to arrive at its decision. For there can be no question that Laclede has ***never*** had the opportunity in this proceeding to rebut the contention, apparently arising out of a mischaracterization of two, out-of-context, sentences of testimony from the record in Case No. GO-98-484, that the Company's exercise of its right under the Program to opt out of the Price Protection Incentive somehow rendered the Overall Cost Reduction Incentive ineffective. And that's because no party to this proceeding – not the Company, nor the Staff, nor the Office of the Public Counsel – has ***ever*** made that contention in their recommendations, pleadings, or testimony in this case.

11. Had the Company been afforded such an opportunity, it would have presented additional evidence showing how these two sentences, when read in the context of the PSP Tariff and Program Description that were being proposed at the time, clearly applied only to the Price Protection Incentive. The Company would have also presented additional evidence demonstrating the concurrence of other parties in this conclusion. The Company had no reason to do so, however, because all of the parties to this case have said or conceded that the Overall Cost Reduction Incentive remained in full force and effect throughout the entire ACA period. These are the very same parties who were involved in litigating Case No. GO-98-484, in submitting and reviewing the PSP Tariff Sheets and Program Description that were filed in compliance with the Commission's Report and Order in that case, in reviewing the Company's June 1, 2000 letter declaring the Price Protection Incentive inoperable, and in negotiating and reviewing the September 1, 2000 Stipulation and Agreement and implementing tariff sheet in Case No. GO-2000-394 that modified one aspect of the PSP. (*See* Exhibits 1HC, 2HC, 3HC; 4HC, 5HC, 6HC, Tr. 76-79; 85-93; 239-40; 265-66). Moreover, they have said that the Overall Cost Reduction Incentive remained in full force and effect with full knowledge of the statement that was made by Laclede witness Neises in Case No. GO-98-484. (Tr. 239-40).[4]

12. The parties' unanimous conclusion that the Company's exercise of its right to opt out of the Price Protection Incentive did not render the Overall Cost

[4] The actions of all parties to this case have always been unswervingly consistent with the Overall Cost Reduction Incentive surviving the Price Protection Incentive. This is because the tariff language is clear and unambiguous that the Company's right to declare the Price Protection Incentive inoperable applies solely to the Price Protection Incentive. It is well-settled law in Missouri that when a tariff (or statute) is clear and unambiguous on its face, it cannot be given another meaning or construction by resorting to other evidence. ***Allstates Transworld Vanlines, Inc. v. Southwestern Bell Telephone Co.***, 937 S.W.2d 314, 317 (Mo. App. 1996); ***Jones v. Director of Revenue***, 832 S.W.2d 516, 517 (Mo. 1992).

Reduction Incentive ineffective is also supported again and again by the explicit terms of the tariffs, program descriptions, agreements and other instruments that the Commission approved and that the parties have all agreed are "controlling" in this case. Indeed, before the PSP was even approved, Laclede's Initial Brief in Case No. GO-98-484 clearly stated that the only impact of declaring the Price Protection Incentive inoperable for a particular year was the elimination of the Company's right to profit under that particular incentive component. (Tr. 264-65). And, as Staff acknowledged again and again during the evidentiary hearing, such a result was reconfirmed by each and every document filed thereafter. These included, among others, the PSP Tariff Sheets and Program Description approved in that case (Tr. 76-77), the Company's letter declaring the Price Protection Incentive inoperable (Tr. 78-79), and the September 1, 2000 Stipulation and Agreement and the compliance tariff that implemented that agreement. (Tr. 85). In fact, the compliance tariff implementing the September 1, 2000 Stipulation and Agreement could not have been more clear on this point. While that tariff referenced the modification in the Stipulation and Agreement that had eliminated the 70 percent volume requirement and specifically noted that the Company's "opting out of the Price Protection incentive features," it made absolutely ***no*** change to the structure, wording or incentive aspects of the Overall Cost Reduction Incentive. (Exh. 6HC, pp. 10-11; Schedule 1, p. 2).

13. In view of this undisputed factual record, any consideration by the Commission of a claim or theory that is contrary to the foregoing would represent a gross violation of Laclede's due process rights. Indeed, it would be a violation far more egregious than those that have been prevented by the Commission in the past, in that it would be premised not only on the introduction of new, extra-record matters that were

never presented, but on matters that are also in direct conflict with what was presented during the evidentiary hearing in this case. As the Court noted with favor in ***Union Electric Company, et al. v. Public Service Commission and Commissioner Alberta Slavin,*** 591 S.W.2d 134, 138 (Mo.App.W.D. 1979), "[the] cardinal test of the presence or absence of due process in an administrative proceeding is .... 'the presence or absence of rudiments of fair play long known to the law.'" ***Jones v. State Dept. of Public Health and Welfare,*** 354 S.W.2d 37, 40 (Mo.App. 1962), *quoting from* 16A C.J.S. Constitutional Law §628 p. 851. At a minimum, these "rudiments of fair play long known to the law" include an obligation on the part of the Commission to follow and enforce its own established procedures and to do so regardless of which party's rights are at stake. Indeed to do otherwise is a clear abuse of discretion that will invalidate any Commission action. ***Roma Martin-Erb v. Missouri Commission on Human Rights,*** 77 S.W.3d 600 (Mo. 2002); ***Mangieracina v. Haney,*** 141 S.W.2d 89, 92 (Mo.App. 1940); ***Kelleher v. St. Louis Public Schools,*** 35 S.W.617, 619-620 (Mo. 1896). In this case, the only way for the Commission to comply with this fundamental obligation is by rejecting any consideration of and reliance on the new, extra-record matters that were introduced at its April 24, 2003 Agenda Meeting.

14. Such a result is also mandated by the Commission's fundamental obligation to base its decisions on the competent and substantial evidence on the record. *See* ***Friendship Vill. v. Public Service Commission,*** 907 S.W.2d 339, 344 (Mo.App. W.D. 1995); §536.070 RSMo. 2000. As this Commission has recognized, "findings by the Commission must be based on substantial and competent evidence, taken on the record as a whole. In making its findings, the Commission may not take into

consideration any matter not on the record and may not base a finding of fact on any matter not in evidence." ***Re: Missouri Public Service,*** 7 Mo.P.S.C.3rd 178 (March 16, 1998). Nor may an administrative agency, like the Commission, arbitrarily disregard and ignore the competent, substantial and undisputed testimony of witnesses who have not been shown by the record to have been impeached or disbelieved by the agency and instead "base its findings upon the personal opinions of its members unsupported by any sufficient competent evidence in the record". ***Koplar et al. v. State Tax Commission,*** 321 S.W.2d 686, 695 (1959). In view of this fundamental principle, it is wholly improper for the Commission to consider new theories and claims at this late stage of the proceedings that are not only unsupported by the record, but diametrically opposed to the undisputed testimony that was presented by all of the witnesses in this case.

15. As the Company indicated in its earlier Motion, as a result of Staff's proposed adjustment, Laclede has been subjected to the possibility of taking a significant write-off because of its participation in a Program under which it produced tens of millions of dollars in price protection for its customers during the winter of 2000/2001. Laclede has attempted throughout this proceeding to explain why such an adjustment is unlawful, unsupported and unfair, and should therefore be rejected by the Commission. As a consequence of the introduction of these new matters, however, Laclede now faces the prospect of suffering this financial penalty based on a consideration of new, extra-record claims and theories that it has never had an opportunity to address because they were never presented during the evidentiary phase of this proceeding. Accordingly, Laclede requests that the Commission schedule an oral argument in this case so that these critical legal matters can be fairly presented and thoroughly addressed.

16. Moreover, in the event the Commission does not reject consideration of these new matters in their entirety, Laclede should and must be given a full opportunity to respond to these new matters, given the reliance that has been placed on them. In such event, Laclede would therefore petition the Commission to reopen the record in this case and establish a new procedural schedule under which Laclede will have the opportunity to introduce evidence, cross-examine witnesses and exercise all of the other procedural rights guaranteed by law and the Commission's rules. In addition to what is already on the record, there is a variety of additional evidence that, in Laclede's view, also directly disputes such a claim, and Laclede should not be foreclosed from providing it because of the untimely and improper attempt to raise this matter.

WHEREFORE, for the foregoing reasons, Laclede Gas Company respectfully requests that the Commission grant its request for oral argument and, if necessary, reopen the record in this case and establish a new procedural schedule.

Respectfully submitted,

Michael C. Pendergast, #31763
Vice President & Associate General Counsel
Telephone: (314) 342-0532
E-mail: mpendergast@lacledegas.com

Rick Zucker, #49211
Assistant General Counsel-Regulatory
Telephone: (314) 342-0533
E-mail: rzucker@lacledegas.com

Laclede Gas Company
720 Olive Street, Room 1520
St. Louis, MO 63101
Facsimile: (314) 421-1979

Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing Request was served on all counsel of record in this case on this 28th day of April, 2003 by hand-delivery, email, fax, or by placing a copy of such Request, postage prepaid, in the United States mail.