BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of Laclede Gas Company's Purchased Gas Adjustment (PGA) to be Audited in its 2004-2005 and 2005-2006 Actual Cost Adjustment

Case No. GR-2005-0203 and GR-2006-0288

NOTICE TO THE COMMISSION OF LACLEDE'S CONTINUED REFUSAL TO PRODUCE DOCUMENTS, MOTION FOR CLARIFICATION, AND MOTION FOR FURTHER COMMISSION ORDERS

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COMES NOW, the Staff of the Public Service Commission, and notifies the Commission and parties that Laclede Gas Company (Laclede) refuses to produce documents pursuant to the Commission's October 20, 2008, and January 21, 2009 Orders. The Staff moves the Commission to Clarify its January 21, 2009 Order and again moves the Commission to order Laclede to produce Laclede Energy Resources (LER) documents.

1. The Staff has been trying to acquire the underlying documentation of Laclede's transactions with its affiliate, LER, and ** ______** for some time. Laclede has stymied Staff's efforts at every stage and, despite the Commission's most recent Order, continues to refuse to produce documentation that is necessary for the Staff to complete its ACA review for the 2004-2005 and 2005-2006 audit.

2. Because Laclede repeatedly refused to provide documentation through the Commission's DR process, during a May 23, 2008 prehearing conference the Staff agreed to file a list of documents related to the affiliate transactions between Laclede and LER necessary to complete its prudence evaluation. Staff filed a List of Documents...and Motion for Order Directing Laclede to Produce documents on July 25,



2008. The legal basis for that Motion was that Laclede and LER are affiliates and Laclede is required by Commission rule 4 CSR 240-40.015(6)(A) and 40.016(7) to "make available the books and records of its parent or any other affiliated entities when required in the application of this rule." Clearly, the Commission rule requires Laclede, the regulated entity, to make available LER's books and records to the Commission; the rule requires Laclede, the regulated entity, to possess, control and make available LER books and records to the Commission.

3. On August 21, 2008, RLJ Kennard Jones conducted a discovery conference with the parties. In response to the Judge's inquiry about whether Laclede had possession or access to the LER documents requested, counsel for Laclede committed expressly to the Judge, the Staff of the Commission, the General Counsel's Office, and the Office of the Public Counsel that Laclede would not use the issue of whether Laclede has possession of the LER documents as a defense. Counsel for Laclede clearly indicated that possession or control of the documents was not an issue that needed to be addressed. After counsel for Laclede's assurances, the issue of Laclede's possession of the documents was not contested or litigated¹.

4. The Staff filed a Motion to Compel on September 18, 2008. In response to Laclede's concerns, expressed in the discovery conference about the volume of documents sought, the Staff greatly limited the number of documents to only four months (January and April, 2005 and 2006) of information instead of 24.

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¹ Note that this commitment is consistent with Laclede's commitment made in Case No. GM-2001-342, referenced below.

5. On October 20, 2008, the Commission issued its Order Granting Motion to Compel directing Laclede to provide the documents. The Commission found the documents requested to be relevant to Staff's analysis of the ACA periods at issue here.

6. Laclede successfully delayed the Commission's directive for two months by filing a Motion for Reconsideration and requesting an evidentiary hearing before Laclede produced the documents that would be needed by Staff for the evidentiary hearing. On December 17, 2008, the Commission denied the Motion for Reconsideration.

7. On January 5, 2009, Laclede sought clarification of the Commission's Order Granting Motion to Compel. Laclede claimed that by compelling production of documents, the Commission had implicitly decided that an investigation into Laclede's affiliate transactions with LER should take place.²

8. The Commission responded on January 21, 2009, with an Order clarifying its position and directing Laclede to produce the documents "to the extent that Laclede is in possession of the information" by February 4, 2009.

9. Thereafter, in a discussion with counsel for the Staff, counsel for Laclede claimed it would not produce the documents ordered by the Commission because the documents were not in Laclede's "possession." The Commission should note that Laclede never made an issue of its possession, control, or access to **______

** until now.³

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³ See Laclede Gas Company's Response to Staff's List of Documents..., filed August 4, 2008, Laclede Gas Company's Response to Staff's Motion to Compel..., filed September 29, 2008, Laclede Gas Company's Motion for Reconsideration..., filed October 30, 2008, and Laclede Gas Company's Request for Clarification..., filed December 29, 2008.



 $^{^2}$ Staff's December 31, 2007 recommendation in GR-2006-0288 was that the Commission consider opening an investigatory docket to determine if affiliate transactions between Laclede and LER are in compliance with 4 CSR 240-40.015 and 4 CSR 240-40.016, the affiliate transactions rules.

10. On February 5, 2009, Laclede produced <u>**</u>

** and, curiously, 13 issues of ** **. None of these documents conform to the information requested by Staff. In addition, on or about February 9, 2009, **

** These documents did not address information requested in the documents that the Commission ordered to be provided in its October 20, 2008 Order compelling production. Laclede had previously, in October of 2008, provided certain cash bonus information for employees mentioned in Item #5 of Staff's September 18, 2008 Motion to Compel, except for ** ______**. Laclede has yet to provide ** ______** And previously on September 15, 2008, Laclede provided copies of ** ______** for a small subset of the documents requested in Items #1 and #2 of the Motion to Compel. The documents compelled were to include copies of ** ______

<u>**</u>.

11. Laclede has purposely failed and refused to comply with the Commission's Orders and has breached its assurances to the Judge, the Staff, the General Counsel's Office, and the Office of the Public Counsel made on August 21, 2008.

12. At this time, seven months after Laclede made its commitments, and in spite of its commitments regarding "possession" of the documents sought by the Staff,



Laclede is forcing the Commission to litigate and make a finding on the issue of Laclede's possession and control of the documents.

13. Discovery may be obtained at the Commission by the same means and under the same conditions as in civil actions in the circuit court. 4 CSR 240-2.090(1). Rule 58.01(a) provides for the production, copying and inspection of documents that are in the possession, custody, and control of the party upon whom the request is made.

14. Rule 58.01(a) "...is not limited to documents only in the possession of a party. Instead, Rule 58.01(a) provides that '[a]ny party may serve on another party a request (1) to produce...any designated documents...which are in the possession, custody *or control* of the party upon whom the request is served....?" *Hancock v. Shook*, 100 S.W.3d 786, 796 (Mo. banc 2003)(emphasis in original).

15. The Missouri Supreme Court *en banc* in Hancock court continued:

The basic test of the rule is 'control' rather than custody or possession....Control does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability, to obtain the documents from a non-party to the action....A court may require a party to produce documents held by a non-party if the party has the "practical ability to obtain the documents...irrespective of his legal entitlement to the documents." *Id.* at 796-797.

16. Laclede is also required by law to have possession, custody and control of

the documents under 4 CSR 240-40.016(6) and (7) which provide that:

...a regulated gas corporation shall make available the books and records of its parent and any other affiliated entities.... The Commission shall have authority to review, inspect and audit books, accounts and other records kept by a regulated gas corporation or affiliated entity....Records required under this rule shall be maintained by each regulated gas corporation for a period of not less than six (6) years.

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17. Though Laclede may argue that this rule applies only to the Commission's determination about compliance with the affiliate transactions' rule, there can be no dispute that Laclede has "possession" of the documents as defined by the Missouri Supreme Court.

18. Laclede has the right, authority, and practical ability to provide the documents. Otherwise, Laclede would not have made the commitments it did on August 21, 2008, to the Judge, the Staff, the General Counsel, and the Office of Public Counsel.

19. Laclede made another commitment directly to the Commission regarding its "possession" of affiliate records. Laclede's defense of lack of "possession" is a breach of its commitments made in, and a violation of, the Stipulation and Agreement entered into by Laclede *In the Matter of the Application of Laclede Gas Company for an Order Authorizing Its Plan to Restructure Itself Into a Holding Company, Regulated Utility Company, and Unregulated Subsidiaries*, Case No. GM-2001-342. The Stipulation and Agreement on page 9 states:

Laclede Gas Company and The Laclede Group, Inc. shall also provide Staff and Public Counsel any other such information...relevant to the Commission's ratemaking, financing, safety, quality of service and other regulatory authority over Laclede Gas Company; provided that Laclede Gas Company and any affiliated or subsidiary of the Laclede Group, Inc. shall have the right to object to such production of records...on any basis under applicable law and Commission rules, excluding any objection that such records and personnel of affiliates or subsidiaries: (a) are not within the possession or control of Laclede Gas Company; or (b) are either not relevant or are not subject to the Commission's jurisdiction and statutory authority by virtue of or as a result of the implementation of the Proposed Restructuring.⁴ (Emphasis added).

How could Laclede make this commitment to the Commission if it did not have

possession or control of records of its affiliates like LER?

⁴ GM-2001-342 order issued August 14, 2001. Stipulation and agreement filed July 9, 2001.

20. Laclede made these commitments because Laclede has the right, authority, and practical ability to provide LER documents to the Staff and Commission. In fact common employees of Laclede and LER have possession and control of both Laclede and LER documents. Ken Neises is Executive Vice President-Energy and Administrative Services for Laclede Gas and Vice President for LER. Mr. Neises as an officer and employee of both Laclede Gas and LER has access to the LER information Staff has requested and therefore the information is available to Laclede Gas.⁵

21. Laclede will continue to refuse to produce <u>**</u>_______** for as long as the Commission allows Laclede to manipulate these proceedings. It's been four months since the Commission ordered Laclede to comply. The Commission should make a finding, based upon Laclede's commitments and Missouri law, that Laclede has "possession" of the documents sought and again issue an order directing that Laclede produce all of the documentation sought by the Staff in its September 18, 2008 Motion to Compel. Laclede has a legal obligation to comply with the Commission's rules, Commission Orders, Missouri law, and Supreme Court rules. It's now time that the Commission insist on compliance, clarify its January 21, 2009 Order to delete the word "possession", and set a deadline for production.

22. Supreme Court Rule 61 expressly permits sanctions for failure to produce documents. Sanctions for abuse of the discovery process are appropriate when a party demonstrates "contumacious and deliberate disregard for the authority of the Court"⁶ or Commission. Sanctions can include denying the right to cross-examination and

⁵Laclede's annual Meeting of Shareholders and Proxy Statement, January 29, 2009, incentive compensation statement, "Mr. Neises' award reflects his contributions in increasing Laclede Energy resources' earnings and maximizing Laclede Gas' off-system sales revenues for the year." ⁶ See Davis v. Chatter, 270 S.W.3d 471 (Mo. App. 2008).



presenting witnesses, striking pleadings and defenses, and default.⁷ In the event Laclede continues to refuse to comply and continues to manipulate the discovery process, the Commission should issue a default against Laclede and find that the Staff's proposed disallowances are appropriate.

WHEREFORE, the Staff prays for the Commission to find that Laclede has possession of the documents and direct Laclede to produce the documents that were the subject of Staff's Motion to Compel filed five months ago on September 18, 2008, by issuing an order that does not include any language of limitation, reservation, or restriction that would allow Laclede to further delay its production of documents. In the event Laclede fails to fully comply with the Commission's Order, default and disallowance are the appropriate remedies.

Respectfully submitted,

/s/ Steven C. Reed

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⁷ Id.

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<u>Certificate of Service</u>

I hereby certify that copies of the foregoing have been mailed, hand-delivered, e-mailed or transmitted by facsimile to all counsel and parties of record this 19th day of February, 2009.

/s/ Steven C. Reed