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April 23, 2003

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

**FILED<sup>3</sup>**  
**APR 23 2003**  
**Missouri Public  
Service Commission**

**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 Response to Staff's Reply and Renewed Request for Leave to Respond in Full.

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. Swearngen

JCS/lar

Enclosures

cc: All parties of record

**FILED**  
APR 23 2003  
Missouri Public  
Service Commission  
2001-387

In the Matter of Laclede Gas Company's )  
Purchased Gas Adjustment Factors to Be Reviewed ) Case No. GR-2000-622  
in Its 1999-2000 Actual Cost Adjustment )

**RESPONSE TO STAFF'S REPLY AND  
RENEWED REQUEST FOR LEAVE TO RESPOND IN FULL**

**COMES NOW** Laclede Gas Company (“Laclede” or “Company”) and for its Response to Staff’s Reply and Renewed Request For Leave to Respond in Full, 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 fundamentally inconsistent with both the record as well as Staff’s own prior positions and representations to the Commission in this case. (Tr. 76-77; 85-93; 239-40; 265-66). Laclede further asserted that by introducing these new, inconsistent and unsupported matters in the very last post-hearing filing scheduled in this case, the Staff had:

- violated (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 acknowledgment, 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;
- violated Staff’s agreement and the Commission’s Order in this case that Staff provide in its initial recommendation in this proceeding a “full and complete explanation of the basis for any proposed adjustment”;<sup>1</sup>
- violated Commission rules and orders designed to prevent unfair surprise and ensure that issues are identified in advance so that they can be fairly addressed;<sup>2</sup> and
- deprived Laclede of its due process right to have an opportunity to respond to the claims and contentions of opposing parties.

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<sup>1</sup> See page 2 of the Commission’s April 18, 2001, *Order Adopting Procedural Schedule* in this case.

<sup>2</sup> See paragraph (A) of the Commission’s April 18, 2001, *Order Adopting Procedural Schedule* in this case.

4. On April 22, 2003, the Staff filed its Reply to Laclede's Motion. In its Reply, Staff acknowledges, as it must, that at least one of its proposed findings – specifically the proposed finding set forth in paragraph 3 – does not 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 admission, the Staff nevertheless proceeds in its Reply to once again violate the Commission's orders and rules, its own prior agreements, and Laclede's due process rights by arguing that the Commission may nevertheless adopt its proposed finding because, notwithstanding Staff's own prior representations and positions to the contrary, there is something on the record to support such a finding. (*Id.*).

5. The Commission should not countenance this transparent attempt to circumvent its procedural rules and orders and, in the process, deny Laclede its due process right to a fair hearing in which it has been given notice of, and a reasonable opportunity to rebut, the claims of opposing parties.<sup>3</sup> If Staff believed that there was, in fact, evidence to support an assertion that Laclede had disclaimed any right to proceeds under the PSP in the event it opted out of the Price Protection Incentive, then Staff had a clear and unambiguous obligation under the Commission's April 18, 2001 Order Adopting Procedural Schedule in this case to say so in its initial Recommendation filed on June 28, 2002. Staff did not do so. Staff also had an obligation to raise and support

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<sup>3</sup>In granting Staff's request to strike a utility's claim in its brief regarding a revenue deficiency that had not been addressed during the evidentiary hearing, the Commission noted that to have a "full and fair hearing" it was essential that the deficiency be included in testimony and subject to cross-examination. *Re: Empire District Electric Company*, 6 Mo.P.S.C.3d. 17, 19 (February 13, 1997). See also *Re: Missouri Gas Energy*, 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). See also *State ex rel. Donelon v. Division of Employment Sec.*, 971 S.W.2d 869, 876 (Mo. App. W.D. 1998).

such a claim at the time it filed its direct, rebuttal and surrebuttal testimony in this case. No such claim from Staff, however, was forthcoming in any these submissions. Nor did the Staff assert such a claim in its Statement of Positions filed on January 9, 2003, during the evidentiary hearings held in this case on February 13 and 14, 2003, or, as Staff has acknowledged in its Reply, in its post-hearing briefs.

6. To the contrary, far from making such a claim, the Staff has said just the *opposite* throughout these proceedings. Specifically, it has acknowledged and represented to this Commission over and over again that pursuant to the terms of the PSP Tariff and Program Description approved in Case No. GO-98-484 and the Stipulation and Agreement and implementing tariff approved in Case No. GO-2000-394 -- terms which the Staff itself has told this Commission are controlling to the outcome of this case -- the Overall Cost Reduction Incentive under which Laclede has claimed savings remained in full force and effect and that the only issue was how those savings should be measured. (See Exhibits 1, 2 and 3; Tr. 76-77; 85-93; 239-40; 265-66).<sup>4</sup>

7. Given these undisputed facts, there is absolutely no evidentiary support in the record for the finding that Staff has proposed, nor any procedural pretext that could possibly excuse or justify Staff's attempt to have the Commission adopt it. Indeed, by even continuing to argue the merits of such a finding, the Staff is not only exacerbating

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<sup>4</sup> Staff has cited nothing in its Reply that would contravene Staff witness Sommerer's statement during the evidentiary hearing 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*). Nor has the Staff presented anything in its Reply that would contravene the numerous instances in which Staff witness Sommerer agreed that such a position was fully consistent with or affirmatively mandated by, among other things, the Company's Brief in Case No. GO-98-484 (Tr. 264-65), the PSP Tariff Sheets and Program Description approved by the Commission in that case (Tr. 76-77), the notice filed by the Company in June of 2000 in which it declared the Price Protection Incentive inoperable (Tr.

the violations it committed in its Proposed Conclusions and Findings, but is effectively asking the Commission to disbelieve and reject the sworn testimony of its own witness (and the representations of its own counsel) regarding how the PSP worked and how its various provisions should be construed.<sup>5</sup>

8. Contrary to Staff's contention at page 2 of its Reply, there is nothing in the practice of preparing proposed findings for either this Commission or the circuit courts of Missouri that in any way condones such actions. Simply put, the privilege of proposing such findings does not give a party carte blanche to introduce new claims and positions or to ignore that party's obligation to identify and try such matters in accordance with the procedural requirements that have been established by the tribunal. It never has and it never will. Indeed, Staff itself recognizes this when it states at page 2 of its Reply that "Staff perceives its role in drafting proposed findings to be as a scrivener for the Commission in case the Commission should see fit to rule the contested issues *as Staff has viewed and presented them.*" (*emphasis supplied*). Obviously, the Staff has gone well beyond that role when it submits findings, as it has in this case, that not only introduce issues that Staff has never "presented" to the Commission, but that also suggest a resolution of such issues that is directly contrary to the "views" that Staff *has* presented to the Commission.

9. 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

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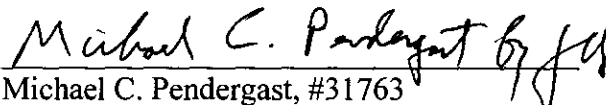
78-79), and the September 1, 2000 Stipulation and Agreement and implementing tariff approved by the Commission in Case No. GO-2000-394. (Tr. 85).

<sup>5</sup> The Commission has repeatedly determined that a Motion to Strike is appropriate and should be granted in the absence of evidence to support a particular claim or finding. See *Re: Empire District Electric Company*, 6 Mo.P.S.C.3d. 17, 19 (February 13, 1997); *Re: Missouri Public Service*, 7 Mo.P.S.C.3d. 178, 224-25 (March 6, 1998).

under which it produced tens of millions of dollars in financial benefits for its customers. 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 Staff's latest filings, however, Laclede now faces the prospect of suffering this financial penalty based on the 11<sup>th</sup> hour introduction of claims and positions that it has never had an opportunity to address because they were never made. Accordingly, unless Staff's position is rejected in its entirety, Laclede believes it should be given a full opportunity to respond to the new contentions that have been raised by Staff in both its Proposed Conclusions and Findings as well as its Reply. This should include not only the opportunity to submit further pleadings, but also the opportunity to introduce additional evidence pursuant to 4 CSR 240-2.130(14) and to cross-examine Staff witnesses on the new claims it has presented. 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 Staff's untimely and improper attempt to raise this matter.

**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 in accordance with the recommendations set forth herein.

Respectfully submitted,



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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing Response was served on all counsel of record in this case on this 23rd day of April, 2003 by hand-delivery, email, fax, or by placing a copy of such Motion, postage prepaid, in the United States mail.

