BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public Service Commission, Complainant,	)	
v.	)	Case No. GC-2011-0098
Laclede Gas Company, Laclede Energy Resources, The Laclede Group, Respondents.	)	

APPLICANT INTERVENOR LERA SHEMWELL'S RESPONSE TO LACLEDE GAS COMPANY'S SUGGESTIONS IN OPPOSTION TO APPLICATION TO INTERVENE

Come now Applicant Lera Shemwell ("Shemwell") and, in response to Laclede Gas Company's Response to Shemwell's Application to Intervene, states as follows:

1. **Laclede does not deny that Shemwell has the right to intervene.**

Laclede's Suggestions include a number of editorial topics, but interestingly the Suggestions do not directly contest Shemwell's right to intervene under Commission Rules. In fact, the criteria set forth in the Rules[1] are not even mentioned in the Suggestions.

2. **Laclede admits that Shemwell is "exposed" to professional sanctions.**

Having been called to task for its shotgun approach, Laclede tries to distance itself from its own pleading. Laclede says that Shemwell's actions "have left her *virtually* unexposed to any allegations of professional misconduct." (emphasis added). Laclede says there is a "paucity" of

[1] 4 CSR 240-2.070 requires that an intervenor have an interest different from that of the general public and which may be adversely affected by a final order arising out of the case; or that the intervention would serve the public interest.

evidence against [Shemwell] personally.[2] Note that Laclede cannot make (and does not want to make) an unequivocal commitment that Shemwell's professional license is not at risk. The dictionary definition of "virtually" is "almost entirely;" and the definition of "paucity" is "smallness of number."[3] Neither word means "not at all." Therefore, by implication Laclede concedes that which cannot be denied -- that Shemwell's professional license has been put at risk by the Counterclaim.

Laclede is amazingly cavalier about having one's bar license exposed to discipline.[4] And with similar *hubris* Laclede presumes that the Commission and the Office of Chief Disciplinary Counsel will defer to Laclede as to whether Ms. Shemwell in particular deserves sanctions. In fact, having played the "bad faith pleading card" by alleging a violation of Rule 4 CSR 240-2.080, Laclede cannot put some of the toothpaste back in the tube and suggest that Shemwell has no personal stake in the outcome of the Counterclaim. Laclede's Counterclaim is on the record, and nothing Laclede says about "what it really meant" can undo it. And no minimalizing of Shemwell's exposure to sanctions can remove the actual threat.

3. Laclede Presumes Too Much.

Laclede pretends to know why Ms. Shemwell withdrew from the case, baldly asserting she withdrew because she disagrees with Staff's position. For the record, that statement is false. Shemwell concurs with Staff's position in this case. Shemwell withdrew because she wishes to

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[2] Laclede alludes to just one pleading "signed by Ms. Shemwell that is even referenced in the testimony in this case." Actually Ms. Shemwell signed most of the pleadings in this case, and numerous pleadings in the other cases referenced in the Counterclaim.

[3] Merriam Webster's Collegiate Dictionary, Tenth Edition.

[4] An attorney looks at such exposure like being exposed to a serious disease: the chances of contracting the disease may be slim (or "virtually" non-existent) but reasonable people do not incur event a small risk due to the dire consequences that will always occur.

defend her professional reputation and her right to practice law, both of which are threatened by Laclede's improper Counterclaim.

4. Real Solutions: Dismissal or Bifucation.

Since Laclede departs from the only issue before the Commission in Shemwell's Application – whether she should be allowed to intervene -- and makes procedural and policy suggestions to solving the "morass." Actually, there is no morass – other than the confusion caused by Laclede's Counterclaim – a result fully intended by Laclede. Laclede attempts to completely elude the Complaint by substituting a workshop. Actually, there are two more straightforward solutions to simplify the case and have the Complaint heard in timely fashion.

a. Laclede should use the correct procedure for alleging bad faith.

The Commission's attention is directed to the case of *Ingram v. Horne*, 785 S.W.2d 735 (Mo.App. W.D. 1990) which is not only instructive, but controlling. The court points out that a counterclaim "does not properly present a motion for sanctions filed pursuant to Rule 55.03." *at 739.* The proper filing is *a motion.* The court agrees with a long line of cases holding that "counterclaims cannot be used as substitutes for motions in Rule 11 proceedings, since the question of whether sanctions should be applied is limited to a review of the particular pleading, motion or other paper complained about." *At 739.*

It is this procedural analysis that Laclede's real motives are laid bare. If Laclede felt that Shemwell (or any other attorney) violated Rule 4 CSR 240-2.080, Laclede should have simply filed a motion. That would have allowed the Commission to review the "particular pleading, motion or other paper complained about" as a separate matter.[5] It is clear that what Laclede

[5] It is expeditious to review the motion for sanctions separately since the evidence and the burden of proof will not be the same as in the case on the merits. The issue of "bad faith" will necessarily involve intent and motivation. Probing such matters within the case on the merits will only prolong and overcomplicate the record.

desires is the opportunity to inject sanction issues into the trial on the merits and create a "morass." Laclede hopes to: (1) intimidate it adversary with the threat professional sanctions; (2) make matters relevant that would not otherwise be relevant in the trial on the merits; and (3) obfuscate the basic issues in the case.[6] Laclede should not be rewarded for this tactic. Based on *Ingram*, Laclede's Counterclaim should be dismissed; and if Laclede believes there have been ethical violations then Laclede may proceed with a motion to that effect.[7]

b. Bifurcation.

At the very least, even if the Commission ignores the legal and practical lessons of *Ingram*, the Commission should bifurcate the issues in the case in chief and the issues in Laclede's Counterclaim. There are at least five reasons bifurcation is appropriate:

(i) The issues are different.

(ii) The parties are different.

(iii) The burdens of proof are different.

(iv) Matters relevant in one case may not be relevant in the other case.

(v) The sanction case might be moot depending on the outcome of the main case.

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[6] Laclede's Counterclaim actually references pleadings *in other cases*. How will such claims be adjudicated? Will issues, evidence and motivations in those other cases be tried with the main case?

[7] The court in *Ingram* advises that such an accusation is "a tool that should be applied sparingly and with great caution." *at 739*. If the Commission allows a regulated utility to use a Counterclaim whenever the utility believes Staff or the Office of Public Counsel or any other party has "crossed the line," then that tactic will be employed in every case. Why would any utility attorney not do so? Thus, every hotly contested matter before the Commission will routinely include a counterclaim alleging Rule 4 CSR 240-2.080 violations. The Commission will be well advised to address such matters in the proper context of a separate motion and hearing. This is a perfect case to provide that guidance.

5. Conclusion.

Shemwell should be allowed to intervene because her separate interests are admitted by Laclede and she qualifies for intervention under Commission rules. The Commission should address the issue of professional sanctions in the proper context (by motion or bifurcation) to allow this critical issue of professional responsibility to be decided as a distinct issue, with separate pleadings, discovery and hearings. The Commission should follow the specific guidance provided by the Missouri Court of Appeals in *Ingram*. Finally, the Commission should not reward Laclede's improper Counterclaim by dismissing the case.

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Certificate of Service

I, the undersigned, do hereby certify that on this 11th day of July, 2011, a copy of the foregoing document was served upon all interested parties by e-mailing a true copy thereof to:

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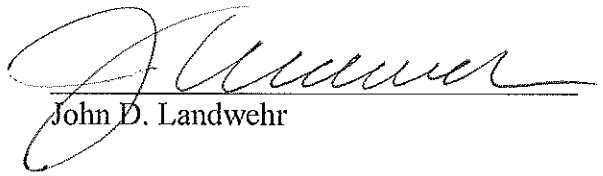

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