

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

In the Matter of Laclede Gas's Tariff to ) **File No. GR-2010-0171**  
Increase Its Annual Revenues for Natural Gas Service ) Tariff No. YG-2010-0376

## ORDER GRANTING MOTION TO COMPEL AND DENYING MOTION TO QUASH

Issue Date: July 19, 2010

Effective Date: July 19, 2010

The Missouri Public Service Commission is granting Staff's *Motion to Compel Discovery* ("motion to compel"). The Commission is also denying the *Motion to Quash Subpoena and Objections to Subpoena* ("motion to quash") of Laclede Gas Company ("Laclede Gas"). Those rulings stand upon statutes, case law, rules, and regulations providing that the Commission has jurisdiction to issue a subpoena duces tecum to any person, if such subpoena is reasonably calculated to lead to the discovery of admissible evidence. The disputed matter, as described in the motions of both Staff and Laclede, set is squarely within that standard. The Commission's affiliate transaction regulations contain no language to negate that jurisdiction.

## A. Background

The procedural background is as follows. On December 4, 2010, Laclede Gas commenced this action with the filing of a tariff seeking an increase in the amounts that Laclede Gas charges for gas service. On December 10, 2009, the Commission suspended the tariff, initiating a contested case.<sup>1</sup>

The parties agree that on July 12, 2010, Staff served subpoenas duces tecum (“subpoenas”) on Laclede Gas, Laclede Energy Resources (“Energy Resources”) and The

<sup>1</sup> Section 393.150.1. All sections are references to the 2000 Revised Statutes of Missouri unless otherwise noted.

Laclede Group (“Group”) in connection with *Amended Notice[s] of Deposition Pursuant to Subpoena Duces Tecum*. Each subpoena instructed the custodian of records (“witnesses”) for the respective entity to appear for deposition and bring certain records (“documents”) related to Energy Resources and “SM&P.”<sup>2</sup> On July 15, 2010, Laclede Gas filed the motion to quash relating only to the subpoena served on Laclede Gas. On July 16, 2010, Staff filed the motion to compel. The motion to compel alleges that the witnesses failed to comply with all three subpoenas.

Because the Commission has scheduled two weeks of evidentiary hearing on the merits of this action to begin 14 days from the date of this order, and the parties have had ample time to muster their arguments, the Commission finds good cause to dispense with the response time as provided by Commission regulation.<sup>3</sup>

### **B. Settlement**

Initially, Laclede Gas alleges that the parties have settled all matters related to the transactions to which the documents relate. Staff alleges that such matters remain in dispute. Staff’s allegation finds ample support in this discovery dispute, so the Commission will overrule Laclede Gas’s objection and deny the motion to quash on that basis.

### **C. Discovery**

The Commission’s jurisdiction as to discovery is subject to several provisions general and specific.

Generally, in any proceeding, the Commission’s jurisdiction includes ordering the deposition of a witness:

[A]ny party<sup>4</sup> may, in any investigation or hearing before the commission, cause the deposition of witnesses residing within

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<sup>2</sup> The parties do not further identify SM&P.

<sup>3</sup> 4 CSR 240-2.080(15) and 4 CSR 240-2.015

<sup>4</sup> Staff is a party to this action under 4 CSR 240-2.010(11).

or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the circuit courts of this state and to that end may compel the attendance of witnesses and the production of books, waybills, documents, papers, memoranda and accounts [<sup>5</sup>]

under subpoena duces tecum:

The commission shall:

(9) Have power to compel, by subpoena duces tecum, the production of any accounts, books, contracts, records, documents, memoranda and papers. In lieu of requiring production of originals by subpoena duces tecum the commission or any commissioner may require sworn copies of any such books, records, contracts, documents and papers, or parts thereof, to be filed with it.

\* \* \*

(10) Have power in all parts of the state, either as a commission or through its members, to subpoena witnesses, take testimony and administer oaths to witnesses in any proceeding or examination instituted before it, or conducted by it, in reference to any matter under sections 393.110 to 393.285.[<sup>6</sup>]

The General Assembly considers that jurisdiction important enough to enforce by remedies including jail time.<sup>7</sup>

Specifically, in this contested case, the statutes<sup>8</sup> and Commission regulations<sup>9</sup> provide that parties to may obtain the same discovery as the Missouri Supreme Court rules provide for civil actions in circuit court. Discovery includes the deposition of a witness under subpoena duces tecum.<sup>10</sup> Under those provisions, the Commission has jurisdiction to compel a witness to attend the depositions and bring the documents with them.

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<sup>5</sup> Section 386.420.2.

<sup>6</sup> Section 393.140.

<sup>7</sup> Section 386.460.

<sup>8</sup> Sections 536.073.2 and 386.410.1.

<sup>9</sup> Regulation 4 CSR 240-2.090(1).

<sup>10</sup> Rules 57.03 and 57.09. Rules are the 2010 Missouri Supreme Court Rules.

## D. Jurisdiction and Relevance

Laclede Gas objects that the documents are not relevant and will not lead to the discovery of admissible evidence. Matters subject to discovery are as follows:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The party seeking discovery shall bear the burden of establishing relevance.<sup>11</sup>

Laclede Gas also argues that the Commission “has no regulatory jurisdiction over the affairs of” Energy Resources and SM&P “except as to transactions they may have with” Laclede Gas. But the jurisdiction that Laclede Gas describes makes the documents relevant and supports the subpoenas under the plain language of the statutes as follows.

The Commission’s jurisdiction includes the rate of every public utility,<sup>12</sup> including gas corporations,<sup>13</sup> which includes Laclede Gas.<sup>14</sup> Generally in a rate action, evidence admissible includes evidence probative of all relevant factors.<sup>15</sup> Specifically, such factors include any unduly discriminatory contracts.<sup>16</sup> Also, Section 393.140(12) specifically provides that the Commission’s subject matter jurisdiction includes:

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<sup>11</sup> Rule 56.01(b).

<sup>12</sup> Sections 386.250 and 393.150.

<sup>13</sup> *Id.* and Section 393.140(1).

<sup>14</sup> Section 386.020(18), (19) and (43), RSMo Supp. 2009.

<sup>15</sup> ***State ex rel. Utility Consumers Council v. P.S.C.***, 585 S.W.2d 41, 49-52 (Mo. banc 1979).

<sup>16</sup> Section 393.130.2, RSMo Supp. 2009.

. . . the right to inquire as to, and prescribe the apportionment of, capitalization, earnings, debts and expenses fairly and justly to be awarded to or borne by the ownership, operation, management or control of such gas [service] . . . as distinguished from . . . other business [. <sup>17</sup>]

Insofar as every transaction has at least two participants, any statute governing Laclede Gas's transactions affects Laclede Gas's trading partners in such transactions. Case law provides that, under those statutes, the Commission's jurisdiction to inquire into "other business" extends beyond a public utility to an entity related by common ownership or control, <sup>18</sup> which Commission regulations call an "affiliate." <sup>19</sup>

The parties agree that the documents relate to affiliates and cost allocation.<sup>20</sup> That fact places the documents within the Commission's Section 393.140(12) inquiry <sup>21</sup> and makes the subpoenas reasonably calculated to lead to the discovery of admissible evidence, of whether Laclede Gas's tariff includes any unduly discriminatory contracts. Therefore, the Commission will overrule Laclede Gas's objection to relevance and jurisdiction and deny the motion to quash on those grounds.

### **E. Affiliate Transaction Regulations**

Laclede Gas refers to the Commission's affiliate transaction regulations.<sup>22</sup> Laclede Gas argues that, unless the affiliate transaction regulations expressly describe the documents, those regulations limit discovery. In other words, under Laclede Gas's argument, immunity from discovery increases with proximity to a public utility.

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<sup>17</sup> Section 393.140(12).

<sup>18</sup> ***State ex rel. Atmos Energy Corp. v. Public Serv. Comm'n of State of Mo.***, 103 S.W.3d 753, 764 (Mo. banc 2003), quoted at length below.

<sup>19</sup> 4 CSR 240-40.31.015 and 4 CSR 240-40.016.

<sup>20</sup> Motion to Quash, page 1, paragraph 2; Motion to Compel, page 4, paragraph 11.

<sup>21</sup> Further, the statutes direct an expansive reading of Commission jurisdiction toward legislatively established goals "To such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly." Section 386.250(7).

<sup>22</sup> 4 CSR 240-40.31.015 and 4 CSR 240-40.016.

Contrary to Laclede Gas's position, Staff cites the following language from the affiliate transaction regulations:

Access to Records of Affiliated Entities.

(A) To the extent permitted by applicable law, and pursuant to established commission discovery procedures, a regulated gas corporation shall make available the books and records of its parent and any other affiliated entities when required in the application of this rule.

(B) The commission shall have the authority to—

1. Review, inspect and audit books, accounts and other records kept by a regulated gas corporation or affiliated entity for the sole purpose of ensuring compliance with this rule and make findings available to the commission; and

2. Investigate the operations of a regulated gas corporation or affiliated entity and their relationship to each other for the sole purpose of ensuring compliance with this rule. [<sup>23</sup>]

Staff's undisputed purpose is ensuring compliance with the affiliated transaction regulations. Those regulations expressly provide investigation of affiliates — including access to affiliates' books, accounts and other records. The regulations require certain recordkeeping of Laclede Gas<sup>24</sup> and its affiliates,<sup>25</sup> but do not limit the investigation to such records.

Affirming the validity of the affiliate transaction regulations, the Missouri Supreme Court held:

**The PSC's authority to enact these regulations is set out in chapter 393.** Section 393.130.2 precludes a utility from “directly or indirectly by any special rate ... or other device or method ... [from] collect[ing] or receiv[ing] from any person or corporation ... greater or less[er] compensation” for that utility's services than it charges every other person or corporation.

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<sup>23</sup> Regulations 4 CSR 240-40.31.015(6) and 4 CSR 240-40.016(7).

<sup>24</sup> Regulations 4 CSR 240-40.31.015(4) and 4 CSR 240-40.016(5).

<sup>25</sup> Regulations 4 CSR 240-40.31.015(5) and 4 CSR 240-40.016(6).

Section 393.140(1) states that the PSC shall have “general supervision” over all gas utilities, electric utilities, and heating utilities. Reading section 393.130.2 in conjunction with the broad supervisory power granted under section 393.140(1), the PSC's authority to require utilities to maintain records so that it may determine whether utilities are following their obligations under section 393.130.2 is firmly established.

**Likewise, the PSC has authority to extend the reach of the rules to a utility's affiliates.** Section 393.140(12) precludes regulation of a utility's affiliate where the affiliate is “substantially kept separate and apart” from the business of the utility. However, that section also states that the PSC shall have the “right to inquire as to, and prescribe the apportionment of, capitalization, debts and expenses fairly and justly to be awarded to or borne by the ownership, operation, management or control of such gas plant, electric plant, [or heating plant]....” Sec. 393.140(12); *see State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 706 S.W.2d 870, 880-81 (Mo.App.1985).<sup>[26]</sup> Thus, where the affiliate is not one “substantially kept separate” from the utility, the PSC is authorized to “inquire” into certain aspects of the affiliate's operations as they relate to the capitalization, debts, expenses, etc., of the utility. **By requiring affiliates to maintain records of certain transactions with regulated utilities, the rules at issue do no more than is prescribed in section 393.140(12).**<sup>[27]</sup>

The court added:

With respect to allegations by appellants that the PSC will enforce these rules against affiliates that are, in fact, “substantially kept separate” from the utilities, any perceived violation is best litigated on a case-by-case basis when and if those circumstances arise. <sup>[28]</sup>

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<sup>26</sup> In ***Associated Natural Gas Co.***, the Missouri Court of Appeals held that the voluntary segregation of business between a regulated entity and a non-regulated entity does not prevent the Commission from applying the facts related to the non-regulated entity in a decision binding the regulated entity.

<sup>27</sup> ***State ex rel. Atmos Energy Corp. v. Public Serv. Comm'n of State of Mo.***, 103 S.W.3d 753, 763-64 (Mo. banc 2003) (emphasis the Commission's).

<sup>28</sup> *Id.*

And, correspondingly, the regulations add:

Enforcement.

(A) When enforcing these standards, or any order of the commission regarding these standards, the commission may apply any remedy available to the commission. [<sup>29</sup>]

A “remedy available to the commission” includes an order to comply with discovery,<sup>30</sup> and the other remedies cited above.

Laclede Gas cites no language from the affiliate transaction regulations to support its position but cites an order of this Commission in a different case<sup>31</sup> (“Ameren’s asset transfer”):

It is true that the Commission is authorized and required to examine dealings of regulated entities with their unregulated affiliates. However, as Union Electric points out, that authority applies to transactions between the affiliates and the regulated entity. **It does not apply to transactions between the unregulated affiliates and third parties absent a specific showing of relevancy to transactions between the affiliates and the regulated entity.** The Commission lacks any general authority to pry into the affairs of unregulated companies, or third parties that they do business with, merely because they are affiliates of regulated entities.[<sup>32</sup>]

Ameren’s asset transfer is easily distinguishable.

In Ameren’s asset transfer, the specific showing of relevancy was absent because, in such action, the issue is whether the public will suffer any detriment.<sup>33</sup> The disputed data requests sought information on whether the transfer would lead to a rate increase. On a

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<sup>29</sup> Regulations 4 CSR 240-40.31.015(8) and 4 CSR 240-40.016(9).

<sup>30</sup> Sections 536.073.2 and 386.410.1, Regulation 4 CSR 240-2.090(1), and Rule 61.01(g).

<sup>31</sup> Commission orders have no stare decisis value and so do not bind the Commission. ***State ex rel. AG Processing, Inc. v. Public Service Comm'n of State of Missouri***, 120 S.W.3d 732, 736 (Mo. banc 2003).

<sup>32</sup> ***In the matter of the application of Union Electric Company, d/b/a AmerenUE, for an order authorizing the sale, transfer and assignment of certain assets, real estate, leased property, easements and contractual agreements to Central Illinois Public Service Company, d/b/a AmerenCIPS, and, in connection therewith, certain other related transactions***, Case No. EO-2004-0108, order dated February 26, 2004, page 8 (emphasis Laclede Gas’s).

<sup>33</sup> ***State ex rel. City of St. Louis v. Public Service Comm'n of Missouri***, 73 S.W.2d 393, 400 (Mo banc 1934).



transfer of assets application, a public detriment does not depend on whether rates will increase.<sup>34</sup> But here, whether rates will increase is expressly at issue:

At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the gas corporation [. <sup>35</sup>]

That statute, with Section 393.140(12), and the ban on unduly discriminatory contracts,<sup>36</sup> constitute the “specific showing of relevancy to transactions between the affiliates and the regulated entity” demanded in Laclede Gas’s quotation from Ameren’s asset transfer. Therefore, the Commission will overrule Laclede Gas’s objection and deny the motion to quash on that basis.

#### **F. Possession, Custody and Control**

Laclede Gas alleges that the documents are within the possession, custody and control of Energy Resources and Group; not the possession, custody and control of Laclede Gas. Staff alleges that Laclede Gas has already produced such documents for Staff’s review but without allowing copies. Staff also alleges that Laclede Gas:

. . . directly or indirectly, through one (1) or more intermediaries, controls, is controlled by, or is under common control with . . . <sup>37</sup>

Energy Resources—which is the definition of an affiliate<sup>38</sup>—in the person of several directors and officers.

In addition to the affiliate transaction regulations already quoted:

a regulated gas corporation shall make available the books and records of its parent and any other affiliated entities[, <sup>39</sup>]

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<sup>34</sup> ***State ex rel. AG Processing, Inc. v. Public Service Comm’n***, 120 S.W.3d 732, 737 (Mo. banc 2003).

<sup>35</sup> Section 393.150.2.

<sup>36</sup> Section 393.130.2, RSMo Supp. 2009.

<sup>37</sup> Subsection (1)(A) of 4 CSR 240-40.015 and 4 CSR 240-40.016.

<sup>38</sup> *Id.*

<sup>39</sup> Regulations 4 CSR 240-40.31.015(6) and 4 CSR 240-40.016(7).

Staff cites a Missouri Supreme Court opinion describing control over documents in practical, rather than formalistic, terms:

The rule is not limited to documents only in the possession of a party. . . . “ ‘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.”); (“The word ‘control’ is to be broadly construed....”). [40]

That language describes the scope of a document production request<sup>41</sup> which applies to a subpoena duces tecum,<sup>42</sup> which applies before the Commission.<sup>43</sup> Moreover, the same documents are subject to the subpoenas served on Energy Resources and Group, neither of which has joined in the motion to quash. Therefore, the Commission will overrule Laclede Gas’s objection, deny the motion to quash on that basis, and grant the motion to compel as to any subpoenaed documents in the possession of any Laclede Gas affiliate.

## **G. Summary**

The statutes, rules, case law, and Commission regulations spell out the Commission’s authority and duty to inquire into transactions among the subpoenaed entities. Laclede Gas stands that law on its head with the assumption that discovery is less for an affiliate than for a stranger. That assumption has no support in any cited authority.

### **THE COMMISSION ORDERS THAT:**

1. The *Motion to Quash Subpoena and Objections to Subpoena* is (a) overruled as to the objections raised and (b) denied as to the relief sought.

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<sup>40</sup> ***Hancock v. Shook***, 100 S.W.3d 786, 796 -797 (Mo. banc 2003) (citations omitted).

<sup>41</sup> Rule 58.01.

<sup>42</sup> Rule 57.03.

<sup>43</sup> Sections 536.073.2 and 386.410.1; Regulation 4 CSR 240-2.090(1).

2. The motion to compel is granted as to the subpoenas duces tecum ("subpoena") served in connection with the *Amended Notice[s] of Deposition Pursuant to Subpoena Duces Tecum*. Specifically, Laclede Gas Company shall produce any document that is (a) requested by the subpoena served on it; and (b) within the control of Laclede Gas Company, or any affiliate of Laclede Gas Company, as described in the body of this order.
3. This order shall become effective immediately upon issuance.

( S E A L )

**BY THE COMMISSION**



Steven C. Reed  
Secretary

Daniel Jordan, Regulatory Law Judge,  
by delegation of authority pursuant to  
Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 19<sup>th</sup> day of July 2010.