

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

In the Matter of Laclede Gas Company's)	
Purchased Gas Adjustment (PGA) to be)	Case No. GR-2005-0203 and
Audited in its 2004-2005 and 2005-2006)	GR-2006-0288
Actual Cost Adjustment.)	

**PUBLIC COUNSEL'S RESPONSE TO LACLEDE'S
OBJECTIONS TO STAFF INFORMATION REQUESTS**

COMES NOW the Missouri Office of the Public Counsel and for its response to Laclede's March 19, 2009 Objections to Staff Information Requests states:

1. Public Counsel offers this response to Laclede's objections and urges the Commission to *again* order Laclede to comply with the Commission's orders directing Laclede to open its records so that Staff may perform its audit and prudency review.
2. Staff and Public Counsel¹ seek information regarding Staff's concerns that Laclede's affiliate, Laclede Energy Resources (LER), received benefits that should have instead been retained by Laclede and allocated to consumers through the Actual Cost Adjustment (ACA) to Laclede's rates. Laclede is a regulated distributor of gas purchased for the benefit of its customers, and as a result the Commission allows Laclede to pass-through these gas costs directly to customers on an interim basis subject to refund if the rates charged were not just and reasonable. If Laclede's gas purchasing operations and decisions provided an unjust and unreasonable benefit to Laclede's shareholders through LER, Laclede's actions harmed consumers by essentially taking what should be consumer gas rate reductions and instead channeling those amounts to shareholders.

¹ On September 3, 2008 Public Counsel requested from Laclede the same data sought by the Staff in this discovery dispute.

3. The Commission is charged by statute with setting just and reasonable rates. § 393.130 RSMo 2000. Discovery of relevant information is essential and requires a full and complete disclosure and audit of *all relevant records* in Laclede's control before the Commission can properly review whether Laclede's gas purchasing decisions and operations were prudent for 2004-2005 and 2005-2006.

4. Public Counsel first became aware of this discovery controversy over two years ago in the Staff's December 28, 2006 Recommendation in Case No. GR-2005-0203, the audit of Laclede's 2004-2005 gas purchasing decisions and operations. Staff stated in the Recommendation that Laclede was not forthcoming with the records that Staff needed to conduct its prudency review. In Staff's December 31, 2007 Recommendation in Case No. GR-2006-0208, the audit of Laclede's 2005-2006 gas purchasing, Staff repeated that Laclede had not provided the necessary records.

5. Staff's discovery frustrations with Laclede continued, prompting Staff to file its July 25, 2008 List of Documents Required by Staff to Analyze Laclede's ACA Filings and Motion for Order Directing Laclede to Produce. Staff later withdrew its list and re-filed a much shorter list on September 18, 2008 in Staff's Motion to Compel. The Motion to Compel states that on August 28, 2008, Staff provided Laclede with a revised record request that reduced the request from 24 months of records to two months of records for each ACA period at issue.

6. The Commission's October 20, 2008 *Order Granting Motion to Compel* ordered: "Laclede Gas Company shall produce the information set out in the Staff of the Commission's motion." The Commission specifically concluded in the *Order Granting*

Motion to Compel that the records appear reasonably calculated to lead to the discovery of admissible evidence and that Staff must have the information it seeks:

Staff seeks information concerning LER, Laclede's affiliate. Many of the concerns set out in Staff's memorandum have to do with LER and how LER acquires natural gas. In its memorandum in Case No. GR-2005-0203, after discussing discretion in sourcing supply, Staff specifically states: "This discretion in sourcing supply could result in gains for LER that should be allocated to Laclede's ACA." Additionally, in Case No. GR-2006-0288, Staff describes in its memorandum a transaction wherein Laclede may have shared the benefit of a sale with LER, thus receiving less than fair market value. Staff has demonstrated that in order to answer these questions, it must have access to the information it seeks. The Commission therefore concludes that the information Staff seeks appears reasonably calculated to lead to the discovery of admissible evidence. The Commission will therefore grant Staff's motion.

Any question as to the whether the data requests are reasonably calculated to lead to the discovery of admissible evidence is resolved. The Commission correctly concluded that under Missouri Rule of Civil Procedure 56.1 "it is not grounds 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."

7. The *Order Granting Motion to Compel* was the first of *three* Commission orders ordering Laclede to produce the records sought by Staff. Laclede requested reconsideration of the *Order Granting Motion to Compel*, and on December 17, 2008 the Commission's unanimous *Order Denying Motion for Reconsideration* stated:

Laclede has presented the same arguments available to the Commission when the Commission issued its order of October 20. More particularly, Laclede has expressed concerns about its right to a hearing. Although the Commission will deny Laclede's motion for reconsideration, the Commission assures Laclede that no decision will be made with regard to the above-captioned matters without the benefit of an evidentiary hearing.

The Commission also responded to Public Counsel's November 26, 2008 motion for an order directing Laclede to comply with the *Order Granting Motion to Compel*, and concluded:

...the denial of Laclede's motion for reconsideration effectively requires Laclede to abide by the Commission's order of October 20. Therefore, the Commission will not issue an order granting or denying Public Counsel's motion.

8. Not to be denied every opportunity to repeat its discovery arguments *ad nauseam* and delay this prudency review, Laclede filed a Request for Clarification on December 29, 2008. The Commission's unanimous January 21, 2009 *Order Regarding Request for Clarification* made it clear that if Laclede possessed the records, Laclede was required to produce them:

The Commission has ordered Laclede to produce information about its affiliate according to the rules of discovery not under the Commission's Affiliate Transaction Rule. Although it is true that by granting Staff's motion, Staff is permitted to investigate Laclede's affiliate transactions, such investigation is limited to information that may lead to evidence that is relevant to these ACA cases. To the extent that Laclede is in possession of the information, the Commission clarifies its order compelling Laclede to produce the information requested by Staff.

Laclede has also requested that the Commission hold a hearing on the above-captioned matters prior to producing the information requested by Staff. The purpose of discovery, which is to facilitate preparation for hearing, would be thwarted if the Commission granted this relief to Laclede. Laclede's request, in this regard, shall therefore be denied.

The Commission has directed Laclede to produce the information requested by Staff. Laclede is reminded that under Section 386.570, RSMo 2000, the Commission is allowed to seek penalties against Laclede for failure to comply with a Commission order. To this end, the Commission will again direct Laclede to produce information set out in the *Order Granting Motion to Compel* issued on October 20, 2008.

The Commission warned Laclede that Laclede's failure to comply with the Commission's *Order Granting Motion to Compel* could result in the Commission seeking

penalties against Laclede for Laclede's failure to comply with a Commission order. Nevertheless, Laclede continues to violate the orders issued October 20, 2008, December 17, 2008, and January 21, 2009 directing Laclede to produce the records. Anything less than full disclosure of the records that Laclede is required to keep and produce when requested, after the Commission has ordered Laclede to produce the records *three* times, would compromise the Commission's ability to conduct its prudency analysis, and would compromise future Commission orders compelling utility companies to produce records.

9. To gain favor from the Commission in 2001 when Laclede sought to restructure itself and move LER out from under Laclede and into an unregulated holding company, Laclede entered into a Unanimous Stipulation and Agreement wherein Laclede agreed to provide access to the very records sought by Staff and Public Counsel:²

Upon request, Laclede Gas Company and The Laclede Group, Inc. agree to make available to Staff, Public Counsel and PACE, upon written notice during normal working hours and subject to appropriate confidentiality and discovery procedures, all books, records and employees of The Laclede Group, Inc., Laclede Gas Company and its affiliates as may be reasonably required to verify compliance with the CAM and the conditions set forth in this Stipulation and Agreement...

Laclede agreed to provide access to "all books, records and employees" of LER to verify compliance with the conditions set forth in the Unanimous Stipulation and Agreement.

These conditions include the following:

The Laclede Group, Inc. represents that it does not intend to take any action that has a material possibility of having a detrimental effect on Laclede Gas Company's utility customers, but agrees that, should such detrimental effects nevertheless occur, nothing in the approval or implementation of the Proposed Restructuring shall impair the Commission's ability to protect such customers from such detrimental effects.

...

² Unanimous Stipulation and Agreement, Case No. GM-2001-342, July 9, 2001.

The Laclede Group, Inc., and Laclede Gas Company also agree that the Commission has the authority, through the lawful exercise of its ratemaking powers, to ensure that the rates charged by Laclede Gas Company for regulated utility service are not increased as a result of the unregulated activities of Laclede's affiliates and Laclede agrees, consistent with such standard, that rates should not be increased due to such activities.

The prudency review at issue in this case seeks to determine whether the transactions between Laclede and LER had a detrimental effect on Laclede's customers. As such, Laclede and LER agreed to provide the requested records, and have agreed that the Commission maintains the authority to compel Laclede to produce such records.

10. Laclede also agreed in the Unanimous Stipulation and Agreement that it would not object to producing records of Laclede or LER on the grounds of possession, relevancy, or the Commission's jurisdiction:

Laclede Gas Company and The Laclede Group, Inc. shall also provide Staff and Public Counsel any other such information (including access to employees) 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 affiliate or subsidiary of The Laclede Group, Inc. shall have the right to object to such production of records or personnel 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.

Laclede specifically agreed not to make the very relevancy arguments it continues to raise in its pleadings opposing access to the records of Laclede and LER.

11. Laclede is desperately trying to restrict the ability of Staff and Public Counsel, and ultimately the Commission, to conduct a prudency analysis of Laclede's gas purchasing and operating decisions by keeping relevant records hidden from view. If Laclede's purchasing decisions were prudent, Laclede should have no concerns with

opening its records. Laclede has not identified any harm that will come from releasing the records and has provided no valid reason for the Commission to reverse its three prior decisions ordering Laclede to produce the records. Staff and Public Counsel must be permitted an opportunity to review the records and submit as evidence those records they deem relevant. A proper time for Laclede to raise its relevancy objection is when an attempt is made to enter such evidence into the Commission's case record, not when Laclede is asked to produce records it is required to keep and produce under Section 393.140 RSMo 2000.

12. The Missouri Supreme Court previously identified the importance of the Commission's ability to review the relationship between a public utility and its affiliate to address:

...the emergence of a profit-producing scheme among public utilities termed "cross-subsidization," in which utilities abandon their traditional monopoly structure and expand into non-regulated areas. This expansion gives utilities the opportunity and incentive to shift their non-regulated costs to their regulated operations with the effect of unnecessarily increasing the rates charged to the utilities' customers. *See United States v. Western Elec. Co., 593 F. Supp. 846, 853 (D.D.C. 1984)* ("As long as a [public utility] is engaged in both monopoly and competitive activities, it will have the incentive as well as the ability to 'milk' the rate-of-return regulated monopoly affiliate to subsidize the competitive ventures...") To counter this trend, the new rules – and in particular, the asymmetrical pricing standards – prohibit utilities from providing an advantage to their affiliates to the detriment of rate-paying customers. In addition, to police compliance, the rules require the utilities to ensure that they and their affiliates maintain records of certain transactions.³

This same concern applies to Laclede's gas purchasing and operating decisions since Laclede has the opportunity and incentive to shift revenues from gas sales to its affiliate,

³ *State ex rel. Atmos Energy Corp. et al. v. P.S.C.*, 103 S.W.3d 753 (Mo. 2003).

which harms Laclede's residential and business customers by forcing consumers to pay unjust and unreasonable gas rates.

13. Laclede seeks a Commission decision on the merits of Laclede's case before the Staff and Public Counsel have the opportunity to review all records that are relevant or that could lead to relevant data, and before Staff and Public Counsel have an opportunity to gather and present evidence to the Commission. The Commission should strongly reject Laclede's delay tactics and direct Laclede to produce the records immediately so that the prudency review may move forward. Public Counsel also urges the Commission to direct its General Counsel to seek penalties in Circuit Court under Sections 386.360 and 386.570, RSMo 2000 for every day Laclede failed to produce its records, for every record that Laclede refuses to produce, and for every order that Laclede continues to violate.

WHEREFORE, the Office of the Public Counsel respectfully requests that the Commission direct Laclede Gas Company to comply with the Commission's orders and that the Commission direct its General Counsel to pursue penalties against Laclede in Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 25th day of March 2009:

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