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May 7, 2003

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Missouri Public Service Commission

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Re: Case No. GR-2001-387/GR-2000-622

Dear Mr. Roberts:

Enclosed for filing on behalf of Laclede Gas Company, please find an original and eight (8) copies of an Application for Rehearing and Motion for Reconsideration.

Would you please see that this filing is brought to the attention of the appropriate Commission personnel.

I thank you in advance for your cooperation in this matter.

Very truly yours,

James C. Swearengen

JCS/lar
Enclosure
cc: Dan Joyce
John Coffman

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Laclede Gas Company's Purchased Gas Tariff Revisions to Be Reviewed in Its 2000-2001 Actual Cost Adjustment	)))	Case No. GR-2001-387
In the Matter of Laclede Gas Company's Purchased Gas Adjustment Factors to Be Reviewed in Its 1999-2000 Actual Cost Adjustment	)))	Case No. GR-2000-622

APPLICATION FOR REHEARING AND MOTION FOR RECONSIDERATION

COMES NOW Laclede Gas Company ("Laclede" or "Company") and, pursuant to §386.500 RSMo. 2000 and Rule 4 CSR 240-2.160 of the Commission's Rules of Practice and Procedure, submits its Application for Rehearing and Motion for Reconsideration. In support thereof, Laclede respectfully states as follows:

1. On April 29, 2003, the Commission issued its Report and Order in the above-captioned proceeding (hereinafter "Report and Order" or "R&O"). In its Report and Order, the Commission decided, on a 3 to 2 vote, that Laclede should be required to flow through to its customers, effective with its next Actual Cost Adjustment ("ACA") filing, $4.9 million in hedging proceeds that the Company had retained pursuant to the terms of the Overall Cost Reduction Incentive of its Price Stabilization Program ("PSP"). This was in addition to the nearly $24 million in hedging proceeds that Laclede had already flowed through to its customers either in direct reductions to the customers' Purchased Gas Adjustment ("PGA") cost of gas or as supplemental funding for the PSP during its third year.

2. As discussed below, the Commission's decision is unlawful because it imposes an outcome that is directly contrary to the result mandated by the controlling tariffs and other legally binding instruments that were in effect at the time the transactions at issue in this case took place. The Commission's decision is also unreasonable and unlawful in that it is completely unsupported by any competent and substantial evidence on the record or by any findings of fact that are actually consistent with its decision. Moreover, by basing its decision on an entirely new, extra-record theory that completely disregards such record evidence, the Commission has also acted in an arbitrary and capricious manner in violation of its own rules and Missouri law. Indeed, by relying on this new theory, while simultaneously denying Laclede any opportunity to rebut it, the Commission has perpetrated a gross violation of Laclede's due process rights to be notified of and have an opportunity to respond to the claims being made against it. For all of these reasons, the Commission should grant rehearing or reconsideration of its decision in this case.

A. The Commission's decision is unlawful because it imposes an outcome that is directly contrary to the result mandated by the controlling tariffs and other legally binding instruments that were in effect at the time the transactions at issue in this case took place.

3. At pages 14 and 17 of its R&O, the Commission correctly finds that Laclede calculated its share of savings under the Overall Cost Reduction Incentive provision of the PSP in compliance with the PSP Tariff Sheets that were on file and in effect during the ACA period. Specifically, at page 14 of its Report and Order, the Commission states that the "Staff does not challenge the accuracy of Laclede's calculations under the tariff, and the Commission finds that Laclede's calculation is an accurate description of the numbers that would be obtained by applying the language of

the tariff." Similarly, at page 17, the Commission states that "[t]he formula contained in Laclede's tariff indicates that Laclede is entitled to keep $4.9 million in proceeds under the Overall Cost Reduction Incentive."

4. Having made these findings, however, the Commission nevertheless goes on to conclude that Laclede is not entitled to retain this $4.9 million in proceeds after all on the theory that the Overall Cost Reduction Incentive was no longer in effect once Laclede exercised its right to opt out of the Price Protection Incentive. This attempt to nullify Laclede's tariff in order to justify a result different than what that tariff clearly mandates is unlawful and should not be allowed to stand.

5. As the Commission recognizes at page 18 of its R&O, a tariff that has been approved by the Commission becomes Missouri law and, as such, has the same force and effect as a statute. ***Bauer v. Southwestern Bell Telephone Company,*** 958 S.W.2d 568, 571 (Mo. App. E.D. 1997); ***Allstates Transworld Vanlines, Inc. v. Southwestern Bell Telephone Company,*** 937 S.W.2d 314, 317 (Mo. App. E.D. 1996). This means that the tariff is binding not only on the utility and the consumer, but also on the Commission itself. And this, in turn, means that until the tariff itself is changed the ratemaking or regulatory treatment provided in such tariffs cannot be modified by the Commission to accomplish a different result than what was authorized by those tariffs at the time the transactions to which they apply took place.[1] *See* ***State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission,*** 585 S.W.2d 41, 49 (Mo. banc 1979); ***Arkansas Louisiana Gas Co. v. Hall,*** 453 U.S. 571, 577, 101 S.Ct.

[1] The Commission's attempt to retroactively modify the terms of the PSP is particularly objectionable given the fact that there was a specific procedure set forth in the PSP Tariff Sheet and Program Description under which the Commission could correct, by February 15 of each year, any deficiency it believed existed in the Program. (Exh. 4HC, Exhibit 1, Section G.7 of PSP Tariff).

2925, 2930. However, this is precisely what the Commission had done in this case with its retroactive determination that the Overall Cost Reduction Incentive was no longer in effect once the Company exercised its right to opt out of the Price Protection Incentive.

6. The Commission attempts to justify this retroactive nullification of an effective tariff provision by suggesting that a such result is necessary to ensure that the "intent" of Laclede in creating the Program and of the Commission in approving it will not be "frustrated" or "defeated." (Report and Order, page 18). And to determine what that intent was and what interpretation would or would not frustrate it, the Commission states that it is necessary to "look elsewhere for interpretation" -- i.e., to look at something other than the specific language of the PSP tariff and the other documents that all of the parties to this case have affirmatively stated are controlling to the outcome of this case. (*Id.*) There are at least four fundamental reasons, however, why such a justification cannot be sustained.

7. First, there is absolutely no basis under long-standing principles of statutory construction (which the Commission acknowledges in its R&O are equally applicable to tariffs) that would warrant such an attempt to ascertain intent by looking at matters beyond the specific language of the PSP Tariff and Program Description. Under those principles, the Commission must give effect to a tariff as it is written. ***Kearney Special Road District v. County of Clay,*** 863 S.W.2d. 841, 842 (Mo. banc 1993); ***State v. Burns,*** 978 S.W.2d 759 (Mo. 1998). And like a court interpreting a statute, the Commission must seek to ascertain that intent *from the language used* in the tariff,with the words in the tariff given their plain and ordinary meaning. ***State v. Rousseau,*** 34 S.W.3d 254, 259 (Mo. App., W.D. 2000; *emphasis supplied*). For the regulatory body,

like the legislature, is presumed to have intended what the tariff or statute says. *Id.* As a consequence, when the intent is apparent from the words used and no ambiguity exists, there is no room for construction even when a Commission may prefer a policy different from that of an earlier Commission. *See* ***Kearney, supra,*** at 842. *See also* ***Allstates Transworld Vanlines, Inc. v. Southwestern Bell Telephone Co.***, 937 S.W.2d 314, 317 (Mo. App. 1996); ***Jones v. Director of Revenue***, 832 S.W.2d 516, 517 (Mo. 1992).

8. Notably, the Commission does not cite in its R&O a single paragraph, sentence or even word from the PSP Tariff Sheets or Program Description that would in any way suggest, intimate, hint, or otherwise create the impression that Laclede's exercise of its right to "opt out" of the Price Protection Incentive had any impact on the continuing effectiveness of the Overall Cost Reduction Incentive. And the Commission does not do so because, as its own Staff recognized throughout this proceeding, there is nothing -- absolutely nothing -- in the plain and ordinary wording of those instruments to support such an interpretation. To the contrary, the plain wording of all of the instruments consistently indicated just the opposite; namely, that the Company's exercise of its right to declare the Price Protection Incentive inoperable had no impact whatsoever on the continuing effectiveness of the Overall Cost Reduction Incentive. As a result, there is simply no legal basis that would sanction the Commission's self-described attempt to "look elsewhere for [its] interpretation" that the Overall Cost Reduction Incentive did not remain in effect. (*See* Report and Order, p. 18).

9. Second, the Commission's attempt to go beyond the specific language of the PSP Tariff and Program Description to support its new interpretation is flatly inconsistent with the reasons it has given in its R&O for concluding that Laclede had no

due process right to rebut that interpretation. On the one hand, the Commission states that it needs to "look elsewhere" in order to "discern" the "intent" of Laclede and the 1999 Commission as to the purpose of the PSP and to assess whether an interpretation that the Overall Cost Reduction Incentive remained in effect would "frustrate that intent." (Report and Order, p. 18). And to that end, the Commission proceeds to devote nearly three pages of its Report and Order to a consideration of factual matters that are completely external to the specific wording of the PSP tariff and the other the instruments that were deemed controlling in this case; matters that, in the Commission's view, support its new theory regarding the effectiveness of the Overall Cost Reduction Incentive. (*See* Report and Order, pp. 19-21).

10. This need to journey beyond the four corners of the controlling documents, however, comes to a screeching and inexplicable halt when the Commission addresses Laclede's due process arguments at page 22 of its Report and Order. For in addressing those arguments, the Commission concludes that Laclede had no due process right to rebut this new theory because, according to the Commission, its decision in this matter had been reached " ... entirely upon the basis of its conclusions of law about the meaning of the words of a tariff and a stipulation and agreement." The Commission cannot have it both ways. Specifically, the Commission cannot roam beyond the four corners of the documents it is interpreting in order to arrive at one result and then summarily deny a party the right to do the same thing on the grounds that the only relevant consideration is what that documents say on their face. Only by relying on the specific language of the PSP Tariff and Program Description -- under which the continued effectiveness of the Overall Cost Reduction Incentive is clear and

unambiguous -- can the Commission correct this obvious legal defect in its approach to this matter.

11. Third, even if the Commission did have the discretion to "look elsewhere" in determining whether Laclede or the 1999 Commission intended that Overall Cost Reduction Incentive would remain in effect (which it does not under Missouri law), it clearly failed to exercise such discretion in a lawful or reasonable manner in its R&O. There is simply no basis for the Commission's conclusion that the parties' interpretation that the Overall Cost Reduction Incentive remained in effect after Laclede opted out of the Price Protection Incentive produces an "illogical result" that "frustrates" the intent of either Laclede or the 1999 Commission. Contrary to the inaccurate and unsupported assertions that the Commission puts forth at pages 19 to 22 of the Commission's R&O in support of that proposition, there is nothing "illogical", "frustrating", "illusory", or "perverse" about an incentive program under which nearly $24 million in real cash money was generated by Laclede and flowed through to its customers, either in the form of direct offsets to their cost of gas or as supplemental funding for the third year of the Program. Indeed, it is almost inconceivable that a regulatory body would use such terms to describe a Program that, when all was said and done, produced a 500% plus return on the ratepayer's investment.

12. Nor can the Commission obscure this fundamental attribute of the Program with the kind of selective and incorrect characterizations of how the PSP and the Overall Cost Reduction Incentive actually worked that appear in the Conclusions of Law Section of its R&O. For example, the Commission states at pages 19-20 of its Report and Order that once the Company opted out of the Price Protection Incentive, the Overall

Cost Reduction Incentive became a "meaningless vestige" and that the "[i]ntermediate trading of call options [under that Incentive Provision] did not necessarily provide any price protection to Laclede's customers." However, the Commission's own Report and Order, as well as the undisputed record evidence in this case, show these statements to be utterly false. As pages 13 and 14 of the R&O confirm, Laclede did indeed generate millions of dollars in proceeds as a result of its intermediate trading of call options under the Overall Cost Reduction Incentive. And as Staff witness Sommerer acknowledged, the customers' share of these proceeds were indeed flowed through to them in the form of reductions in their PGA cost of gas. (Tr. 61-66; 253-54).

13. Similarly, at page 20 of its R&O, the Commission questions whether it makes sense to assume that the Overall Cost Reduction Incentive remained in effect by positing an example of where an option was sold early for a lesser profit then could have been achieved, because of rising gas prices, had the option been held to the last three business days of options trading. In rhetorical fashion, the Commission then asks whether it can "still be said that Laclede's customers have profited" under such circumstances. The answer to that question can only be yes, however, since it is indisputably true that customers did, in fact, receive in each and every case a share of the financial proceeds generated by Laclede when options were sold early. Notably, these are all proceeds that, by reducing the customers' overall cost of gas, provided real price protection to the Company's customers (Tr. 61-66; 253-54) -- price protection that would not have been available or provided in the absence of the Program. Moreover, in providing this example, the Commission ignores numerous other instances in which the early sale of options resulted in ***greater*** savings for customers than would have been the

case had Laclede held them till close to expiration (*see* Exh. 1HC, Schedule 9-4 and 9-5) as well as the fact that the cumulative impact of ***all*** of the Company's trading activities was the generation and (flow through to customers) of tens of millions of dollars in financial benefits. (Exh. 4HC). In short, the Commission's discussion of this selective example does nothing to detract from the overall merits or logic of an incentive feature that produced millions of dollars in net benefits for the Company's customers.

14. The Commission also states at page 20 of its R&O that Laclede had a "perverse incentive" to sell options early since it was only by doing so that the Company could profit under the Program once it opted out of the Price Protection Incentive. The Commission does not, however, find or conclude that this hypothetical concern had any basis in reality, let alone the record in this case. Indeed, it would not be possible for the Commission do so given those portions of its own R&O which confirm that, notwithstanding this so-call "perverse incentive", Laclede nevertheless generated and flowed through to its customers approximately $11.5 million in proceeds from the sale of options during the last three business days. (*See* Report and Order, pp. 13–14). Nor does the Commission have any other basis for concluding that the Overall Cost Reduction Incentive operated to the detriment of the Company's customers. To the contrary, Laclede's evidence throughout this proceeding showed that it was *only* by engaging in such intermediate trading activity that the Company was able to generate the additional funding required to produce the level of benefits it ultimately achieved under the Program and that absent such activity such benefits would have been reduced by half. (Exh. 4HC, pp. 6-7; 5HC, p. 8; Exh. 6HC, p. 3). And by properly rejecting in its R&O the only Staff analysis that sought to challenge this assessment (*see* Report and Order page 17), the

Commission has effectively acknowledged this basic truth. In short, it made sense at the time the PSP was approved, and it makes sense now, that the Overall Cost Reduction Incentive would remain in effect as a spur to achieving these kind of superior results, regardless of whether the Company did or did not exercise its right to declare the Price Protection Incentive inoperable.

15. Finally, as the Commission recognizes at page 20 of its R&O, any interpretation that the Overall Cost Reduction Incentive did not remain in effect once Laclede opted out of the Price Protection Incentive necessarily "bumps up" against the September 1, 2000 Stipulation and Agreement in Case No. GO-2000-394. Although both the Company and the Staff testified and represented to the Commission throughout this proceeding that the Overall Cost Reduction Incentive was one of the provisions that the Stipulation and Agreement stated would remain in full force and effect, the Commission nevertheless concludes at page 21 of its R&O that the parties are somehow mistaken in their construction of that Agreement. It is, to say the least, amazing to see how assiduously the Commission will, on the one hand, look beyond the clear wording of the PSP Tariff and Program Description in order to ascertain an "intent" that supports the result it wants to reach in this case and then, on the other hand, so casually ignore the parties' sworn testimony regarding the intent and effect of another instrument that is completely inconsistent with that result. There is simply no justification for such a disparate and inconsistent application of the legal principles governing the construction of documents.

16. Nor can the Commission's construction of the September 1, 2000 Stipulation and Agreement be reconciled with the tariff that was subsequently filed to

implement it. That tariff, which is not even acknowledged by the Commission in its R&O, specifically referenced both the modification in the Stipulation and Agreement that had eliminated the 70 percent volume requirement as well as the Company's "opting out of the Price Protection incentive features." In doing so, however, the tariff made absolutely ***no*** change to the structure, wording or incentive aspects of the Overall Cost Reduction Incentive. (Exh. 6HC, pp. 10-11; Schedule 1, p. 2). When combined with the parties' sworn testimony that the Stipulation and Agreement was intended to leave the Overall Cost Reduction Incentive in full force and effect, this explicit reconfirmation of that intent in the implementing tariff eliminates any possible vestige of support for the Commission's inexplicable construction to the contrary.

17. In view of the foregoing considerations, Laclede respectfully submits that there is no basis in either law or fact for the Commission's attempt to retroactively nullify the explicit terms of the controlling instruments that were in effect at the time the transactions at issue in this case took place. By engaging in such retroactive nullification, the Commission's decision violates the well established legal principle that tariffs have the full force and effect of law and cannot be retrospectively modified to produce a different result than what was mandated by those tariffs. For the same reason, the Commission's decision also violates the September 1, 2000 Stipulation and Agreement and implementing tariff which provided that the Overall Cost Reduction Incentive would remain in full force and effect, the prohibition against the retrospective application of laws and impairments of contracts set forth in Article 1, Section 13 of the Constitution of Missouri, and the guarantees of the 14th Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution that no person shall be deprived of

property without due process of law. For all of these reasons, the Commission should rehear or reconsider its decision and conclude that Laclede was lawfully entitled to retain the $4.9 million at issue in this case pursuant to the terms of the Overall Cost Reduction Incentive that was in full force and effect.

B. <u>The Commission's decision is unreasonable because it is completely unsupported by any competent and substantial evidence on the record.</u>

18. In order to comply with its obligation to render decisions that are reasonable, the Commission must ensure that such a decision is supported by competent and substantial evidence on the whole record. *See* ***Friendship Vill. v. Public Service Commission,*** 907 S.W.2d 339, 344 (Mo.App. W.D. 1995); §536.070 RSMo. 2000. It is literally impossible to conclude that the Commission has met that obligation in this case. Far from supporting its decision, the findings and conclusions contained in the Commission's R&O actually support Laclede's contention that the Company calculated its share of savings under the PSP in strict compliance with the controlling PSP Tariff Sheets and Program Description that governed the transactions at issue in this case. (*See* Report and Order, pp. 14 and 17).

19. Moreover, the evidentiary record is completely barren of any support on the one issue that the Commission determined against Laclede, namely on the issue of whether the Overall Cost Reduction Incentive remained in effect once Laclede opted out of the Price Protection Incentive. To the contrary, all of the parties who were involved in litigating Case No. GO-98-484 in which the PSP was approved, in submitting and reviewing the PSP Tariff Sheets and Program Description that were filed in compliance with the Commission's Report and Order in that case, in submitting and reviewing the

Company's June 1, 2000 letter declaring the Price Protection Incentive inoperable, and in negotiating and reviewing the September 1, 2000 Stipulation and Agreement and implementing tariff sheet in Case No. GO-2000-394 that modified one aspect of the PSP, have testified or conceded that the Overall Cost Reduction Incentive remained in full force and effect. (*See* Exhibits 1HC, 2HC, 3HC, 4HC, 5HC, 6HC, Tr. 76-79; 85-93; 239-40; 265-66).

20. The conclusion that the Company's exercise of its right to opt out of the Price Protection Incentive did not render the Overall Cost Reduction Incentive ineffective is also supported again and again by the explicit terms of the tariffs, program descriptions, agreements and other instruments that the Commission approved and that the parties have all agreed are "controlling" in this case. Indeed, before the PSP was even approved, Laclede's Initial Brief in Case No. GO-98-484 clearly stated that the only impact of declaring the Price Protection Incentive inoperable for a particular year was the elimination of the Company's right to profit under that particular incentive component. (Tr. 264-65). And, as Staff acknowledged repeatedly during the evidentiary hearing, such a result was reconfirmed by each and every document filed thereafter. These included, among others, the PSP Tariff Sheets and Program Description approved in that case (Tr. 76-77), the Company's letter declaring the Price Protection Incentive inoperable (Tr. 78-79), and the September 1, 2000 Stipulation and Agreement and the compliance tariff that implemented that agreement. (Tr. 85). In fact, the compliance tariff implementing the September 1, 2000 Stipulation and Agreement could not have been more clear on this point. As previously noted, while that tariff referenced the modification in the Stipulation and Agreement that had eliminated the 70 percent volume

requirement and the Company's "opting out of the Price Protection incentive features," it made absolutely ***no*** change to the structure, wording or incentive aspects of the Overall Cost Reduction Incentive. (Exh. 6HC, pp. 10-11; Schedule 1, p. 2). Given the complete lack of any competent and substantial evidence supporting its decision, the Commission should rehear or reconsider its decision and conclude that Laclede was lawfully entitled to retain the $4.9 million at issue in this case pursuant to the terms of the Overall Cost Reduction Incentive that was in full force and effect.

C. <u>The Commission's decision is unlawful because it was made and issued in direct violation of Laclede's due process rights to be notified of the claims and contentions against it and to have an opportunity to rebut those claims</u>.

21. In its apparent haste to render a decision while there was still a majority of Commissioners who would support it, the Commission has run roughshod over Laclede's due process rights in this case. Although the Commission acknowledges at page 22 of its R&O that it has decided this case on a new theory that had never been presented during the course of this proceeding, it nevertheless denies Laclede's request to reopen the record so that it could rebut that theory and also denies Laclede's Motion to Strike Staff's Proposed Conclusion of Law and Findings of Fact in which the theory was first alluded to.

22. Indeed, the violation of Laclede's due process rights resulting from the Commission's reliance on this new theory could not be any clearer or more egregious. As this Commission has previously recognized, a party's right to a "full and fair hearing" requires that it be notified of the claims and contentions made against it and be given a reasonable opportunity to rebut those claims through the presentation of evidence and the ability to cross-examine parties. *See* ***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); ***Re: Empire District Electric Company,*** 6 Mo.P.S.C.3d. 17, 19 (February 13, 1997). *See also* ***State ex rel. Donelon v. Division of Employment Sec.,*** 971 S.W.2d 869, 876 (Mo. App. W.D. 1998).[2]

23. To that end, the Commission has adopted and implemented a number of procedural requirements to safeguard these rights in contested cases such as the one before it in this proceeding. These include, among others, procedures for the pre-filing of testimony, the submission of a list of issues, the submission of statements of positions on those issues, and the holding of an evidentiary hearing during which the full array of procedural rights are afforded the participating parties. (*See* 4 CSR 240-2.080(21); 4 CSR 240-2.110; 4 CSR 240-2.130(1), (7) and (8)). They also include procedural orders, such as the one issued more than two years ago in this case, in which the Commission directed the Staff to "provide a full explanation and complete explanation of the basis for its Proposed Adjustment." (*See Order Adopting Procedural Schedule,* dated April 18, 2001).

24. By ensuring that parties are notified of the claims against them and given a reasonable opportunity to rebut them, each and every one of these procedural requirements serves to protect the due process rights of the parties appearing before the Commission. For such rights to have any meaning, however, they must be enforced by

[2]These due process rights of a party to be notified of the claims that have been made against it and to rebut them through the use of such procedural avenues have also been specifically recognized in the Administrative Procedures and Review Act. *See e.g.* §536.070 RSMo. 2000, which is referenced at 4 CSR 240.2.130(1) of the Commission's Rules of Practice and Procedure.

the Commission. And the Commission has not hesitated to do that when the need has arisen. For example, in ***Re: Empire District Electric Company,*** 6 Mo.P.S.C.3d. 17, 19 (February 13, 1997), the Commission granted a Staff Motion to Strike the mathematical calculation of a revenue requirement deficiency that a utility had presented in its brief on the grounds that the exact derivation of the deficiency had not been addressed by a witness during the evidentiary hearing. Although the various numbers used to calculate the revenue requirement deficiency had been presented on the record, the Commission determined that the Staff's right to a "full and fair hearing" required that the calculation itself be contained in testimony which was subject to cross-examination by the Staff. *Id.* at 19. Since that did not happen, the Commission struck the calculation, thereby effectively eliminating any ability by the utility to recover the revenue deficiency. *Id.*

25. Similarly, in ***Re: Missouri Gas Energy,*** 188 P.U.R.4th 30, 79-81 (September 2, 1998), the Commission denied a Joint Motion that had been submitted by the Staff, Missouri Gas Energy, and Public Counsel to correct the revenue requirement that had been ordered in that case. Once again, the Commission noted that since the correction had not been presented during the evidentiary hearing, certain objecting parties had not had the opportunity to contest the propriety of the correction through cross examination or other means. As the Commission stated: "[i]n order to afford the appropriate due process, the evidence must be submitted, and the other parties must have an opportunity to contest that evidence." *Id.* at 81. The Commission therefore determined that the correction could not be approved. The Commission's decisions are replete with other examples of where it has rejected "eleventh hour" attempts to introduce new matters or claims on the grounds that it would prejudice the due process rights of

other parties. *See* ***Ahlstrom Development Corporation, et. al. v. The Empire District Electric Company,*** 4 Mo.P.S.C.3d 187, 201 (November 8, 1995); ***Re: Missouri Public Service,*** 7 Mo.P.S.C.3d. 178, 224-25 (March 6, 1998). *See* also the Commission's November 19, 2001 Order in ***Re: Empire District Electric Company,*** Case No. ET-2002-210, in which it said that it was without authority to correct an acknowledged $3.6 million error made by the Staff in the calculation of the utility's revenue requirement in the utility's recently concluded rate case proceeding.

26. In view of the foregoing, it was incumbent on the Commission to enforce these due process guarantees, as it has so often done in the past to the financial detriment of the utilities it regulates. Instead, the Commission has abridged those rights by depriving Laclede of its opportunity to rebut this new theory with its denial of Laclede's Motion to Strike and the Company's Request for Oral Argument and, if necessary, to Reopen the Record in this case. There is simply no justification for such treatment. Nor has the Commission provided any. As previously discussed, the Commission has asserted that Laclede had no due process right to rebut its theory because this matter was determined solely on the basis of the wording of instruments that the Commission was interpreting. It is impossible to reconcile that assertion, however, with the fact that the Commission itself has gone well beyond the specific wording of these controlling instruments in this case in its Report and Order by relying on a wide variety of factual matters to support the theory that the result adopted in its R&O is necessary to avoid an illogical result that would frustrate the "intent" of Laclede in creating the Program. Moreover, the Commission's denial of Laclede's due process right to rebut its theory is even more objectionable given the Commission's earlier and, in Laclede's view,

erroneous ruling that certain evidence offered by Laclede on this very subject should not be admitted on the grounds, among others, that other parties would not have an opportunity to recross the witness on this item. (*See* Tr. 400-405 for a discussion of Exhibit 21).

27. In short, there can be no question that the Commission has abridged Laclede's due process rights in this case in violation of its own procedural rules, its orders in this case, the requirements of Section 536.070 RSMo. 2000, and the due process guarantees set forth in the 14th Amendment to the United States Constitution and Article 1, Section 10, of the Missouri Constitution. To correct this clear and unambiguous violation of Laclede's due process rights, the Commission should and must rehear or reconsider its decision and conclude that Laclede was lawfully entitled to retain the $4.9 million at issue in this case pursuant to the terms of the Overall Cost Reduction Incentive that was in full force and effect.

28. In view of the foregoing, it is also clear that the Commission's R&O is legally defective in that it is devoid of any findings of fact that would support its decision and satisfy the requirements of Missouri law. ***State ex rel. Noranda Aluminum, Inc. v. Public Service Commission,*** 24 S.W.3d 243 (Mo. App.W.D. 2000); §§386.420, 536.090 RSMo. (2000). In fact, the Commission's findings of fact are inherently inconsistent with its decision. It is equally clear that the Commission's R&O is the product of a completely arbitrary and capricious decision on the part of the Commission to adopt a result that is plainly contrary to the record evidence and applicable Missouri law.

WHEREFORE, for the foregoing reasons, Laclede Gas Company respectfully requests that the Commission rehear or reconsider its decision and conclude that Laclede

was lawfully entitled to retain the $4.9 million at issue in this case pursuant to the terms of the Overall Cost Reduction Incentive that was in full force and effect.

Respectfully submitted,

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Facsimile: (314) 421-1979

Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing Application for Rehearing was served on all counsel of record in this case on this 7th day of May, 2003 by hand-delivery, email, fax, or by placing a copy of such Application, postage prepaid, in the United States mail.

STATE OF MISSOURI)
)ss
COUNTY OF COLE)

James C. Swearengen, of lawful age, being first duly sworn upon his oath, states that he is an attorney for Laclede Gas Company and is authorized to execute this document on its behalf; that the matters set forth in the foregoing pleading are true and correct to the best of his knowledge, information and belief.

James C. Swearengen

Subscribed and sworn to before me this 7th day of May, 2003

Notary Public

My Commission expires:

7/14/05

LORI RACKERS
Osage County
My Commission Expires
July 14, 2005