

1 IN THE CIRCUIT COURT MISSOURI
2 19TH JUDICIAL CIRCUIT, DIVISION II
3 HONORABLE PAUL C. WILSON, JUDGE

4 MISSOURI PUBLIC SERVICE)
5 COMMISSION,)

6 Plaintiff,)

7 vs.)

10AC-CC00170

8 LACLEDE GAS, GROUP &)
9 ENERGY,)

10 Defendants,)

11 TRANSCRIPT OF PROCEEDINGS

12 On May 11, 2010, the above-entitled cause came
13 on regularly before the Honorable Paul C. Wilson, Judge of
14 Division II of the 19th Judicial Circuit, Cole County, at
15 Jefferson City, Missouri.

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19 Mindy S. Hunt, Certified Court Reporter
20 Official Court Reporter, 19th Judicial Circuit
21 Cole County, Missouri
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A P P E A R A N C E S

FOR THE COMMISSION:

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FOR LACLEDE GROUP, INC.:

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1 THE COURT: 10AC-CC0010 -- excuse me -- 170,
2 Missouri Public Service Commission versus Laclede Gas Group
3 and Energy, et al. Correct? And I think this is the first
4 hearing that we've had in this case, yes?

5 MR. PENDERGAST: It is, your Honor.

6 THE COURT: Let's have everyone enter their
7 appearance for the record, please, and start with the
8 relator.

9 MS. HEINTZ: Jennifer Heintz, H-e-i-n-t-z, for
10 the Missouri Public Service Commission.

11 MR. PENDERGAST: Michael C. Pendergast,
12 appearing on behalf of Laclede Gas Company. That's P, as
13 in Paul, e-n-d-e-r-g-a-s-t. And my business address is
14 720 Olive Street, St. Louis, Missouri 63101.

15 MR. NIEHOFF: William Niehoff, N-i-e-h-o-f-f,
16 and I'm here on behalf of Laclede Energy Resources.

17 MR. DARRELL: I'm Mark C. Darrell, appearing on
18 behalf of the Laclede Group. Business address is also
19 720 Olive Street, St. Louis, Missouri 63101.

20 THE COURT: I think what we have before us is
21 the motion to dismiss of Laclede Group and Energy
22 Resources. Correct?

23 MR. PENDERGAST: And Gas.

24 THE COURT: Okay.

25 MS. HEINTZ: This is also the hearing on my

1 petition, and that's the statutory hearing.

2 THE COURT: That's what I was trying to figure
3 out, is whether we had the ultimate merits here as well.

4 MS. HEINTZ: I don't know. Have those been
5 formally noticed? I don't remember getting notice of them
6 being heard today. I'm prepared to argue, but I don't know
7 if there was a notice filed.

8 MR. NIEHOFF: I think it's part of the Court's
9 scheduling order, certainly, and the pleadings that were
10 filed up to this date.

11 THE COURT: Probably it's all going to have to
12 get discussed even in the context of your petition. So I
13 think it would be more helpful for me to have the
14 Commission go first anyway, and then we'll hear your
15 defenses, both to the nature of the motion to dismiss and
16 otherwise.

17 So, Ms. Heintz, let's hear from the Commission
18 for this action.

19 MS. HEINTZ: Thank you. Just briefly, your
20 Honor. The underlying case here is a case where the
21 Commission is sitting as the fact finder in what is known
22 as a purchased gas adjustment or actual cost adjustment
23 dispute. And that is a case where the gas costs of the
24 regulated utility get adjusted up or down, based on what
25 the actual costs were, which, of course, can only be

1 reviewed after the fact.

2 So in this case, what happened is that Staff, as
3 a party, requested certain documents from Laclede as part
4 of this prudent determination that the Commission has to
5 make. And Staff contended that the Commission -- or I'm
6 sorry --or that Laclede didn't fully comply with that
7 order. They filed a motion to compel. And that motion to
8 compel went through several iterations. It was first
9 granted unanimously. There has been extensive litigation
10 at the Commission level on this motion. It resulted in a
11 November 4th order wherein the motion was granted. It was
12 granted by a 3-2 margin and Laclede was ordered to produce
13 the remainder of the documents.

14 Staff has subsequently informed the Commission
15 that there still has not been compliance, so that is what
16 led to the filing of this action in the Circuit Court. Of
17 course, the Commission doesn't have enforcement powers, but
18 we do have a statutory authority under 386.360 to come in
19 and have our orders enforced through the Circuit Court
20 through a mandamus, which is why the petition was filed in
21 this Court.

22 THE COURT: Did the Commission make -- was there
23 any other action at the Commission level that said that
24 they were not in compliance or that further compulsion was
25 needed or are we all -- is the last thing that the

1 Commission did was granted the motion to compel that the
2 Staff had filed?

3 MS. HEINTZ: After the motion to compel was
4 granted and the Staff informed the Commission that there
5 was no compliance, the Commission then issued a show-cause
6 order to Laclede. Laclede responded to that show-cause
7 order, and the Commission said, Okay, we have heard your
8 response. We still need to have the order enforced. And
9 that's what authorized me as the general counsel to come in
10 and file the enforcement action. So that's the last thing
11 that happened at the Commission.

12 THE COURT: And when was that, just so I'm
13 caught up?

14 MS. HEINTZ: That was -- this petition was
15 filed, I believe, in late March.

16 THE COURT: Okay. All right. I interrupted
17 you. I'm sorry.

18 MS. HEINTZ: That was what I wanted to tell you,
19 so...

20 THE COURT: At what point was it clear -- or was
21 it clear to the Commission that you were seeking documents
22 not all of which may have been in the possession or control
23 of the gas company?

24 MS. HEINTZ: Well, the documents are -- that's a
25 little bit of a loaded question, because I think that they

1 are in the possession of, the gas company, in that they
2 have the right authority and ability to obtain them. The
3 fact that they pertain to transactions that are between an
4 affiliate of Laclede and a third party, I think was clear
5 from the first time Staff filed its first motion to compel
6 in September of '08.

7 THE COURT: I should have asked the basic
8 question. What makes Group and Energy necessary to this
9 action as necessary to enforce the Commission's order?

10 MS. HEINTZ: Right. Well, the Commission -- all
11 of the Commission-level orders have been directed to
12 Laclede, the regulated company. The statute that
13 authorizes mandamus has a section in it that says that, at
14 the Circuit Court's discretion, any parties can be added to
15 make the Court's orders effective. So at that point I
16 included Laclede Group and LER in my petition because these
17 are records that do involve LER's transactions with a third
18 party, although the Commission in this case does have the
19 right to order those documents to be produced for the
20 purposes of this prudence review.

21 THE COURT: And it's your position that even if
22 you hadn't done that, then the regulated entity could
23 comply with the subpoena or could comply with the writ in
24 this case through LER, even though the -- regardless of
25 where the documents actually are? They could still comply

1 and produce them. Correct?

2 MS. HEINTZ: Yes.

3 THE COURT: Okay. Well, let's hear first from
4 the Gas Company, and then we'll work our way up to the
5 Group and to LER.

6 MR. PENDERGAST: Thank you, your Honor. I'll be
7 speaking for the gas company. And I want to make it very
8 clear from the very beginning that we don't dispute that,
9 in a proper case, the Commission has the ability to get
10 documents from LER directly. In fact, the Commission, I
11 believe, has issued subpoenas in the past seeking documents
12 from Laclede's affiliates. And those have been, I think,
13 complied with. At least I've heard no arguments about them
14 being complied with.

15 Nor do we disagree that under a proper case the
16 Commission could go ahead and get documents from LER
17 through Laclede Gas Company. The problem is this isn't
18 that proper case, and I think it's most instructive to look
19 at what the Commission hasn't done as opposed to what it
20 has done here.

21 As I said, the Commission says it's proceeding
22 under general rules of civil discovery. The Commission has
23 determined, in fact, in a very recent case that when it
24 comes to a non-party like LER -- and LER was never a party
25 nor was Laclede Group in these underlying Commission

1 proceedings -- that the proper way to go ahead and get
2 information and records from them is to go ahead and issue
3 a subpoena under the statutory power the Commission has to
4 issue subpoenas. For whatever reason -- and to this day I
5 don't know -- the Commission has not pursued that
6 particular administrative remedy. And I think it's grossly
7 premature to come before this Court and have you get
8 involved in this process at this stage when they haven't
9 even exhausted that remedy. In fact, they are seeking to
10 have you compel LER and Laclede Group to provide
11 information that they haven't even sought through the sole
12 administrative remedy the Commission itself has said is
13 available to seek such information.

14 So they could have gone ahead and tried to get
15 it directly from LER, and that would have had the benefit
16 of giving LER the opportunity, you know, if it has
17 legitimate reasons for not providing that information, like
18 confidentiality agreements, it doesn't believe such
19 information is relevant, go ahead and defend itself, go
20 ahead and object, go ahead and file a motion to quash, then
21 the Commission would have to go ahead and decide whether to
22 seek enforcement and we could be back here in front of you
23 with an evidentiary hearing under which LER would be able
24 to ahead and pursue its rights. That's all been
25 short-circuited by the process the Commission has followed

1 here.

2 The Commission could have also tried to get
3 these documents from Laclede through LER by virtue of the
4 affiliate transaction rule. Now, the affiliate transaction
5 rules are rules that the Commission proposed and adopted
6 almost ten years ago, and its purpose was to go ahead and
7 protect utility rate payers from detrimental impacts and
8 subsidies by making sure that if a utility like Laclede did
9 business with an affiliate like LER, that those
10 transactions would be priced a certain way to go ahead and
11 prevent subsidies, primarily because they have to be priced
12 at a market price so a utility is not overpaid or not
13 undercollecting for what the true value of the good or
14 service is.

15 And it also has very specific provisions that
16 provide access to affiliate records and say, if you need
17 those, to go ahead and ensure compliance with these
18 standards and other requirements in the rules, you shall
19 get them. Now, for the life of me, your Honor, I don't
20 understand since this involved an affiliate transaction,
21 it's a purchase of gas or a sale of gas between Laclede and
22 LER, you have an affiliate transaction rule that purports
23 to govern these specific transactions. It's an affiliate
24 transaction rule. It's been upheld by the Supreme Court.
25 We weren't crazy about it, didn't particularly like it, but

1 those are the rules and we complied with it. Why on earth
2 wouldn't the Commission say, Okay, I've got my affiliate
3 transaction rule, it's been upheld. Here's why this is
4 relevant under the affiliate transaction rules, and we're
5 going to go ahead and pursue it from you under those rules.

6 Instead, instead, astoundingly, they called the
7 affiliate transaction rule a red herring, a red herring in
8 the context of transactions that involve two affiliates.
9 And you know, my theory on why they did that is because you
10 can't square these information requests. And why they
11 wanted them under the affiliate transaction rule is because
12 they are based on a pricing standard that's not in those
13 rules. And I just direct your attention to Tab No. 2,
14 which includes those rules, and they go into great detail
15 on what information has to be provided and why it has to be
16 provided. And it just beggars the imagination that the
17 Commission would go ahead and conclude that these rules are
18 a red herring, it doesn't have -- even have to articulate a
19 basis as to why they're not applicable under these
20 circumstances.

21 There's an alternative way that the Commission
22 could have gotten access to LER records through Laclede
23 that would have been through the stipulation and agreement
24 in a holding company case that the Commission approved,
25 once again, about ten years ago in 2001. And Laclede and

1 its various affiliates were reorganizing their corporate
2 structure. And as part of that process, the Commission
3 approved stipulation and agreement, which Ms. Heintz has
4 referenced in her pleadings, in which they did several
5 things.

6 First of all, the stipulation and agreement
7 adopted a cost allocation manual. Just like the affiliate
8 transaction rule, the cost allocation manual was designed
9 to protect utility rate payers by developing specific
10 pricing standards for governing transactions between an
11 affiliate and a utility. It also had provisions that
12 provided access to affiliate information to the extent
13 necessary to demonstrate compliance with those particular
14 pricing standards and the other requirements in the rule.

15 Now, once again, if the Commission wanted to get
16 information from LER, it could have said, Well, you know,
17 guys, you signed a stipulation and agreement here about ten
18 years ago. We've got a valid Commission order that says
19 that you have an obligation to provide information to the
20 extent it's necessary to comply with the CAM. Now, why on
21 earth, given that, would they say in their order, Well,
22 that CAM and enforcement thereof is just a red herring.

23 I mean, you know, these are the very kind of
24 transactions that this CAM and that stipulation and
25 agreement were designed to address. Once again, I think

1 the Commission said that was a red herring because it knows
2 that the various information that Staff has requested and
3 the various adjustments it's made can't be squared with the
4 pricing standard in that CAM. In fact, a majority of
5 Commissioners at one time, on April 22nd, determined that
6 all of this information was indeed irrelevant for that very
7 reason.

8 But in any event, the Commission decided I'm not
9 going to ahead and apply the affiliate transaction rule.
10 I'm not going to go ahead and apply the CAM or the
11 stipulation and agreement. Those are all red herrings.
12 I'm going to go ahead and proceed through the general rules
13 of civil discovery. The Commission had said that, as
14 Ms. Heintz indicated earlier, when it first granted the
15 motion to compel for it first itself, but what she didn't
16 mention is that in granting that initial motion to compel,
17 the Commission, because it was proceeding under the general
18 rules of civil discovery, clarified its order on January
19 21st. And that January 21st order is in Document No. 5
20 here, Tab 5, in which it said, of course, we mean only to
21 the extent that they are in your possession. To this day
22 the Commission has not altered that clarification.

23 It went back to the general rules of civil
24 discovery, the November 4th order, said, let's ignore the
25 CAM, let's ignore the affiliate transaction rule. It never

1 altered and it shouldn't, because that's consistent with
2 the rules of -- general rules of civil discovery that they
3 have to be in your possession. We have, we being Laclede
4 Gas Company, have provided everything that's in our
5 possession. We have indicated to the Commission that we
6 have provided everything in our possession. And we think
7 they have complied fully with that rule or that order as it
8 would be reasonably construed.

9 The documents aren't something that Laclede Gas
10 Company has possession, custody or control over. They
11 belong to LER. Unlike the case that's been cited by the
12 Commission in support of the proposition that's never been
13 proven up in any kind of evidentiary hearing, but is based
14 solely on a Staff recommendation. They are a separate
15 company. They have their own fiduciary duties. We do not
16 get to dictate to LER what documents they have to provide
17 to us. They are not under pendage(phonetic spelling) of
18 Laclede Gas Company and they have their own fiduciary
19 duties to go ahead and provide information and to respond
20 to these things in a way that they believe is appropriate
21 and in conformance with their own corporate interest.

22 The fact that they have that fiduciary duty, and
23 the regulated gas company can't be forced to go ahead and
24 make them comply with something was recognized in a recent
25 case involving AmerenUE. In that case, the allegation was

1 made that an AmerenUE affiliate should have sold gas to the
2 utility at cost rather than a fair market price. Of
3 course, the Commission did apply the affiliate transaction
4 rules in that case and they determined that AmerenUE's
5 affiliate had no obligation to go ahead and sell
6 electricity to the utility at cost. That market price was
7 the right price, that the directors and officers of that
8 affiliate had a fiduciary duty to the affiliate's company
9 and that it would have been inappropriate to go ahead and
10 require the regulated utility to try and force the
11 affiliate to act against its own interest and its own
12 fiduciary duty.

13 And so, if you just look at that, if you look at
14 the fact that we don't have these documents, that we don't
15 have the legal right to get them, that we can't force LER
16 to provide them, and that the Commission has provided
17 absolutely nothing for your Honor to go ahead and suggest
18 otherwise, other than to go ahead and say, Well, they have
19 some overlapping officers and they are in the same
20 building. You know, I can just easily say that about a
21 case -- it was, I believe, State of Missouri -- excuse me.
22 It was a Department of Revenue case and I'll find it for
23 you, but in that particular case, the issue was could the
24 Department of Revenue be required to go ahead and produce
25 records in a DUI case. And the Department of Revenue said,

1 I don't have them. The Department of Health Services has
2 those records.

3 Now, you know, those are all under the same
4 executive, whoever the Governor was at that time. They may
5 all be in the same building, for all I know. They all have
6 overlapping service territories and they all serve the
7 State of Missouri. Now, the Court recognized, you're a
8 separate governmental entity and, therefore, I can't
9 require that you provide records that aren't in your
10 control and possession.

11 The same thing is true of us. So I think the
12 sensible thing to do at this point from our perspective is
13 to go ahead and tell the Commission, look, you haven't
14 issued a subpoena. I'm not going to go ahead and get
15 involved when you haven't even exhausted that simple
16 administrative remedy that you said is appropriate under
17 here. You haven't explained to me why the affiliate
18 transaction rule which governs information in this very
19 kind of transaction as inapplicable. Go back and look at
20 that, if you want to go ahead and proceed under that. Look
21 at the CAM if you want to proceed under that. But don't
22 come to me in the first instance and say, I've got to rule
23 upon these matters without giving the utility an
24 opportunity to go ahead and do an evidentiary hearing.

25 I think the Commission said that -- the

1 Commission said it was a red herring because some parties
2 had said this was in the nature of a complaint and it
3 really wasn't in the nature of a complaint. Well, your
4 Honor, it had to be a complaint. They would have to have
5 given us an evidentiary hearing. We would have been able
6 to go ahead demonstrate, No. 1, that we had complied and,
7 No. 2, that this wasn't within our control or possession
8 and, therefore, we couldn't be required to go ahead and get
9 it. And we'd also be able to go ahead and demonstrate that
10 far from us violating the CAM, far from us violating the
11 affiliate transaction rule, it's the Staff and its proposal
12 in its effort to get this information that has been in
13 violation of those.

14 The Commission decided to short-circuit all of
15 that, which basically says, we can't have a hearing, LER
16 can't have a hearing, nobody can have any evidentiary
17 hearing and we're going to go to you first and have you
18 take all of that out of, you know, the Commission's hands
19 and our hands and rule in the first instance. And I think
20 that is backwards and there is no basis for enforcing this
21 particular order.

22 THE COURT: If they had not named the Group and
23 LER, where would we be?

24 MR. PENDERGAST: In this enforcement action or
25 before?

1 THE COURT: In this writ application.

2 MR. PENDERGAST: In this writ application, I
3 think it would be just as untenable and unlawful as I've
4 said it is, because they still haven't explained why they
5 should get it from Laclede Gas Company when they say the
6 affiliate transaction rule isn't applicable, and so we have
7 no obligation under there. When they say that the CAM and
8 the stipulation and agreement in 2001 isn't applicable, and
9 we have no obligation there. Then the only thing that's
10 applicable, I guess, is the general rules of discovery.

11 The Commission has already said we only have to
12 provide those to the extent they are in our possession.
13 And under those general rules of civil discovery, if they
14 are not within our possession, which they are not, we have
15 no obligation to provide them. So we have already complied
16 and there's nothing more that I think we can be required to
17 do.

18 THE COURT: Okay. I want to ask both the Group
19 and LER to respond, but let me go back to the Commission
20 for a second. Where would we be if you had not named the
21 Group and LER? What -- would there be a factual issue as
22 to whether or not they are within the custody and control
23 of the regulated entity? Because he thinks that he's
24 provided -- he has fully complied with the Commission's
25 order.

1 MS. HEINTZ: No. Because I think that the issue
2 of whether or not the documents are in possession of a
3 party are -- first of all, I think it's a legal question.
4 And the case that I cited in my written response does a
5 good job, I think, of laying out the standard and when
6 those documents can be produced.

7 The other piece of this is that Mr. Pendergast
8 mentioned the stipulation. And the stipulation and
9 agreement that was entered into about ten years ago
10 contains a provision that I cited in my petition that said,
11 When the Commission is exercising its normal regulatory
12 function, which is what an actual cost adjustment is, then
13 Laclede Group, among others, and Group and the gas company
14 and LER, can have any legal objection except objections
15 based on relevance or that the documents are not in
16 possession of Laclede Gas Company.

17 And the Commission's order of November 4th,
18 while it said, This is not a complaint, there has been no
19 violation or there has been no alleged violation of that
20 stipulation, does not say, Oh, and by the way, the
21 stipulation is out the window here and Laclede is not bound
22 by it. That is not what the November 4, 2009 order says.

23 MR. PENDERGAST: And, once again, your Honor,
24 that's just a way of circumventing the Commission's
25 obligation to grant us a hearing if it's going to make any

1 kind of determination that we haven't complied with that
2 stipulation and agreement. If you read the terms of the
3 stipulation and agreement, before you even get to what we
4 agreed to object on or not object on and what basis, it
5 says -- and this is in paragraph 2 on page 8 and tab 3,
6 upon request, Laclede Gas Company and our affiliates upon
7 written notice during its normal working hours and subject
8 to appropriate confidentiality and discovery procedures,
9 agree to provide all books, records and employees and its
10 affiliates as may be reasonably required to verify
11 compliance with the CAM and the conditions set forth in
12 this stipulation and agreement.

13 You know, we talked until we were blue in the
14 face how those information requests were inconsistent with
15 the CAM, with the stipulation and agreement's provisions
16 for enforcing that CAM. And during the oral argument, the
17 first oral argument, I think what turned the Commission
18 around on on this, and made the first majority decide that,
19 you know, it was irrelevant was Staff counsel telling the
20 Commission, well, you know, it doesn't really matter to us
21 what's in the CAM, we're not paying any attention to the
22 CAM. We think we can go ahead and proceed on whatever
23 basis we have.

24 And it's just absolutely ridiculous to sit here
25 and say I'm going to hold you to one part of this agreement

1 while I completely violate and ignore the other part. And
2 while I have the Commission say that other part is a red
3 hearing, and then, having done that, I'm going to come to
4 Court and I'm going to ask the Court to rely on that red
5 herring and to go ahead and enforce the order that said it
6 was a red herring. I don't know. That just doesn't make
7 any sense to me.

8 And as far as the case that she mentioned,
9 that's the Hancock case, that was a situation where you had
10 an individual, an expert witness who wanted to go ahead and
11 testify or wanted to have him testify for the plaintiff
12 about some tests that were in the expert witness's
13 possession. The expert witness had failed to go ahead and
14 turn over those tests. And therefore, the court said,
15 well, you didn't turn over the tests. You know, the
16 plaintiff could have gotten the tests because the tests
17 were done for the plaintiff. And, therefore, I'm going to
18 go ahead and not allow you to move forward and use that
19 evidence affirmatively.

20 Well, your Honor, we're not trying to use any of
21 this LER evidence. We think this LER evidence is
22 completely irrelevant. You'll never find us going before
23 the Commission and saying, We want to go ahead and
24 introduce that evidence because we don't think it's
25 relevant under the Commission's affiliate transaction rule

1 or the CAM.

2 Secondly, LER and Laclede Group, they are not
3 expert witnesses of Laclede. This information doesn't
4 involve Laclede information, it doesn't involve tests on
5 Laclede. Most of the information relates to sales and
6 purchases that LER made involving third parties. They have
7 nothing to do with Laclede. So I don't think there's one
8 bit of applicability of that Hancock decision on this
9 particular case.

10 THE COURT: Let me hear from whichever of the
11 other two entities thinks that logically ought to go first.

12 MR. NIEFHOF: Probably me, your Honor. I'm
13 Bill Niehoff. I represent LER in this matter. And I
14 agree, first off, with what Mike has said on behalf of
15 Laclede Gas Company. We adopt his arguments. We did
16 receive -- I received this morning in my home a 16-page
17 brief from Staff on this issue that the Court has given us
18 leave to address and we will do that.

19 From our perspective, it's very, very important
20 to note these are documents that are being sought that are
21 LER's transactions with unrelated third parties, including
22 its suppliers, customers and pipelines. These are not
23 documents that represent or cover transactions LER had with
24 Laclede. To my understanding, those documents have been
25 made available.

1 We believe that the order or the mandamus should
2 not be issued because the order they are attempting to
3 enforce as it concerns LER, there's no legal authority for
4 that, that it would be highly burdensome and that the
5 information sought has no relevance. And we have gone
6 through those issues in detail in our pleadings.

7 I would point out that the Court, I think, has
8 come to something I noticed in the pleadings that were
9 filed this morning in my quick read through them, in that
10 the Commission has on one hand said we have all the
11 authority we need to order Laclede Gas Company to produce
12 LER documents, and yet they joined us in this mandamus
13 action so that this Court can make its order effective. So
14 either they did that as an admission that they don't have
15 the authority to order Laclede to produce LER records, or
16 as a hedge at best. But we think that LER should not be in
17 the case, should be dismissed from the mandamus, from this
18 mandamus action.

19 We believe there's not a valid underlying order
20 as concerns LER and that there's not -- the procedure that,
21 as Mike has -- as Mr. Pendergast has laid out very, very
22 well, shows that there's not a legal basis to get LER
23 documents that are exclusively -- relate to transactions
24 exclusively with unrelated third parties. There's no
25 statutory authority. They haven't followed their own

1 rules. They haven't followed prior decisions of the
2 Commission, as we've pointed out. And we think that this
3 is all compelling evidence of arbitrary and capricious
4 behavior certainly with respect to LER.

5 THE COURT: You wanted to in turn adopt his
6 position that these documents could be compelled by the
7 Commission using some other mechanism. Correct?

8 MR. NIEFHOF: I would not concede that they
9 could be compelled. I would say that that's appropriate
10 procedure. We're not there yet. Had the Staff or the
11 Commission issued or sought to issue a subpoena, then we
12 have another process to go through. We have the ability on
13 behalf of LER to make our objections, to state our
14 positions, to brief it, maybe even have documents looked at
15 in camera by the Court or some other fact finder and then a
16 decision made.

17 This has, again, short-circuited all of that,
18 attempting to bring us in really at the tail end of the
19 process in a mandamus action we believe is inappropriate.

20 MR. DARRELL: Yes, your Honor. Mark Darrell on
21 behalf of the Laclede Group. The Laclede Group is a
22 publicly traded company. It owns 100 percent of the stock
23 of Laclede Gas Company, which is -- the company is
24 regulated by the Commission, and Laclede Energy Resources,
25 which is an unregulated marketing company that's not

1 regulated by the general authority of the Commission.

2 Your Honor, we do not know why the Laclede Group
3 was named as a Respondent in this proceeding. The
4 Commission has provided the Laclede Group with no notice of
5 any legal obligations that it has in the ACA proceedings.
6 Laclede Group is not a party to the ACA proceedings. The
7 orders as issued by the Commission in the ACA proceedings
8 were not directed to the Laclede Group. The Laclede Group
9 has never been ordered by the Commission to do anything in
10 this proceedings, but yet they have come to this Court and
11 asked the Commission to -- or asked this Court to order or
12 to enforce an order against Laclede Gas Company, against
13 Laclede Group, frankly, makes no sense to me. We do not
14 believe there's any basis for us to be named as a
15 Respondent, and we believe that this petition should be
16 dismissed as Laclede Group.

17 THE COURT: If they were proceeding under the --
18 either the other two vehicles, that would allow at least to
19 more directly approach LER, would those vehicles allow the
20 Commission to subpoena records from Group as well?

21 MR. DARRELL: Well, as far as I know, they are
22 not asking for or seeking any records that we have in this
23 matter. The records, again, as Mr. Niehoff pointed out,
24 are records that are owned by and in the possession of LER,
25 so I'm not sure I'm following your question exactly.

1 THE COURT: Well, I'm trying to figure out, I
2 guess maybe inartfully, what documents we're talking about,
3 where they are and whether the Commission has any relief
4 other than the form that they are seeking.

5 MR. DARRELL: It would be our position, your
6 Honor, that the Commission has ample authority to subpoena
7 the documents from LER. Now, in prior cases and prior
8 matters is not a factor, whereas this year the Commission
9 issued a subpoena against Laclede Group for specific
10 documents in another matter and we responded to that
11 subpoena. So I'm not sure why the Commission could not do
12 that in this instance.

13 THE COURT: Ms. Heintz, why is the Group
14 necessary to make the writ effective in this case?

15 MS. HEINTZ: I added the Laclede Group. I don't
16 think that they are necessary. It's in the statute that
17 they can be -- that they can be added if the Court thinks
18 that they are necessary or proper. The statutes also say
19 that you get to craft the relief the way you see fit.
20 Laclede Group was added to the petition because they are
21 the parents, first of all, of the regulated entity, and
22 because they are parties to that stipulation and agreement.
23 They have made that agreement again to cooperate with the
24 Commission, to produce records, to allow access to any
25 records. I don't think any of the records belong to the

1 Laclede Group in the sense that you're asking the question.

2 THE COURT: Okay. So let's go back then to LER.

3 And if there are other mechanisms by which the Commission
4 could have sought these documents directly rather than
5 through the gas company, why didn't you?

6 MS. HEINTZ: This is a -- this is a complicated
7 question and I hope that I will be able to explain it by
8 using an example. First of all, in this case it's
9 important to remember that the Commission is acting in its
10 judicial function until we come here, and then we're a
11 party. So the way the case proceeds when the Commission is
12 sitting as the fact finder is largely dictated by counsel
13 for Staff, who is not the same as counsel for the
14 Commission, and Laclede, who are the parties of the case.
15 And the docket sheet shows that there has been a lot of
16 back and forth here.

17 But the Commission was just asked to decide
18 whether or not the Staff's motion to compel was well
19 grounded and that's what they did. When the argument is
20 made, well, you didn't show a violation of the affiliate
21 transactions rule or a violation of the CAM, well, that's
22 not why the Commission is sitting in its fact finding role
23 in this case. This case is to determine whether Laclede
24 prudently incurred its gas costs for the period that's
25 under review. That can be done without any reference to

1 either the CAM or the affiliate transactions rules. And
2 here is an example of why the Commission determined that
3 this information was relevant.

4 Laclede Gas Company during the relevant period
5 purchased gas from LER. If, for example, LER sold that gas
6 to Laclede Gas Company -- and I'm just making this number
7 up -- for \$5 per decatherm, but they sold the same amount
8 of gas at the same amount of time for -- you know, for
9 another customer at \$3 a decatherm, well, then the
10 Commission might well determine that Laclede's \$5 purchase
11 was not prudent and that it harmed their rate payers so
12 that Laclede Gas Company would have to adjust their rates
13 to make up for their imprudence for that gas purchase.

14 So it's important for the Commission to be able
15 to -- or the Staff in this case, I'm sorry, to be able to
16 see not only what Laclede and LER were doing with each
17 other, which is always, of course, a little bit of self
18 dealings because they are affiliates, but what they were
19 doing in the market. And it's particularly important in
20 this case because there is no other way to see, because the
21 St. Louis market doesn't have, unlike other markets, like
22 the Henry hub in Louisiana or the NYMEX in New York, they
23 don't have published indices where you can see what the
24 price of gas is on a given day. We have to look at the
25 actual transactions that occurred.

1 THE COURT: And let me just follow up here.
2 Before the Commission, who has the burden of proving that
3 it was prudent?

4 MS. HEINTZ: Staff. In fact, Laclede has a
5 presumption in their favor, and I've cited this case law in
6 my memoranda, that they -- it is presumed that their
7 purchases were prudent. So Staff, in the event that they
8 recommend a disallowance, which we haven't even reached
9 that point yet, but if they recommend a disallowance, they
10 have to overcome -- they have to produce evidence to
11 overcome the presumption of prudence. That's where the
12 burden of proof will be.

13 THE COURT: And so the discovery that Staff
14 sought originally was to see whether or not there was
15 evidence between LER and third parties that you could use
16 then to overcome that?

17 MS. HEINTZ: That they could use for this case,
18 yes.

19 THE COURT: Well, that either they would use or
20 if it was --

21 MS. HEINTZ: And the Commission could rely on
22 it, correct.

23 THE COURT: And in the most recent Commission
24 order that was talking about -- that was limited to the
25 documents that the gas company had, was it not clear at

1 that point that the documents that we're now talking about
2 were not -- were in the possession of LER and dealt with
3 transactions that didn't involve the gas company and,
4 therefore, were not at all going to be in their records?

5 MS. HEINTZ: I'm not -- I'm sorry. At what
6 point?

7 THE COURT: Whichever order it is that would
8 underlie the request for the writ, which I am assuming
9 that's the way this normally happens, is they issue an
10 order. And then to the extent that it's not complied with,
11 then you seek a writ based on the particular order. So
12 that's why I tried to identify the most recent in time
13 order.

14 MS. HEINTZ: Right. That would be the
15 November 4th order, except -- well, that's not most recent
16 in time order, because we have had the motion to reconsider
17 and to show cause and all that since then. But when the
18 Commission issued its November 4th, 2009 order, it knew
19 that the documents were LER documents rather than Laclede
20 Gas Company documents.

21 THE COURT: And what about when they dealt with
22 the show cause issue?

23 MS. HEINTZ: Yes.

24 THE COURT: And so am I -- what can I conclude
25 then from their unwillingness to overtly require anybody

1 but the gas company to produce them? I mean, it doesn't
2 seem when they took up the -- either the show cause or the
3 clarification -- in other words, none of this is new. So
4 what is it that the Commission -- what can I infer that the
5 Commission concluded about the propriety of having these
6 other companies directly compelled to produce these?

7 MS. HEINTZ: It's not new, but what is new --
8 the facts are not new and the Commission knew when it
9 issued its order. But what's new is when we come into
10 court, we have this statute and the statute is, you know,
11 it's a statute that allows us to obtain enforcement of our
12 order in the circuit court and it contains a provision
13 where you, as the fact finder in this case, can decide that
14 certain parties are necessary or proper.

15 THE COURT: But only to enforce -- only to make
16 effective my writ compelling compliance with the
17 Commission's order.

18 MS. HEINTZ: Right.

19 THE COURT: So if the Commission's order is only
20 this big, then I can only bring in new parties and craft my
21 relief to do that much or less. It would seem to me that
22 you're asking for me to issue a writ requiring more than
23 the Commission did, which I'm not sure I'm entitled to do,
24 I'm not sure I'm authorized to do.

25 MS. HEINTZ: I don't think that that's true.

1 And I don't think that's what the Commission's writ
2 petition was intended to do. Again, as I said, we have
3 gone through this ad nauseam at the Commission level.

4 THE COURT: I certainly get that sense.

5 MS. HEINTZ: And so we need -- something has to
6 give at this point. And if what the Commission needs in
7 order to make Laclede Gas Company produce these documents
8 is an order compelling Laclede Gas to produce these
9 documents and they are going to need the cooperation of
10 their affiliated companies to do that, then I think it is
11 within the Court's authority to issue that order.

12 THE COURT: Okay. Mr. Pendergast?

13 MR. PENDERGAST: Just very briefly, I don't
14 think anything Ms. Heintz has said in any way disturbs the
15 basic point that you have subpoena powers. You can go
16 ahead and pursue this directly. You know, she complains
17 about the fact that this has gone on ad nauseam. I agree.
18 It's been, like, over a year and a half, I think, since
19 they first asked for this information. Why in that year
20 and a half they have never taken the simple step of issuing
21 a subpoena to LER and say, I want this information, I do
22 not know. Particularly since the Commission said that's
23 the vehicle that we ought to be pursuing.

24 THE COURT: Can they do that, though, without
25 bringing -- without -- and, again, I don't do PSC practice

1 so I may not use the right words -- but without opening up
2 a matter under the affiliate transaction rule or -- and can
3 they do it without opening up -- you know, can they do it
4 in context of the purchased gas adjustment?

5 MR. PENDERGAST: Sure, they can. They can issue
6 a subpoena to any corporation. The issue, as Mr. Niehoff
7 indicated, is whether or not that subpoena is appropriate
8 and whether or not whoever it's being issued to has lawful
9 objections and offenses to it is a different matter, but
10 they can do that and they have done it in other proceedings
11 involving us. I think one of them has been an ACA.

12 And, once again, I don't know why they haven't
13 done it, because that's the way to go ahead and comply with
14 what the Commission said is the appropriate route. And
15 regardless of whether the Staff brought this up, the
16 Commission is the custodian of its own rules. And, you
17 know, the KCPL case, Staff was pursuing something different
18 there, and the Commission said, wait a minute, there's a
19 way you have to do this when you have a non-party or it's a
20 non-contested case and that you have to issue a subpoena.
21 And, you know, quite frankly, they should have done the
22 same thing here. Why they haven't and why the Staff hasn't
23 pursued that approach, I don't know.

24 As far as why they need this information, look,
25 if the affiliate transaction rule was insufficient, if it

1 wasn't, you know, up to the task of covering this
2 particular transaction, at the very least I would expect to
3 see something in the Commission's order along the lines of
4 what Ms. Heintz has just argued. Instead, you just have
5 this summary dismissal. It's a red hearing. We're not
6 going to talk about it. We're not going to say why it's
7 inapplicable, we're not going to say why it doesn't do the
8 job, why we need additional information. Forget about it.
9 We're not even going to go ahead and talk about it.

10 And I think when you're an administrative agency
11 and you have passed very detailed rules that set out how
12 these transactions are going to be priced and you're
13 supposed to go ahead and get affiliate records, to simply
14 dismiss it in that kind of summary fashion, you know, it's
15 just completely arbitrary. It's completely capricious.
16 And it's not the kind of order that you should have to rely
17 on to go ahead and say, I'm going to intervene now and
18 order you to provide this information. I mean, if they
19 think that's the case, then they ought to articulate that
20 in an order. In fact, they ought to go ahead and have some
21 kind of hearing so we can go ahead and challenge it, but at
22 least they ought to articulate an order and then we'd have
23 something to talk about.

24 As far as the St. Louis market, we provided
25 information on the St. Louis market. We worked with LER

1 to go ahead and make some of the information available on
2 the St. Louis market that we thought was relevant. During
3 oral arguments, the Staff just basically said, Oh, well,
4 you know, that doesn't do the job for us. That's nothing
5 we really want to take a look at.

6 And so I'm not sure what it takes to go ahead
7 and satisfy these folks. What they are asking for is every
8 sales transaction that LER had with every third party
9 whether it was in the St. Louis market or whether it was
10 someplace else in Illinois, you know, wherever. And every
11 purchase they made regardless of what state it was made in
12 and regardless of who it was for.

13 THE COURT: But it sounds to me like the
14 Commission said and they can have it, to the extent you
15 have it.

16 MR. PENDERGAST: And the Commission said to the
17 extent it's in your possession, they can have it. So we
18 said, Okay, to the extent it's in our possession, we'll
19 turn it over. We have turned it over. We have complied
20 with it. And I just don't think there's anything more to
21 require of Laclede Gas Company under these circumstances.

22 THE COURT: Mr. Pendergast, in his first
23 iteration here referenced that there had been -- that at
24 one point, a majority of the Commission had determined the
25 documents not to be relevant. Did I recall that? What was

1 he referring to, do you think, and is that an accurate
2 assessment of what happened?

3 MS. HEINTZ: When the Commission -- gosh. There
4 was -- the first order granting the motion to compel, which
5 was unanimous. There was then reconsideration. There was
6 oral arguments. The Commission issued its January 21st,
7 2009 order. I think there might have been -- no, the first
8 oral argument happened in March. And in April, the
9 Commission split, I think it was 3/2, and said the original
10 motion to compel is withdrawn. We withdraw our grant of
11 that motion.

12 Staff at that point, and I believe maybe public
13 counsel, asked to reconsider that. There was another oral
14 argument in September. And the Commission then changed its
15 mind again by a 3/2 majority and said, you're right, it was
16 relevant and you should produce the documents. That was
17 the November -- that was the November 9th order.

18 THE COURT: Was the scope of the subpoena
19 changing in this or simply the threat of what the
20 Commission was willing to compel?

21 In other words, is the underlying request the
22 same?

23 MS. HEINTZ: The underlying requests are the
24 same.

25 THE COURT: So the Commission unanimously

1 ordered --

2 MS. HEINTZ: Granted the first motion. Granted
3 the motion to compel in the first instance.

4 THE COURT: Three to two denied the motion to
5 compel?

6 MS. HEINTZ: Right.

7 THE COURT: Upon reconsideration and three to
8 two granting the motion to compel upon further
9 reconsideration?

10 MS. HEINTZ: Yes.

11 THE COURT: All right.

12 MR. PENDERGAST: And, your Honor, the only
13 clarification I would offer to that is that the
14 Commission's order of clarification on January 21st has
15 never been changed. Never was challenged. That was
16 unanimous as well. And in that particular order, they
17 indicated that we only had to provide the documents to the
18 extent they were in our possession. And once again, we
19 have complied with that. And then it was after --

20 THE COURT: Now, Ms. Heintz, will you agree with
21 that, that the clarification from January of '09 still
22 attaches, even though we've gone in and out of motion to
23 compel world, but the most recent order compelling
24 production is clarified by this statement in January of
25 '09?

1 MS. HEINTZ: No. I disagree with that because
2 the order that that -- that the January 29th order was
3 clarifying is no longer a valid order.

4 THE COURT: Okay.

5 MS. HEINTZ: And so we have now is the November
6 4th, 2009 order, which is a different order than the one
7 that was -- I'm sorry -- that was clarified.

8 MR. PENDERGAST: And, your Honor, I think that
9 hits the nub of it, the whole custody, control and
10 possession issue. In this whole series of Commission
11 orders, the only thing that ever addresses that particular
12 issue is the January 21st order. When the Commission came
13 back after reversing itself from having determined that
14 these documents were irrelevant under the affiliate
15 transaction rule and the CAM, it went ahead and decided
16 three to two that that information should be provided.

17 It did not alter the possession language of the
18 earlier one. It did not go ahead and make a finding that
19 Laclede was in possession, custody and control of it.
20 We've never had a hearing to determine whether we were in
21 custody and control of it. In fact, Ms. Heintz is here
22 today wanting your Honor to make that determination without
23 any evidentiary basis whatsoever. And nothing other than
24 the Staff assertion based on some conclusory comments about
25 the fact that we share a common office and we have some

1 overlapping directors that we are.

2 And so, you know, what we have is an
3 unchallenged Commission order saying that we only have to
4 provide what's in our possession and absolutely nothing to
5 go ahead and suggest that it isn't or it is.

6 MS. HEINTZ: Your Honor, I don't believe that
7 Laclede has actually raised lack of possession as an issue.
8 I don't think they argued that in front of the Commission.
9 And, again, the stipulation and agreement bars them from
10 doing so. There are three separate provisions in that
11 agreement. One relates to the CAM and access to
12 information under the CAM, which incidentally Laclede --
13 we're not here to argue this -- but they never actually
14 submitted that to the Commission for approval. They have
15 one. It's a procedural manual for Laclede's employees, but
16 we have not approved it. The Commission has not approved
17 that CAM.

18 The second relates to information about
19 employees, and the third relates to the Commission's
20 regulatory function, and that is where the waiver of the
21 defense of lack of possession comes in with regard to the
22 Commission's regular regulatory functions.

23 MR. PENDERGAST: And, your Honor, I just have to
24 say, the Commission approved the CAM. You know, it was in
25 draft form at the time. But my recollection is when we had

1 the holding company docket, it approved it. It was the
2 Staff that went ahead and proposed the CAM. In proposing
3 the CAM, the Staff of the Commission said, this is what we
4 really need to go ahead and protect rate payers when we
5 have transactions between the utility and its affiliates.

6 Okay. We had transactions between the utility
7 and affiliate. And now for the Commission to go ahead and
8 say, I'm going to summarily dismiss that, I don't care
9 what's in it. I don't care what the pricing standards are.
10 I'm not going to pay any attention to it, as counsel for
11 the Staff said during the first oral argument, well, you
12 know, I think the Commission just looked at that and said,
13 wait a minute, this is a document that we approved, that we
14 authorized the company to develop, that you guys have
15 basically proposed, you being the Staff, and now you're
16 telling us you're not going to pay any attention to it.

17 And, you know, this whole thing in the order
18 about I'm just going to go ahead and say it's a red
19 hearing, the affiliate transaction rule is a red herring.
20 I'm trying to go ahead and get this information through the
21 general rules of discovery. You know, leave aside all my
22 substantive rules for dealing with affiliate transactions,
23 which is what's at issue here. Okay, fine. If that's what
24 you're going to do, then kind of cue to the rules of
25 discovery and if we're not in possession and control and

1 custody of it, which we're not, and which you never found
2 that we are. In fact, the only thing you said is, you
3 know, to the extent that you're in possession, it's in your
4 possession, provide it. To the extent you're not, you
5 don't have to. You know, I think the matter is closed.

6 I don't think having said enforcement of that
7 agreement is a red herring and we're not going talk about
8 it, we're not going to talk about whether you've complied
9 with it. And then have counsel for the Commission to come
10 in and say, I want you, your Honor, to rely on that
11 agreement that we said was a red herring, to go ahead and
12 enforce the order that said it was a red herring, I just
13 don't see how that adds up. I really don't.

14 THE COURT: Let's talk about schedules. If I
15 were to dismiss -- if I were to deny the motion to dismiss
16 on one or both parties, is there anything that the party
17 that would be left -- and assume I deny it for both of you.
18 Is there anything that would need to be decided from your
19 perspective before the Court rules on the underlying
20 petition for the writ?

21 In other words, is there anything in the way of
22 an answer or factual issues that you think need to be
23 resolved, or when I leave here today is -- even if I deny
24 your motion, can I take your responses to be your response
25 to the writ as well, to the petition for a writ?

1 MR. NIEHOFF: And I don't want to speak for both
2 entities. There are differences. I would say, from LER's
3 perspective, I think were some new issues particularly with
4 respect to control, whether having the same registered
5 agent, the same corporate address in a 20-something-story
6 building and a common officer is enough control, that would
7 be an issue that, you know, may need to be explored
8 factually before the Court could rule that Laclede was in
9 possession of LER documents.

10 Without the benefit of having been able to go
11 through the pleading that I received this morning in
12 detail, there may be more. And we certainly would like to
13 file a response to that in any event to point some of the
14 other deficiencies out.

15 THE COURT: All right. At a minimum do I have
16 an answer to the petition from the gas company?

17 MR. PENDERGAST: You do.

18 THE COURT: All right.

19 MR. DARRELL: Your Honor, with respect to
20 Laclede Group, I don't -- again, as Mr. Niehoff pointed
21 out, I too received the Staff's or the Commission's
22 pleadings this morning, and I've only had a cursory
23 opportunity to review it. I'm not aware of any other
24 issues that I've got with respect to this matter that I
25 would need to present additional authority to represent it.

1 I think our position is pretty straightforward. If you
2 deny the motion to dismiss, I'm not sure exactly where that
3 leaves us, but since we don't have a Commission order
4 pending against us, I don't know if I understand that,
5 so . . .

6 THE COURT: Well, if there is any light to be
7 shed in the cases, I assume you would have already done so,
8 about expanding the -- adding to the list of parties and at
9 this stage you were not before the Commission when it
10 entered the order that is the underlying order, so --
11 Ms. Heintz?

12 MS. HEINTZ: When I looked at the case law under
13 360, there were no cases that addressed that issue.

14 THE COURT: How long have we been doing purchase
15 gas adjustments?

16 MS. HEINTZ: I think Laclede has had their PGA
17 since 1962. A good long while.

18 THE COURT: I'm trying to figure out why this
19 little brush fire started now and why we are dealing in
20 such an unchartered territory. Anybody?

21 MS. HEINTZ: In transactions, the kinds of
22 transactions that the Staff is interested in here, I think
23 only took place during this limited review period, is what
24 I believe the answer to that question is.

25 MR. PENDERGAST: From our perspective, your

1 Honor, the reason this proceeding has developed as it has
2 and why we're here today is because we sincerely believe
3 that the Staff and Commission has proposed disallowances
4 and sought information based on pricing standards that are
5 nowhere to be found in the affiliate transaction rule.
6 Nowhere to be found in the CAM. The majority of the
7 Commissioners agreed with that at one point before
8 proceedings were delayed and another Commissioner came on
9 board. It is a standard that would preclude those
10 transactions even taking place.

11 The Commission has an obligation to implement
12 and enforce its own rules. I think it's had an abject
13 failure doing that. It's tried to avoid it by saying these
14 rules that are so seemingly applicable are just a red
15 herring and the CAM that's so seemingly applicable is a red
16 herring. And I guess my only question as far as what
17 further needs to be done, you know, and the process for
18 hearing these are rather vague.

19 But we haven't been given our evidentiary
20 hearing in front of the Commission. They scripted things
21 so that we don't get an evidentiary hearing showing that we
22 violated anything, that we've rendered an obligation that
23 we haven't met. And obviously we haven't had an
24 evidentiary hearing here either. And I guess my only
25 question would be, if the Commission's not going to be

1 compelled to follow its own procedures and provide those
2 kind of hearings, do we get a hearing here on these
3 particular issues?

4 Because I think, you know, there is a real
5 dispute. We don't believe that these are in our
6 possession, custody and control. We don't believe a
7 factual foundation has been laid for that. And, you know,
8 if the thing's not going to be sent down to the Commission
9 and say, you know, do your job and, you know, provide me
10 with an evidentiary foundation or at least findings of fact
11 that address these issues, do we need to address them here
12 in court?

13 THE COURT: If I denied it, because I didn't
14 feel that the first subsection of 360 had been met, there
15 was an order sufficient to grant a writ to compel
16 performance, that was my next question. That then puts
17 this where it was before you filed it, which is they
18 have -- the Commission has its own motion to compel out
19 there and they have either exhausted their remedies or they
20 have got additional remedies, which would include, I
21 imagine, adding one or the other of you to its subpoena or
22 finding that, as a matter of fact, that you do have and
23 that you haven't complied.

24 Ordinarily, in a motion to compel in normal
25 civil practice, although it's usually assumed, there is a

1 finding that you haven't complied, which I don't think has
2 been made here.

3 MS. HEINTZ: The Commission did issue -- when it
4 issued its show-cause order, and Laclede responded to that,
5 the Commission, when it denied Laclede's response, did find
6 that there had -- there was still a lack of compliance.

7 MR. PENDERGAST: We went ahead and said we have
8 complied on the information, and the Staff made an
9 assertion that Laclede has not or refuses to comply. We
10 asked for a hearing to go ahead and demonstrate to the
11 Commission that we had complied. That wasn't afforded us.
12 And based on nothing the but unsworn allegations made by
13 Staff counsel, the Commission made a finding for which it
14 has no evidentiary foundation at all.

15 THE COURT: Well, suppose -- no. Let's not go
16 there.

17 Ms. Heintz, am I -- have I followed this
18 accurately that the reason you're not -- the reason that
19 the affiliate transaction rule and the CAM are red herrings
20 is that whether they have been complied with or not, the
21 Staff's position is that you may still be able to show that
22 the price they paid was imprudent, even if it complied with
23 these other regulatory mechanisms?

24 MS. HEINTZ: There doesn't need to be a
25 violation of the affiliate transactions rule for there to

1 be imprudence, yes.

2 THE COURT: And is the Staff entitled to seek
3 documents under the affiliate transaction rule without
4 there being an allegation at least that it hadn't been
5 complied with?

6 MS. HEINTZ: Under the affiliate transactions
7 rules, could they seek the documents? They didn't. That
8 would be a different case. I mean, yes, I think if Staff
9 brought a complaint that said that Laclede has violated the
10 affiliate transaction rules, they could then obtain the
11 information. They haven't made such an allegation here.
12 They haven't filed such a complaint, so they didn't seek
13 the information under the affiliate transaction rules
14 because they don't have to.

15 THE COURT: That's what I'm asking. Can they
16 seek it under the affiliate transactions rule --

17 MS. HEINTZ: And it's a different case.

18 THE COURT: -- without bringing a case that
19 alleges a violation?

20 MS. HEINTZ: I don't believe so.

21 MR. PENDERGAST: Your Honor, I think they could.
22 I think as long as they followed what the rule says and the
23 information they are seeking from the affiliate is
24 necessary to show compliance with the pricing standards and
25 the rule and the other requirements, they are free to do

1 that. In fact, we have to go ahead and file an annual
2 report and make information available to the Commission
3 that shows, you know, how we complied with it, what our
4 transactions have been, and why those transaction are
5 appropriate.

6 We also provided a significant amount of other
7 information. And, once again, if the rule was insufficient
8 to go ahead and protect the customers, if there was
9 something missing, you know, something could have still
10 been improved even if you were in complete compliance with
11 the rule, I think the Commission had an obligation to
12 articulate how that could be so. I think it had an
13 obligation to say, well, you know, proceeding through the
14 affiliate transaction rule, even though it seemingly covers
15 this, just won't do the job and here's why. And instead,
16 all you get in the order is, well, it's a red herring and
17 we're just going to say we're going to go under the general
18 rules of discovery.

19 And I think, once again, if you promulgated
20 rules like that, that detail is purported to cover those
21 kind of things, you have some kind of obligation if you're
22 going to jettison them and say they are a red herring to
23 explain why. And I don't think you will find anything in
24 the Commission's order that even approaches doing that.

25 Same thing with the CAM that we were operating

1 under that the Commission Staff proposed and the Commission
2 approved, at least in form, draft form as part of that
3 holding company docket. I just think an administrative
4 agency has to go ahead and first deal with its own rules
5 and explain to the world and to the judges that have to
6 review it why, you know, these seemingly applicable rules
7 aren't.

8 THE COURT: Yes. I'm not unsympathetic to that
9 logic. The problem is I'd much rather deal with that in a
10 case where they have determined, notwithstanding the
11 compliance, that your purchased gas adjustment would be X
12 instead of Y. I don't want to do it in a discovery battle,
13 which is not my discovery. So the -- if the Commission at
14 least has not foreclosed the possibility that the Staff can
15 prove imprudence without needing to prove a violation, then
16 I'm not inclined to trump them on that in the broad world
17 of discovery.

18 It may be that this comes back and the argument
19 then you will make is, they are not allowed to assert the
20 imprudence without a violation, then I think your whole
21 argument about the proper conduct of a regulatory body
22 should have a lot more weight. At least that's the normal
23 time in which you would -- you would review this, if the
24 court of appeals doesn't review the decisions I make about
25 what's a proper cause of action and the context of

1 discovery writs. They just get to say denied, so you don't
2 know what they think.

3 But I assume this. But I would much rather have
4 this case come up where I've awarded, you know, judgment
5 for somebody on the ground and then they will decide
6 whether it's a proper ground.

7 MR. PENDERGAST: And quite frankly, I don't
8 think you have to reach those issues. I don't think you
9 have to get to them.

10 THE COURT: Okay.

11 MR. PENDERGAST: But what I -- you know, that's
12 just by way of background, and where we are and why it's
13 developed the way it has. But I do think that if they're
14 going to proceed under some other basis than just the
15 general rules of civil discovery, that they have to comply
16 with those rules.

17 And, once again, you know, they have made no
18 showing that these are in the possession of Laclede Gas
19 Company and their custody and control. The only thing they
20 have ever said is, if it's not in our possession, we don't
21 have to go ahead and provide it. And I think having you
22 try and enforce something where they haven't made any kind
23 of finding like that and where we say we have complied,
24 without any evidence to the contrary and where they haven't
25 sought administrative remedies like issuing a subpoena and

1 there's still been no explanation provided as to why they
2 haven't done that, I think it's premature to go ahead and
3 enforce that order.

4 THE COURT: What happens if the -- what's the
5 mechanism for enforcing a writ in this case of mandamus
6 that's not complied with or that you don't think is
7 complied with?

8 Suppose I issued a writ of mandamus to the gas
9 company only that says exactly no more and no less than the
10 Commission said in its last order, where would we be?

11 MR. PENDERGAST: Well, we'd probably be asking
12 for a stay so we could go ahead and seek judicial review.

13 THE COURT: But surely 360 would allow me to
14 issue that writ against you only.

15 MR. PENDERGAST: Well, I think arguably it would
16 allow it. I might not agree with the propriety of the
17 writ, but -- and then, you know, I guess we would have to
18 go ahead and look at whether to pursue judicial review of
19 that. And --

20 THE COURT: Not that I would mind that but, I
21 mean, ordinarily that's what 360 would allow me to do, is
22 if I got an order from the Commission, I can mail it out to
23 you if there were a writ of mandamus at the tip of it. So
24 now it's a court order instead of just the Commission.

25 MR. PENDERGAST: And assuming it went back to

1 the Commission, that would put us in the unenviable
2 position of trying to go ahead and somehow get documents
3 that aren't in our possession, put us in the unenviable
4 position of trying to go ahead and somehow require a
5 separate company to go ahead and furnish us with documents.

6 THE COURT: Suppose you refuse to do that?
7 Suppose you say, Look, I've given you everything I have
8 custody and control of. Is the remedy contempt?

9 MR. PENDERGAST: Well, then I think the
10 Commission can come back to court and seek penalties.

11 THE COURT: Move for contempt for your failure
12 to comply with the writ, your defense would be, I've
13 complied with the writ, and we would be in the factual
14 hearing that you say today you haven't gotten?

15 MR. PENDERGAST: Yeah. We would be in that,
16 only there might be some penalties at issue under those
17 circumstances.

18 THE COURT: I don't know, but that's certainly
19 only in the common law context of -- well, before I get too
20 far ahead of myself, does 360 provide penalties in the case
21 of non-compliance or no?

22 MS. HEINTZ: No. We have a different statute,
23 386.600 that provides for penalties.

24 THE COURT: Of a writ?

25 MS. HEINTZ: No. Well, of --

1 THE COURT: I mean, ordinarily if you violate --

2 MS. HEINTZ: Right.

3 THE COURT: The Court's remedy for the Court's
4 writ would be whatever I decide it would be. And in this
5 case certainly -- I'm trying to figure out when that issue
6 of custody and control is going to get litigated.

7 MR. PENDERGAST: Right. Yeah. And I suppose
8 that if you were to issue a writ like that and we were to
9 respond that it's not within our, you know, possession,
10 custody and control, we would be back here talking about it
11 and maybe having an evidentiary hearing.

12 MR. NIEHOFF: The one point I might make is I
13 think that counsel said she thought it was legal issue. I
14 think there's factual -- I think there's a substantial
15 factual underlying of that and there may be time to build
16 in an actual hearing to determine what the scope of custody
17 and control is, rather than, you know, a sentence and a
18 brief.

19 THE COURT: Well, I mean, we're way outside of
20 the normal procedure here for this particular type of
21 action. So I'm thrashing around a little bit to try and
22 find a way to respond. And this is assuming that I'm not
23 going to go 100 percent your way or 100 percent your way.

24 So the other thing that normally we would do
25 with other types of writs is issue a show-cause order

1 before I issue the writ, which allows you to establish
2 compliance without the writ ever having been issued. And
3 that's not the normal process. It's not even a good
4 process, frankly, in this situation or in this normal
5 procedure, but it might -- doesn't seem to be completely
6 out of line here because there was a show-cause proceeding
7 below, but I don't have much of a record of what was or
8 wasn't determined in it, other than that you, you know --
9 usually if you do a show-cause order and the party fails to
10 show cause, then you do something.

11 And so that's the piece of this puzzle that I
12 don't think I have. They didn't do anything after the
13 failure to show cause. They didn't issue any other orders.

14 MS. HEINTZ: They did. That was the order then
15 telling us to go get the writ. I think that's part of the
16 record.

17 THE COURT: Yeah, but that -- it didn't have
18 factual findings of the sort that we're talking about here,
19 correct? And that's the order I need to read again,
20 obviously, because that's the --

21 MS. HEINTZ: So do I obviously. I'm not having
22 recall of it now. I think it was very short and I don't
23 believe that it had findings of fact and conclusions of law
24 like a normal Commission order does. But, of course, from
25 the Commission's point of view, this is an interlocutory

1 order, and I cited that case law in my memoranda about how
2 in discovery orders, you don't get the same sort of review
3 that you do -- that Laclede will, in fact, be entitled to
4 whenever the Commission can decide this issue on the ACA
5 case that we've still got kicking around down there.

6 MR. PENDERGAST: The order still has to be, I
7 think, valid and not require us to do something that's
8 beyond our power to do, your Honor.

9 MR. NIEFHOF: And the last thing I'll say on
10 behalf of LER, that this is all ending up on us with the
11 cost expense, the invasion of the confidentiality of
12 records that they maintain all for transactions that do not
13 relate to anything it did with Laclede. And we have..
14 outlined some of that expense. There will be significant
15 expense, disruptions for information that is not going to
16 be relevant or useful in any regulatory proceeding.

17 THE COURT: All right. I'll give you the last
18 word if you want it.

19 MS. HEINTZ: You've already heard quite a lot.

20 THE COURT: Yes.

21 MS. HEINTZ: The relevance determination has
22 been made by the Commission. I gave you that example. And
23 I think the relief that Laclede is intimating as a part of
24 all of this, the idea that we've alleged that the violation
25 of the affiliate transactions rule or we've alleged a

1 violation of stipulation and agreement, those are things
2 that are not at issue here. The sole issue is this
3 underlying ACA case. And I guess, the Commission's
4 position is that it is permitted to require this type of
5 discovery in that case.

6 THE COURT: How long would the Respondents like
7 to respond to the memorandum this morning? No. It was
8 yesterday. In any event --

9 MR. NIEFHOFF: Well, it was --

10 THE COURT: -- the Commission's --

11 MR. NIEHOFF: -- after business hours.

12 MS. HEINTZ: I faxed it late yesterday
13 afternoon.

14 THE COURT: That's all right. I think I would
15 benefit from your having an opportunity to respond to this,
16 but without belaboring the issue, how long will it take?

17 MR. NIEHOFF: Fourteen days, is that too much?

18 MR. DARRELL: I don't know if we need that much.
19 Ten days?

20 MR. NIEFHOFF: Ten days.

21 THE COURT: There's one for you, and one for the
22 two of you.

23 MR. NIEFHOFF: I think we can do this in ten
24 days. We'll try to focus on the -- we'll try to keep it
25 short.

1 THE COURT: I would like to have those then by
2 the 25th.

3 And then would the PSC like time to reply? And
4 you pretty well briefed it. I did have an opportunity to
5 read these. But if you would like time to reply.

6 MS. HEINTZ: I would like -- not knowing what
7 they are going to say, I would like the opportunity to
8 respond since I am the relator here.

9 THE COURT: Yes. Let's do this then. The
10 Respondents have to the 25th --

11 MS. HEINTZ: I am out of town until June 2nd.
12 I'll be back in the office on the 3rd. So if I could have
13 until the Friday of the week of Memorial Day.

14 THE COURT: What is the date of that?

15 MS. HEINTZ: June 4th.

16 THE COURT: So the Respondents have until the
17 25th to file replies to the Petitioner's opposition of
18 their motions to dismiss. Then the last briefing will be
19 on or before June 4th. Petitioner will have an opportunity
20 to file a reply in support of its petition.

21 MR. PENDERGAST: Your Honor, would it be at all
22 helpful to file proposed orders?

23 THE COURT: I hate to assign those because
24 it's -- a lot of times unless we're in complete agreement
25 in our thoughts, it's not worth a lot of your time. On the

1 other hand, I don't ever refuse them. So if you would like
2 to, I tell you I'm inclined to take the very narrowest
3 route I can find here, because the world is not going to be
4 well served by having the Cole County Circuit Court delving
5 into the minutia of PSC practice. The statutes don't
6 ordinarily require it and we don't ordinarily do it.

7 If we let the reviewing court get involved in
8 the process business, I think that's a bad -- you know, I
9 am inclined to delve into that as the court of appeals is
10 in my discovery. So it's not to say never, but it's going
11 to be the narrowest extent that I can find a way to do.

12 So if either of you are inclined to propose
13 orders, that's the narrow order I'll be looking for. And
14 so I'll do a docket entry that reads that Respondents have
15 until the 25th to file replies, and by June 4th, the
16 petitioner will file a reply in support of its petition.
17 And at that point, the Court will take both the motions and
18 the petition itself under submission.

19 MS. HEINTZ: Your Honor, I did bring -- they are
20 in the record. I filed them with my petition. I did bring
21 copies of my exhibits. Would you like to have a copy for
22 yourself?

23 THE COURT: I would, yes. It's very difficult
24 to break them out of these things and get them back in.
25 Thank you all.

1 MR. NIEFHOFF: Thank you, Judge.

2 MR. PENDERGAST: Thank you.

3 (Hearing concluded.)

4 (Off the record.)

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1 REPORTER'S CERTIFICATE

2
3 I, Mindy S. Hunt, Certified Court Reporter,
4 hereby certify that I was the official court reporter for
5 Division II of the Circuit Court of the County of Cole,
6 State of Missouri; that on the 11th day of May, 2010, I was
7 present and reported all the proceedings had in the case of
8 Missouri Public Service Commission, Plaintiff, versus
9 Laclede Gas, Group and Energy, Defendants, Cause No.
10 10AC-CC00170; and I further certify that the foregoing
11 pages contain a true and accurate reproduction of the
12 proceedings had on that date.

13
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