BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Laclede Gas Company's Purchased Gas Adjustment for 2005 – 2006	))	Case No. GR–2006–0288
In the Matter of Laclede Gas Company's Purchased Gas Adjustment for 2004-2005	))	Case No. GR–2005–0203

DISSENT OF COMMISSIONER TERRY M. JARRETT
TO THE COMMISSION ORDER DIRECTING
LACLEDE TO PRODUCE INFORMATION

I dissent from the Missouri Public Service Commission's order[1] (the "Order") directing the Laclede Gas Company[2] ("Laclede") to produce information of its unregulated affiliate, Laclede Energy Resources Group[3] ("Group" or "LER"). The majority's treatment of this as a "discovery dispute" has no basis in statute or rule.

Background

This matter has a long and torturous history, which I will not repeat in its entirety. I only set out the relevant background for this inquiry. In Case No. GR–2006–0288, upon the completion of the Staff's review of Laclede's estimated and actual gas purchases, on December 31, 2007, the Staff filed a recommendation that requested the Commission do three things; (1) adopt the Staff's recommendations set out in the "Staff's Memorandum," (2) establish the ACA balances set forth in the Staff's recommendations and (3) "open an investigatory docket into the affiliate relationship between LER and

[1] Issued and effective November 4, 2009.
[2] Laclede Gas Company and Laclede Energy Resources are subsidiaries of the holding company The Laclede Group, Inc.
[3] ***Id.***

LCG."[4,5] It is important to note that no case or investigatory docket has been opened or re-opened by the Commission in response to this request.

In Case No. GR–2005–0203, upon the completion of the Staff's review of Laclede's estimated and actual gas purchases, on December 28, 2006, the Staff filed its recommendations. The Staff recommended that the Commission accept Staff's recommendations and issue an Order consistent with Staff's Recommendations. The Commission has not issued any such order or opened any case. One of the recommendations made by Staff, among other things, was the disallowance of approximately $5.5 million in demand charges paid by Laclede during the ACA period to obtain first of the month pricing on its swing supplies on the apparent grounds that such charges were imprudently incurred. [6] Laclede in its response to the Staff's recommendation to the Commission vigorously disputed the recommendations.[7] A pre-hearing conference was held in this case which focused on issues in the GR–2005–0203 case being similar to those in the GR–2006–0288 matter.[8]

[4] LCG refers to Laclede Gas Company.
[5] The Staff acknowledges in its December 31, 2007 report that "Given the expansive nature of the affiliate relationship between LER and LGC, the ever increasing scope and materiality of affiliate transactions, the common management of the gas supply functions, the dramatic rise in LER's net income that could in part be due to the affiliate relationship, the Staff recommends an investigation be opened to review the affiliate practices, and transactions between LER and LGC. This investigation should include an evaluation of the compliance with the Commission's affiliate transaction rule, any further adjustment necessary to the 2005-2006 sharing account for off-system sales and capacity release, and additional review of how fair market value is determined and shared between LGC and LER. **This separate investigation is also necessary due to the likelihood that LER documents will need to be subpoenaed and examined**." (Emphasis added). The Staff clearly understood, at the time of its report, that a non-party unregulated affiliate would require subpoena power in order for the Staff to obtain LER's documents.
[6] *Staff Recommendation* Case No. GR–2005–0203, December 28, 2006, No. 4, p. 13, and pp. 4–5 of *Staff's Memorandum* Case No. GR–2005–0203.
[7] *Response to Staff's Recommendation*, Case No. GR–2005–0203, February 16, 2007.
[8] The simple scheduling of a conference, even where an audit is controversial and adversarial, does not make a matter a contested case.

In both cases, on July 25, 2008[9], the Staff submitted to Laclede a list of documents that it claimed was necessary to complete Staff's inquiry into the prudence of Laclede's gas purchasing practices and Laclede's compliance during the ACA periods with the affiliate transactions rules, 4 CSR 240–40.015 and 40.016. Many of the documents concern Laclede's relationship with its affiliate, LER. This July 25, 2008, filing included a motion for Laclede to produce documents. Staff subsequently withdrew the July 25, 2008 filing[10] and on September 18, 2008, Staff filed a Motion to Compel, which essentially mirrored the July filing, except that the new filing was framed as a discovery matter. Following several related proceedings, oral arguments, numerous filings and other machinations, we come to this point in time.

Discovery versus an Investigation or Audit

Although the majority in this case has characterized this as a "discovery dispute," I disagree. File Number GR–2006–0288 was formally closed on November 21, 2006, following the effective date of the compliance tariff filings resulting from the Commission's approval of the tariff. Likewise, File Number GR–2005–0203 was formally closed on April 5, 2006, following the effective date of the compliance tariff filings resulting from the Commissions' approval of the tariff. No other docket or case has been opened. As such there is no open contested case in this matter.

Commission Rule 4 CSR 240–2.090 provides that: "[D]iscovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court." "The rules of discovery enumerated by our Missouri Supreme Court are found at Rule 56

[9] *List of Documents Required by Staff to Analyze Laclede`s ACA Filings and Motion for Order Directing Laclede to Produce*, filed July 25, 2008.
[10] See *Withdrawal Of Motion For Order Directing Laclede To Produce Documents*, August 21, 2008.

through Rule 61 of the Missouri Rules of Civil Procedure (the Discovery Rules)."[11] "Litigants and lawyers involved in lawsuits have a right to perform discovery, and they are entitled to do so within the parameters of rules of discovery enacted by our Missouri Supreme Court."[12] There is no provision or mechanism for the application of discovery rules outside the boundaries of the existence of a contested action.

To be sure, Supreme Court Rule 56.01(a) provides:

> ***Parties*** may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. (Emphasis added).

And, Commission Rule 4 CSR 240–2.090(2) provides:

> ***Parties*** may use data requests as a means for discovery. (…) As used in this rule, the term data request shall mean an informal written request for documents or information which may be transmitted directly between agents or employees of the commission, public counsel or other parties. Answers to data requests need not be under oath or be in any particular format, but shall be signed by a person who is able to attest to the truthfulness and correctness of the answers.

When, as here, there is no case, there are no parties. Accordingly, the above-referenced rules are inapplicable in this matter.

Further, Staff did not even use data requests in this case. Rather, staff filed a July 25, 2008, notice where staff submitted to Laclede a list of documents it wanted. The July 25, 2008, filing was nothing more than an informal written request for documents and information, and when used outside of the framework of a contested case, discovery rules do not provide any basis to compel production of the information requested. Requests for information in a non-case audit falls under the Commission's investigatory power, and

[11] ***State ex rel. Proctor v. Messina***, 2009 WL 3735919, 14 (Mo. App. W.D. 2009).
[12] ***Id.***

production of documents in this procedural context can only be compelled by use of a *subpoena* as provided for in Sections 386.440 and 536.077, RSMo. Section 536.077 sets out the enforcement procedures for *subpoenas*:

> The agency or the party at whose request the subpoena is issued shall enforce subpoenas by applying to a judge of the circuit court of the county of the hearing or of any county where the witness resides or may be found for an order upon any witness who shall fail to obey a subpoena to show cause why such subpoena should not be enforced, which said order and a copy of the application therefor shall be served upon the witness in the same manner as a summons in a civil action, and if the said circuit court shall, after a hearing, determine that the subpoena should be sustained and enforced, said court shall proceed to enforce said subpoena in the same manner as though said subpoena had been issued in a civil case in the circuit court. The court shall permit the agency and any party to intervene in the enforcement action. Any such agency may delegate to any member, officer, or employee thereof the power to issue subpoenas in contested cases; provided that, except where otherwise authorized by law, subpoenas duces tecum shall be issued only by order of the agency or a member thereof.[13]

The proper mechanism for Staff to have followed was to seek production of the disputed documents by means of a subpoena and its enforcement under Section 536.077, not under the rules of discovery which are inapplicable in this matter.

Conclusion

What we have here is not a contested matter at all – but rather it is an investigation for the purposes of conducting a prudence audit. This is not and never has been a discovery dispute. The benefits of the rules of discovery are triggered when a contested case is before the Commission. Here, there is no evidence or even allegation of any violation of any rule, law or Commission Order; the undertaking by Staff is merely an investigation, and Staff is not entitled to use the discovery rules.

[13] See also ***Division of Labor Standards, Department of Labor and Indus. Relations v. Chester Bross Const. Co.***, 42 S.W.3d 637, 639 (Mo. App. E.D. 2001).

Initially I supported Commission orders in each of these cases with regard to Staff's Motion to Compel. However, after a multitude of filings and allegations I supported the scheduling of oral argument.[14] After hearing the oral argument, it became apparent to me that this was not a discovery dispute and that the most basic tenet of administrative law had been overlooked.

For the reasons stated above, I respectfully dissent.

Terry M. Jarrett, Commissioner

Submitted this 3rd day of December, 2009.

[14] ***Order Directing Filing and Setting Oral Argument***, March 5, 2009.