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February 18, 2003

Mr. Dale Hardy Roberts Missouri Public Service Commission P.O. Box 360 Jefferson City, MO 65102 FEB 1 8 2003

Missouri Public Service Commission

Re: Case No. GT-2003-0117

Dear Mr. Roberts:

DAVID V.G. BRYDON

GARY W. DUFFY

PAUL A. BOUDREAU

SONDRA B. MORGAN CHARLES E. SMARR

JAMES C. SWEARENGEN

WILLIAM R. ENGLAND, III JOHNNY K. RICHARDSON

On behalf of Laclede Gas Company, I deliver herewith for filing with the Missouri Public Service Commission in the referenced matter an original and eight (8) copies of a Memorandum of Laclede Gas Company Regarding Section 393.130.2, RSMo 2000.

Copies of this filing will be provided this date to all parties of record.

Would you please bring this filing to the attention of the appropriate Commission personnel.

Thank you very much for your assistance.

Very truly yours,

Diana Jan

Diana C. Farr

DCF/lar Enclosures

cc: All parties of record



BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

Missouri Public Service Commission

In the Matter of the Tariff Filing of Laclede)	
Gas Company to Implement an Experimental)	Case No. GT-2003-0117
Low-Income Assistance Program Called)	Tariff No. JG-2003-0396
Catch-Up/Keep-Up)	

MEMORANDUM OF LACLEDE GAS COMPANY REGARDING SECTION 393.130.2, RSMO 2000

Pursuant to the schedule established by Judge Ruth at the oral argument held in this case on February 13, 2003, Laclede Gas Company ("Laclede") hereby submits the following memorandum in the above-captioned proceeding to the Missouri Public Service Commission (the "Commission"):

I. Introduction

Referencing Section 393.130.2, RSMo. 2000, in its *Report and Order* of January 16, 2003, the Commission stated that it "acknowledges that there is the issue of whether the law permits a utility to charge, directly or indirectly, customers within the same class a different rate for the same service." At the oral argument on February 13, 2003, Commissioners Gaw and Forbis both presented questions regarding the scope of §393.130.2 and its applicability to Laclede's proposed Catch-Up/Keep-Up program (the "Program") and other experimental programs already approved by the Commission. This filing by Laclede is designed to address those questions. As such, it will not debate the merits of the Program, nor substantially address the other issues raised regarding Catch-Up/Keep-Up.

Section 393.130.2, RSMo. 2000, and its statutory predecessors, have been referenced in numerous Public Service Commission decisions and a handful of appellate court decisions, but, to Laclede's knowledge, the statute has never been relied upon by the appellate courts to invalidate an experimental program such as Catch-Up/Keep-Up. In pertinent part, RSMo. §393.130.2 reads as follows:

No gas corporation . . . shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas . . . or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

II. Public Service Commission Decisions

The Commission has had a number of opportunities to reflect on the purpose and effect of RSMo. §393.130. In *Bailiff v. Laclede Gas Company*, 26 Mo.P.S.C.(N.S.) 484 (1983); Mo. PSC Lexis 3, a case involving a customer complaint over a gas bill, the Commission said it understood the purpose of the statute to be "to prevent a utility from giving preference to any customer or to discriminate against any customer in the rates charged and service provided." *Id.* at 487. However, the Commission noted the phrase "except as authorized in this chapter" in RSMo. §393.130.2 and stated that the statute may be modified by other sections of Chapter 393. *Id.* The Commission also stated that it was "of the opinion that its discretion under §393.130 is greater than that of the courts, since it is given jurisdiction over the establishment of rates and tariffs of public utilities." *Id.*

The Commission also elaborated on its discretion under §393.130 in its more recent Order of October 2, 2001 denying the Public Counsel's Motion to Reject Tariff and Motion to Dismiss in Case No. ER-2001-672, *Re: Tariff Filing of Missouri Public Service, a Division of UtiliCorp United, Inc., to Implement a General Rate Increase for Retail Electric Service,* 2001 Mo. PSC Lexis 1338. In that case, Public Counsel contended that "rates based on a consideration of only one service area may result in a violation of Section 393.130.2, which forbids discrimination in utility rates." *Id.* at 5. In reaching its determination that the statute did not prohibit that proceeding, the Commission stated that the parties had "cited ample cases to demonstrate that Section 393.130.2 only prohibits *undue* discrimination." *Id.* at 24. The Commission continued by noting its "broad discretion" and stating that it is "not methodology or

theory but the impact of the rate order which counts in determining whether rates are just, reasonable, lawful, and non-discriminating." *Id.* at 25.

The Commission has used this discretion in numerous instances to approve programs, policies or tariff provisions that permit a utility to charge different rates for service or impose different terms of service, even among customers within the same rate class. In virtually each case, such authorization has been given based on extrinsic circumstances or conditions affecting the customer that, in the Commission's view, warrant such treatment.

For example, the Commission has consistently authorized both gas and electric utilities subject to its jurisdiction to reduce their rates to specific customers within the same class simply because those customers had competitive alternatives or because such rate discounts would permit the utility to attract customers that would contribute to economic development within the state. See Re: Union Electric Company, 7 Mo. P.S.C.3d 36 (1997); Re: Kansas City Power & Light Company's Tariffs for Standby Service and Special Contracts, 179 P.U.R.4th 342 (1997); Re: Missouri Gas Energy, 5 Mo.P.S.C.3d 437 (1997). The Commission has also used this same discretion to approve programs under which utilities have been authorized to provide grants or credits to low-income customers for purposes of making service more affordable or weatherizing their homes, see Re: Laclede Gas Company, Case No. GR-2001-629 (2001); Re: Missouri Gas Energy, Case No. GR-96-285 (1997); Re: Union Electric Company, Case No. GR-2000-512 (2000), Re: Missouri Gas Energy, Case No. GR-2001-292 (2001).

In each of the above-referenced cases, the Commission apparently concluded that there was nothing in §393.130.2, or any other provision of Missouri law for that matter, that precludes it from authorizing tariff terms under which a utility may provide service to certain customers pursuant to differing rates or terms of service. Indeed, as long as some benefits can be posited for other customers as a result of such programs (i.e. such as the additional fixed cost contribution that comes from allowing a utility to attract or retain customers who have competitive alternatives), the Commission has repeatedly determined that it is lawful and

reasonable to authorize such programs. The record in this case established that the Catch-Up/Keep-Up Program qualifies under this kind of benefit test.

That is not to suggest, of course, that the Commission has never invoked §393.130.2 to invalidate a tariff or program based on discrimination grounds. For example, in *Re: Missouri Gas Energy tariffs designed to expand the availability of transportation service and to recover transition transportation service*, 3 Mo.P.S.C. 3d. 421 (1995), Case No. GT-95-32 and GR-95-33, the Commission stated that MGE's tariffs, as written, could result in discriminatory pricing or preferences in violation of §393.130.2. *Id.* at 424-425. The Commission then determined that the tariff language should be reformed to state specifically the factors that would be used by the company in determining whether to permit an otherwise nonqualifying customer to participate in the class and to state specifically what elements would go into the calculation of the exit fee. *Id.* at 424-426. The Commission thus concluded that the specificity of the tariffs could cure the potential violations of §393.130.2.

Relying in part on RSMo. §393.130.2, the Commission also rejected a proposal of Missouri Gas Energy in Case No. GE-2001-393, *Re: Missouri Gas Energy*, 207 P.U.R.4th 488 (2001); Mo. PSC Lexis 195.¹ MGE requested a one-time variance from its filed and Commission-approved tariff in order to enable MGE to assign certain federal refunds and unauthorized use charges to assist certain low-income residential customers. The majority determined that the requested variance was prohibited by Missouri statutes and case law. Commissioner Simmons, in a dissenting opinion, argued that the proposed low-income assistance did not result in a prohibited special or reduced rate. *Id.* at 23.

Both of these cases are distinguishable from Laclede's proposal. First, unlike the matter before the Commission in Case No. GT-95-32, Laclede's Catch-Up/Keep-Up Program is very

¹ A similar decision with regard to the same case was reported in Re: Missouri Gas Energy's Application for Variance from Sheet Nos. 24.18 and 61.4 to Permit the Use of Certain Federal Refunds and Unauthorized Use Charge Collections for the Benefit of Low-Income Customers in the Company's Service Area, 2001 Mo. PSC Lexis 716.

specific as to which customers would be eligible to participate in the Program. Indeed, a significant portion of the evidentiary hearing in this case was consumed over the issue of how the specific eligibility criteria for the Program should be refined.

Second, unlike the matter before the Commission in Case No. GE-2001-393, Laclede's program does not involve the use of pipeline refunds which, by their very nature, are amounts that FERC has determined to be in excess of just and reasonable rates. Instead, it relies on the achievement and use of discounts below the rates that FERC has determined to be just and reasonable. Moreover, in contrast to pipeline refunds that have traditionally been flowed through to customers in their entirety, the pipeline discounts utilized by Laclede's Program also represent amounts that Laclede and other utilities have been permitted to retain, to one degree or another, for their own use pursuant to various incentive programs previously authorized by the Commission. Finally, Laclede's Program does not constitute a one-time variance from a currently filed and Commission-approved tariff in which no benefits to other customers have been alleged. It is instead an experimental program that, like other low-income programs previously approved by the Commission, is premised on the creation of ongoing benefits for non-participating customers. Indeed, given the experimental nature of the Catch-Up/Keep-Up Program, there should be no question regarding the Commission's approval authority, notwithstanding the arguments that could be made regarding the meaning and effect of §393.130.2. The Commission and Missouri courts have consistently found that the Commission has broad authority to approve experimental rates for the purpose of acquiring the data necessary to fix just and reasonable rates.²

² See In the matter of the investigation into all issues concerning the provision of extended area service (EAS) in the State of Missouri under Commission Rule 4 CSR 240-30.030, 29 Mo. P.S.C. (N.S.) 75, 106 (1987), citing, State ex rel. Watts Engineering Company v. Missouri Public Service Commission, 191 S.W. 412 (Mo. banc 1917); State ex rel. Washington University v. Missouri Public Service Commission, 272 S.W. 971 (Mo. banc 1925); State ex rel. City of St. Louis v. Missouri Public Service Commission, 296 S.W. 790 (Mo. banc 1927); State ex rel. Campbell Iron Company v. Missouri Public Service Commission, 296 S.W. 998 (Mo. banc 1927); State ex rel. McKittrick v. Missouri Public Service Commission, 175 S.W. 2d 857 (Mo. banc 1943); and State ex rel. Laclede Gas Company v. Missouri Public Service

In his dissenting opinion in Case No. GE-2001-393, Commissioner Simmons astutely noted that "(p)ublic policy is flexible enough to encompass unusual solutions for unusual problems." *Re: Missouri Gas Energy*, 207 P.U.R.4th 488 (2001); Mo. PSC Lexis 195, 23. Regardless of the differences between the proposal in that case and the Catch-Up/Keep-Up proposal, this statement by Commissioner Simmons rings true.

III. Missouri Appellate Court Decisions

To Laclede's knowledge, there have been relatively few Missouri appellate court decisions construing §393.130.2.³ Moreover, of the decisions that have construed that statutory section, none of them are on point and none of them purport to preclude the Commission from exercising its broad authority to approve experimental rates. In *Laclede Gas Co. v. Solon Gershman, Inc.*, 539 S.W.2d 574 (Mo.App. 1976), a gas customer appealed the judgment of the circuit court. The circuit court had ruled in favor of the gas company in its action to collect on a balance due and had dismissed the customer's counterclaim. Citing RSMo. §393.130.2 (1969), the appellate court afforded partial relief to the customer. The large majority of the court's holding focused on the doctrines of estoppel and waiver and how the defense of estoppel could not be used as a defense in a collection case. The court held that "(t)o permit the defense of

Commission, 535 S.W. 2d 561 (Mo.App. K.C.D. 1976). By structuring the Program as experimental, the Company has brought it squarely within this broad range of Commission discretion.

³ At the oral argument in this case, Douglas E. Micheel, on behalf of the Office of the Public Counsel, stated his belief that the De Paul Telephone case was on point with regard to Section 393.130.2 being used as a basis to overturn a Commission decision. The 1976 case of *De Paul Hospital School of Nursing, Inc. v. Southwestern Bell Telephone Company*, 539 S.W.2d 542 (Mo.App. 1976), appears to be the case to which Mr. Micheel has referring. However, the *De Paul* case is not applicable to the case at hand. First, in *De Paul*, a nursing school filed suit against a telephone company after the Commission determined that the company had overcharged the school for telephone service by not classifying the school as a hotel. Second, the Commission's decision was upheld, not overturned. Third, with regard to the issue of discrimination, the Court dealt with Sections 392.200 and 392.350, RSMo. 1969, and the meaning of "willful" in the context of rate discrimination.

estoppel would be merely another way of evading the provisions of the law prohibiting rate discrimination." *Id.* at 576.

Customers sought review of the circuit court's decision affirming the Commission's decision in *Friendship Village of South County v. Public Service Commission of Missouri*, 907 S.W.2d 339 (Mo.App. W.D. 1995). The appellate court stated that the question of the lawfulness of the Commission's decision rested on whether the Commission had the statutory authority to act as it did. The court said that question was answered by a review of *State ex rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044 (Mo. banc 1942) and the statutory predecessors to RSMo. §§393.130 and 393.140. Referring to the Commission's broad discretion, the court held that the Commission was clearly authorized to rule on the issue of whether the utility company had charged the complainants under the proper rate classification. *Id.* at 349.

In State ex rel. Inter-City Beverage Co., Inc. v. Missouri Public Service Commission, 972 S.W.2d 397 (Mo.App. W.D. 1998), business customers sought review of a circuit court decision affirming the Commission's decision. The appellate court held that certain statutes, including RSMo. §393.130.2, gave the Commission "jurisdiction to regulate and fix rates or charges for public utilities and to determine the proper classification of the consumers to whom such rates or charges apply." Id. at 400.

In addition to the above cases dealing with RSMo. §393.130.2, the Missouri Supreme Court dealt with RSMo. §5645⁴ in *State ex rel. McKittrick v. Missouri Public Service Commission*, 175 S.W.2d 857 (Mo. banc 1943). In that case, the Missouri Attorney General alleged that maintaining separate service rates while a property sale was pending between two utility companies made the lesser rate of the one company a special rate, rebate, drawback or special advantage. *Id.* at 865. The Supreme Court upheld the Commission's decision allowing the separate rates, stating that §5645 forbids a company from having two or more rates for the same service. *Id.* at 866. Although *McKittrick* is not squarely on point with regard to the

⁴ Section 5645(2) is the statutory predecessor to §393.130.2.

discrimination statute, the case demonstrates the position of Missouri courts with regard to experimental programs. The Missouri Supreme Court stated: "This court has held several times that the Commission may establish test or experimental rates pro tempore." *Id*.

Accordingly, a review of Missouri case law reveals that while RSMo. §393.130.2 provides for consistent rate treatment if "like and contemporaneous service" is being provided "under the same or substantially similar circumstances or conditions," it also gives the Commission considerable discretion to determine what circumstances or conditions meet that criteria, particularly in instances involving experimental programs like the Catch-Up/Keep-Up Program.

IV. Section 393.130.2 and Experimental Programs

Laclede would also submit that §393.130.2 has to be construed by the Commission in a consistent fashion that does not vary from one utility to the next. Although Laclede is of the opinion that §393.130.2 is inapplicable and that the Commission has broad authority to approve low income experimental programs such as the one adopted last year for MGE and Laclede's current proposal,⁶ at a minimum that statutory section should be construed in a way that would not automatically invalidate other experimental programs that have been approved by the Commission. A finding that Laclede's Program violates §393.130.2, however, would be tantamount to a finding that other low-income programs approved by the Commission are also unlawful.

⁵ See also State ex rel. Ashcroft v. Public Service Commission, 674 S.W.2d 660, 664 (Mo.App. W.D. 1984), holding that "Section 393.130, RSMo 1978 expressly forbids rate discrimination . . . for like and contemporaneous service under the same or substantially similar circumstances or conditions."

⁶ First, as was correctly noted by Commissioner Murray in her dissent to the Commission's Order of January 16, 2003, the tariff in question would not result in different rates being charged, and that, therefore, the statute may be inapplicable. Second, Laclede asserts that, given the experimental nature of the program, there should be no question regarding the Commission's authority to approve the Catch-Up/Keep-Up Program. The Commission and Missouri courts have consistently found that the Commission has broad authority to approve experimental rates for the purpose of acquiring the data necessary to fix just and reasonable rates.

A. Comparison of Catch-Up/Keep-Up Program and Other Programs. According to the undisputed testimony presented in this case, every feature of the Catch-Up/Keep-Up Program is rooted in low-income or gas cost incentive programs previously approved by the Commission. Like the Catch-Up/Keep-Up Program, MGE's recently approved low-income program provides financial assistance to certain customers (in the form of bill credits) so long as the customer remains current on his or her bill and observes certain other requirements. If the Catch-Up/Keep-Up Program involves prohibited discrimination within a class, then MGE's program involves prohibited discrimination within a class in violation of §393.130.2.

In its last rate case (Case No. ER-2002-424), Empire and the other parties entered into a stipulation regarding the future filing of a tariff which will conform substantially to MGE's program. If MGE's program violates §393.130.2, so too will Empire's tariff. Additionally, there is little practical distinction between the effects of these programs and the effects of the cold weather rule. Like the cold weather rule, Laclede's Program will provide financial help to low income customers within the same class. And, while that help may come in the form of arrearage reductions rather than the provision of special credit terms as provided for under the cold weather rule, the fact remains that customers in both instances are being assisted financially because of a stated inability to pay their bills. A finding that Laclede's Program violates §393.130.2 on discrimination grounds would therefore also raise substantial questions regarding the lawfulness of the cold weather rule.

B. The Alleged Distinctions. The Commission and the other parties to this case appear to be making a distinction between MGE's program and other programs of this sort being the result of settlement agreements and Laclede's program not being supported by all parties. This distinction is without merit, as §393.130.2 does not distinguish between programs resulting from

⁷ See Laclede Exhibit 3, pp. 3-9. Also, a material attribute of the Catch-Up/Keep-Up Program is that, in contrast to other incentive programs, all savings achieved by Laclede as a result of its negotiation of discounts from the maximum pipeline rates will be passed on to Laclede's customers, either in rates or through the grants and services provided by the Program.

contested hearings and those resulting from settlement agreements.⁸ Public Counsel has made a distinction regarding the Catch-Up/Keep-Up Program being proposed outside of a rate case, but §393.130.2 also does not distinguish between programs resulting from rate cases and programs resulting from contested hearings outside of rate cases. In short, no aspect of the Commission's decision in this case should be impacted by the fact that the proposal is being considered outside the confines of a general rate case.

C. Likelihood of Appeal. There appears to also be a concern regarding the possibility of a party appealing the Commission's decision, in the event the Commission were to approve the Catch-Up/Keep-Up Program. At the oral argument in this case, Laclede's counsel stated that the prospects of an appeal in this case seemed unlikely. Counsel for neither Public Counsel nor DNR attempted to assert otherwise. As such, it is unlikely that the Program would be challenged in the courts on the basis of §393.130.2. However, a finding by this Commission that Catch-Up/Keep-Up is unlawful on the basis of §393.130.2, may negatively impact and lay the

⁸ Additionally, the Commission may not approve an otherwise unlawful program, just because the parties are in agreement. The Commission refused to approve a Unanimous Stipulation and Agreement in *Office of the Public Counsel v. Missouri Gas Energy*, 6 Mo. P.S.C. 3d 464 (1997), holding that the Commission "cannot proceed in a manner contrary to the terms of a statute and may not follow a practice which results in nullifying the express will of the Legislature." Further, all parties need not agree in order for an experimental program to be approved by the Commission. Over the objection of Public Counsel, the Commission approved the experimental small volume customer aggregation program proposed by Missouri Public Service (UtiliCorp) in GT-2001-61. Despite the objections of Public Counsel, the Commission determined that the experiment was worth conducting.

groundwork for challenges to the experimental programs of other utility companies. It should be noted that a stipulation does not foreclose the possibility for appeal, as a nonparty may seek rehearing and then appeal from a Commission decision. As such, even those programs which result from stipulations and agreements may be challenged at a later date, either through appeal or through the complaint process. This is particularly true with regard to Empire's program, the tariff for which has yet to be finally approved by the Commission.

V. Conclusion

The proposed Catch-Up/Keep-Up Program provides the Commission with a rare opportunity to help literally thousands of Laclede's most vulnerable customers to regain or maintain their natural gas service, while still allowing for oversight by the Commission and remaining moderate in scope and cost. As outlined above, RSMo. §393.130.2 does not appear to prohibit the Program, and the Commission should not rely on this statute as a basis for rejecting an experimental program that would address in a timely and meaningful way a need that all parties have acknowledged is immediate and compelling. As Commissioner Simmons noted in his dissenting opinion in Missouri Gas Energy Case No. GE-2001-393, public policy is flexible enough to encompass unusual solutions for unusual problems. Accordingly, Laclede requests that the Commission approve the Catch-Up/Keep-Up Program on the terms indicated in the Company's Motion for Reconsideration and/or Rehearing for implementation as soon as possible.

Respectfully Submitted,

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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing Memorandum Regarding Section 392.130.2, RSMo 2000 was served on the General Counsel of the Staff of the Missouri Public Service Commission on this 18/4 day of February, 2003 by hand-delivery or by placing a copy of such document, postage prepaid, in the United States mail.