BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Tariff Filing of Laclede Gas Company	))	Case No. GT-2003-0032

BRIEF OF LACLEDE GAS COMPANY

Pursuant to the briefing schedule established by the Commission in this case, Laclede Gas Company ("Laclede" or "Company") hereby submits its brief in this proceeding.

I. INTRODUCTION/BACKGROUND

This case focuses on the issue of who will pay for the pipeline capacity that Laclede originally reserved for school districts that now wish to participate in an experimental aggregation program. The statute implementing the school districts' experimental aggregation program mandates that the program not have any negative financial impact on Laclede or its other customers. In order to comply with this statutory requirement, the school districts, and not Laclede or its other customers, must be responsible for the pipeline capacity that was reserved for them. In this brief, Laclede will show that its tariff is the only one proposed in this case that requires school districts to be responsible for the pipeline capacity necessary to avoid negative financial impacts.

It is important to begin by reviewing the relevant statute. Effective July 11, 2002, Section 393.310 RSMo Supp. 2002 (the "Statute") requires each Missouri gas corporation to file tariffs to establish an experimental program that permits participating school districts (known as eligible school entities, or "ESEs") to aggregate their gas purchases. Section 393.310.5 of the Statute provides that the aggregation program must not have any negative financial impact on Laclede or its customers. Specifically, Paragraph 5 of the Statute states that:

> "The commission...shall approve such tariffs upon finding that implementation of the aggregation program set forth in such tariffs will not have any negative financial impact on the gas corporation, its other customers or local taxing authorities, and that the aggregation charge is sufficient to generate revenue equal to all incremental costs caused by the experimental aggregation program."

As a Missouri gas corporation, Laclede filed a tariff establishing an Experimental School District Aggregation Service (the "Aggregation Program"). Following submission by the parties to this case of a Unanimous Stipulation and Agreement (the "Agreement") on October 11, 2002, the Commission approved Laclede's Aggregation Program on October 17, 2002.

However, the Agreement only fully covered the first winter of the Aggregation Program, the winter of 2002-03. This is because the Agreement provided only a temporary settlement, through May 31, 2003, of the pipeline capacity issue. The first two sentences of Paragraph 6 of the Agreement set forth a method for reaching a resolution that covers the remainder of the experiment:

> "The parties agree that, within 60 days of the effective date of the tariff establishing the experimental program, the Company, Staff, Office of the Public Counsel and the association representing the schools shall meet to determine if they can reach a mutually acceptable recommendation for revising the treatment of capacity costs or other program provisions subsequent to May 31, 2003. Such parties shall file either their joint recommendation or, if an agreement is not reached, their individual recommendations regarding such matters, by March 17, 2003 together with testimony explaining why such revisions are appropriate and consistent with the requirements of §393.310."

(Exh. 2, pp. 4-5). Representatives of all of the parties attended the meeting referenced in paragraph 6 via conference call on December 11, 2002. The capacity issue was the only issue discussed at that meeting, and is the only issue that has been discussed since that meeting. The parties have discussed no other program provisions. (*Id.*)

Therefore, the only matter to be decided in this case is the ESEs' responsibility with respect to pipeline capacity. Although the parties left open the possibility that revisions to other program provisions could be litigated, this only applied to issues first discussed by the parties prior to the filing of testimony in order to determine whether they could be resolved by mutual agreement. Since no other issue was raised or discussed, the appropriate treatment of pipeline capacity thus became the sole matter remaining for determination by the Commission in this case. (Exh. 1, pp.1-3; Exh. 2, p. 5).

II. ARGUMENT

As stated in the Issues List submitted in this case, both Laclede and the Missouri School Board Association ("MSBA") have filed competing tariff proposals regarding the transportation capacity for which the ESEs should be responsible. Accordingly, consistent with the foregoing, the issues in this concern are two-fold. First, does the Statute, Stipulation and Agreement or the Tariff require ESEs to take or pay for interstate pipeline capacity acquired by Laclede to serve the requirements of the ESEs? Second, if one or more of these instruments do require such a result, which of the competing tariff proposals for the treatment of capacity costs under the Program may and should the Commission adopt? Each of these matters will be addressed in turn.

A. <u>Does the Statute, Stipulation and Agreement, or the Tariff require eligible school entities to take or pay for interstate pipeline capacity acquired by Laclede to serve the requirements of eligible school entities?</u>

It is clear that the ESEs must, in fact, take or pay for the capacity that Laclede acquired for them, since the failure to assume such responsibility would necessarily result in a negative financial impact to Laclede or its customers in violation of paragraph 5 of the Statute. This result stems from the fact that, prior to the approval of the Statute, the Company entered into long-term contracts for pipeline capacity to meet the high priority, temperature-sensitive needs of all of its firm sales customers, including schools. (Exh. 1, p. 3; Tr.96-97). These contracts provide for Laclede to purchase a fixed amount of year-round pipeline capacity. None of these contracts permit the Company to reduce the amount of capacity it is bound to purchase due to circumstances like a school aggregation program. (Exh. 1, p. 6; Tr. 75). All firm customers share the cost of this fixed demand charge for pipeline capacity.

If the schools are not required to purchase and pay for their proportionate share of this capacity, then other customers will have to pay a proportionally greater share of this cost, since such cost cannot be shed by Laclede. (Exh. 1, p. 3; Exh. 2, p. 12; Tr. 92). In other words, the cost of capacity reserved for the schools will be spread among Laclede's remaining customers through the PGA. Such a result is flatly inconsistent with the requirements of Paragraph 5 of the Statute, as it causes a negative financial impact on the gas corporation or its other customers. Thus, in order to adhere to the explicit provisions of the Statute that prohibit any negative financial impact on the Company or other customers, the ESEs must be required to either take assignment of the pipeline capacity or bear the cost the Company incurs to continue holding such capacity. (Exh. 1, pp.3-4).

The MSBA suggested that there would not be any harm done because natural growth in Laclede's service territory would cover any pipeline capacity left behind by the ESEs. (Exh. 3, pp.16-17). This argument is belied by the fact that Laclede is not experiencing growth in its service territory, and hasn't for some time. (Exh. 1, p.7; Exh. 2, pp. 15-16; Tr. 77).

Finally, the MSBA has also suggested that Laclede could release the capacity that the ESEs leave behind if Laclede finds it appropriate to do so. (Exh. 3, p. 14). There is absolutely no evidence on the record, however, to indicate that Laclede could release such capacity to other parties, particularly during the summer months, in amounts and at rates sufficient to compensate for the ESEs' failure to take such capacity. Moreover, Laclede is willing to release the ESEs' capacity – to the ESEs. After the ESEs take their required share of capacity, they may release it themselves if they find it appropriate to do so. Mr. Ervin testified that he is familiar with the process of posting capacity for release. (Tr. 136). The only apparent reason why this would not be perceived by MSBA as a solution to its stated objective of avoiding responsibility for these costs, is because MSBA, like Laclede, knows that such capacity cannot be released to a degree that would compensate for such capacity cost. Moreover, any process by which Laclede attempted to release such capacity for the MSBA, rather than to the MSBA, would inevitably lead to complicated and subjective issues over how the revenues for such releases should be credited between Laclede and its remaining customers. The only lawful and far more appropriate solution is for the ESEs to be responsible for using or releasing their own capacity.

B. <u>If so, which of the competing tariff proposals for the treatment of capacity costs under the Program may and should the Commission adopt?</u>

1. Laclede's tariff proposal is the only one that complies with the Statute

The evidence in this case demonstrates that the amount of pipeline capacity that an ESE must purchase to avoid a negative financial impact is the amount set forth in Laclede's tariff proposal in this case. Specifically, it is an amount equal to an annual average level of 114% of the average daily consumption of that ESE in the ESE's peak usage month that occurred during the 24-month period between September 2000 to September 2002. (Exh. 1, p. 4). Laclede derived this average annual figure by simply dividing the total amount of daily pipeline capacity under contract by the Company that is available for deliveries into its distribution system (726,000 MMBtu) by the average daily throughput in January 2001[1] for which the Company had a firm sales obligation (636,000 MMBtu). (Exh. 1, p. 5). Thus, 114% represents the ratio of available pipeline capacity to average peak month usage for firm sales customers. For a given ESE, this ratio can be applied to the average daily consumption in the ESE's peak usage month that occurred during the 24-month period between September 2000 and September 2002, in order to derive the amount of capacity that the ESE is responsible for to avoid a negative financial impact on other customers. (Exh. 1, Schedule 1, paragraph E).

At the hearing in this case, the MSBA challenged the fact that the ratio derived by Laclede was based on the peak, or coldest, month covering a two-year period, a period that included unusually cold months in the winter of 2000-2001. The implication is that Laclede had chosen a period that may increase the cost to be borne by ESEs. In response, Laclede witness Cline effectively demonstrated that the time period or temperature

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[1] January 2001 was the peak usage month that occurred during the 24-month period between September 2000 to September 2002.

chosen was inconsequential, because the purpose in choosing a usage period was simply to create a company-wide ratio that could be applied to an ESE's actual use. (Tr. 72-73, 101-04). Hence, it matters not whether the Company uses 114% multiplied by the coldest month in a two year period, or 150% multiplied by an average of four winter months,[2] so long as the formula honors the concept that the ESEs assume the cost of the pipeline capacity reserved for them. It should also be noted that the usage period in Laclede's tariff was not only similar to usage periods in other tariffs,[3] but was also the same period agreed to by all the parties, *including the MSBA*, in the Agreement entered into in October 2002.

Although the 114% factor set forth above is a year-round average, Laclede voluntarily proposed to structure the ESEs' capacity purchases in a way that better matches their usage characteristics. Specifically, Laclede has proposed in its tariff filing in this case to allow the ESEs to take pipeline capacity in the amount of 150% in the winter months of November to March, and only 88% in the non-winter months of April to October. (Exh. 1, Schedule 1, paragraph E). In other words, instead of requiring the ESEs to purchase the same level of capacity each and every month in order for them to meet their peak needs (as most customers generally have to do under standard FERC-approved transportation tariffs) such an approach gives the ESEs the ability to lessen both the risk of having to buy supplemental pipeline capacity when the weather is coldest and such capacity is likely to be most expensive, and the burden of paying for a large amount of capacity at a time when needs are relatively small. (Exh. 1, pp. 4-5).

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[2] This is roughly how MSBA witness Ervin described MGE's aggregation program. (Tr. 134-35).

[3] For example, Aquila's tariff covers a three-year period from 1999-2002. (Tr. 98-101).

Laclede did this as an accommodation to the schools. At the same time, the 150%/88% split results in an average of 114% for all twelve months. Therefore, Laclede and its customers are compensated for the costs associated with the year round capacity the Company has contracted for to meet the ESEs' needs, and there is no negative financial impact. (*Id.*)

Finally, in order to avoid a negative financial impact on Laclede or its customers, the ESEs should also pay the same price for pipeline capacity that Laclede pays. For convenience and reliability purposes, all of the capacity released by Laclede to the ESEs will be on the Mississippi River Transmission Corporation ("MRT") system, which covers the large majority of Laclede's pipeline needs. (Exh. 1, Schedule 1, paragraph E; Tr. 67). Therefore, the price paid by the ESEs should be at MRT's maximum FERC-approved tariff rate, minus a credit for a pro-rata share of the system-wide discount Laclede receives from MRT. (Exh. 2, p. 10). This is the price proposed by Laclede in its tariff. (See Exh. 1, Schedule 1, paragraphs E and F).

Notably both the Staff and Public Counsel have agreed that Laclede's tariff proposal for treatment of capacity costs represents the *only* proposal presented in this case that complies with the law. (*See Statements of Positions Filed by Staff and Public Counsel).*

2. <u>MSBA's tariff proposal does not comply with the Statute</u>.

MSBA's tariff proposal is based on two fanciful, but inaccurate interpretations of the Statute. First, MSBA witness Ervin opines that the prohibition against the program having a negative financial impact does not apply to the pipeline capacity issue, but only to the incremental administrative costs of aggregation and balancing. (Exh. 3, p.9).

Second, he claims that the Statute intended to treat ESEs exactly like large transportation customers (Exh. 3, pp. 7-8), except that ESEs are exempted from the telemetry or special metering requirements that large volume transportation customers are subject to (Exh. 3, p. 8), and ESEs are subject to local franchise taxes, which transportation customers may not be required to pay. (Exh. 3, p. 9).

Mr. Ervin is mistaken with respect to the application of the negative financial impact clause for a number of reasons. First, as stated above, a plain reading of paragraph 5 of the Statute demonstrates that "implementation of the aggregation program set forth in such tariffs will not have *any* negative financial impact on the gas corporation, its other customers or local taxing authorities…" (emphasis supplied). This language could not be more clear in affirming that the negative financial impact clause applies broadly to ***any*** impacts caused by implementation of the Aggregation Program, and not just aggregation and balancing costs. There can be no other reason why the word "any" is specifically used in the paragraph.

Second, interpreting the negative financial impact clause to apply only to aggregation and balancing costs effectively renders meaningless the entire clause that reads "that implementation of the aggregation program set forth in such tariffs will not have any negative financial impact on the gas corporation, its other customers or local taxing authorities, and." This is because the remainder of paragraph 5 ("and that the aggregation charge is sufficient to generate revenue equal to all incremental costs caused by the experimental aggregation program.") already refers to the type of costs that include aggregation and balancing. Mr. Ervin conceded this point on the stand. (Tr. 148-50). It is axiomatic that every word, clause and sentence of a statute must be given meaning, if possible. ***Hovis v. Daves***, 14 S.W.3d 593, 595 (Mo. 2000). Mr. Ervin's interpretation fails by effectively writing an entire clause out of paragraph 5 of the Statute.

Finally, if there was any doubt remaining, Mr. Ervin himself provides the rationale for the negative financial impact clause. Mr. Ervin stated that because gas corporations already had firm and final pipeline capacity reservations in place for the winter of 2002-03 by the time the aggregation tariffs were approved in October 2002, he understood that they could have a concern if the ESEs did not assume their capacity obligations for at least the first full year of the three year program. (Exh. 3, pp. 6, 11). By doing so, Mr. Ervin confirmed that the gas corporations or their customers would experience a negative financial impact if ESEs failed to assume the capacity reserved for them. This is the exact situation that Laclede is in, except that, as stated above, Laclede has long-term contracts that obligate it to make a firm and final purchase of pipeline capacity well past the first year of the Aggregation Program. Despite the fact that Laclede faced the same constraint, Mr. Ervin absolutely refused to extend the ESEs' obligation for Laclede's pipeline capacity past the first year of the Aggregation Program. (Tr. 143). This stance violates both the principle espoused by Mr. Ervin and the prohibition against the Aggregation Program causing a negative financial impact.

Mr. Ervin's second inaccurate interpretation is that the Statute intended to treat ESEs exactly like large transportation customers. First, there is absolutely no language in the Statute that could possibly communicate this point to anyone reading the Statute, as Mr. Ervin conceded on the stand. (Tr. 148). Language would have to be added to the Statute to support Mr. Ervin's interpretation. Ironically, a legislative amendment to the

Statute has been proposed which appears to be intended to accomplish that very goal. (Exh. 9). Exhibit 9 adds to the Statute, among other things, a clause that requires the Commission to treat pipeline capacity costs for ESEs in the same manner as for large industrial or commercial customers. Unfortunately, this language may need some construction.[4] Nevertheless, the fact that some amendment is required to allow ESEs to be treated like transportation customers with regard to pipeline capacity is proof that the current Statute does not do so.

III. <u>CONCLUSION</u>

In opening statements, the attorney representing the MSBA claimed that this case was important because it involved needy children and needy school districts. (Tr. 51) However, MSBA consultant Louie Ervin himself revealed that this case is really about establishing an expanding number of small volume transportation programs that are to be implemented without regard to their effect on other customers. (Tr. 154-55). Hence, it is more likely that the purpose of starting with children and school districts is to establish a beachhead from which these larger programs can be launched.

Even in the face of legislation that prohibits negative financial impacts, Mr. Ervin seeks to profit for his clients by stranding costs that other customers will have to bear. As stated by Public Counsel attorney Micheel, we should be careful to avoid cross-subsidies, even those that benefit students, "because in the end, it's going to be the students' parents who pay." (Tr. 54). Indeed, in the event the MSBA's proposal is adopted, it will not only

[4] Laclede witness Cline opined that because Laclede's large industrial or commercial customers may be either firm sales, firm transportation or basic transportation customers, with different treatments regarding pipeline capacity charges, it is not clear how Laclede should treat ESEs' capacity. (Tr. 88-91)

be the parents of those students who will be burdened, but also all other customers who were to be held harmless under the explicit safeguards set forth in the Statute.

In conclusion, Laclede's proposed tariff is the only one in this case that complies with the Statute, because it provides for ESEs to be responsible for the pipeline capacity necessary to avoid negative financial impacts. The Commission should approve the tariff sheets provided by Laclede in the Schedule to Exhibit 1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Brief was served on all counsel of record in this case on this 5th day of May, 2003 by hand-delivery, email, fax, or by placing a copy of such Initial Brief, postage prepaid, in the United States mail.

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