**BEFORE THE PUBLIC SERVICE COMMISSION**
**OF THE STATE OF MISSOURI**

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

**MOTION TO RESCIND ORDER GRANTING**
**MOTIONS FOR RECONSIDERATION**
**UPON CONCLUSION OF ORAL ARGUMENT**

**COMES NOW** Laclede Gas Company ("Laclede" or the "Company"), and for its Motion to Rescind Order Granting Reconsideration, respectfully states as follows:

1. On September 9, 2009, the Commission issued an Order Granting the Motions for Reconsideration ("September 9 Order") that had been filed by the Commission Staff ("Staff") and the Office of the Public Counsel ("OPC") in early May of this year in response to the Commission's April 22, 2009 Order denying Staff's Motion to Compel the production of certain records. In the September 9 Order, the Commission also scheduled a second oral argument to address the issues underlying this dispute.

2. Laclede intends to fully participate in the oral argument currently scheduled by the Commission and it appreciates Commissioner Kenney's interest in examining this matter more closely. Laclede remains confident that, in the end, the Commission will reaffirm the principles underlying its April 22, 2009 Order Denying Motion to Compel. Specifically, Laclede is confident that the Commission will continue to recognize that no party is above the law, that to command respect its rules must be enforced evenly and fairly, and that Staff's and OPC's efforts to obtain information in

direct contradiction to the terms of the Commission's affiliate transaction rules must therefore be rejected.

3. Laclede's participation in the upcoming oral argument, however, should not be misconstrued as acquiescence by the Company in either the propriety or fairness of the process that has led to the current state of affairs. Indeed, the Commission's September 9 Order reveals precisely why the conduct of this case and, in particular, the disposition of the issue now under reconsideration, has been so lacking in the fundamental elements of fairness and impartiality that should always characterize administrative proceedings.

## I. Because Nothing New Has Been Raised Since the Commission Decided the Underlying Issue on April 22, 2009, there is no Basis for Reconsidering the April 22 Order.

4. In support of granting reconsideration, the Commission's September 9 Order does not cite any change in the law or facts since the Commission first rejected Staff's Motion to Compel on April 22. Nor does it reference any new or overlooked arguments that had not previously been addressed by the Commission. Instead, the September 9 Order simply states that "[f]or some time now there have been four, rather than five, Commissioners ….", that those " . . . four Commissioners remained split on whether to grant Staff and OPC's motions . . . ' and that "[n]ow a fifth Commissioner has joined the Commission and this issue may be settled."

5. This failure to articulate any legal or evidentiary basis for granting reconsideration is sufficient reason alone for the Commission to rescind its Order Granting Reconsideration and replace it with an Order Denying Reconsideration. Under the Commission's Rules, motions for reconsideration must ". . . set forth specifically the ground(s) on which the applicant considers the order to be unlawful, unjust, or

unreasonable." 4 CSR 240-2.160(2). *See e.g.* ***Re: Missouri-American Water Company,*** Case No. WR-2008-0311, *Order Denying Motion for Reconsideration*, (October 24, 2008). By extension, this would indicate that a Commission order granting reconsideration must also set forth the specific grounds upon which the Commission considers its previous order to have been unlawful, unjust, or unreasonable. Nothing in the Commission's September 9 Order satisfies this threshold requirement.

6. Looked at another way, it has been the Commission's consistent practice over the years to deny motions for reconsideration and applications for rehearing where the movant or applicant has failed to raise any new arguments in their pleadings. *See, e.g.,* ***Re: Laclede Gas Company***, Case No. GT-2009-0026, *Order Denying Application for Rehearing* (April 29, 2009); ***Re: Union Electric Company d/b/a AmerenUE,*** Case No. ER-2007-0002, *Order Denying Missouri Industrial Energy Consumers Application for Reconsideration* (Nov. 21, 2006)*;* Re***: Proposed Acquisition of AT&T Corporation by SBC Communications, Inc.,*** Case No. TM-2005-0355, *Order Denying Request for Reconsideration* (May 3, 2005). The Commission's rule and practice are both sensible; otherwise there could be a never-ending string of baseless requests for re-votes disguised as requests for reconsideration.

7. In their Motions for Reconsideration, neither Staff nor OPC cited any new or overlooked arguments. In fact, the absence of any new arguments in the pleadings filed by Staff and OPC was freely acknowledged in agenda discussions by both the Presiding Judge as well as the commissioners who addressed the issue. As a result, there is nothing in the Commission's September 9, 2009 Order to indicate that reconsideration is appropriate or warranted based on such grounds. In light of this consideration, there is

simply no basis for the Commission's decision to reconsider this matter and it should accordingly rescind its September 9 Order.

## II. The Commission's Process For Addressing The Issue Has Been Manifestly Unfair And Prejudicial.

8. There is a second and even more compelling reason why the Commission should rescind its September 9 Order. Completely missing from that Order is any recognition of the fact that the purported 2-2 impasse cited in the Order was not a matter of mere happenstance, but instead the direct result of a purposeful effort to delay the Commission's consideration of these motions until a new and different Commissioner would be available to rule upon them – all with the apparent goal of achieving a result different from that reached by a majority of commissioners in both the April 22 Order and in the Commission's discussion of the motions. Indeed, as Laclede has pointed out in previous pleadings in this case, such a conclusion is inescapable from the consistent pattern of irregular and highly prejudicial actions that have been taken since the Commission issued its April 22 Order.

9. Take for example the unexplained and unwarranted delay in bringing the motions for reconsideration to a vote. These motions were filed by Staff and OPC on May 1, 2009 and May 4, 2009, respectively. On May 8, 2009, Laclede filed a brief two and half page response in which it simply stated that neither Staff nor OPC had raised anything new in the motions for reconsideration and that such motions should therefore be denied. Notably, the Presiding Judge, as well as all of the commissioners, expressed their concurrence with Laclede's assessment that no new issues had been raised. Under normal circumstances, this would have led to the prompt issuance of an order denying

motions for reconsideration within a few days or, at most, a few weeks of when the motions were filed.[1] That did not happen in this case.

10. Instead, knowing that the Commission was on the verge of changing personnel, and that one of the three Commissioners comprising the majority on the April 22 Order, Connie Murray, would be retiring at the end of May, a concerted effort was made to delay a vote on these unmeritorious motions. Thus, even though the matter was ripe for decision, the motions were not placed for a vote on either the Commission's May 13, 2009 Agenda Meeting or its May 21, 2009 Agenda Meeting. Amazingly, the only reason given for not scheduling a prompt vote was the Presiding Judge's assertion that he was awaiting a Staff reply to the short response filed by Laclede to the motions on May 8, 2009. It is difficult to accept such an assertion, however, as anything more than a pretext for delaying consideration of the motions given (i) that such a reply is not contemplated by the Commission's rules; (ii) that the Staff subsequently verified that it had not even requested the opportunity to file such a reply; (iii) that the April 22 Order was itself the ultimate result of a request for reconsideration; and (iv) that such a reply would, in any event, have been directed at a 2½ page response that simply reiterated what the judge himself had already concluded -- i.e. that the motions had raised no new issues for Commission consideration.[2]

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[1]For example, when the Commission determined that no new issues had been raised in an application for rehearing filed by Laclede in another recent case, it took the Commission less than three business days to schedule and complete a vote on an order denying the application. *See* ***Re: Laclede Gas Company***, Case No. GT-2009-0026 (Application for Rehearing filed on Friday, April 24, 2009, and denied on Wednesday, April 29, 2009). Similarly, in Case No. EX-2009-0252, an application for rehearing filed on May 22, 2009 was rejected 19 days later, on June 10, 2009.

[2]In contrast, the Motions for Reconsideration in Case Nos. GT-2009-0026 and EX-2009-0252 were denied before a response was even filed

11. Moreover, when the motions finally were placed on the Commission's May 27, 2009 agenda, they were noted as a "discussion item" rather than as an order denying motions for reconsideration and/or clarification, an action which would ostensibly preclude any final disposition of the motions on that day. Again, there is no plausible explanation for why these motions were placed on the agenda for discussion rather than a vote. Specifically, there was no indication that there had been a change of position by one or more of the commissioners who had voted in favor of the April 22 Order. Moreover, the Presiding Judge himself acknowledged that the motions had not raised any new issues or arguments that had not already been considered and rejected by the Commission. This begs the question of what there was to discuss. Clearly, this action was simply another attempt to prevent a final disposition of the motions at the May 27 meeting, prior to Commissioner Murray's retirement, and in the process frustrate the will of the majority of Commissioners who voted that very same day to deny the motions.

12. Even at this late date, however, such a transparent effort to sabotage the will of the majority of commissioners who agreed with Laclede's position could have been rectified. To that very end, Laclede requested that the Commission schedule a special agenda meeting on May 28 or May 29, 2009 so that the votes of the majority of the commissioners who wished to deny the motions for reconsideration could be reflected in a formal order. In one of her last acts as a Commissioner, Connie Murray, who had served this institution with distinction over a 12 year period, also submitted a request that such an agenda meeting be scheduled. It is apparent from the record, however, that no action was taken to even acknowledge these last requests, let alone accommodate them.

13. On their face, these actions betray a deliberate effort to manipulate the process for considering and disposing of issues that come before the Commission in order to reach a result different from the one that a majority of Commissioners favored. Moreover, such a conclusion is reinforced by actions on the part of the Presiding Judge—whose job it was to uphold the Commission's duly approved April 22 Order—that are not consistent with any standard of impartiality.

14. The appearance of a lack of impartiality first became evident on April 15, 2009, when the Commission discussed the Staff's Motion to Compel following the first oral argument held in this matter. For the case discussion, Presiding Judge Jones had apparently prepared a memorandum with options for the commissioners' consideration, and three commissioners chose "option three," which was to reverse the prior order granting Staff's motion. Commissioner Murray said it was clear that Staff was going well beyond what it should be seeking in an ACA case. She added that she was sorry that she had voted for the prior order requiring Laclede to produce the requested information. Commissioner Jarrett also voted to rescind the order. He stated that the oral argument was especially helpful in this case, and that he found specifically informative the exchange between Commissioner Murray and Staff Attorney Steven Reed (in which Mr. Reed eschewed the importance of the Commission's affiliate transaction rules and Laclede's CAM in favor of Staff's own standard for determining affiliate pricing). Commissioner Davis concurred with Commissioner Murray that the previous order should be rescinded. He suggested that the Commission may need to look at its affiliate transaction rules, but should not pursue a post hoc fishing expedition.

15. It was at this point that the Presiding Judge's actions began to appear to depart from the standard of impartiality that should apply. The judge asked if Commissioner Davis wanted to open an investigatory docket. This was an improper question because there was nothing in Commissioner Davis' comments which suggested interest in such an alternative, and because opening an investigation is one of the ultimate issues to be litigated in the case. The effect of the Presiding Judge's question was to solicit the result of an ultimate issue without permitting Laclede the most basic components of due process—notice and an opportunity to be heard.. Commissioner Davis declined to pursue an investigation at that time.

16. As previously noted, the result of the April 15 agenda meeting was that three commissioners voted to rescind the order granting the motion to compel on the grounds that Staff's request of LER's non-affiliate information strayed well beyond the boundaries of this ACA proceeding.

17. Despite this clear direction, for the April 22 Agenda meeting, Judge Jones continued to demonstrate a lack of impartiality by presenting the Commission with a bare-bones order that failed to discuss any of the rationales cited by the majority for why the Commission rescinded the previous order or why it believed Staff's information requests were improper. Instead, the April 22 Order simply stated that, based on the arguments of the parties, the information requested by Staff was not reasonably calculated to lead to the discovery of relevant evidence. Although one can by reference to the record determine the substance of the arguments that the Commission accepted and relied upon as the basis for its Order, the failure to incorporate <u>any</u> of those arguments in the April 22 Order leads one to believe that April 22 Order was not written to provide a

full and persuasive explanation of the majority's reasoning in reaching its decision – a circumstance that eventually led to a request for clarification by OPC. This failure to provide such support is more inexplicable given the fact that Laclede and the other parties had submitted proposed orders to the Commission in which they set forth in detail the factual findings and legal conclusions supporting their respective desired rulings. The fact that none of the proposed language supportive of the result reached in the April 22 Order was incorporated therein only reinforces the view that little or no effort was made to write an order that would provide a clear and defensible articulation of a Commission decision with which the Judge disagreed.

18. The Presiding Judge's antipathy towards the result reached by the Commission in its April 22 Order became even more apparent at the May 27, 2009 Agenda meeting. In responding to an admonition from Commissioner Murray that it was improper for the judge to take a position adverse to the Commission's April 22 Order, Judge Jones stated the following:

> Judge Jones: Oh, I'm not taking the position [that the Commission's April 22 order was wrong]. I'm just saying that that's the truth of the matter. If it…that's - that's what discovery is - and we, the only reason we made that…well I won't say why I wrote those words [on the April 22 Order], I'll just leave it…

19. Judge Jones' assertion that a majority of commissioners had erred in their decision to deny Staff's Motion to Compel was clearly inconsistent with his duty to uphold, rather than subvert, the decisions of those commissioners who have been appointed to make such decisions. Such an assertion also provides a further indication of

the real motivation and bias underlying the inexplicable and unwarranted delays in disposing of the motions that were pending before the Commission at the time.

20. As the foregoing clearly demonstrates, these motions could and should have been disposed of long ago in the normal course of the Commission's regulatory business and there should be no reason to revisit them. The only reason they are being revisited at all is because a deliberate process was undertaken to artificially delay their final consideration in order to pursue a decision different from the one reached by a majority of commissioners on April 22, 2009 and reaffirmed on May 27, 2009. Because the process for scheduling Commission matters is not a transparent one, Laclede has no idea whether the will of the majority was frustrated by a single regulatory law judge or was sanctioned or even directed by others. What Laclede does know, however, is that this is decidedly not the kind of fair and impartial conduct of Commission proceedings that is affirmatively mandated by the Commission's own rules (4 CSR 240-2.120) and applicable Missouri law. ***State ex rel. Fischer v. Public Service Commission***, 645 S.W.2d 39 (Mo. App. W.D. 1982). Nor is it in any way consistent with the duties mandated by the Commission for its presiding officers which includes the both the duty to act in a fair and impartial manner and the duty to "take appropriate action to avoid unnecessary delay in the disposition of cases . . ." (4 CSR 240-2.120(1))

21. This recitation of the tortured procedural history of the attempts to reconsider the April 22 Order raise troubling questions about the fairness of those procedures. But equally important is the fundamental legal issue: the April 22 Order was approved by a majority of the Commission and the Commission does not reconsider its orders when, as is the case here, a motion for reconsideration does not raise any new

issues that were not already considered by the Commission. Reconsideration in this circumstance would be a radical departure from settled law and consistent Commission precedent.

## III. Conclusion

22. The September 9 Order is unlawful, unjust, arbitrary, capricious and unreasonable, and should be rescinded for two reasons. First, the September 9 Order grants motions for reconsideration without any legal or evidentiary basis, and in the absence of any new or overlooked arguments, which standard has been consistently applied in numerous Commission cases. Second, the process in which motions for reconsideration of the Commission's April 22, 2009 Order was handled has been manifestly biased, unfair and prejudicial.

**WHEREFORE,** for the foregoing reasons, Laclede respectfully requests that the Commission rescind its September 9 Order Granting Motions for Reconsideration upon conclusion of the oral argument scheduled in this case.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading has been duly served upon the General Counsel of the Staff and the Office of the Public Counsel by email or United States mail, postage prepaid, on this 29th day of September, 2009.

/s/ **Gerry Lynch**
Gerry Lynch