

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

In the Matter of Laclede Gas Company's)
Purchased Gas Adjustment Factors to be)
audited in its 2005-2006 Actual Cost) Case No. GR-2006-0288
Adjustment.)

)
In the Matter of Laclede Gas Company's)
Purchased Gas Adjustment (PGA) Factors) Case No. GR-2005-0203
to be Audited in its 2004-2005 Actual)
Cost Adjustment .)

STAFF'S NOTICE CONCERNING STATUS OF CASES AND LACLEDE'S

FAILURE TO COMPLY WITH COMMISSION ORDERS

COMES NOW the Staff of the Missouri Public Service Commission in the above-captioned matters and, in response to the Commission's November 4, 2009 Order Directing Laclede to Produce Information states that Laclede has not produced any information. For its Notice Staff states:

1. On November 4, 2009, the Commission, by majority vote, issued its Order directing Laclede to produce documents in each of the above cases.

2. Laclede has failed to do so. In a November 9, 2009 letter to Staff Counsel, Laclede, stated that it is not in possession of the requested documents, even though Laclede Gas Company and Laclede Energy Resources are affiliated and have the same Vice President, Kenneth Neises. Mr. Neises undoubtedly has the ability to control the requested documents. In its letter, Laclede further stated:

However, consistent with the procedural and substantive due process abuses that have marked this case over the past several months, we anticipate that neither Staff nor the current Commission will be satisfied with this legally acceptable discovery response.

Therefore, we are also writing to inform Staff that Laclede is today filing a petition with the Missouri Western District Court of Appeals for a Writ of Prohibition or Mandamus to stop the Commission from taking advantage of its improper procedural actions to order an unlawful document production. At the same time, LER, the party on whom falls the entire burden of compliance with the unlawful document request, is also requesting a Writ of Prohibition or Mandamus. We will, of course, provide copies of these filings to Staff.

3. In addition to filing its Application for Rehearing, or Alternatively Request for Reconsideration, on November 9, Laclede filed its Writ and Suggestions in Support with the Western District Court of Appeals. As Laclede indicated, it provided these documents to Staff. (*See Attachment A.*)

4. On November 20, 2009, the Commission filed its Response in the Western District. On November 24, 2009, the Western District denied Laclede's Petition for Writ.

5. Subsequently On December 14, Laclede filed its Petition for Writ for Prohibition or Mandamus with the Missouri Supreme Court. (*See Attachment B.*)

6. On Tuesday January 26, in Case No. SC90567, the Missouri Supreme Court also denied Laclede's Petition.

7. The Commission's Orders in this case are in effect and Staff respectfully suggests Laclede has exhausted its Writ process. The Commission may wish to consider moving forward in this case by directing Laclede to comply with Commission orders. One way of proceeding would be through a show-cause order.

WHEREFORE, the Staff requests, in light of the Supreme Court's denial of Laclede's Writ of Prohibition or Mandamus, the Commission consider moving forward with enforcing its orders in this case.

Respectfully submitted,

/s/ Lera L. Shemwell

Lera L. Shemwell
Deputy General Counsel
Missouri Bar No. 43792

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-7431 Telephone)
(573) 751-9285 (Fax)
lera.shemwell@psc.mo.gov

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered or transmitted by facsimile or electronic mail to all counsel of record this 28th day of January, 2010.

/s/ Lera Shemwell

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

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MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI ex rel.)
LACLEDE GAS COMPANY,)
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Relator,)
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v.)
)
PUBLIC SERVICE COMMISSION)
OF THE STATE OF MISSOURI,)
)
Respondent.)

Cause No. **WD 71702**

**RELATOR LACLEDE GAS COMPANY'S PETITION
FOR WRIT OF PROHIBITION OR MANDAMUS**

COMES NOW Relator Laclede Gas Company ("Laclede"), and states:

1. Relator Laclede Gas Company ("Laclede") seeks a writ of prohibition or, in the alternative, a writ of mandamus, to prevent Respondent Missouri Public Service Commission (the "PSC" or "Commission") from enforcing its November 4, 2009 Order in which a 3-2 majority of the PSC purports to require Laclede to produce —on three business days notice—over ten thousand pages of records that belong to Laclede's unregulated affiliate Laclede Energy Resources ("LER").

2. Laclede and LER are each subsidiaries of a holding company, The Laclede Group, Inc. ("LG"). Laclede is a regulated public utility engaged in the retail distribution and sale of natural gas. LER is an energy marketing company engaged in the unregulated marketing of natural gas and other services to retail and wholesale customers primarily in the Midwest. LER and other subsidiaries of LG are not subject to PSC regulation.

3. LER's sales to Laclede are a negligible part of LER's business. Since 2004 LER's sales to Laclede have never been more than 8% of LER's total sales to all buyers. In 2008 LER's sales to Laclede were less than 1% of LER's total sales. During that period, LER never purchased from Laclede more than 7% of LER's total gas and capacity purchases, and in 2008 the percentage of LER's gas and capacity purchased from Laclede was less than 1% of LER's total purchases.

4. The November 4, 2009 Order—entered over the dissent of two of the five Commissioners—purports to require Laclede to produce over ten thousand pages of documents belonging to LER that pertain to sales between LER and entities other than Laclede.

5. Laclede seeks review by writ because the PSC and the actions of the presiding regulatory law judge (the "Presiding Judge") are violating Laclede's due process rights in two significant ways:

- (a) the PSC and the Presiding Judge did not follow the Commission's own procedures, but instead acted in a highly irregular, ad hoc and biased manner that prevented enforcement of a vote by a majority of the Commission that ruled that Laclede was *not* required to produce LER's documents; and
- (b) when a different majority of the Commission later voted to require Laclede to produce LER's documents, the Commission was acting far in excess of its statutory authority and contrary to its own regulations, which strictly limit the PSC's authority to investigate unregulated affiliates of regulated entities and which afford utilities the right to an evidentiary hearing.

6. Because the PSC repeatedly refused to follow its own procedures, and disregarded a binding prior Commission vote that Laclede was not required to produce the LER records, the PSC has violated Laclede's due process rights. *See, e.g., Colyer v.*

State Bd. of Registration for Healing Arts, 257 S.W.3d 139, 145 (Mo. App. 2005);
Derrickson v. Bd. of Educ. of the City of St. Louis, 703 F.2d 309, 315 (8th Cir. 1983).

7. At a Commission Agenda meeting on April 15, 2009, the Commission voted 3-2 that Laclede was *not* required to produce the LER documents, and that vote resolved the issue. Consistent with Commission practice, at the next Agenda Meeting on April 22, 2009, the Commission voted to approve the order implementing its April 15, 2009 vote. The Presiding Judge, however, did not follow PSC procedure for routine, post-decision motions for reconsideration, precluding a timely vote on those motions and otherwise delaying the ultimate finality of the April 22, 2009 Order until after the publicly known retirement of one of the Commissioners who had voted in favor of Laclede's position. The motions for reconsideration were then left undecided for an additional five months, during which time a new Commissioner was seated. On November 4, 2009, the Commission reversed the April 22, 2009 Order, and issued a new Order in which the new Commissioner voted with the two Commissioners who had voted against Laclede's position on April 15, 2009.

8. These tactical maneuvers violated the Commission's own regulations, as well as statutes that limit the authority of the Presiding Judge and expressly state that the PSC shall not unnecessarily delay the resolution of matters. R.S.Mo. § 386.240; 4 C.S.R. 240-2.120(1).

9. These serious procedural violations are more than sufficient reason to issue the writ. But the November 4, 2009 Order must also be set aside because it purports to give the PSC authority to investigate unregulated affiliates such as LER in violation of

the PSC's statutory authority, which expressly prohibits the PSC from investigating such unregulated entities.

10. Pursuant to R.S.Mo. § 393.140(12), the PSC's authority to investigate unregulated affiliates is limited to examining transactions between the regulated entity and the unregulated affiliate. The Commission's own affiliate transaction rules, 4 C.S.R. 240-40.015, as well as the prior Commission Order approving the LG holding company structure, are equally clear that the Commission has no authority to investigate LER's transactions with entities other than Laclede.

11. Forcing Laclede to produce documents that belong to an unregulated affiliate that is not subject to PSC jurisdiction is an end run around the statutory limits on the PSC's authority and a further violation of Laclede's due process rights. *See Gerling Global Reinsurance Corp. of America v. Gallagher*, 267 F.3d 1228, 1235 (11th Cir. 2001).

12. This Court has jurisdiction to review the actions of the PSC under Article V, Section 4, Subsection 1 of the Missouri Constitution. "Each district of the court of appeals shall have general superintending control over all courts and tribunals in its jurisdiction." *Id.* This jurisdiction includes administrative bodies like the PSC. *See, e.g., State ex rel. A & G Comm. Trucking, Inc. v. Dir. of the Manufactured Housing & Modular Units Program of the Public Service Comm'n.*, 168 S.W.3d 680, 683 (Mo. App. 2005). Specifically, this Court "has authority to examine acts of the Public Service Commission for due process violations." *State ex rel. Fischer v. Public Service Comm'n.*

of Mo., 645 S.W.2d 39, 43 (Mo. App. 1982); and *State ex rel. Chicago Rock Island & Pacific R.R. Co. v. Public Service Comm'n.*, 312 S.W.2d 791, 796 (Mo. banc 1958).¹

13. Judicial review is proper where an administrative board has acted unlawfully or outside its jurisdiction. *State ex rel. Office of the Public Counsel v. Public Service Comm'n.*, 236 S.W.3d 632, 635 (Mo. banc 2007).

14. Mandamus is appropriate “where the administrative board (or court) has acted unlawfully or wholly outside its jurisdiction or authority or has exceeded its jurisdiction, and also where it has abused whatever discretion may have been vested in it.” *Id.*

15. Prohibition is a “proper remedy for an abuse of discretion during discovery.” *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. banc 2002). This Court has jurisdiction to issue a writ of prohibition in relation to an order issued by the PSC. *See, e.g., State ex rel. Southwestern Bell Telephone v. Brown*, 795 S.W.2d 385, 386-87 (Mo. banc 1990). Prohibition will lie “where an act in excess of jurisdiction is clearly evidenced.” *Id.*

16. A writ of prohibition or mandamus should issue here because the PSC has acted outside the scope of its jurisdiction and in a manner that violated Laclede’s due process rights. The manipulation of the Commission’s rules to reverse a decision

¹ As this Court has previously ruled, Laclede is required to seek review by writ in this Court and cannot seek that remedy in Circuit Court. *State ex rel. A & G Comm. Trucking, Inc. v. Dir. of the Manufactured Housing & Modular Units Program of the P.S.C.*, 168 S.W.3d 680, 683-84 (Mo.App. 2005) (holding that only the Supreme Court and Courts of Appeal have jurisdiction to issue writs of prohibition against the PSC, and that circuit courts do not have authority to issue such writs). The issue of this Court’s jurisdiction is discussed in more detail in Section III(A) (pp. 9-10) of Laclede’s Suggestions in Support.

approved by a majority of Commissioners would be troubling enough and sufficient to warrant issuance of a writ because of the blatant violation of due process.

17. But a writ is all the more necessary because the violations here are not merely procedural, but substantive. The Order entered by the new Commission majority is wholly outside the PSC's jurisdiction because the PSC is claiming the right to investigate Laclede's unregulated affiliate LER, in direct violation of the statutes that define the scope of the PSC's jurisdiction and the PSC's own regulations that limit its authority to investigate unregulated affiliates of regulated entities.

18. Prohibition and mandamus are extraordinary remedies, but they are necessary here because of the flagrant nature of the due process violations and the importance of establishing that the PSC may not act outside the scope of its statutorily defined jurisdiction.²

19. As a practical matter, if the PSC is allowed to proceed, Laclede will have no effective remedy because the harm caused by the Commission's ultra vires actions will have already occurred before Laclede can appeal at the conclusion of the underlying and ongoing proceeding.

20. Laclede has filed contemporaneously herewith its Suggestions in Support of its Petition for a Writ of Prohibition, or in the Alternative, a Writ of Mandamus. Laclede's Suggestions in Support set forth a more detailed description of the

² LER has concurrently filed a petition for a writ of review with this Court. Laclede concurs with the arguments made by LER in its Petition.

unauthorized and irregular actions of the PSC, and those Suggestions are hereby incorporated by reference as if fully set forth herein.

WHEREFORE, for all of the foregoing reasons, and the reasons stated in Laclede's Suggestions in Support, Relator Laclede Gas Company respectfully requests that the Court issue its preliminary writ of prohibition or, in the alternative, mandamus, and, after briefing and argument, to make the writ permanent by directing the Respondent Missouri Public Service Commission to vacate its November 4, 2009 Order and reinstate its April 22, 2009 Order denying the Staff's Motion to Compel, and grant Relator Laclede Gas Company such other and further relief as the Court deems proper under the circumstances.

Respectfully submitted,

THOMPSON COBURN LLP

By Lawrence Friedman by MR

Lawrence C. Friedman, #34382

Paul D. Lawrence, #53202

One US Bank Plaza

St. Louis, Missouri 63101

314-552-6000

FAX 314-552-7000

lfriedman@thompsoncoburn.com

plawrence@thompsoncoburn.com

Attorneys for Relator
Laclede Gas Company

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WESTERN DISTRICT

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WESTERN DISTRICT

STATE OF MISSOURI ex rel.)
LACLEDE GAS COMPANY,)
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Relator,)
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v.)
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PUBLIC SERVICE COMMISSION)
OF THE STATE OF MISSOURI,)
)
Respondent.)

Cause No. **NWD 71702**

**SUGGESTIONS IN SUPPORT OF LACLEDE GAS COMPANY'S
PETITION FOR WRIT OF PROHIBITION OR MANDAMUS**

I. INTRODUCTION

Relator Laclede Gas Company ("Laclede") seeks a writ of prohibition or, in the alternative, a writ of mandamus, to prevent Respondent Missouri Public Service Commission (the "PSC" or "Commission") from enforcing its November 4, 2009 Order in which a 3-2 majority of the PSC purports to require Laclede to produce — on three business days notice — over ten thousand pages of records that belong to Laclede's unregulated affiliate Laclede Energy Resources, Inc. ("LER").

Laclede and LER are each subsidiaries of a holding company, The Laclede Group, Inc. ("LG"). Laclede is a public utility engaged in the retail distribution and sale of natural gas subject to the Commission's regulation. LER is an energy marketing company that engages in the unregulated marketing of natural gas and other services to

retail and wholesale customers primarily in the Midwest. LER and other subsidiaries of LG are not subject to PSC regulation.

LER's transactions with Laclede are a negligible part of LER's business. Since 2004 LER's sales to Laclede have never been more than 8% of LER's total sales to all buyers. In 2008 LER's sales to Laclede were less than 1% of LER's total sales. During that period, LER never purchased from Laclede more than 7% of LER's total gas and interstate pipeline capacity purchases, and in 2008 the percentage of LER's gas and pipeline capacity purchased from Laclede was less than 1% of LER's total purchases. The November 4, 2009 Order in Laclede's Actual Cost Adjustment ("ACA") cases was entered over the dissent of two of the five Commissioners. The Order purports to require Laclede to produce more than ten thousand pages of documents belonging to LER that pertain to purchases and sales between LER and entities other than Laclede.

Laclede seeks the review of this Court by writ¹ because the PSC and the actions of the presiding regulatory law judge (the "Presiding Judge") are violating Laclede's due process rights in two significant ways: (a) the PSC and the Presiding Judge did not follow the Commission's own procedures, but instead acted in a highly irregular, ad hoc and biased manner that prevented enforcement of a vote by a majority of the Commission that ruled that Laclede was *not* required to produce LER's documents; and (b) when a

¹ As this Court has previously ruled, Laclede is required to seek review by writ in this Court and cannot seek that remedy in Circuit Court. *State ex rel. A & G Comm. Trucking, Inc. v. Dir. of the Manufactured Housing & Modular Units Program of the P.S.C.*, 168 S.W.3d 680, 683-84 (Mo.App. 2005) (holding that only the Supreme Court and Courts of Appeal have jurisdiction to issue writs of prohibition against the PSC, and that circuit courts do not have authority to issue such writs). The issue of this Court's jurisdiction is discussed in more detail in Section III(A) (pp. 9-10) below.

different majority of the Commission later voted to require Laclede to produce the very same LER documents, the Commission acted far in excess of its statutory authority and contrary to its own regulations and practices, which strictly limit the PSC's authority to investigate unregulated affiliates of regulated entities, and which afford utilities the right to an evidentiary hearing before PSC Staff ("Staff") recommendations are approved in ACA cases.

Because the PSC repeatedly refused to follow its own procedures, and disregarded a binding prior Commission vote that Laclede was not required to produce the LER records, the PSC has violated Laclede's due process rights. *See, e.g., Colyer v. State Bd. of Registration for Healing Arts*, 257 S.W.3d 139, 145 (Mo. App. 2005); *Derrickson v. Bd. of Educ. of the City of St. Louis*, 703 F.2d 309, 315 (8th Cir. 1983). At a Commission Agenda meeting on April 15, 2009, the Commission voted 3-2 that Laclede was *not* required to produce the LER documents, and that vote resolved the issue. Consistent with Commission practice, at the next Agenda Meeting on April 22, 2009, the Commission voted to approve the order implementing its April 15, 2009 vote. The Presiding Judge, however, did not follow PSC procedure for routine, post-decision motions for reconsideration, precluding a timely vote on those motions and otherwise delaying the ultimate finality of the April 22, 2009 Order until after the publicly known retirement of one of the Commissioners who had voted in favor of Laclede's position. The motions for reconsideration were then left undecided for an additional five months, during which time a new Commissioner was seated.

On November 4, 2009, the Commission reversed the April 22, 2009 Order, and issued a new Order [Exhibit 1] in which the new Commissioner voted with the two Commissioners who had voted against Laclede's position on April 15, 2009. These tactical maneuvers violated the Commission's own regulations, as well as statutes that limit the authority of the Presiding Judge and expressly state that the PSC shall not unnecessarily delay the resolution of matters. R.S.Mo. § 386.240; 4 C.S.R. 240-2.120(1).

These serious procedural violations are more than sufficient reason to issue the writ. But the November 4, 2009 Order must also be set aside because it purports to give the PSC authority to investigate unregulated affiliates such as LER in violation of the PSC's statutory authority and the PSC's own rules, both of which expressly prohibit the PSC from investigating unregulated entities like LER.

Pursuant to R.S.Mo. §393.140(12), the PSC's authority to investigate unregulated affiliates is limited to examining transactions between the regulated entity and the unregulated affiliate. The Commission's own affiliate transaction rules, 4 C.S.R. 240-40.015, as well as the prior Commission Order approving the LG holding company structure, are equally clear that the Commission has no authority to investigate LER's transactions with entities other than Laclede. Forcing Laclede to produce documents that belong to an unregulated affiliate that is not subject to PSC jurisdiction, and that do not relate to transactions with Laclede, is an end run around the statutory limits on the PSC's authority and a further violation of Laclede's due process rights. *See Gerling Global Reinsurance Corp. of America v. Gallagher*, 267 F.3d 1228, 1235 (11th Cir. 2001).

The arbitrary and capricious nature of the PSC's treatment is further illustrated by the imposition of a three business day deadline for Laclede to produce the LER documents — a timetable that would be impossible to meet even if Laclede had possession of LER's documents, which it does not. The November 4, 2009 Order also concedes that the Commission does *not* have the authority under Missouri statutes or the affiliate transaction rules to obtain the requested documents.

In the November 4, 2009 Order, the three-member majority claims that the PSC is not basing its demand on any (non-existent) authority to investigate LER under the affiliate transaction rules. Instead, the majority claims to be acting solely under the “discovery...rules of civil procedure” (*i.e.*, S.Ct.R. 56 *et seq.*) that apply to PSC proceedings. Nov. 4, 2009 Order [Exhibit 1] at 2-3. If that were really the case, Laclede could not be required to produce LER documents. Laclede and LER are separate entities and a party like Laclede cannot be required to produce documents of a non-party. *E.g.*, *Richardson v. Dir. of Rev.*, 725 S.W.2d 141, 142 (Mo. App. 1987).

Prohibition and mandamus are extraordinary remedies, but they are necessary here because of the flagrant nature of the due process violations and the importance of enforcing the established law prohibiting the PSC from acting outside the scope of its statutorily defined jurisdiction. As a practical matter, if the PSC is allowed to proceed, Laclede will have no effective remedy because the harm caused by the Commission's ultra vires actions will have already occurred before Laclede can appeal at the conclusion of the underlying and ongoing proceeding.

II. FACTUAL AND PROCEDURAL BACKGROUND

This dispute arises out of Laclede's ACA cases for 2004-05 and 2005-06 (PSC Case Nos. GR-2005-0203 and GR-2006-0288). An ACA case is an annual Commission procedure to determine whether gas costs incurred by Laclede in a designated prior annual period were properly included in customer rates that are subject to regulation by the Commission. Laclede is the entity that is the party to the Laclede ACA Cases. LER is not a party to those Cases.

During the course of the Laclede ACA cases, the PSC Staff requested and Laclede provided numerous documents concerning transactions between Laclede and LER consistent with the PSC's affiliate transaction rules. The Staff, however, first requested the LER documents that are the subject of this Petition on July 25, 2008. The Staff sought to require Laclede to produce all of LER's gas supply and transportation invoices, contracts, nomination records, general ledger and dealbooks, journals, sales data, and net margins achieved for all or portions of the relevant ACA periods, without regard to whether those documents related to transactions between Laclede and LER. [Exhibit 2]. Laclede had already produced to the Staff tens of thousands of documents relating to Laclede's purchases and sales of gas between Laclede and other entities, including purchase and sales made between Laclede and LER.

Laclede opposed the request for documents relating to LER's transactions with unrelated entities because, among other reasons, LER's transactions with entities other than Laclede are not subject to PSC regulation or the PSC's affiliate transaction rules. R.S.Mo. §393.140(12) and 4 C.S.R. 240-40.015 specifically state that the PSC may only

investigate an unregulated entity's transactions with its regulated affiliate. [Exhibit 3].

Laclede also opposed the request because it was part and parcel of an effort by the Staff to circumvent the practices and procedures that the Commission has followed for years in ACA cases. Those practices and procedures always afforded the utility and other affected parties an opportunity to be heard, present and rebut evidence, cross examine witnesses, and otherwise exercise their due process rights *before* the Commission decided how to rule on a Staff ACA recommendation. In this case, one of those recommendations was Staff's suggestion that the Commission should open up an investigatory docket to explore whether Laclede has complied with the Commission's affiliate transactions rule in its dealings with LER.

The Staff's recommendation for such an investigation was premised on its "concerns" over the propriety of several transactions between Laclede and LER that the PSC has now relied on in its November 4, 2009 Order to compel the production of LER information. Rather than follow the traditional ACA process and give Laclede the opportunity to demonstrate to the Commission why those concerns were baseless (and hence did not warrant such an investigation), the Staff sought to short circuit these procedures by requesting that the Commission order Laclede to produce the very kind of information that Staff would presumably seek in such an investigation.

Several rounds of briefing and argument by Laclede, the Staff and the Office of Public Counsel ("OPC") followed. The Commission initially granted the Staff's Motion to Compel on October 20, 2008. Laclede filed (in accordance with PSC procedure) a timely Motion for Reconsideration on October 30, 2008. [Exhibit 4]. The Commission

denied Laclede's Motion for Reconsideration on December 17, 2008. [Exhibit 5].

Laclede and the PSC Staff filed separate motions for clarification of the December 17, 2008 Order. [Exhibits 6 and 7]. After briefing on the motions for clarification and an oral argument, on April 15, 2009, a 3-2 majority of the PSC voted to rescind the October 20, 2008 Order and deny the Motion to Compel.²

In accordance with PSC procedure, the Commission approved an Order implementing that vote on April 22, 2009. [Exhibit 8]. The Presiding Judge apparently disagreed with the Commission's April 15 decision, as did the Chairman of the Commission, who had voted with the minority on April 15, 2009. As the retirement of Commissioner Connie Murray, who had voted with the majority on April 15, 2009, was imminent, the Presiding Judge and, to a lesser extent, the Chairman of the Commission, proceeded to embark on a series of highly unusual, if not extraordinary, maneuvers that were contrary to PSC rules and procedures and that had the effect of nullifying the PSC's April 22, 2009 Order:

- Motions for reconsideration, and by extension, orders granting reconsideration, must set forth specific grounds for reconsideration. 4 C.S.R. 240-2.160(2). Following the April 15, 2009 vote, the Presiding Judge should have presented an order reflecting the Commission's vote and the reasons supporting it. He instead presented an extremely short, legally questionable proposed order that did not reflect the Commission's reasons for its vote. The Presiding Judge did so even though the Commission had clearly stated those reasons and Laclede had submitted proposed findings of fact and conclusions of law for the order. [Exhibit 9].

² Video recordings of PSC Agenda meetings are available online. To the extent that these Suggestions refer to statements or actions at an Agenda meeting that are not memorialized in a written exhibit, the recorded PSC Agenda meeting can be viewed at www.psc.mo.gov by selecting "Resource Center," "Watch Meetings/Hearings," and then the specific date under "Agenda 2009."

- The PSC promptly and summarily denies motions for reconsideration that do not set forth new legal or factual arguments. *See, e.g., 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), and other cases cited *infra*. Pursuant to this practice, the Presiding Judge should have placed the Staff and OPC motions for reconsideration (which stated no new arguments) on one of the Commission's upcoming agendas (May 13 or 21) for disposal. The motions were not placed on any agenda until May 27, when, incredibly, they were listed as a "discussion item," rather than as an "Order." As discussed below, this maneuver prevented a final vote and implementation of the Commission's decision at the May 27 meeting to reject the motions for reconsideration. [Exhibit 10].
- Although on May 20, 2009, Laclede filed a request for the Commission to move the matter along by placing the motions for reconsideration on the May 21, 2009 Agenda, the Presiding Judge and the Chairman not only failed or refused to do so but, at the May 21 Agenda meeting, the Chairman attempted to cancel the May 27, 2009 Agenda meeting.
- Under PSC regulations, the Presiding Judge is not authorized to act in contradiction of the authorization of the Commission. R.S.Mo. § 386.240. At the May 27 meeting, the Presiding Judge indicated to the Commissioners that he believed they had erred in entering the April 22, 2009 Order. Commissioner Murray, who was expected to retire on or about June 1, specifically admonished the Presiding Judge for taking a position adverse to the Commission's vote.
- At the May 27, 2009 Agenda Meeting, the Commission discussed the Motions for Reconsideration and by a vote of 3-2 resolved to deny them. Later that day, Commissioner Murray and Laclede separately requested a special agenda meeting to be held on May 28 or 29, so an order implementing the May 27 vote could be formally approved before Ms. Murray retired. The Chairman failed to respond to either request. Since the Chairman had been made aware that Commissioner Murray's retirement was imminent, the result of his inaction was that the matter was not resolved before Commissioner Murray retired. [Exhibit 11].

When the Presiding Judge raised the matter again at the June 3, 2009 Agenda Meeting for a vote to implement the Commission's May 27 decision, Commissioner Murray was gone. As both the Presiding Judge and the Chairman were well aware, also

gone was the majority who had read the briefs, heard the oral argument, issued an order more than a month before to deny the Motion to Compel, and voted just the week before to reject the motions to reconsider that order.

The matter was raised again on July 8, 2009, at which time the Chairman jokingly remarked in response to a 2-2 vote, "Where's Commissioner Murray when you need her?" The Presiding Judge next raised the motions for consideration after Commissioner Kenney (the new Commissioner who replaced Commissioner Murray) was seated on the Commission on July 29, 2009. On September 2, 2009, the Commission voted 3-2 to grant the Motions for Reconsideration and set the matter for another oral argument. This vote was implemented by order dated September 9, 2009, and the oral argument was scheduled on September 29, 2009 (and later rescheduled for October 1). [Exhibit 12]. Laclede filed a Motion to Rescind Order Granting Motions for Reconsideration on September 29, 2009. [Exhibit 13]. Laclede's motion was neither considered nor ruled upon by the Commission.

The Commission entered its Order Directing Laclede to Produce Information on November 4, 2009. [Exhibit 1]. Two of the five Commissioners dissented. Commissioner Jarrett will be issuing a separate dissenting opinion which Laclede will submit to the Court as a supplement to this Petition when that dissent is issued.

III. ARGUMENT

A. This Court Has Jurisdiction to Issue a Writ of Prohibition or a Writ of Mandamus.

Article V, Section 4, Subsection 1 of the Missouri Constitution gives this Court jurisdiction to review actions of the PSC. “Each district of the court of appeals shall have general superintending control over all courts and tribunals in its jurisdiction.” *Id.* This jurisdiction includes administrative bodies like the PSC. *See, e.g., State ex rel. A & G Comm. Trucking, Inc. v. Dir. of the Manufactured Housing & Modular Units Program of the Public Service Comm’n.*, 168 S.W.3d 680, 683 (Mo. App. 2005); and *State ex rel. Mississippi Lime Co. v. Mo. Air Conservation Comm’n.*, 159 S.W.3d 376, 381 (Mo. App. 2004). Specifically, this Court “has authority to examine acts of the Public Service Commission for due process violations.” *State ex rel. Fischer v. Public Service Comm’n. of Mo.*, 645 S.W.2d 39, 43 (Mo. App. 1982); and *State ex rel. Chicago Rock Island & Pacific R.R. Co. v. Public Service Comm’n.*, 312 S.W.2d 791, 796 (Mo. banc 1958).

Judicial review is proper where an administrative board has acted unlawfully or outside its jurisdiction. *State ex rel. Office of the Public Counsel v. Public Service Comm’n.*, 236 S.W.3d 632, 635 (Mo. 2007). Mandamus is appropriate “where the administrative board (or court) has acted unlawfully or wholly outside its jurisdiction or authority or has exceeded its jurisdiction, and also where it has abused whatever discretion may have been vested in it.” *Id.* Prohibition is a “proper remedy for an abuse of discretion during discovery.” *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. banc 2002). This Court has jurisdiction to issue a writ of prohibition in relation to an order issued by the PSC. *See, e.g., State ex rel. Southwestern Bell Telephone v. Brown*, 795 S.W.2d 385, 386-87 (Mo. banc 1990). Prohibition will lie “where an act in excess of jurisdiction is clearly evidenced.” *Id.*

A writ of prohibition or mandamus should issue here because the PSC has acted outside the scope of its jurisdiction and in a manner that violated Laclede's due process rights. The manipulation of the Commission's rules and practices to first deprive Laclede of its right to the evidentiary hearing customarily afforded in ACA proceedings³ and then to reverse a decision approved and reconfirmed by a majority of Commissioners would be troubling enough and sufficient to warrant issuance of a writ because of the blatant violation of due process. But a writ is all the more necessary because the violations here are not merely procedural, but substantive. The Order entered by the new Commission majority is wholly outside the PSC's jurisdiction because the PSC is claiming the right to investigate Laclede's unregulated affiliate, LER, in direct violation of the statutes that define the scope of the PSC's jurisdiction and of the PSC's own regulations that limit its authority to investigate unregulated affiliates of regulated entities.

B. The PSC Violated Laclede's Due Process Rights by Failing to Provide Laclede an Opportunity for Hearing at a Meaningful Time and in a Meaningful Manner, and by Failing to Follow the PSC's Own Procedures.

"[D]ue process requires that administrative hearings be fair and consistent with rudimentary elements of fair play." *State ex rel. Fischer*, 645 S.W.2d at 43. "Procedural due process require the opportunity to be heard at a meaningful time and *in a meaningful manner*." *Colyer v. State Bd. of Registration for Healing Arts*, 257 S.W.3d at 145

³ Laclede has repeatedly requested, but has been denied, an opportunity for such an evidentiary hearing. *E.g.*, Ex. 4 (Laclede's October 30, 2008 Motion for Reconsideration, Request for Stay and Request for Establishment of an Evidentiary Hearing) pp. 17-18.

(emphasis added). An agency such as the PSC violates the due process rights of the parties subject to its jurisdiction if it does not follow its own regulations or procedures. *Id.*; see also *Derrickson v. Bd. of Educ. of the City of St. Louis*, 703 F.2d at 315.

The PSC here departed so dramatically from its usual procedures and acted in manner so at variance with impartial adjudication that Laclede was deprived of its right to be heard in a “meaningful manner.” After a full briefing and oral argument, the Commission, in its April 15, 2009 vote, conclusively resolved in favor of Laclede the issue of the Staff’s Motion to Compel Laclede to produce the LER documents.

In addition to being fully consistent with the applicable laws, rules and regulations governing access to affiliate information, such action was also protective of Laclede’s due process right to challenge, in an evidentiary hearing, the basis for the Staff recommendation and supporting allegations upon which the request to produce such documents was premised. At that point, however, the Presiding Judge along with the Chairman prevented the PSC from following its own procedures, starting with entry of a summary April 22 Order that failed to provide any rationale supporting the PSC’s April 15 ruling, and continuing with manipulation of the process whereby consideration of motions for reconsideration were artificially delayed in violation of Commission rules until one Commissioner retired and a new Commissioner took office and voted to reverse the April 22, 2009 Order.⁴

⁴ Whether the Presiding Judge acted on his own or at the direction of others was never clear to Laclede. In either event, PSC procedures were not followed.

The Commission's Rules require that motions for reconsideration must "set forth specifically the ground(s) on which the applicant considers the order to be unlawful, unjust, or unreasonable." 4 C.S.R. 240-2.160(2); *see also Re: Missouri-American Water Company*, Case No. WR-2008-0311, *Order Denying Motion for Reconsideration* (October 24, 2008). This standard similarly requires that an order granting reconsideration be based on a specific legal or evidentiary basis. To that end, the PSC regularly denies motions for reconsideration and applications for rehearing where the movants or applicants fail 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 September 9, 2009 Order, which granted the Motions for Reconsideration filed by the PSC Staff and the OPC, did not comply with these rules and procedures. Remarkably, the Commission's September 9, 2009 Order conceded that the April 22, 2009 Order was not "unlawful, unjust, or unreasonable," which are the only grounds on which the Commission is allowed to grant a Motion for Reconsideration. 4 C.S.R. 240-2.160(2). Rather, having run out the clock on Commissioner Murray, the September 9, 2009 Order confirmed that the delay was engineered improperly for that purpose by stating blithely that reconsideration was being granted solely because of the

change in the composition of the Commission. [Exhibit 12] (“Now a fifth Commissioner has joined the Commission and this issue may be settled”).

PSC rules require that motions for reconsideration setting forth no new arguments or issues of fact should be disposed of *promptly*; the Presiding judge must “take appropriate action to avoid unnecessary delay in the disposition of cases....” 4 C.S.R. 240-2.120(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, the Commission took 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.

Because of the actions of the Presiding Judge, the PSC failed to comply with the rule of avoiding unnecessary delay. The motions for reconsideration were filed by the Staff and OPC on May 1, 2009 and May 4, 2009, respectively. The Presiding Judge and all of the Commissioners expressed their concurrence with Laclede’s assessment that no new issues had been raised in these motions. Under normal circumstances, that would have resulted in the prompt issuance of an order denying motions for reconsideration within a few days or, at most, within a few weeks of when the motions were filed.

That did not happen in this case, even in the face of repeated requests for the Commission to do so. The Presiding Judge failed to place the motions for a vote on either the Commission’s May 13, 2009 Agenda Meeting or its May 21, 2009 Agenda

Meeting.⁵ 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, which ostensibly precluded entry of an order implementing that day's vote denying the motions before Commissioner Murray's retirement.

The Chairman not only ignored Laclede's May 20, 2009 request for expedited treatment, but also unsuccessfully attempted to cancel the May 27 Agenda Meeting.⁶ He then failed or refused to honor Commissioner Murray's request to permit a final vote on the Motions, either at the May 27 Agenda Meeting, when a majority of Commissioners clearly and unambiguously expressed their decision that those Motions should be denied, or at a special agenda meeting on May 28 or May 29, 2009. Meanwhile, the Presiding Judge kept the matter alive for several months,⁷ until after July 29, 2009, when a new Commissioner had been seated, permitting a reversal of the earlier majority and producing a 3-2 vote to require Laclede to produce the LER documents.

The statutes governing Commission procedure expressly state that the Presiding Judge's authority extends only to actions authorized by the Commission. R.S.Mo.

⁵ 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. However, such a reply is not allowed by the Commission's rules, nor had the Staff requested the opportunity to file such a reply at the time the Presiding Judge made such assertion.

⁶ The Chairman's attempt to cancel the May 27 Agenda Meeting was thwarted by another commissioner, who noted that there was not just one, but two motions for expedited treatment pending before the PSC.

⁷ The Presiding Judge raised the matter again at the July 8, 2009 agenda meeting, which resulted in another 2-2 tie vote. Arguably, this tie vote acts as yet a second PSC decision upholding the April 2009 Order, since a *majority* of the Commission at the July 8, 2009 vote did *not* vote in favor of reversing the April 2009 Order.

§ 386.240. The Presiding Judge's actions here violated that statute because they were not authorized by, and were directly contrary to, the Commission, and because he publicly disagreed with the Commission's position. In each of these instances detailed above, the Presiding Judge stepped far beyond the bounds of his statutory authority and thereby violated PSC procedures and regulations.

Finally, the Commission's own rules require that Commission proceedings be fair and impartial. 4 C.S.R. 240-2.120; *see also State ex rel. Fischer*, 645 S.W.2d at 43. Presiding officers of the Commission are likewise required to act in a fair and impartial manner. 4 C.S.R. 240-2.120(1). This requirement that the Commission and its officers act in a fair and impartial manner includes conducting proceedings that are meaningful and not instead merely meant to carry out a predetermined result or engineer a reversal of a duly decided issue.

This Court has previously held that the PSC failed to provide an opportunity for hearing in a meaningful manner where it conducted a hearing after already determining the result. In *State ex rel. Fischer*, the OPC claimed that its due process rights were violated where, although it was permitted to argue at hearing its position in a rate proceeding, the Commission had previously decided on the result prior to the hearing. 645 S.W.2d at 43. In particular, Laclede and other parties had stipulated to a rate structure. When the OPC objected to that rate structure, the PSC announced that it would hold a hearing on the matter, but it would be precluded from approving anything but the stipulated rate structure. *Id.* The trial court had entered judgment affirming the PSC's order. *Id.* This Court reversed and ruled that because the PSC had already decided the

matter prior to the hearing, the OPC's due process rights were violated because the PSC did not give the OPC an opportunity for hearing in a meaningful manner. *Id.*

The right to a meaningful hearing before an impartial decision-maker is a foundational element of due process rights, and a necessary component of a hearing "in a meaningful manner." *See Mangels v. Pena*, 789 F.2d 836, 838 (10th Cir. 1986) ("An impartial tribunal is an essential element of a due process hearing..."); and *Miller v. City of Mission*, 705 F.2d 368, 372 (10th Cir. 1983) (same); *see also Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Given v. Weinberger*, 380 F.Supp. 150, 154-55 (S.D. W. Va. 1974); *Borg-Johnson Elec., Inc. v. Christenberry*, 169 F.Supp. 746, 753 (S.D.N.Y. 1959); and *Friendly, Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1279 (1975) ("an unbiased tribunal is a necessary element in every case where a hearing is required").

Laclede's fundamental rights to an impartial adjudication in accordance with the PSC's own rules and procedures were repeatedly violated here. For a month and a half after the April 15, 2009 vote, the Presiding Judge and the Chairman essentially re-wrote the rules so that the will of the Commission majority was thwarted, and implementation of the Commission's decision was delayed until a new majority could rule in the manner the Presiding Judge and Chairman desired. If these tactics are legitimate, there can be no certainty about any Commission action, and parties that are regulated by the Commission can have no assurance that they can rely on a Commission order to remain in effect. That result is offensive to the fundamental principles of due process and requires review by writ by this Court.

C. The PSC Violated Laclede's Due Process Rights by Acting Outside the Scope of Its Jurisdiction and Requiring Laclede to Produce Documents Belonging to LER, an Unregulated Affiliate of Laclede.

The manipulation of the Commission's rules to reverse a decision approved by a majority of Commissioners would be troubling enough and sufficient to warrant issuance of a writ because of the blatant violation of due process. But a writ is all the more necessary because the violations here are not merely procedural, but substantive. The Order entered by the new Commission majority is wholly outside the PSC's jurisdiction because the PSC is claiming the right to investigate Laclede's unregulated affiliate, LER, in direct violation of the statutes that define the scope of the PSC's jurisdiction and of the PSC's own regulations that limit its authority to investigate unregulated affiliates of regulated entities.

The PSC is an administrative body created by statute. *Union Elec. Co. v. Public Service Comm'n*, 591 S.W.2d 134, 137 (Mo. App. 1979). The Commission has jurisdiction over "the manufacture, sale or distribution of gas, natural and artificial..." MO. REV. STAT. § 386.250(1) (2008). However, as an administrative body, the PSC "only has such powers as are expressly conferred by statute and reasonably incidental thereto." *Union Elec. Co.*, 591 S.W.2d at 137. Where, as here, the PSC attempts to act outside its jurisdiction, the Court can and should enter an appropriate order prohibiting the PSC from pursuing such action. *State ex rel. Office of Public Counsel v. Public Service Comm'n*, 236 S.W.3d 632, 635 (Mo. 2007).

Laclede is a regulated gas corporation as defined in R.S.Mo. §386.020 and

4 C.S.R. §240-40.015(1)(I) and is subject to PSC jurisdiction and regulation. LER is an affiliate of Laclede as defined by § 240-40.015(1)(A) and is not directly subject to PSC regulation. R.S.Mo. §393.140 sets forth the powers of the PSC with respect to gas, water, electricity and sewer service companies. Subsection 12 of §393.140 permits gas companies and other regulated utility companies to operate affiliated businesses that are not subject to the PSC's authority that otherwise is set forth in §393.140. Section 393.140(12) states in relevant part:

In case any ... gas corporation ... engaged in carrying on any other business other than owning, operating or managing a gas plant ... which other business is not otherwise subject to the jurisdiction of the commission, and is so conducted that its operations are to be substantially kept separate and apart from the owning, operating, managing or controlling of such gas plant ... , said corporation in respect to such other business *shall not be subject to the provisions of this chapter and shall not be required to procure the consent or authorization of the commission to any act in such other business or to make any report in respect thereof.* ...

(emphasis added). In other words, §393.140(12) permits gas companies and other regulated utilities to operate affiliated businesses that engage in non-regulated activities, and such affiliated businesses are neither subject to the jurisdiction of the PSC nor required to make reports to the PSC concerning those affiliated, non-regulated businesses. So long as the regulated utility company keeps the operations of its affiliate “substantially ... separate and apart” from the regulated utility business, §393.140(12) “precludes regulation of a utility’s affiliate....” *Id.*; see also *State ex rel. Atmos Energy Corp. v. Public Service Comm’n*, 103 S.W.3d 753, 764 (Mo. 2003) (emphasis added).

Case law and PSC decisions interpreting §393.140(12) require that affairs of a utility and its affiliate must be much more substantially intertwined than are Laclede and

LER before the affiliate may be subject to PSC jurisdiction. The fact of common ownership of a regulated utility and its affiliate does *not* give the PSC jurisdiction over the unregulated affiliate. *See Staff of Mo. P.S.C. v. Missouri Pipeline Co., LLC et al.*, 2006 WL 1344906 (Mo. P.S.C. 2006) (copy attached hereto as Exhibit 14). Rather, the affairs of a regulated utility and its affiliate have been held to *not* be “substantially kept separate and apart” when the utility and the affiliate engage in transactions with each other. In *State ex rel. Atmos Energy Corp.*, the Missouri Supreme Court held that a regulated utility and its affiliate were not “substantially separate and apart” because the regulated utility and the affiliate had engaged in transactions with each other. 103 S.W.3d at 764. The records sought by the PSC Staff in this case, however, do *not* involve transactions between Laclede and LER, but instead relate to transactions between LER and third parties. As a result, those records do not pertain to affiliate transactions and therefore fall outside the scope of the PSC’s jurisdiction.

The documents sought by the Staff likewise fall outside the scope of the affiliate transaction rules that specifically limit what records can be obtained from regulated entities regarding their unregulated affiliates. 4 C.S.R. 240-40.015(6)(B) permits the Staff to obtain affiliate-related records from Laclede “for the *sole purpose* of ensuring compliance with” the affiliate transaction requirements set forth in that rule, *i.e.*, transactions between the regulated entity and its unregulated affiliate (emphasis added). The Staff has acknowledged, however that the documents at issue do *not* concern transactions between Laclede and LER. The Staff cannot possibly be seeking these records to determine whether Laclede complied with affiliate transaction rules – the “sole

purpose” allowed by 4 C.S.R. 240-40.015 – and, as a result, the Staff’s request exceeds the scope of its regulatory authority.

The Commission Staff — abetted by a Presiding Judge and Chairman who have manipulated PSC procedures to nullify a vote to the contrary — seeks voluminous documents that document transactions between LER and unrelated and unregulated third parties. The Staff contends that it is permitted to obtain such records because it is reviewing the “prudence” of certain costs incurred by Laclede. In utility cost recovery proceedings such as the Laclede ACA Cases, a utility is permitted to recover its costs from ratepayers if it is determined that those costs were reasonable, or prudent, under the circumstances. *See State ex rel. GS Technologies Operating Co., Inc. v. P.S.C.*, 116 S.W.3d 680, 694 (Mo. App. 2003); and *State ex rel. Assoc. Nat. Gas Co. v. P.S.C.*, 954 S.W.2d 520, 529 (Mo. App. 1997). Under the prudence standard, a utility’s costs are presumed to be prudent unless shown to be otherwise. *Id.*

As these cases demonstrate, the prudence standard is a *standard* for evaluating certain costs that are subject to regulation. It is *not* a grant of jurisdiction to the PSC. If it were, Section 393.140(12) and the PSC’s own affiliate transaction rules would effectively be repealed.

In *Gerling Global Reinsurance Corp. of America v. Gallagher*, the Eleventh Circuit found a due process violation under analogous circumstances. There, a Florida statute permitted the Florida Insurance Commission to require insurers to report information about Holocaust-era insurance claims. *Id.* at 1229-30. The plaintiffs were six insurers that were affiliates of a German insurance company, which would have been

subject to Florida reporting requirements if it were subject to Florida regulation. *Id.* However, the German affiliate had no contacts with Florida and was not otherwise subject to Florida jurisdiction. *Id.* The regulated affiliates filed suit to prevent the Florida Insurance Commission from enforcing subpoenas that required them to produce documents of their unregulated affiliate. *Id.* at 1234.

The Eleventh Circuit agreed that the subpoenas violated the regulated entities' due process rights: "[W]e agree ... that the statute's reporting provisions, as applied, violate legislative Due Process constraints." *Id.* at 1236. In particular, the court agreed with the plaintiffs that the reporting provisions violated their due process rights because they concerned records belonging to the German affiliate, which was outside the jurisdiction of the state of Florida. *Id.* at 1234-35.

The same reasoning applies here. Transactions between LER and unrelated third parties are outside the scope of the PSC's jurisdiction pursuant to R.S.Mo. §393.140(12) and 4 C.S.R. 240-40.015. As in *Gerling*, the PSC's attempt to launch an investigation outside the scope of its jurisdiction violates the due process rights of Laclede, the regulated entity that has been ordered to produce the records of its unregulated affiliate.

IV. CONCLUSION

For the foregoing reasons, Relator Laclede Gas Company respectfully requests that the Court issue its preliminary writ of prohibition, or, in the alternative, mandamus, and, after briefing and argument, to make the writ permanent by directing Respondent Missouri Public Service Commission to vacate its November 4, 2009 Order and reinstate its April 22, 2009 Order denying the Staff's Motion to Compel, and grant Relator Laclede

Gas Company such other and further relief as the Court deems proper under the circumstances.

Respectfully submitted,

THOMPSON COBURN LLP

By Lawrence Friedman by *MR*
Lawrence C. Friedman, #34382
Paul D. Lawrence, #53202
One US Bank Plaza
St. Louis, Missouri 63101
314-552-6000
FAX 314-552-7000
lfriedman@thompsoncoburn.com
plawrence@thompsoncoburn.com

Attorneys for Relator
Laclede Gas Company

whether they relate to transactions between Laclede and LER. In doing so, the PSC expressly declined to follow its own rules regarding affiliate transactions, which establish specific parameters governing PSC access to the records of otherwise unregulated affiliates such as LER. By ignoring its own rules, the PSC not only acted in a manner that is arbitrary and capricious and an abuse of its discretion, but it exceeded the jurisdictional limits defined by the legislature in R.S.Mo. § 393.140(12) and affirmed by this Court in State ex rel. Atmos Energy Corp. v. Public Service Comm'n, 103 S.W.3d 753 (Mo. 2003). Those jurisdictional limits specify that the PSC can, at most, only obtain records relevant to transactions between LER and Laclede.

In 2000, the PSC promulgated its rule governing affiliate transactions at 4 C.S.R. 240-40.015 (the “Affiliate Transaction Rule” or “Rule”).¹ The Rule defines “affiliate transactions” as transactions between unregulated entities and affiliated regulated utilities. 4 C.S.R. 240-40.015(1)(B). The Rule further specifies that regulated utilities must make records of “affiliate transactions” available to the PSC. 4 C.S.R. 240-40.015(5). Finally, and most critically, the Rule states that the PSC “shall have the authority to” investigate an unregulated affiliate “for the sole purpose of ensuring compliance with this rule.” 4 C.S.R. 240-40.015(6)(B) (emphasis added). In Atmos, the Court found that the provisions of the Rule, including those defining the scope of PSC

¹The PSC also promulgated a companion rule for transactions with marketing affiliates at 4 CSR 240-40.016. Because the relevant provisions of this companion rule are the same as 4 CSR 240-40.015, these Suggestions refer to that Rule.

access to affiliate records, squared with the boundaries prescribed by R.S.Mo. § 393.140(12), which for 70 years has expressly and substantially limited the PSC's authority over unregulated affiliates like LER.

Section 6 of the Rule has—until issuance of the PSC's November 4, 2009 Order that Laclede asks this Court to review (“November 4 Order”)—always been interpreted only one way by this Court and by the PSC itself. The PSC's authority to investigate unregulated affiliates such as LER is limited to examining “affiliate transactions”—*i.e.*, transactions between that affiliate and the regulated utility – to ensure compliance with the Rule. Similarly, the regulated utility can be required to produce records relevant to such “affiliate transactions.” But there is no authority, either by statute or by rule, for the PSC to require the regulated utility to produce records that do not relate to “affiliate transactions” or otherwise investigate the other activities of the unregulated affiliate.

This Court established and affirmed that standard in 2003 in State ex rel. Atmos Energy Corp. In that case, the Court ruled that R.S.Mo. 393.140(12) permitted the PSC to require affiliates “to maintain records of certain transactions with regulated utilities.” Id., 103 S.W.3d at 764. At the same time, the Court unanimously confirmed that R.S.Mo. 393.140(12) “precludes regulation of a utility's affiliate where the affiliate is substantially kept separate and apart from the business of the utility.” Id. (emphasis added; quotation omitted).

On April 22, 2009, the PSC issued an order consistent with the statutory and regulatory standard affirmed in Atmos. A 3-2 majority of the PSC denied a motion by the PSC Staff (“Staff”) that would have required Laclede to produce LER records that do

not relate to affiliate transactions between Laclede and LER, but instead, pertain to unregulated transactions between LER and unrelated third parties. However, in its November 4 Order for which Laclede seeks review, a 3-2 PSC majority reversed the earlier April 22, 2009 Order and ruled that Laclede is required to produce LER records that do not relate to affiliate transactions between Laclede and LER, but instead, pertain to unregulated transactions between LER and unrelated third parties.² This reversal of the PSC's April 22, 2009 Order is an unprecedented attempt to expand the PSC's jurisdiction beyond the scope defined by the PSC's own Affiliate Transaction Rule, R.S.Mo. § 393.140(12), and this Court's unanimous decision in Atmos.

The PSC conceded in the November 4 Order that it was ignoring its own Affiliate Transaction Rule, describing it as a "red herring." Notwithstanding the limits in that Rule (and in this Court's Atmos decision), the PSC concluded that it can investigate and seek information from LER or any other entity not subject to its regulatory jurisdiction pursuant to general discovery rules, which the Staff argues are reflected in R.S.Mo. § 386.450. That statute on its face does not independently confer jurisdiction and cannot purport to give the PSC a broad grant of authority to investigate unregulated affiliates or other entities. The PSC has never before argued that it does. But now the PSC is making that argument because it concedes that the more recent and more specific provisions of

² Subsequent to the April 22, 2009 Order, one of the Commissioners who voted against the PSC Staff's motion retired and was succeeded by a new Commissioner, who voted on November 4, 2009 to reverse the PSC's April 22, 2009 Order.

the Affiliate Transaction Rule, Section 393.140(12), and this Court's ruling in Atmos prohibit the PSC from investigating LER's non-affiliate transactions.

The essentially lawless nature of the PSC's actions is exemplified by its attempt to obtain the LER information without requiring the Staff to seek a subpoena to enforce its information request. On December 9, 2009, the PSC denied Laclede's Motion to Reconsider the November 4, 2009 Order. As discussed in more detail below (at pp. 22-23), the PSC ruled on the same day in a separate case involving another utility with similar circumstances that the Staff did not have the authority to seek such information without a subpoena (a procedure that would allow Laclede and/or LER pursuant to 4 CSR 240-2.100 to object, move to quash, or seek judicial review of whether the PSC has the authority to seek the information it is demanding).

Laclede's Petition asks this Court to review and reject the PSC's unprecedented broad reading of Section 386.450 that would independently confer jurisdiction upon the PSC over entities it does not regulate and circumvent the PSC's own regulations, Section 393.140(12), and this Court's ruling in Atmos.

Prohibition and mandamus are extraordinary remedies, but they are appropriate and indeed necessary here. This Court has jurisdiction to review PSC actions by writ.³ The Commission's position will have far-reaching consequences not just for Laclede, but

³ E.g., State ex rel. Office of Public Counsel v. Public Service Comm'n, 236 S.W.3d 632, 632 (Mo. 2007). The Court of Appeals denied Laclede's Petition for Writ of Prohibition or Mandamus on November 24, 2009.

for any entity regulated by the Commission that may have unregulated businesses not subject to the Commission's jurisdiction. Indeed, the broad manner in which the Commission is interpreting its jurisdiction means that no entity operating inside or outside of Missouri is beyond the Commission's reach.

The fact that two (and earlier this year, three) of the five Commissioners voted against investigating LER demonstrates that the question whether the PSC really has the authority it now claims is a substantial one. Review now by this Court will not materially delay the ongoing underlying regulatory proceeding. In contrast, if the PSC is incorrect about its new theory of jurisdiction (as Laclede submits clearly is the case), the harm caused by its acting outside its jurisdiction is irreparable and cannot be cured retroactively.

II. FACTUAL AND PROCEDURAL BACKGROUND

Laclede is a public utility engaged in the retail distribution and sale of natural gas subject to the Commission's regulation. LER is an energy marketing company that engages in the unregulated marketing of natural gas and other services to retail and wholesale customers primarily in the Midwest. Laclede and LER are each subsidiaries of a holding company, The Laclede Group, Inc. ("LG"). LER and other subsidiaries of LG are not subject to PSC regulation.

This dispute arises out of Laclede's Annual Cost Adjustment ("ACA") cases for 2004-05 and 2005-06 (PSC Case Nos. GR-2005-0203 and GR-2006-0288). An ACA case is an annual Commission procedure to determine whether gas costs incurred by Laclede in a designated prior annual period were reasonably incurred and properly

included in customer rates that are subject to regulation by the Commission. LER does not participate in Laclede's ACA cases. During the course of these proceedings, the Staff asserted that a portion of the gas costs incurred by Laclede might not be properly included in rates on the grounds that a few transactions involving the purchase and/or sale of gas between Laclede and its affiliate LER had not been properly priced and urged the PSC to open an investigation into such transactions.⁴

As is typical in Laclede ACA proceedings, the Staff requested and Laclede provided tens of thousands of documents relating to Laclede's purchases and sales of gas between Laclede and other entities, including purchase and sales made between Laclede and LER, as authorized by the Affiliate Transaction Rule. Beginning on July 25, 2008, however, the Staff demanded that Laclede produce at least eleven categories of documents that included all of LER's gas supply and transportation invoices, contracts, nomination records, general ledger and dealbooks, journals, sales data, and net margins achieved for all or portions of the relevant ACA periods, without regard to whether those documents related to transactions between Laclede and LER. [Exhibit A]. Simply stated, this constitutes a full-blown regulatory audit of LER, notwithstanding that the PSC has

⁴While the Affiliate Transaction Rule places no limits on the amount of business a utility may conduct with its affiliates, so long as such transactions are priced in accordance with the pricing standards set forth in the Rule, transactions between Laclede and LER nevertheless are a very small part of each entity's business, comprising substantially less than 10% of each company's total gas sales and purchases.

admitted that it does not regulate LER and the requested records do not relate to transactions with Laclede.

This Court ruled in Atmos that “by requiring affiliates [like LER] to maintain records of certain transactions with regulated utilities, the [Affiliate Transaction] rules at issue do no more than is prescribed in Section 393.140(12).” Atmos, 103 S.W.3d at 764 (emphasis added). The PSC Staff, however, demanded that Laclede produce more than just “records of certain transactions with regulated utilities.” For example, the Staff sought “transactional records (in general ledger, supporting journals and dealbooks) that record all LER gas supply and transportation deals along with LER’s Purchase and Sales commitments for each deal.” [Exhibit A, p. 9; emphasis in original.] That and the ten other PSC Staff requests are clearly and expressly beyond the scope of what the Staff is authorized to obtain under the Affiliate Transaction Rule and Atmos.

Laclede opposed these requests for documents relating to LER’s transactions with unrelated entities because they were based on a pricing standard that is fundamentally inconsistent with those set forth in the Affiliate Transaction Rule and therefore precluded by such Rule, and because the Staff did not propose to give Laclede an opportunity to be heard as to whether there was any justification for an investigation of LER. [Exhibit B].

Specifically, the Affiliate Transaction Rule requires transactions with LER to be based on Laclede’s cost or the fair market price for a good or service at the time the transactions took place. 4 CSR 240-40.015(2). Because Laclede does not own production or pipeline facilities – and must therefore purchase all of its gas supplies and pipeline capacity on the wholesale market – the cost and fair market price are effectively

the same. [Exhibit B, p. 5]. Rather than focus on the fair market price of the gas supplies purchased by Laclede from LER, however, Staff asserted that such purchases should be based only on the lowest cost of gas in the supply portfolio developed by LER to serve all of its customers. [Exhibit A, p. 4; Exhibit S, pp. 1-2]. Similarly, rather than focus on the fair market price at the time of sale of the gas supplies and capacity Laclede sold to LER in affiliate transactions, Staff asserted that the fair market price for LER's affiliate transactions with Laclede must be based on the price of gas that LER subsequently sold in non-affiliate transactions to other entities. [Exhibit C, pp. 7-8, 11-12].⁵

The Commission initially granted the Staff's Motion to Compel on October 20, 2008. Laclede filed (in accordance with PSC procedure) a timely Motion for Reconsideration on October 30, 2008. [Exhibit C]. Several rounds of briefing and

⁵ If the Staff's different standards were enforced, they would effectively preclude any affiliate transactions between Laclede and LER, because no marketer would ever transact business without any opportunity for a return on the services provided. Nevertheless, it was solely on the basis of these unauthorized standards that the PSC Staff sought the LER information that is the subject of this dispute. Rather than address this key issue in the November 4, 2009 Order, the PSC abdicated its duty to evenly and fairly apply its own rules by summarily and without explanation dismissing the entire Affiliate Transaction Rule, including its substantive provisions on pricing and access to information, as "red herrings."

argument by Laclede, the Staff and the Office of Public Counsel (“OPC”) followed. On January 21, 2009, the Commission clarified its October 20 Order and required Laclede to produce the requested information “to the extent that Laclede is in possession [of it]...” [Exhibit D].⁶

Following the filing of more pleadings, on March 5, 2009, the Commission set the matter for oral argument and requested that the Staff and Laclede submit certain information, mainly consisting of descriptions of the documents sought by the Staff and, from Laclede, its objections to these requests. [Exhibit E]. The Commission heard argument on March 26, 2009. On April 15, 2009 a 3-2 majority voted to rescind the October 20, 2008 Order and deny the Staff’s Motion to Compel. The Commission approved an Order implementing that vote on April 22, 2009. [Exhibit F].

The Staff and the OPC filed motions for the Commission to again reconsider the matter on May 1 and May 4, 2009 respectively. Under regular PSC procedures and practices, those motions would have been ruled on before May 30, 2009. In this case, however, despite a May 20, 2009 request by Laclede for the matter to be voted on, and a similar request by a Commissioner on May 27, 2009, the Presiding Judge and the PSC

⁶As Laclede pointed out to the Commission, Laclede does not possess LER’s documents. The Commission contends that Laclede can get the documents from its affiliate LER. Even if that were the case, the PSC has no authority to order Laclede to produce documents unrelated to affiliate transactions and that fundamental jurisdictional issue should be decided by this Court.

Chairman (who had voted with the minority) did not put those motions on any meeting voting agenda until after May 30, 2009, by which time that Commissioner, who had voted with the majority to deny the Staff's Motion to Compel on April 22, had retired. Her successor joined the Commission on July 29, 2009. On September 2, 2009, the Commission, without any basis or explanation, voted 3-2 to grant the Motions for Reconsideration and set the matter for another oral argument that took place on October 1, 2009. [Exhibit G]. Laclede filed a Motion to Rescind Order Granting Motions for Reconsideration on September 29, 2009. [Exhibit H].

The Commission entered its Order Directing Laclede to Produce Information on November 4, 2009. [Exhibit I]. Two of the five Commissioners dissented. Commissioner Jarrett issued a separate dissenting opinion on December 3, 2009. [Exhibit J].

The November 4, 2009 Order directed Laclede to produce the LER documents by November 9, 2009. Laclede filed a timely Application for Rehearing Or Reconsideration on November 9, 2009. [Exhibit K]. Because, among other reasons, Laclede had been directed to produce the LER documents by November 9 notwithstanding the filing of its Application for Rehearing, Laclede filed a Petition for Writ of Prohibition or Mandamus with the Western District Court of Appeals on November 9, 2009 (Case Nos. WD71701, WD71702). [Exhibit L]. LER also filed a Petition for Writ of Prohibition or Mandamus. [Exhibit M]. The Court of Appeals consolidated the two cases on November 10, 2009. [Exhibit N]. The Commission filed Suggestions in Opposition on November 20, 2009.

[Exhibit O]. The Court of Appeals denied Laclede's Petition (and LER's Petition) without comment on November 24, 2009. [Exhibit P].

On December 9, 2009, the Commission, treating Laclede's November 9, 2009 Application for Rehearing Or Reconsideration as a Motion for Reconsideration, denied that Motion. Two of five Commissioners dissented. [Exhibit Q]. Laclede did not produce the LER documents while its Petition for Writ of Prohibition or Mandamus was pending in the Court of Appeals or while its Application for Rehearing or Reconsideration was pending with the PSC. Laclede has not produced the LER documents pending review of Laclede's Petition by this Court.

III. ARGUMENT

A. **This Court Has Jurisdiction to Issue a Writ of Prohibition or a Writ of Mandamus.**

This Court has jurisdiction under Article V, Section 4, Subsection 1 of the Missouri Constitution to review actions of the PSC.

The Supreme Court shall have general superintending control over all courts and tribunals. Each district of the court of appeals shall have general superintending control over all courts and tribunals in its jurisdiction. The supreme court and districts of the court of appeals may issue and determine original remedial writs. Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power.

Id. This authority includes jurisdiction over administrative bodies like the PSC. See, e.g., State ex rel. A & G Comm. Trucking, Inc. v. Dir. of the Manufactured Housing &

Modular Units Program of the Public Service Comm'n, 168 S.W.3d 680, 683 (Mo. App. 2005); and State ex rel. Mississippi Lime Co. v. Mo. Air Conservation Comm'n, 159 S.W.3d 376, 381 (Mo. App. 2004).

This Court “has authority to examine acts of the Public Service Commission for due process violations.” State ex rel. Fischer v. Public Service Comm'n, 645 S.W.2d 39, 43 (Mo. App. 1982); see also State ex rel. Office of the Public Counsel v. Public Service Comm'n, 236 S.W.3d 632, 635 (Mo. 2007) and State ex rel. Chicago Rock Island & Pacific R.R. Co. v. Public Service Comm'n, 312 S.W.2d 791, 796 (Mo. banc 1958). In particular, this Court has jurisdiction to review a petition for writ of prohibition or mandamus that was first filed with the Court of Appeals (and not in the circuit court) but was denied. See State ex rel. Office of the Public Counsel, 236 S.W.3d at 635 (granting and making peremptory a writ of mandamus that was first filed with, and denied by, the Court of Appeals).

Judicial review is proper where an administrative board has acted unlawfully or outside its jurisdiction. Id. at 635. Mandamus is appropriate “where the administrative board (or court) has acted unlawfully or wholly outside its jurisdiction or authority or has exceeded its jurisdiction, and also where it has abused whatever discretion may have been vested in it.” Id. Mandamus is also appropriate to ensure that an administrative agency is following its duly promulgated rules and not abusing its discretion by ignoring those rules. Martin-Erb v. Mo. Comm'n. on Human Rights, 77 S.W.3d 600, 607 (Mo. banc 2002) (quotations omitted). “Once an agency exercises its discretion and creates the

procedural rules under which it desires to have its actions judged, the agency denies itself the right to violate those rules.” Id., 77 S.W.3d at 608 n. 6.

Prohibition is a “proper remedy for an abuse of discretion during discovery.” State ex rel. Ford Motor Co. v. Messina, 71 S.W.3d 602, 607 (Mo. banc 2002). This Court has jurisdiction to issue a writ of prohibition in relation to an order issued by the PSC. See, e.g., State ex rel. Southwestern Bell Telephone v. Brown, 795 S.W.2d 385, 386-87 (Mo. banc 1990). Prohibition will lie “where an act in excess of jurisdiction is clearly evidenced.” Id. Prohibition is a proper remedy when an agency refuses to follow its own rules. State ex rel. Stewart v. Civil Service Comm’n., 120 S.W.3d 279, 286-87 (Mo. App. 2003).

A writ of prohibition or mandamus should issue here because the PSC has acted outside the scope of its jurisdiction, in a manner that was in direct contravention of its own Affiliate Transaction Rule and that violated Laclede’s due process rights.

B. The PSC Violated Laclede’s Due Process Rights By Requiring Laclede to Produce LER Documents Not Related to Affiliate Transactions in Direct Contravention of the PSC’s Own Rules and the Statutes That Limit PSC Jurisdiction Over Affiliated Entities

The PSC is an administrative body created by statute. Union Elec. Co. v. Public Service Comm’n., 591 S.W.2d 134, 137 (Mo. App. 1979). The Commission has jurisdiction over “the manufacture, sale or distribution of gas, natural and artificial...” R.S.Mo. § 386.250(1). The PSC “only has such powers as are expressly conferred by statute and reasonably incidental thereto.” Union Elec. Co., 591 S.W.2d at 137. Where,

as here, the PSC attempts to act outside its jurisdiction and in contravention of its own rules, the Court can and should enter an appropriate order prohibiting the PSC from pursuing such action. State ex rel. Office of Public Counsel, 236 S.W.3d at 635.

Laclede is a regulated gas corporation as defined in R.S.Mo. §386.020 and 4 C.S.R. §240-40.015(1)(I) and is subject to PSC jurisdiction and regulation. LER is an affiliate of Laclede as defined by the Affiliate Transaction Rule, § 240-40.015(1)(A), and is not directly subject to PSC regulation. R.S.Mo. §393.140 sets forth the powers of the PSC with respect to gas, water, electricity and sewer service companies. Subsection 12 of §393.140 permits gas companies and other regulated utility companies to operate affiliated businesses that are not subject to the PSC's authority that otherwise is set forth in §393.140. Section 393.140(12) states in relevant part:

In case any ... gas corporation ... engaged in carrying on any other business other than owning, operating or managing a gas plant ... which other business is not otherwise subject to the jurisdiction of the commission, and is so conducted that its operations are to be substantially kept separate and apart from the owning, operating, managing or controlling of such gas plant ... , said corporation in respect to such other business shall not be subject to the provisions of this chapter and shall not be required to procure the consent or authorization of the commission to any act in such other business or to make any report in respect thereof. ...

(emphasis added). In other words, §393.140(12) permits gas companies and other regulated utilities to be affiliated with businesses that engage in non-regulated activities.

These affiliated businesses are neither subject to the jurisdiction of the PSC nor required to make reports to the PSC concerning their non-regulated business operations with entities other than the utility. So long as the regulated utility company keeps the operations of its affiliate “substantially ... separate and apart” from the regulated utility business, §393.140(12) “precludes regulation of a utility’s affiliate....” State ex rel. Atmos Energy Corp., 103 S.W.3d at 764.

The fact of common ownership of a regulated utility and its unregulated affiliate does not give the PSC jurisdiction over the unregulated affiliate. See Staff of Mo. P.S.C. v. Missouri Pipeline Co., LLC et al., 2006 WL 1344906 (Mo. P.S.C. 2006) (copy attached hereto as Exhibit R). However, the Affiliate Transaction Rule sets forth standards that apply when the utility and the affiliate engage in transactions with each other. The Affiliate Transaction Rule permits the Staff to obtain affiliate-related records from Laclede “for the sole purpose of ensuring compliance with” these standards, i.e., that the utility is not paying more nor charging less than a fair market price in transactions with affiliates. 4 C.S.R. 240-40.015(2)(A) and (6)(B) (emphasis added).

In Atmos, this Court held that transactions between a regulated utility and its unregulated affiliate could be examined by the PSC pursuant to the Affiliate Transaction Rule. 103 S.W.3d at 764. Laclede has produced to the PSC documents related to transactions between Laclede and LER. In the November 4, 2009 Order, however, the PSC seeks records relating to transactions between LER and unrelated third parties—precisely what Atmos and the Affiliate Transaction Rule do not authorize.

Indeed, R.S.Mo. § 393.140(12) expressly prohibits the Commission from requiring Laclede to report to the Commission regarding its affiliate's activities with third parties. Yet, with the all-encompassing request the PSC authorized by granting the Staff's Motion, Laclede essentially is being required to report to the PSC regarding LER's transactions with third parties in contravention of R.S.Mo. § 393.140(12).

The Staff originally argued to the Commission below that R.S.Mo. § 393.140(12) and Atmos authorized the PSC to obtain records of LER's transactions with other entities. [Exhibit S]. Apparently recognizing that those authorities actually do not support such jurisdiction, the Commission in the November 4, 2009 Order took a new position. The three-member majority in that Order stated that the Commission's own Affiliate Transaction Rule is a "red herring," and that the Commission was acting solely under the "discovery...rules of civil procedure" that apply to PSC proceedings. Nov. 4, 2009 Order [Exhibit I] at 2-3.

It is nothing short of astonishing that an administrative agency would promulgate rules that are specifically designed to govern a particular subject matter – in this case affiliate transactions – and then when that very subject matter is before it, summarily determine that such rules are inapplicable and of no consequence. It is even more inexplicable that an administrative agency would take such an action without any articulation as to why such rules were, in fact, not relevant to and controlling of the matter under consideration.

In addition to constituting the kind of arbitrary and capricious action that administrative agencies are prohibited from taking, the PSC's unexplained abandonment

of its Affiliate Transactions Rule is also fundamentally inconsistent with its obligation to follow its own, lawfully promulgated rules. As Missouri courts have long recognized, rules duly promulgated pursuant to properly delegated authority have the force and effect of law and are binding on the agency adopting them. Martin-Erb, 77 S.W.3d 600 at 607; Missouri Nat. Educ. v. Missouri State Bd., 695 S.W.2d 894, 897 (Mo. banc 1985); Page Western Inc. v. Community Fire Protection, 636 S.W.2d 65, 68 (Mo. banc 1982). A court may compel an agency to follow such rules when it has, as in this instance, failed to do so. Martin-Erb, 77 S.W.3d at 607; State ex rel. Stewart v. Civil Service Comm'n., 120 S.W.3d at 286-87.

Rather than provide any explanation as to why its Affiliate Transaction Rule was not applicable to the affiliate transactions at issue in the ACA cases, the PSC simply asserted in its November 4, 2009 Order that it was proceeding under the “rules of civil procedure.” November 4 Order [Exhibit I], p. 2. The procedural rules that govern discovery, however, do not permit the PSC to ignore the substantive provisions of the Affiliate Transaction Rule.

The rules of civil procedure dictate that a party may obtain information relevant to the subject matter involved in the pending action. S.Ct.R. 56.01(b)(1). The Affiliate Transaction Rule contains the pricing standards applicable to affiliate transactions, and establishes the PSC’s rights and limitations in obtaining access to affiliate records. 4 CSR 240-40.015(2)(A) and (6). Since the subject matter of the pending action (Laclede’s ACA cases) is the pricing of affiliate transactions, “relevant” evidence for purposes of discovery necessarily consists of the records to which the PSC has access under the

Affiliate Transaction Rule. The of records that the PSC Staff seeks, to prove that the prices Laclede paid for gas from LER should have been the lowest cost of gas in LER's portfolio, does not constitute "relevant" evidence under the Affiliate Transaction Rule. The PSC cannot circumvent its own Affiliate Transaction Rule by declaring as procedurally "relevant" matters that are expressly off-limits under the Rule. The procedural tail cannot wag the substantive dog.

In any event, it is an axiomatic rule of construction that specific provisions govern over general provisions to the extent there is a conflict. Here, the specific provisions of the Affiliate Transaction Rule that prescribe the boundaries of access to affiliate records govern over the general rules of discovery. This also applies to the statutes authorizing those rules. Hence, the specific statute authorizing the Affiliate Transaction Rule, 393.140(12) RSMo, controls rather than the more general statute that enables the Commission to prescribe its own procedural rules, RSMo § 386.410. MFA Petroleum Co. v. Director of Revenue, 279 S.W.3d 177, 178 (Mo. 2009)

A special statute that defines procedure in a specific type of proceeding controls over the general rules of civil procedure. In re T.P.S., 595 S.W.2d 320, 322 (Mo.App.1980). And in AT&T Info. Systems, Inc. v. Wallemann, 827 S.W.2d 217, 221-22 (Mo. App. 1992), the Court rejected the argument that an agency can circumvent a specific statutory limitation on its discovery authority by invoking more general "rules of civil procedure." Similarly here, the PSC cannot circumvent the more specific Affiliate Transaction Rule by claiming that the "rules of civil procedure" give it the right to obtain what the Rule specifically does not authorize.

Nor can the PSC disregard its Affiliate Transaction Rule, and the limitations the Rule imposes on the discovery of affiliate information, by asserting, as it did in the cases below, that such discovery is necessary to evaluate the prudence of Laclede's actions in procuring gas supplies. The only issue raised by Staff in the ACA cases was whether Laclede's purchases from and sales to LER of gas supply and capacity were properly priced, a determination that is directly addressed by the pricing standards in the Affiliate Transaction Rule. It is inconceivable that the Affiliate Transaction Rule would not be the applicable standard for the proper scope of discovery of affiliate transactions in these cases. However, if the PSC truly believed that making a prudence determination in the ACA cases involved a consideration of issues that were different from or in addition to the pricing issue addressed by the Rule, it was at the very least incumbent upon the PSC (as opposed to its Staff) to articulate why that was the case, something that the PSC did not even attempt to do.

For example, in Stewart, the St. Louis City Civil Service Commission argued that it had the authority to override its rules because the City Charter gave it the power to consider and determine matters involved in the administration of its rules. The Civil Service Commission further asserted that the courts must defer to an agency's interpretation of its own rules. The Court of Appeals brushed those arguments aside, stating simply that "Rules duly promulgated pursuant to properly delegated authority have the force and effect of law and are binding on the agency adopting them." 120 S.W.3d at 287. The same principle applies here.

In avoiding the Affiliate Transaction Rule, the PSC is expanding its reach over LER, an otherwise non-regulated affiliate. In doing so, the PSC exceeds the limitation of its jurisdiction over affiliates granted by R.S.Mo. § 393.140(12). The PSC's claimed reliance in the November 4 Order on the "rules of civil procedure" cannot constitute an independent addition to or extension of the PSC's jurisdiction. The PSC is an administrative body created by statute and "only has such powers as are expressly conferred by statute and reasonably incidental thereto." Union Elec. Co., 591 S.W.2d at 137. The statute expressly limits the PSC's jurisdiction over affiliates, except in such cases (not here) where the affiliate and the regulated utility have not been kept substantially separate and apart, or to the extent necessary to evaluate transactions between affiliates. The general rules of civil discovery certainly do not contain anything remotely resembling an express addition to this jurisdiction, nor can the Commission point to any authority in support of that claim.

Commissioner Jarrett argued in his dissent [Exhibit J] that the general discovery rules do not apply to the ACA cases in any event because ACA cases are not "contested cases" to which the discovery rules apply, but rather are audits or investigations to which the discovery rules do not apply. Commissioner Jarrett explains that for this reason, the Staff cannot file a motion to compel and the Commission cannot enter an order granting such a motion. Rather, the Staff must pursue a subpoena to enforce its demand for information about LER.

Although Commissioner Jarrett's position was in a dissent from the November 4 Order, it became the Commission's position as part of the majority opinion in a similar

case decided on December 9, 2009. Re: Kansas City Power & Light Co., Order Regarding Staff's Motion to Compel, Case No. ER-2009-0089 (decided December 9, 2009) [Exhibit T]. In other words, on the same day that the Commission denied Laclede's Motion to Reconsider the November 4, 2009 Order, the PSC ruled that the Staff does not have the authority to use the "rules of civil procedure" to seek information in matters that (like Laclede's ACA cases here) are not "contested cases." There can be no better illustration of the essentially lawless nature of the PSC's actions than its issuance of two fundamentally contradictory rulings on the same day.

The PSC seems to have recognized that the general discovery rules of civil procedure were not a grant of jurisdiction to the PSC, because when it opposed Laclede's Petition in the Court of Appeals, the PSC omitted this argument. Instead, the PSC presented yet another purported basis, claiming that it was not investigating LER, but merely using authority granted by R.S.Mo § 386.450 to examine LER documents that do not relate to affiliate transactions. Exhibit O at ¶ 115. There are two fundamental problems with this latest pretextual justification. First, Section 386.450 on its face does not purport to give the PSC a broad grant of authority to obtain the kind of information it seeks from Laclede in this proceeding, particularly where such information is being sought, as it has in this instance, in derogation of the general discovery rules the PSC claims to be following.

Section 386.450 is entitled "Inspection of Out of State Records." (Curiously, there are no "out of state records" at issue in this case.) The provision states that

At the request of the public counsel and upon good cause shown by him the commission shall require or on its own initiative the commission may require, by order served upon any corporation, person or public utility in the manner provided herein for the service of orders, the production within this state at such time and place as it may designate, of any books, accounts, papers or records kept by said corporation, person or public utility in any office or place within or without this state, or, at its option, verified copies in lieu thereof, so that an examination thereof may be made by the public counsel when the order is issued at his request or by the commission or under its direction.

R.S.Mo. § 386.450 (emphasis added).

The emphasized language makes clear that Section 386.450 does not (and cannot) broaden the scope and nature of the PSC's authority to access particular records. The sole purpose of Section 386.450 is to establish a procedure for making records that the PSC has the authority to obtain available at times and locations that are convenient to the PSC and/or the OPC. Section 386.450 does not set forth some additional category of documents over which the Commission has jurisdiction or may require production, but instead provides a method by which the PSC may require production of documents it has the authority to request.

The PSC is now making the circular argument that R.S.Mo. § 386.450 authorizes it to reverse its own prior order and require Laclede to produce LER's documents related to transactions with entities unaffiliated with Laclede even though the PSC admits it has

no regulatory authority over such LER transactions in the first place. Indeed, the Commission previously ruled (in its January 21, 2009 Order) that Laclede only had to produce information that Laclede actually possessed. The PSC is now arguing precisely the opposite, based on a statute that does not confer on the PSC any independent expanded authority to require Laclede to produce any documents unrelated to affiliate transactions.

Section 386.450 has never been construed by any Court and has never been invoked by the PSC as authority to investigate an entity that is not subject to PSC jurisdiction. In In the Matter of Union Elec. Co. d/b/a AmerenUE, 2007 WL 923507 (Mo. P.S.C. 2007), the OPC followed Section 386.450 procedures (something that did not happen here) and the Commission ordered a regulated entity to produce records of transactions with its unregulated affiliate. That is what the Rule authorizes, in contrast to the situation here where the PSC demands that Laclede produce LER records of transactions with other entities. In Mo. P.S.C. v. Universal Utilities, 2008 WL 65083 (Mo. P.S.C. Jan. 7, 2008) and Mo. P.S.C. v. Universal Utilities, 2008 WL 2811290 (Mo. P.S.C. July 15, 2008), the PSC relied on R.S.Mo. § 386.450 as authority to obtain documents from the operators of a sewer system, an activity that unquestionably is within the PSC's jurisdiction.

Reading Section 386.450 in the manner now advocated by the PSC would ignore the statutory language specifying that it applies to orders "in the manner provided herein for the service of orders," i.e., orders served on entities that the PSC has the authority to investigate. The PSC's radical interpretation would give it authority to investigate any

person or entity without regard to the statutory scheme codified in Chapters 386 and 393 which specifically defines who the PSC can regulate and what it can investigate. If PSC really has that power, its authority would exceed that of any court, including this Court, to assert jurisdiction over corporations, individuals, or other entities. For this reason alone, review by writ is imperative so that this Court can determine if the jurisdiction of the Commission is that breathtakingly large in scope.

The second and equally fatal problem with the PSC's argument is the elementary principle of statutory interpretation mentioned above—a specific law controls over a more general one regarding the same subject matter. The law as represented by R.S.Mo. § 393.140(12), Atmos, and the Affiliate Transaction Rule specifically states that the PSC may only investigate an unregulated affiliate's transactions with regulated affiliates, and may not investigate the unregulated affiliate's transactions with other entities. Those authorities are more specific and, in the case of the Affiliate Transaction Rule (and Atmos), more recent, than the more general Section 386.450 that the PSC claims gives it the authority to investigate the very matters that Section 393.140(12) and 4 C.S.R. 240-40.015 prohibit.

“When two statutes cover the same subject matter, the more specific statute governs over the more general statute.” MFA Petroleum Co. v. Director of Revenue, 279 S.W.3d at 178. Here, the more specific statute and more specific (and recent) regulation must prevail. Moreover, Section 386.450 cannot be construed in a way that would make Section 393.140(12) or the Affiliate Transaction Rule meaningless. State ex rel. Ozark Border Elec. Co-op. v. Public Service Comm'n., 924 S.W.2d 597, 600-01 (Mo. App.

1996). If the PSC is correct that Section 386.450 allows it to require Laclede to produce LER records other than “affiliate transactions,” then Section 393.140(12) and the Affiliate Transaction Rule literally are meaningless because the PSC could disregard them at will, as it has in this instance.

By exceeding its own jurisdiction and contravening its own rules in attempting to require Laclede to produce documents related to its affiliate that the law does not give the PSC authority to examine, the PSC is violating Laclede’s due process rights. In Gerling Global Reinsurance Corp. of America v. Gallagher, 267 F.3d 1228 (11th Cir. 2001), the Eleventh Circuit found a due process violation under analogous circumstances. There, a Florida statute permitted the Florida Insurance Commission to require insurers to report information about Holocaust-era insurance claims. Id. at 1229-30. The plaintiffs were six insurers that were affiliates of a German insurance company, which would have been subject to Florida reporting requirements if it were subject to Florida regulation. Id. However, the German affiliate had no contacts with Florida and was not otherwise subject to Florida jurisdiction. Id. The regulated affiliates filed suit to prevent the Florida Insurance Commission from enforcing subpoenas that required them to produce documents of their unregulated affiliate. Id. at 1234.

The Eleventh Circuit agreed that the subpoenas violated the regulated entities’ due process rights: “[W]e agree ... that the statute’s reporting provisions, as applied, violate legislative Due Process constraints.” Id. at 1236. In particular, the court ruled that the reporting provisions violated the regulated entities’ due process rights because they

concerned records belonging to the German affiliate, which was outside the jurisdiction of the state of Florida. Id. at 1234-35.

The same reasoning applies here. Transactions between LER and unrelated third parties are outside the scope of the PSC's jurisdiction pursuant to R.S.Mo. §393.140(12), the Affiliate Transaction Rule, and Atmos. As in Gerling, the PSC's attempt to launch an investigation outside the scope of its jurisdiction violates the due process rights of Laclede, the regulated entity that has been ordered to produce records of its unregulated affiliate.

In addition to exceeding its jurisdiction, the PSC's November 4 Order violated Laclede's due process rights by refusing to enforce the Affiliate Transaction Rule. The PSC clearly understands the applicability and breadth of the Rule as well as the jurisdictional limitations imposed by R.S.Mo. §393.140(12). In a 2003 case, AmerenUE sought Commission approval to move Illinois facilities and customer accounts to its Illinois affiliate. The OPC sought information related to transactions between AmerenUE's affiliates and third parties. In a decision denying OPC access to such information, the PSC ruled:

It is true that the Commission is authorized and required to examine the dealings of regulated entities with their unregulated affiliates.

However...that authority applies to transactions between the affiliates and the regulated entity. It does not apply to transactions between the unregulated affiliates and third parties absent a specific showing of relevancy to transactions between the affiliates and the regulated entity. The

Commission lacks any general authority to pry into the affairs of unregulated companies, or the third parties they do business with, merely because they are affiliates of regulated entities.

Re: AmerenUE, Case No. EO-2004-0108, Order on Reconsideration Concerning Discovery (Mo. P.S.C. February 26, 2004) (emphasis added) [Exhibit U].

In its November 4 Order, the PSC made no attempt to explain how the information sought by Staff pertaining to LER's transactions with unrelated third parties is relevant to Laclede's affiliate transactions with LER. Instead, perhaps aware that it cannot provide such an explanation, the PSC has distanced itself from its own Rule. Although affiliate transactions are the main issue in this case, and although the Affiliate Transaction Rule establishes specific boundaries by which the PSC can obtain access to affiliate records, the PSC nevertheless stated in the November 4 Order that for purposes of deciding an issue pertaining to access to records in an affiliate transaction case, its Affiliate Transaction Rule is a "red herring." The PSC violates Laclede's due process rights by establishing standards for Laclede to follow regarding affiliate transactions and then without notice refusing to enforce those standards. See Atmos, 103 S.W.3d at 759-60 (PSC cannot promulgate rule without notice and hearing).

IV. CONCLUSION

For the foregoing reasons, Relator Laclede Gas Company respectfully requests that the Court issue its preliminary writ of prohibition, or, in the alternative, mandamus, and, after briefing and argument, to make the writ permanent by directing Respondent Missouri Public Service Commission to vacate its November 4, 2009 Order and reinstate

its April 22, 2009 Order denying the Staff's Motion to Compel, and grant Relator Laclede Gas Company such other and further relief as the Court deems proper under the circumstances.

Respectfully submitted,

THOMPSON COBURN LLP

By Lawrence C. Friedman b7D b7E
Lawrence C. Friedman, #34382
Paul D. Lawrence, #53202
One US Bank Plaza
St. Louis, Missouri 63101
314-552-6000
FAX 314-552-7000
lfriedman@thompsoncoburn.com
plawrence@thompsoncoburn.com

Attorneys for Relator
Laclede Gas Company