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April 10, 2003

FILED[3]
APR 1 0 2003
Missouri Public
Service Commission

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

Re: Case Nos. GR-2001-387 and GR-2000-622

Dear Mr. Roberts:

On behalf of Laclede Gas Company, I deliver herewith for filing with the Missouri Public Service Commission ("Commission") in the referenced matter an original and eight (8) copies of a Reply Brief and an original and eight (8) copies of Proposed Findings of Fact and Conclusions of Law.

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

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

Thank you very much for your assistance.

Very truly yours,

James C. Swearengen

James C. Swearengen

JCS/lar
Enclosures
cc: All parties of record

FILED[3]
APR 10 2003
Missouri Public Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Laclede Gas Company's Purchased Gas Tariff Revisions to Be Reviewed in Its 2000-2001 Actual Cost Adjustment	)))	Case No. GR-2001-387
In the Matter of Laclede Gas Company's Purchased Gas Adjustment Factors to Be Reviewed in Its 1999-2000 Actual Cost Adjustment	)))	Case No. GR-2000-622

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF LACLEDE GAS COMPANY

Pursuant to the briefing schedule established by the Commission in this case, as revised, Laclede Gas Company ("Laclede" or "Company") hereby submits its Proposed Findings of Fact and Conclusions of Law in this proceeding.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

BACKGROUND

On June 15, 1999, the Commission approved an incentive program for Laclede in Case No. GO-98-484 known as the Price Stabilization Program (the "PSP" or

"Program"). The Program was implemented in Laclede's Tariff Sheet Nos. 28-e, f and g (the "Tariff") and a Description of Incentive Price Stabilization Program (the "Program Description"), effective July 23, 1999[1]. The purpose of the Program was to encourage the Company to procure certain natural gas financial instruments in order to reduce the impact of natural gas price volatility on the Company's customers. (Tariff Sheet 28-e, Par. G.1). The Commission approved the Program for three heating seasons, beginning with the 1999/2000 heating season. (Tariff Sheet 28-g, Par. G.7).

The issue in this case concerns the second heating season under the Program, which covers the fall and winter of 2000/2001, and roughly coincides with the ACA Period of October 1, 2000 through September 30, 2001 (the "2000-01 ACA Period"). The parties do not dispute that Laclede began the 2000/2001 PSP year with a $4 million stake to be used to purchase natural gas financial instruments. Nor do they dispute that purchases and sales of such financial instruments by Laclede resulted in gross proceeds of $33,499,000. The issue we decide here is whether the incentive features of the Program permit Laclede to retain $4,872,997 of these proceeds.

STRUCTURE AND HISTORY OF THE PROGRAM

The financial instruments Laclede was authorized to use under the Program were limited to only the purchase and sale of call options.[2] The Program authorized the

[1] These documents control the main issue in this case and are located in multiple places in the record, including Exh. 1, Schedule 6 (Program Description) and 7 (Tariff) and Exhibit 4, Schedule 1 (Tariff and Program Description). As discussed *infra*, Tariff Sheet 28-e was revised, effective October 12, 2000 (Exh. 6, Sch. 1). For convenience, references to the Tariff and Program Description will refer to the actual portions of these documents rather than repeated cites to the exhibits where these documents are located.

[2] Call options are a form of financial instrument sold on the New York Mercantile market. In exchange for paying a specific amount, the call option entitles, but does not require, the buyer to receive a specific quantity of natural gas in a future month at a predetermined "strike price." (Tr. 57). Generally speaking, as the market price for natural gas increases, the value of the option will also increase. Conversely, to the extent the market price for natural gas decreases or remains constant, the option will generally lose value and may even expire worthless. To the extent the option increases in value and is sold "in the money" (i.e.,

Company to purchase and sell such call options under two separate incentive components, a Price Protection Incentive and an Overall Cost Reduction Incentive. (Tariff Sheet 28-f, Par. G.3 and G.4, and Sections 2 and 3 of the Program Description).

The Price Protection Incentive applied to call options that were liquidated ***during*** the last three business days of NYMEX (New York Mercantile Exchange) option trading. Under the Price Protection Incentive, Laclede would share in gains associated with option liquidations below either a Target Strike Price ("TSP") or a Catastrophic Price Level ("CPL"). (Program Description, Section 2, pp. 3-4).

The Overall Cost Reduction Incentive pertained to savings achieved by reducing the overall cost of price stabilization from the $4 million Maximum Recovery Amount ("MRA") that Laclede was authorized to collect from its customers through its PGA to fund the Program. (Program Description, pp. 1 and 4). Such savings could be achieved by Laclede either through favorable option purchases or by intermediate trading activities in which the option was sold ***prior*** to the last three business days of NYMEX option trading. (*Id.*).

The Price Protection Incentive also included a provision that permitted the Company to declare the Price Protection Incentive crediting provision inoperable during a particular program year. (Program Description, Section 2.B.ii, p. 4). The Company was permitted to exercise this right in the event there were radical changes in the market price for natural gas during the first 90 days of each Program year. (*Id.*).

Unfortunately, the very circumstances that had been contemplated by this provision actually arose in the second year of the Program, which commenced in March

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generates proceeds at the time it is sold), such proceeds can be used to offset increases in the market price of gas and thus provide price protection for the utility and its customers. (Tr. 57-59).

2000 with the setting of the TSP and CPL for the Price Protection Incentive. (Exh. 5HC, p. 12). Although March had usually been a month for relatively low-priced call options, from the very outset of March 2000, however, the prices for call options were at historically high levels; a circumstance that resulted in a TSP and CPL of $4.70 and $5.20, respectively. (Exh. 5HC, p. 12).[3] Although the Energy Information Administration ("EIA") and respected analysts such as Goldman Sachs and Risk Management Inc. ("RMI") were claiming that natural gas prices were overvalued and should decline in the near future, they never did. Instead, they ultimately increased and increased dramatically. (Exh. 5HC, pp. 12-13). As a result, Laclede notified the Commission on June 1, 2000 that Laclede was exercising its right under the Program to declare the Price Protection Incentive inoperable for the PSP's second year. (Exh. 5HC, p. 13).

Following the Company's exercise of its right to declare the Price Protection Incentive inoperable, Laclede, Staff and Public Counsel met to explore various alternatives for addressing the unprecedented changes in market prices for financial instruments. As a part of that effort, the Company also filed an application with the Commission requesting authorization to make temporary revisions to the Program during the ACA Period. (Exh. 5HC, pp. 14-15). These proposed changes included a request to relax or eliminate the Program's requirement that the Company purchase call options sufficient to cover 70 percent of its normal flowing winter supplies. (*Id.*). They also included a request to increase, from $4 million to $10 million, the amount that could be

[3] These benchmark strike prices were well above the actual strike prices that the Company had purchased call options at during the previous PSP year, which options had expired worthless. (Exh. 5HC, p. 13, Tr. 157-58).

collected from customers to fund the purchase of call options under the Program; and a request to broaden the kind of financial instruments that could be used to provide price protection. (*Id.*).

Ultimately, the Company, Staff and Public Counsel filed a Stipulation and Agreement with the Commission on September 1, 2000 (the "Agreement"), in which they indicated that the parties had only been able to reach agreement on eliminating the 70% coverage requirement. (Exh. 5HC, p. 15). In light of the parties' inability to agree on any other revisions to the PSP, the Stipulation and Agreement also indicated that all other terms of the PSP then in effect would remain in "full force and effect." (Exh. 6HC, p. 10). As the Staff itself has recognized, these remaining provisions included the Overall Cost Reduction Incentive of the PSP -- a fact that was subsequently confirmed by the compliance tariff sheet filed by Laclede to implement the Stipulation and Agreement. (Exh. 6HC, p. 10; Tr. 93, 227). That compliance tariff, which was reviewed by the Staff and then approved by the Commission to be effective on October 12, 2000, explicitly stated that the Company's procurement of financial instruments under the PSP would continue to be "subject to the incentive features described below...except as modified by the terms of the September 1, 2000 Unanimous Stipulation and Agreement approved by the Commission in Case No. GO-2000-394, and subject to the Company's notice of opting out of the price protection incentive features in year two..." (Exh. 6HC, pp. 10-11; Schedule 1, p. 2).

FINDINGS OF FACT ON ISSUES PRESENTED

Based on the issues to be resolved, as submitted by the parties, the Commission makes the following findings of fact.

ISSUE A: What were the controlling Price Stabilization Program ("PSP") Tariff and Program Description terms for the October 1, 2000 through September 30, 2001 ACA period?

FINDING OF FACT:

The Commission finds that the controlling PSP Tariff and Program Description terms for the 2000-01 ACA Period were those terms set forth in the Tariff and Program Description in effect during the 2000-01 ACA Period. These include Second Revised Tariff Sheet 28-e, effective on July 23, 1999, as revised by Third Revised Tariff Sheet 28-e, which became effective October 12, 2000, Original Sheets 28-f and g, each effective on July 23, 1999, and the four-page Program Description. As stated in footnote 1, *supra*, these documents are the central focus of this case.

Because Laclede claims all of its share of the savings in this case under the Overall Cost Reduction Incentive feature of the Program, that section of the Tariff, on Sheet 28-f, is set forth below:

> 4. Overall Cost Reduction Incentive – To provide an incentive for the Company to reduce the overall cost of price stabilization, at the end of each ACA year the Company shall account for any differences between the MRA and the net cost of price stabilization ("Actual Cost") for the preceding heating season, exclusive of the gains and costs covered by Section G.3 [the Price Protection Incentive], in accordance with the following schedule:
>
> (a) If the Actual Cost exceeds the MRA, the IA (Incentive Adjustment) Account shall be credited and the IR (Incentive Revenue) Account shall be debited for 100% of such excess;
>
> (b) If the Actual Cost is less than the MRA, the IA Account shall be debited and the IR Account shall be credited for 40% of the difference between the MRA and the Actual Cost so long as such difference is less than $6,666,666.66; and

(c) If the difference computed in 4.b) above is greater than or equal to \$6,666,666.66, the IA Account shall be debited and the IR account shall be credited for \$2,666,666.66 plus 60% of the amount by which such difference exceeds \$6,666,666.66.

The Program Description's statement of the Overall Cost Reduction Incentive follows the Tariff description, with language in Section 3 of the Program Description stating that the Overall Cost Reduction Incentive applies to "Savings achieved through reductions in the cost of the [P]rogram below the MRA as a result of favorable option purchases or intermediate trading activity (prior to the last three business days of NYMEX option trading)…"

ISSUE B: Do the controlling PSP Tariff and Program Description terms for the October 1, 2000 through September 30, 2001 ACA period entitle Laclede to retain approximately \$4.9 million of the \$33.5 million in financial proceeds received by the Company through its purchase and sale of call options during that period?

FINDING OF FACT:

For the reasons set forth below and in its conclusions of law, the Commission finds that Laclede is entitled to retain \$4,872,997 in proceeds as incentive revenues under the Program.

Based on the uncontraverted evidence in the record the Commission finds that:

- The Maximum Recovery Amount (or "MRA") is \$4 million, as set forth in the Program Description. Accordingly, Laclede's customers provided the Company with \$4 million during the 2000-01 ACA Period with which to purchase natural gas financial instruments (call options). (Program Description, p.1).

- Through a series of profitable intermediate option sales, Laclede generated proceeds sufficient to actually purchase $8,922,450 in call options. (Exhibit 7, p. 3).
- Laclede sold these call options for proceeds of $33,499,000. (*Id.*).
- Of these option sales proceeds, amounts representing $11,566,000 were sold during the last three business days of NYMEX option trading for the corresponding option month. Hence, this amount is attributable to the Price Protection Incentive. The remaining sales occurred prior to the last three business days of NYMEX option trading for the corresponding option month, and are therefore attributable to the Overall Cost Reduction Incentive. (*Id.*).

The Commission finds that Laclede properly calculated the effects of these option purchases and sales in accordance with the provisions of the Tariff and the Program Description in arriving at the amount earned by the Company. First, the Company made those calculations in the same exact manner that it calculated them for purposes of the preceding ACA year, over which Staff had raised no concerns regarding whether such calculations had been performed in accordance with the requirements of the Program. (Exh. 6, pp. 6-7, Exh. 8, p. 2 and Schedule 1; Tr. 157-160). Second, contrary to Staff's suggestion, there is no ambiguity over the term "savings" in the Program Description's depiction of the Overall Cost Reduction Incentive (*supra*). The Commission finds that, in accordance with its dictionary definition, savings means a reduction in expense. (Exh. 2, p. 2). Therefore, Laclede achieved savings in accordance with the Program Description, since real cash money generated by the Company through its intermediate trading activity was used to reduce purchased gas expenses. (Tr. 60-66).

Nor is there ambiguity in the meaning of the phrase "net cost of price stabilization," as used in the PSP Tariff. It simply means the Company's actual cost to procure financial instruments less whatever amounts the Company received from the sale of any such instruments prior to the last three days of NYMEX option trading. For purposes of determining the Overall Cost Reduction Incentive, gains and costs covered by the Company's Price Protection Incentive must be excluded, as clearly provided in Paragraph G.4 of the Tariff. (Exh. 7, pp. 2-3; Tr. 59-61, 258-59).

Based on the above findings, the Commission sets forth below the proper calculations under the Tariff and Program Description for the second year of the Program:

- The "net cost of price stabilization" for the Program under Section G.4 of the Tariff was $8,922,450 - $33,499,000, or $-24,576,550. (Exh. 7, p. 3, Exh. 9).
- According to the terms of the Overall Cost Reduction Incentive (Section G.4 of the Tariff), the gains and costs covered by the Price Protection Incentive (Section G.3 of the Tariff) must be excluded before arriving at the "Actual Cost." The excluded amount equals $11,566,000. (Exh. 7, p. 3, Exh. 9). Therefore, the Actual Cost equals $-13,010,550.
- Incentives for cost reductions under the Overall Cost Reduction Incentive are based on the difference between the Actual Cost of $-13,010,550 and the MRA of $4,000,000. This difference equals $-17,010,550. (Exh. 7, pp. 3-4, Exh. 9).
- Using the schedule in Paragraph G.4 of the Tariff to allocate the $17,010,550 cost reduction between the customers and the Company yields a result of $8,137,553 for

the benefit of customers, and $8,872,997 to be retained by Laclede. (Exh. 7, p. 4, Exh. 9).

The Commission further finds that, by letter dated June 1, 2000, the Company opted out of the Price Protection Incentive features in year 2 of the Program. (Section 2.B.ii of the Program Description, Exhibit 5HC, p. 13, Third Revised Tariff Sheet No. 28-e). As a result of opting out of the Price Protection Incentive, Laclede is not entitled to share in the $11,566,000 attributable to the Price Protection incentive. Therefore, the Commission finds that Laclede should have, and did, credit the Price Stabilization Fund in the sum of $11,566,000 for the benefit of its customers. (Exh. 4, pp. 3-4).

The Commission finds that, of the $8,872,997 that Laclede was entitled to under the Program's Overall Cost Reduction Incentive, it voluntarily contributed $4 million for the benefit of its customers to supplement the funds available for option purchases in the third and final year of the Program. (Exh. 4, pp. 7-8) Thus, the amount remaining to be retained by Laclede is $8,872,997 - $4,000,000, or $4,872,997.

The sum of $4,872,997 is the amount that the Commission finds should be, and in fact has been, retained by Laclede as its incentive share under the Program. This result is mandated by the terms of the Tariff and Program Description, and the facts. At the same time, Laclede's customers benefited as set forth above by the sums of $11,566,000 + $8,137,553 + $4,000,000 for a total of $23,703,553 (less the $4 million they contributed to the MRA to purchase options). Thus, in addition to the fact that the result is mandated by the controlling terms of the Tariff and Program Description, we believe it to be reasonable and beneficial to customers as well.

Staff also performed calculations of the effect of Laclede's purchase and sales of options under the Program. (Exh. 1HC, Sch. 9, and Exh. 3HC, Sch. 2). In effect, Staff defines "savings" not as a reduction in expenses, but by comparing Laclede's actual results that were achieved, in part, with proceeds from the intermediate trading of options, with results that hypothetically could have been achieved had Laclede held all the options it purchased until near expiration. In direct testimony, Staff attempts to demonstrate that, rather than having achieved savings of nearly $25 million, Laclede actually lost money in the Program. (Exh. 1HC, Sch. 9). At the same time, Laclede noted that Staff's approach was based on Laclede's actual option purchases of $8,922,450, when in reality Laclede only had $4,000,000 at its disposal to make such purchases. In effect, Laclede asserted that Staff was improperly judging Laclede on options that it never would have owned had Laclede not reinvested proceeds it generated from intermediate option sales. (Exh. 4, pp. 6-7). Staff then made a recalculation in its surrebuttal testimony, using only certain option purchases[4] totaling $4 million. Staff again concluded that no savings were experienced and therefore Laclede should not be entitled to retain any amounts. (Exh. 3HC, p. 11).

As discussed more fully below in the Conclusions of Law, the Commission finds that Staff's approaches do not reflect the terms of the Program Description or the Tariff and cannot be adopted. Specifically, we find that the Tariff is barren of any language that even references, let alone authorizes, the method that Staff has now proposed be used to determine and allocate proceeds. (Tr. 227).

[4] Staff did not use purchases that it considered to be "reinstatements" of previous option positions held and sold by Laclede. (Exh. 3HC, pp. 7-11).

Further, we find that it is simply not fair or equitable to base Laclede's performance under the Program on either a retroactive or a hypothetical standard, much less both. The evidence demonstrated that Staff's proposed method was developed long after the transactions to which it would be applied took place. Applying such a method is improper as performance under the Program should not be judged by a hindsight assessment, regardless of what the Staff believes "makes sense" in the context of the Program. (Exh. 1, pp. 11-12; Exh. 2, p. 3; Exh. 3, pp. 1-3; Tr. 53).

The Commission finds that a hypothetical standard as proposed by Staff is likewise unreasonable and inequitable. Even if it were appropriate to consider a hypothetical standard, the record in this proceeding is not sufficient to support the adoption of any particular hypothetical standard in this case. As stated above, Staff itself has generated two different hypothetical results, one in its direct testimony and one in surrebuttal. Moreover, in rebutting Staff, Laclede also offered a number of alternative hypotheticals that conflicted with Staff's. For example, Laclede illustrated that, had it not engaged in intermediate trading activities, but instead ceased purchasing call options once it had spent the initial $4 million that it was authorized to collect from customers to fund the Program, it would have only produced about half of the $28.5 million in total benefits that were ultimately generated under the Program. (Exh. 6HC, p. 3).

Even if we did support a hypothetical approach, which we do not, we would not compare Laclede's performance under the Program to the hypothetical result from holding $8,922,450 in option purchases to expiration, when the Company was only provided a $4 million stake. Had all options been held to expiration, as Staff suggests, Laclede would not have been able to generate the additional $4,922,450 for reinvestment. (Exh. 4, pp.6-7, Exh. 5, p. 8, Exh. 6, p. 3).

The Commission finds that Staff's hypothetical approach in its surrebuttal is further flawed for three reasons. First, we disapprove of this approach because it constitutes a hypothetical within a hypothetical. Staff not only assumes that Laclede should have held $4 million in option purchases until near expiration, but also selects which of Laclede's $8,922,450 in option purchases count toward the $4 million through a hypothetical standard that doesn't count some option purchases under the theory that these purchases were "reinstatements" and would not have been made but for the fact that an earlier position was sold. (Exh. 3HC, pp. 7-11).

Second, we disapprove of this approach because it results in an unrealistic hedging strategy. Specifically, based on the hypothetical purchases arrived at under Staff's method, Laclede would have purchased and held 601 option contracts for November, 952 option contracts for December, 743 option contracts for January, but only *two* option contracts each for the months of February and March. Staff expressly admitted that such a strategy would be unreasonable. (Tr. 104-106; Exh. 12).

Third, we disapprove of this approach because it potentially leads to arbitrary results. Staff's reinstatement method produced radically different results, in terms of whether option purchases were counted or excluded, based simply on the order in which such options were purchased and sold in a given month. For example, Staff witness Sommerer was asked to consider three different scenarios under which Laclede made three purchases and three sales of 100 options apiece for the month of November, with each purchase costing $50,000 and generating $100,000 in proceeds. (Exh. 13; Tr. 107-

108). Although the result at the end of the month was the same (i.e. Laclede had made three purchases and sales of the same quantity of options (with the same cost and level of proceeds)), Mr. Sommerer calculated that his reinstatement method would count $50,000 in option purchases under the first scenario, $100,000 under the second, and $150,000 under the third scenario, based solely on the order in which the option purchases were made and sold. (Tr. 110-112). No explanation was provided as to why a method that produces these kinds of dramatically different results for identical transactions with identical outcomes makes any sense. Given these flaws, the Commission finds that the reinstatement method cannot be relied upon, and declines to adopt it.

Staff notes that Laclede sold 100 January options on December 20, 2002, one day before those options would have qualified under the Price Protection Incentive, which would have resulted in customers retaining all of the profits from the sale. Staff's implication is that Laclede timed the sale of these options so as to include the proceeds in the Overall Cost Reduction Incentive, in which Laclede would share. This argument falls flat in the face of overwhelming evidence of the reasonable approach Laclede took under the Program. We find that the evidence provided by Laclede is credible and supported by the objective evidence of actual purchases and sales. Specifically, we find that (i) given the unprecedented rise in gas prices, Laclede believed that $4 million was inadequate to properly hedge gas costs for the entire winter (Exh. 5HC, pp. 14-15); (ii) the Company requested additional hedging funds, but in the face of opposition from Staff and Public Counsel, withdrew such request (*Id.*); (iii) the Company therefore settled on a strategy to try and manage its limited funds by selling option positions at perceived peak prices and reinvesting proceeds to cover subsequent months (Exh. 6, pp. 11-12; Tr. 303-08, 328);

(iv) the Company in fact did so by, for example, selling nearly all of its November options well prior to expiration, garnering over $1.1 million in proceeds on options that would have expired virtually worthless had they been held to near expiration (Exh. 1HC, Sch. 9-1); (v) the Company implemented its strategy by purchasing nearly $9 million in options, more than double its original stake; and (vi) the Company held $11,566,000 in options to within three days of expiration, all of which was distributed to customers because Laclede had opted out of the Price Protection Incentive. (Exh. 1HC, Sch. 9; Exh. 4HC, pp.3-4). Given these facts, we find that the Company acted in good faith in its performance under the Program and we reject Staff's implication to the contrary.

CONCLUSIONS OF LAW

The Commission has arrived at the following conclusions of law:

Jurisdiction:

Laclede is a regulated public utility over which the Commission has jurisdiction in accordance with Chapters 386 and 393, RSMo 1994. The Commission must protect the public interest, ensure that Laclede's rates are just and reasonable, and ensure that Laclede provides safe and adequate service to the public. §§ 393.130 and 393.140, RSMo 1994.

Legal Effect of Tariffs:

The Tariff and Program Description were approved by the Commission effective on July 23, 1999 in Case No. GO-98-484, and revised by the Agreement approved by the Commission in Case No. GO-2000-394.

We reject Staff's claim that the Company's exercise of its right to declare the Price Protection Incentive inoperable and the parties' Agreement to eliminate the 70% coverage requirement permits the retroactive application of Staff's new method for determining savings under the Overall Cost Reduction Incentive. As acknowledged by Staff witness Sommerer, there was nothing in the Tariff and Program Description, the Agreement (Tr. 85), the Suggestions filed by Staff in support of the Agreement (Tr. 88), the tariff that implemented the Agreement (Tr. 90), or the Staff memorandum that recommended approval of the tariff revision (Tr. 93) that purported to alter either the meaning or operation of the Overall Cost Reduction Incentive in any way, let alone in a manner that would authorize the method proposed by Staff in this proceeding. We conclude that the Overall Cost Reduction Incentive continued in full force and effect, based on the Agreement language stating that the remaining provisions of the Tariff continued in full force and effect, and on Staff's testimony that those provisions include the Overall Cost Reduction Incentive. (Exh. 6, p. 10; Exh. 1HC, Sch. 4-4, Tr. 93).

Further, there is nothing in Missouri law to suggest that Staff, or any other party for that matter, may unilaterally rewrite a tariff after the fact to accord with that party's retrospective view of what would have made the most sense. To the contrary, it is a fundamental and long-standing principle of law that it is a utility's filed and approved tariffs that govern its relationship with its customers, ***Bauer v. Southwestern Bell Telephone Company,*** 958 S.W.2d 568, 571 (Mo. App. E.D. 1997). Once the Commission approves such a tariff, as it did in this case, it becomes Missouri law and has the same force and effect as a statute enacted by the legislature. ***Bauer v. Southwestern Bell Telephone Company, supra,*** at 571; ***Allstates Transworld Vanlines, Inc. v.***

Southwestern Bell Telephone Company, 937 S.W.2d 314, 317 (Mo. App. E.D. 1996). *See also* ***Keogh v. Chicago & Northwestern Railway,*** 260 U.S. 156, 162-163; 43 S.Ct. 47, 49 (1922).

As instruments that have the full force and effect of law, such tariffs, and the ratemaking treatment they provide, cannot be retroactively modified by the regulatory body to accomplish a different result than what was authorized by those tariffs at the time the transactions to which they apply took place. *See* ***State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission,*** 585 S.W.2d 41, 49 (Mo. banc 1979); ***Arkansas Louisiana Gas Co. v. Hall,*** 453 U.S. 571, 577, 101 S.Ct. 2925, 2930. However, this is precisely what the Staff has attempted to do in this case with its admittedly new method for determining how savings generated under these past transactions should be treated under the Overall Cost Reduction Incentive. We conclude that Staff may not redefine tariff terms or construct hypothetical standards to change the meaning of the Tariff or accompanying Program Description.

Finally, Staff's proposed adjustment is unlawful because it effectively represents an impermissible collateral attack on the Commission's initial Report and Order in Case No. GO-98-484 which approved the PSP. Section 386.550 RSMo. 2000 provides that "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." This statute is indicative of the law's desire that judgments be final and therefore makes a decision of the Commission immune to collateral attack. ***State ex rel. Licata, Inc. v. Public Service Commission,*** 829 S.W.2d 515 (Mo. App. W.D. 1992); ***State ex rel. Harline v. Public Service Commission,*** 343 S.W.2d 177, 184 (Mo. App. 1960). In both the design of its proposed adjustment, as well as the various rationales offered in support of its adoption, however, it is clear that Staff is seeking to attack and invalidate the Commission's decision in Case No. GO-98-484. For this reason, and in light of the other legal deficiencies discussed above, we conclude that Staff's proposed adjustment cannot be legally sustained and must therefore be rejected.

Respectfully submitted,

Michael C. Pendergast By JCG

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Proposed Findings of Fact and Conclusions of Law has been duly served upon the General Counsel of the Staff of the Public Service Commission and the Office of the Public Counsel by email, fax, or by placing a copy thereof in the United States mail, postage prepaid, on this 10th day of April, 2003.

James C. Swearengen