

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

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

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

REPLY TO STAFF'S NOTICE

COMES NOW Laclede Gas Company (hereinafter "Laclede" or "Company"), and for its Reply to the Staff's Notice Concerning Status of Cases and Laclede's Failure to Comply with Commission Orders filed on January 28, 2010, states as follows:

1. On November 4, 2009, the Commission issued its Order in the above captioned cases in which it voted, 3 to 2, to require Laclede to produce — on three business days notice — records that belong to Laclede's unregulated affiliate, Laclede Energy Resources, Inc. ("LER").

2. As Staff notes, both Laclede and LER sought extraordinary writs from first, the Western District Court of Appeals and second, the Missouri Supreme Court, in an effort to obtain a judicial determination of the propriety of the Commission's actions. For reasons that were not articulated, neither court chose to intervene at this stage of the proceedings, as is the case in the overwhelming number of requests for extraordinary relief. Almost immediately following the Missouri Supreme Court's action, the Staff filed its Notice Concerning Status of Cases in which it stated that the Commission may want to consider moving forward with enforcing its November 4 Order, either by

directing Laclede to comply with the Order or by possibly instituting a show cause proceeding.

3. For the reasons set forth below, Laclede respectfully submits that the Commission should take neither of these actions. Instead, it should recognize that the discovery avenue Staff has attempted to pursue in this proceeding is improper and cannot form a valid basis for obtaining records of a company, like LER, that is legally separate and distinct from Laclede. Laclede bases that conclusion not on its own view of the law, but on the views that have been previously and repeatedly expressed by the Commission itself.

4. In its November 4, 2009 Order, the Commission determined that Staff is entitled to obtain the LER records pursuant to the general rules of civil discovery. In such case, it is abundantly clear that a submission and enforcement of data requests to Laclede is not the proper vehicle for attempting to obtain this information. As the Commission recognized in a unanimous Order it issued in these proceedings on January 21, 2009, Laclede is only required under the general rules of discovery to provide LER information “to the extent that Laclede is in possession of the information.” As the Commission stated:

The Commission has ordered Laclede to produce information about its affiliate according to the rules of discovery not under the Commission’s Affiliate Transaction Rule. Although it is true that by granting Staff’s motion, Staff is permitted to investigate Laclede’s affiliate transactions, such investigation is limited to information that may lead to evidence that is relevant to these ACA cases. To the extent that Laclede is in possession of the information, the Commission clarifies its order compelling Laclede to produce the information requested by Staff.

Order Regarding Request for Clarification, p. 2 (emphasis added).

5. To Laclede's knowledge, the Commission has never reversed this unanimous determination that the LER documents in question must be in Laclede's possession for Laclede to have any obligation to provide them. Nor was this determination appealed by Laclede or any other party to these proceedings. It therefore remains "the law of the case" and must be followed.¹ And that is precisely what Laclede has done by repeatedly advising the Commission of whether, and to what extent, the requested LER documents are or are not in its possession, and by providing any documents that are.

6. Perhaps in recognition of the fact that Laclede has indeed complied with the Commission's actual discovery orders in this case, as written, the Commission referenced another source of its authority to seek the LER documents in its pleadings before the Western District Court of Appeals and Missouri Supreme Court. Specifically, the Commission stated that it was seeking such records based on the authority granted by R.S.Mo § 386.450 which provides 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,

¹The only statement that Staff makes in its Notice in response to the fact that these documents are not in Laclede possession is the bald assertion that there is a common officer, Mr. Neises, who has authority over both the operations of Laclede and LER. Because any corporate structure that has affiliated companies ultimately has to have a common officer at some point near the top of the corporate pyramid, the fact that one exists says nothing as to whether that officer can or must exert undue influence over one corporate entity for the benefit of another one. To the contrary, as the Western District Court of Appeals recently determined, in evaluating what action to take in a particular situation, a corporate board or officer has to make independent decisions that are consistent with its or his fiduciary duty to the entity in question. *State ex rel. Public Counsel v. Public Service Commission*, 274 S.W.3d 569, 582 (Mo. App. W.D. 2009). In effect, Staff is suggesting that Mr. Neises should force LER to provide such information to Laclede without any consideration of whether it is in the best interests of LER to do so, let alone whether there is any legitimate legal basis to support such an action.

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).

7. As indicated by the underscored language, however, this statutory provision only requires that a corporation, person or public utility provide accounts, papers or records that are actually “kept” by that entity in its offices. Absolutely no allegation has been made in these proceedings that LER’s records are “kept” by Laclede. In fact, LER’s records are kept by LER, not Laclede. Accordingly, in providing whatever records it keeps, Laclede has fully complied in these proceedings with its obligations under this statute as well.

8. Given these considerations, it is clear that if the Staff was intent on obtaining information from LER, the proper course of action was to seek such information from LER directly, through the issuance of a subpoena, rather than indirectly through the issuance of data requests to Laclede.² Such an approach would have been consistent with this Commission’s recent and, once again, unanimous determination that a subpoena is the only discovery vehicle available for obtaining information in those instances where the Commission is seeking information from a non-party, like LER, or is conducting an investigation outside the context of a contested case. As the Commission stated in an order that was issued in connection with another prudence audit – in this case of an electric company’s generating plant expenditures:

The Commission has recognized the party – non-party distinction and has declared that data requests cannot be directed to non-parties in a contested

²The Staff is certainly conversant with how to use the subpoena process in connection with obtaining information from Laclede affiliates, like LER. It has served LER directly in the past and recently deposed the Laclede Group’s Corporate Secretary pursuant to a Subpoena Duces Tecum issued by the Commission and served to the Laclede Group.

case.^[9] However, the Commission has also recognized that Staff and the Public Counsel may use data requests outside of the context of a contested case pursuant to the specific statutory authority in Section 386.450, RSMo 2000,^[10] which provides:

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.

Data requests, by definition, are informal written requests for documents and information, and when used outside of the framework of a contested case discovery rules do not provide any means to compel production of the information requested. Use of data requests in a non-case audit fall under the Commission's investigatory power, and production of documents in this procedural context can only be compelled by use of a subpoena as provided for in Sections 386.440 and 536.077, RSMo. Section 536.077 delineates the enforcement mechanism of subpoenas as follows:

The agency or the party at whose request the subpoena is issued shall enforce subpoenas by applying to a judge of the circuit court of the county of the hearing or of any county where the witness resides or may be found for an order upon any witness who shall fail to obey a subpoena to show cause why such subpoena should not be enforced, which said order and a copy of the application therefor shall be served upon the witness in the same manner as a summons in a civil action, and if the said circuit court shall, after a hearing, determine that the subpoena should be sustained and enforced, said court shall proceed to enforce said subpoena in the same manner as though said subpoena had been issued in a civil case in the circuit court. The court shall permit the agency and any party to intervene in the enforcement action. Any such agency may delegate to any member, officer, or employee thereof the power to issue subpoenas in contested cases; provided that, except where otherwise authorized by law, subpoenas duces tecum shall be issued only by order of the agency or a member thereof.^[11]

The proper procedure for Staff to have followed was to seek production of the disputed documents by means of a subpoena and its enforcement.

In Re: Kansas City Power and Light, Case No. ER-2009-0086, Order Regarding Staff's Motion to Compel (December 9, 2009) (emphasis added, footnotes omitted).

9. Given the Commission's unanimously expressed view of the legal parameters governing its authority to compel the production of information in *Kansas City Power and Light*, it is clear that a subpoena should have been issued to LER in the event the Commission believed that it was entitled to obtain the LER information at issue. It is undisputed that LER is not a party to these proceedings. Moreover, like the prudence audit being undertaken in the *Kansas City Power and Light* case, it is also clear that the Commission considers these proceedings to still be in some kind of investigation stage, as evidenced by its persistent refusal to honor Laclede's request for an evidentiary hearing and the other procedural safeguards afforded by a contested case until the Staff's investigation is completed. While either one of these factors alone would mandate the use of a subpoena to obtain such information, together they conclusively compel such a result.

10. In addition to being compelled by the legal analysis endorsed by the Commission in *Kansas City Power and Light*, the use of a subpoena is also the proper discovery vehicle because it is also the only one that permits LER, as a non-party, an opportunity to protect its rights in the manner provided by law. LER has indicated in its pleadings before the Western District Court of Appeals, that it has significant concerns regarding the legality and reasonableness of the information request at issue here, including the difficulty of notifying numerous suppliers and customers of the request for

such information pursuant to confidentiality provisions.³ That is precisely why the General Assembly has provided a means for the Commission and affected entities to obtain an enforcement hearing in the circuit court in the event there is a dispute over whether certain information should be provided. Laclede would respectfully submit that the Commission has no authority under the law to short-circuit these protections by seeking such information from LER indirectly through Laclede. The Commission recognized this legal principle in its own recent decision in the *Kansas City Power & Light* case.

11. For all of the foregoing reasons, Laclede respectfully submits that in the event the Staff still desires to obtain the information at issue in these proceedings, notwithstanding Laclede's arguments as to why such information is not relevant, that it should apply for a subpoena to be issued to LER, as it previously has in other cases, so that this matter may be addressed and adjudicated in the proper manner prescribed by law.

WHEREFORE, for the foregoing reasons, Laclede respectfully requests that the Commission accept Laclede's Reply to Staff's January 28, 2010 Notice.

Respectfully submitted,

/s/ Michael C. Pendergast

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³ Without a direct request to LER from a governmental agency to produce documents, the confidentiality provisions described by LER in its pleadings raise doubt as to whether LER could even provide certain documents to Laclede without causing LER to breach its confidentiality obligations.

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CERTIFICATE OF SERVICE

Gerry Lynch hereby certifies that the foregoing pleading has been duly served upon the General Counsel of the Staff and the Office of the Public Counsel by email or United States mail, postage prepaid, on this 2nd day of February, 2010.

/s/ Gerry Lynch
Gerry Lynch