

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

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

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

**LACLEDE GAS COMPANY'S REPLY TO STAFF'S RESPONSE TO  
LACLEDE'S MOTION FOR RECONSIDERATION, REQUEST FOR STAY AND  
REQUEST FOR ESTABLISHMENT OF AN EVIDENTIARY HEARING**

COMES NOW Laclede Gas Company (hereinafter "Laclede" or "Company") and submits this Reply to Staff's Response to Laclede's Motion For Reconsideration, Request for Stay and Request for Establishment of an Evidentiary Hearing (the "Motion"), and in support thereof states as follows:

1. Staff's Response presents a series of contradictions between the stated purpose of its ACA review and the information it has requested from Laclede. On the one hand, Staff repeatedly claims to be reviewing Laclede's "gas purchasing activities" and "its affiliate relationship" with Laclede Energy Resources ("LER")<sup>1</sup>, while on the other hand, Staff insists that it needs a broad scope of information on LER's business with unrelated third parties. Laclede has fully cooperated with the Staff regarding transactions between it and LER and there is no credible allegation otherwise. Thus, the purpose of the ACA investigation has been fulfilled and the unwarranted detour to investigate LER's transactions with third parties is neither needed nor justified.

**INTRODUCTION**

2. Staff's arguments have become so muddled and illogical that a brief recap is required to ensure that the issue is properly framed for the Commission. In December

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<sup>1</sup> See Response, pars. 1, 7, 8, 11, 12, 13, 30

2006, and again in December 2007, the Staff issued recommendations in the referenced Laclede ACA cases, proposing disallowances in connection with certain affiliate transactions between the Company and Laclede Energy Resources, Inc. (“LER”). Based on little more than the allegation that LER had successfully increased its net income, Staff also recommended in December 2007 that an investigation be opened, purportedly to review the affiliate practices and transactions between LER and LGC. Staff added that a separate investigation was necessary because of the likelihood that Staff will need to subpoena and examine LER documents.

3. Laclede denied that its transactions with LER violated the affiliate transaction rules and opposed the investigation of LER as unwarranted and unnecessary. In fact, Laclede asserted that the Staff itself had proposed adjustments and taken positions that were flatly inconsistent with the provisions of the Commission’s affiliate transactions rules.

4. With respect to determining compliance with the affiliate transactions rules, Laclede agreed that production of information concerning the pricing of Laclede-LER transactions was appropriate for the Staff to review and the Commission to consider in making its decision. While not strictly necessary to determine compliance, Laclede also agreed to provide information, in the form of supplier invoices to LER, showing the cost basis for supplies sold by LER to Laclede. Accordingly, Laclede provided a huge volume of information and documentation demonstrating that the pricing between Laclede and LER complied with the affiliate transaction rules and that the transactions were also eminently reasonable when comparing the amounts LER paid for gas and the amounts LER charged to Laclede.

5. Laclede's reasonable expectation at this point was that the parties would proceed to hearing on the affiliate transaction matters raised by Staff in its recommendations. Instead, Staff has attempted to shortcut the ACA process and usurp the Commission's powers by unilaterally launching a full blown investigation of LER's business, focusing on LER transactions with unrelated third parties. Specifically, Staff issued the following data requests:

- (1) A copy of all Laclede Energy Resources (LER) gas supply and transportation invoices, contracts and nomination records that were effective for the months of January 2005 and April 2005.
- (2) A copy of all Laclede Energy Resources (LER) gas supply and transportation invoices, contracts and nomination records that were effective for the months of January 2006 and April 2006.
- (3) The ledgers or dealbooks or journals or other documents that record all of LER gas supply and transportation deals in summary form or report form or spreadsheet form or similar form. The response should include sales dates, sales and purchase volumes, sales and purchase prices, cost of gas sold and net margin.
- (4) Documentation showing LER's use of any capacity released to LER by the Laclede Gas Company. The response should include receipt and delivery points, date of use, volumes nominated and the Transportation Service Agreement (TSA) number used to make the nomination.

As the Commission can clearly see, these data requests seek information pertaining to LER transactions with third parties. The information sought is not in any way limited to transactions between Laclede and LER. Thus, the requests are far broader than the facts and market information necessary to ensure compliance with the affiliate transaction rules, as provided by 4 CSR 240-40.015(6)(B)(2). They are instead designed for Staff to untether itself from a lawful investigation of Laclede's ACA, and conduct an

investigation and audit of an affiliate in a manner that is squarely inconsistent with the terms of the Commission's rules.

6. Laclede objected to these data requests on the grounds that they are contrary to the Commission's own rules governing what kind of affiliate information Staff is entitled to obtain, are irrelevant, unduly burdensome and not calculated to lead to the discovery of relevant information. Staff responded with a motion to compel Laclede to respond thereto. Based on Staff's allegation in its December 2007 Recommendation, that a transaction had occurred in which Laclede had made a sale to LER on which Laclede made a profit, and LER then made a sale to its customer on which LER had made a profit, the Regulatory Law Judge, on delegation of authority, granted the motion to compel. Hence, the motion to compel was granted based on no more evidence than an allegation that two parties had made sales from which both profited, a routine occurrence in the business world. Granting the motion to compel effectively hands Staff a summary determination on its request to open an investigation, allowing Staff to launch its proposed investigation without affording Laclede a hearing or a chance to present its evidence on how it dealt with the affiliate transactions at issue in this case and why those transactions were fully consistent with the affiliate transactions rules.

7. As a result, on October 30, 2008, Laclede filed its Motion for Reconsideration of the Order granting the motion to compel. In the Motion, Laclede argued that the order:

- (1) circumvents the Commission's ACA process, and the Commission's own rules for resolving issues on a summary basis;
- (2) permits the Staff to launch an entirely new field of discovery literally months and even years after Staff's ACA recommendations were originally due;

- (3) runs afoul of the explicit requirements of the Commission's own affiliate transactions rules governing when access to affiliate information is appropriate, as well as the Commission's decision on a similar issue in a 2004 Ameren case; and
- (4) relies on a completely unsubstantiated and implausible Staff theory on revenue migration that is not only inconsistent with the pricing standards in the Commission's affiliate transactions rules, but affirmatively assumes that Laclede should operate in a manner that is discriminatory, anti-competitive and otherwise inconsistent with federal regulatory and legal requirements.

8. On November 13, 2008, Staff filed its Response to Laclede's Motion for Reconsideration.

#### **ARGUMENT**

9. Based on the responses of Staff and Public Counsel, Laclede appears to be the only party that understands that (i) because of the potential disadvantage to the utility and its customers, affiliate transactions are suspect and should be regulated; (ii) affiliate transactions are *permitted* by the Commission's affiliate transaction rules, subject to compliance with those rules; (iii) the affiliate of a utility is permitted to earn net income; (iv) an affiliate may participate in the gas marketing business without running afoul per se of the utility's operations, including the utility's off-system sales and capacity releases; and (v) an affiliate gas marketer may choose to take business risks that a utility chooses not to take.

10. In short, at issue here is the relevance of the Staff's overbroad request for information on a non-regulated affiliate. Laclede believes this to be an inappropriate fishing expedition. In its Response, Staff attempts to bootstrap entitlement to such overbroad discovery by fiat, first claiming (without justification or support) that the

invasion of LER is “relevant.” Thus, in paragraph 4 of its Response, Staff simply assumes victory on the ultimate issue of fact by stating that the Commission cannot make a sound judgment when a utility refuses to produce “relevant” information.

11. In paragraph 5, Staff proceeds to quote the very same Order on Reconsideration Concerning Discovery in Case No. EO-2004-0108, that Laclede relies upon to show the Commission that it has previously found such broad discovery requests to be improper. Staff emphasizes the passage of the quote bolded below:

It is true that the Commission is authorized and required to examine the dealings of regulated entities with their unregulated affiliates.<sup>[15]</sup> However, as Union Electric points out, 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 that they do business with, merely because they are affiliates of regulated entities. (Order, p. 8, *emphasis supplied by Staff*).

12. Staff believes that its data requests qualify under the exception because it has showed the relevance of its fishing expedition to transactions between Laclede and LER. Nothing could be further from the truth. Staff has shown absolutely no connection between Laclede-LER transactions, and the overbroad and generalized information it seeks on LER’s non-affiliated business. Contrary to demonstrating the relevance of the information it seeks, Staff’s request is a bold attack on LER’s business, disconnected from any LER-Laclede transactions.

13. In paragraph 6, Staff cites to the affiliate transaction rules, in particular 4 CSR 240-40.015(5)(A)(1), for support that it is entitled to the information requested. This section of the regulation does not authorize discovery of third party transactions.

Section (5)(A)(1) provides that an affiliate shall maintain records of “costs associated with affiliate transactions that are incurred by the parent or affiliated entity **and** charged to the regulated gas corporation.” This section cannot authorize the broad discovery Staff seeks of LER’s deals with third parties that are unrelated to LER’s purchases of goods later sold to Laclede. In fact, Laclede has already specifically provided this information to Staff for its review and copying.

14. In paragraph 11, the Staff acknowledged that “perhaps the best method of determining the prudence of Laclede’s transactions with LER is by application of the Commission’s affiliate transaction rules to each transaction...” Laclede fully agrees with this statement, which makes the Staff’s crusade for information about LER transactions with third parties all the more baffling. Having provided substantial information on the actual affiliate transactions, Laclede has repeatedly requested that this case be set for hearing to apply the Commission’s affiliate transaction rules to these transactions. With respect to the request for an investigation, Laclede maintains its belief that any hearing on the affiliate transactions would show conclusively that Laclede’s practices comply with the Commission’s affiliate transaction rules, and therefore, an investigation would be neither necessary nor appropriate.

15. Paragraph 8 also offers up an outrageous example of what Staff considers to be “affiliate abuse” justifying Commission interdiction. In footnote 1, the Staff claims that an LER deal to acquire production or other resources might possibly be affiliate abuse because \*\* \_\_\_\_\_

\_\_\_\_\_\*\*. It is entirely unclear how this is connected to the 2005 and 2006 ACA proceedings at issue. This is nothing more than an

impermissible collateral attack on the Commission affiliate transaction rules because, in fact, unregulated affiliate operations are legal and permitted under Missouri law – a circumstance that clearly contemplates corporate funding for affiliates. Staff’s argument that affiliates may consume financial resources, and therefore its business existence should be prohibited, has been rejected.

16. In paragraph 9 of its response, Staff claims that Laclede has not been denied its due process rights to a hearing. This cannot be true when the Order granting the motion to compel effectively authorizes the investigation sought by Staff in its ACA recommendation without providing Laclede the benefit of a hearing on the matter.

17. In paragraph 10, Staff argues that the Commission has authority to subpoena records and therefore the requests must be granted. Since no one disputes that the Commission may properly subpoena records that are relevant and otherwise discoverable, this circular argument has no probative force. But a subpoena must also comply with such criteria and one seeking the information that Staff is now requesting would be just as invalid and inappropriate as Staff’s data requests.

18. In paragraphs 14 - 16, Staff claims that the need to examine the prudence of the relationship between Laclede and LER is demonstrated because (i) LER has had positive earnings; and (ii) Laclede is resisting Staff’s efforts to invade its affiliate. These arguments are complete red herrings. First, the fact that LER may have earned a profit cannot be legal justification for providing Staff open access to all of its records. Far from offering a rational justification for the discovery requested, the Staff makes an unexplained and murky reference to \*\*\_\_\_\_\_

\_\_\_\_\_\*\* (Response, par. 16). The fact that market opportunities may



exist is not a justification for disregarding constraints imposed on all litigants that discovery be limited to relevant areas. Second, Staff's view that any objection to a discovery request is tantamount to an admission of wrongdoing is ludicrous, as it leaves no opportunity for a party to make a legitimate discovery objection. And no one has objected to the examination of the relationship between Laclede and LER. Indeed, Laclede has only sought to ensure that such an examination be done in a way that complies with the Commission's own affiliate transactions rules, normal ACA procedures and fundamental tenets of due process.

19. In paragraphs 17 – 20 of its Response, Staff \*\*\_\_\_\_\_

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\_\_\_\_\_\*\* Finally, as Laclede has previously argued, the motives of executives are unimportant in any event, since the Commission rules already establish a process for reviewing affiliate transactions and judging such transactions based on objective criteria, not subjective notions of what some employee might be thinking.

20. Paragraphs 18 – 33 of the Response recycle the arguments that Laclede has previously shown in its Motion for Reconsideration to be unsupported and

unpersuasive. Staff argues that it must be permitted to follow all subsequent LER sales to third parties that were made using \*\* \_\_\_\_\_

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\_\_\_\_\_\*\* Absent the rarest of circumstances, no company, affiliated or not, would enter into a transaction to purchase unused capacity from Laclede expecting to lose money on a subsequent sale. All purchasers of unused capacity from Laclede expect to make money through their efforts. Some entities may be better than others at this process. Does this mean that the market price is the same thing as the highest and best price obtained by the most successful participant? If so, examining LER records, which is just one participant in the market, could not provide a meaningful, let alone fair, evaluation of the market price.

21. Any fair consideration of the issues raised by an allegation \*\* \_\_\_\_\_  
\_\_\_\_\_\*\* will involve a high degree of speculation and will necessarily require a separate mini-trial to establish the facts surrounding the transaction, including calling third party witnesses, to reconstruct events in 2005 and 2006 or earlier, since contracts performed in 2005 and 2006 may have been entered into at other dates. This exercise would add many days and much complexity to any hearing; most importantly, however, the needless excursion into

LER-third party transactions would miss entirely the point of the ACA process and the judgment of the Commission expressed in its affiliate transaction rules. ACA proceedings and affiliate transaction rules are designed to determine whether the utility acted prudently and whether or not an unfair subsidy is provided to the affiliate. For all the reasons discussed in Laclede's Motion for Reconsideration, there is no need, no practical way, and certainly no legal justification for going beyond the information already provided, solely to take an unauthorized detour into whether or not the affiliate (or any other entity) made a sale that could have theoretically been made by the utility.

**WHEREFORE**, for the foregoing reasons, Laclede respectfully requests that the Commission reconsider and reverse its October 20 Order Granting Motion to Compel and in its place issue an Order setting an evidentiary hearing and deferring its ruling on such Motion until the completion of that evidentiary hearing. Laclede further renews its request that the Commission stay the effectiveness of the October 20 Order pending its ruling on this Motion.

Respectfully submitted,

/s/ Michael C. Pendergast

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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 24th day of November, 2008.

/s/ Gerry Lynch

Gerry Lynch