

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Office of the Public Counsel,)
)
 Complainant,)
)
 v.)
)
Laclede Gas Company, and)
Missouri Gas Energy,)
)
 Respondents.)

Case No. GC-2016-0297

RESPONSE IN OPPOSITION TO OPC’S MOTION TO COMPEL

COME NOW Respondents Laclede Gas Company (“Laclede” or “Company”), including its Laclede Gas (herein so called) operating unit and Missouri Gas Energy (“MGE”) operating unit, and submit this Response in Opposition to OPC’s Motion to Compel. In support thereof, Respondents state as follows:

1. On June 20, 2016, the Office of the Public Counsel (“OPC”) filed a Motion to Compel in the above captioned proceeding in which it requested that the Commission order the Respondents to provide answers to 103 data requests submitted by OPC on May 23 and 24, 2016. As shown by the objection letter attached to OPC’s Motion, Respondents objected to providing answers to the data requests (“DRs”) primarily because OPC’s Complaint in this proceeding does not state a good faith claim upon which relief can be granted, and is subject to a pending Motion to Dismiss by Respondents. The Commission Staff has also taken the position that there is not a valid basis for the Complaint. Accordingly, before going to the considerable time, effort and expense of answering this large volume of DRs, Respondents strongly believe that the Commission should have an opportunity to weigh in and determine whether there is any basis for the Complaint and hence for the DRs that have been submitted by OPC in furtherance

of the Complaint. In the objection letter, the Respondents also indicated that, pursuant to the Commission's discovery rules, they would need 60 days from the date of a Commission decision to fully answer all of the DRs should this case go forward, and they objected to a small number of other DRs on independent grounds.

2. In its Motion to Compel, OPC argues that, under Section 386.450 RSMo., it has unfettered access to Respondents' books and records, permitting OPC to conduct discovery regardless of what action the Commission may take on Respondents' Motion to Dismiss. OPC also suggests that Respondents have no legal basis for their position that they will need 60 days to respond due to the high volume of DRs submitted by OPC.

3. In reply, Respondents would first note that, contrary to OPC's implication, Respondents have done nothing to deny OPC access to the Company's books and records. In fact, Respondents provided responses to OPC's initial set of data requests in this case. Although the initial set was limited in number, Respondents' answers included, among other things, its *entire* general ledger, which provides OPC electronic access to every accounting entry made by Respondents in a searchable Microsoft excel format. Respondents have also indicated their willingness to make arrangements for OPC to review other records maintained by the Respondents, including applicable Board of Directors' minutes. In short, Respondents have not only provided OPC with access to their books and records, but have done so in an extremely accommodating manner.

4. What Respondents have objected to is the second and third wave of data requests that were submitted by OPC and that go far beyond a request to merely obtain access to the Respondents' books and records. Specifically, these are the kind of data requests that would normally be submitted in a full blown rate case, including data requests that ask the Company to

search for and compile various kinds of information, justify or explain various corporate actions that have been taken in the past, and develop new analyses that have not previously been done.

5. Laclede submits that OPC does not have an “unfettered” authority to compel the production of such information. In this case, OPC has filed a Complaint that, for the reasons stated in Respondents’ Motion to Dismiss and Answer, fails to state a claim for which relief can be granted. OPC threw together its Complaint without any due diligence, premised it on an obviously inflated ROE that was nevertheless within the zone of reasonableness, and then filed it just in time for the Complaint to be used as fodder in the General Assembly for those opposing the gas ISRS legislation. The inescapable conclusion is that the Complaint was motivated by impermissible political considerations rather than a good faith concern over Respondents’ earnings levels. Indeed, far from being a valid exercise in protecting consumers, OPC’s Complaint is at best deficient, and at worst filed in bad faith.

6. Respondents agree with Staff that OPC has failed to demonstrate a valid basis for its Complaint. Regarding the voluminous discovery issued by OPC, all Respondents seek is that their obligation to answer OPC’s Complaint DRs should be taken up and decided by the Commission at the same time and in the same manner that the Commission rules on Respondents’ Motion to Dismiss the Complaint. Respondents submit that this is an entirely reasonable and appropriate approach to take, rather than diverting hundreds of hours of employee attention away from managing the day-to-day business of serving its customers to gather even more data in response to an expansive boilerplate set of DRs that have been issued in connection with a baseless Complaint.

7. What is not reasonable, appropriate, or even lawful for that matter, is OPC’s suggestion at page 4 and then again at page 5 of its Motion that it intends to continue pursuing such discovery regardless of what the Commission may decide on the Respondents’ Motion to

Dismiss. In effect, OPC is suggesting that it has boundless authority to pursue whatever volume or kind of discovery it wants, whenever it wants, without any supervision or input from the Commission. Indeed, OPC's approach appears to relegate the Commission to being nothing more than a powerless bystander when it comes to such matters.

8. As OPC notes in its Motion, even though Section 386.450 is titled as, and targeted at, the production of out of state records, it has been construed by the Commission as authorizing OPC to request documents even where a proceeding is not pending. OPC does not, however, get to unilaterally decide the scope and nature of such request. As the underscored language makes clear, OPC must first demonstrate to the Commission's satisfaction that there is "good cause" for the Commission to order that such information be provided.

386.450. 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.

9. As the Commission has articulated in a variety of contexts, "good cause" means a good faith request for reasonable relief. To constitute good cause, the reason "must be real, not imaginary, substantial, not trifling, and reasonable, not whimsical, and good faith is an essential element." *Re: Union Electric Company d/b/a Ameren Missouri's Voluntary Green Program/Pure Power Program Tariff Filing*, Case No. EO-213-030 (2013) *citing Schuenemann v. Route 66 Rail Haven, Ltd.*, 353 S.W.3d 691, 696 (Mo. App. 2011), *citing to, Belle State Bank v. Indus. Comm'n*, 547 S.W.2d 841, 846 (Mo. App. 1977). In determining

good cause, the Commission has in the past issued orders both approving and denying OPC requests under Section 386.450.¹

10. Should the Commission dismiss the Complaint as Respondents request and should OPC, despite receiving financial reports month after month that conspicuously demonstrate an absence of overearning, nevertheless decide to seek further access to Laclede's books and records, OPC would have the opportunity to demonstrate good cause under Section 386.450.

11. In summary, the presumptuous and expansive view by OPC of its own discovery powers is impossible to reconcile with the statutes governing those powers. Should OPC nevertheless persist with such unauthorized discovery efforts without demonstrating to the Commission good cause under Section 386.450, Respondents reserve the right to seek a Motion for Protective Order to ensure that OPC complies with the law.

12. In terms of OPC's contention that there is no legal basis for the Respondents' position that they would not be prepared to fully answer all of OPC's questions until 60 days after the Commission rules on their Motion to Dismiss, the legal basis is two-fold. First, for all of the reasons stated above, the Respondents should not be required to expend the resources that would be necessary to answer such DRs until and unless the Commission determines the matter along with deciding whether the Complaint should proceed.

13. Second, should the Commission decide that the Complaint and the discovery requests should proceed, Commission discovery rules clearly provide a Party with the right to indicate that it will not be able to respond to data requests within the normal 20 day period as long as it provides reasons for that inability² and specifies a time frame for when it will be able

¹ One example of a denial of such a request can be found in *Re: Revised Tariff Filing of Choctaw Telephone Company*, Case Nos. TR-2012-0298 and JI-2012-0441, Order Denying Application for Rehearing (May 17, 2012)

² 4 CSR 240-2.090 (2)(D)

to answer such questions.³ As shown by the objection letter attached to OPC's Motion to Dismiss, the Respondents complied fully with these requirements, stating that they would not be able to process the 103 DRs within 20 days due to their sheer volume and the fact that, unlike the situation in a rate case where relevant information has been prepared by the utility in advance of filing, Respondents were not prepared to process such a large number of DRs. Respondents also specified when they would be able to fully respond, stating that the 60 day period was an ending date and that an effort would be made to provide answers sooner as they become available. Apparently, OPC's sole reason for nevertheless asserting that there is no legal basis for the approach taken by Respondents on this matter is the fact that OPC has not agreed to it. Once again, however, OPC does not have the power to unilaterally resolve such disputes and, should it be necessary, the Commission should find that the Respondents have acted reasonably with regard to this matter.

14. Finally, OPC takes issue with the Respondents' objection to several data requests. DR 27 seeks highly sensitive information regarding any potential acquisition targets the Company may be considering. OPC has failed to provide anything to show what possible relevance this has to an over-earnings complaint other than to suggest that the time spent by management on such matters might be a cost that should be considered for potential exclusion from rates. If OPC seeks to discover the time spent by management on such matters, then it should simply ask *that* question instead of seeking substantive details identifying companies, if any, that may be under review. There are multiple ways of auditing any such response, including asking when and where such matters were discussed, without having specific companies identified.

³ 4 CSR 240-2.090 (2)(E).

15. OPC also takes issue with Respondents' response on DR 1000, where Respondent merely reserved its rights to redact Board Minutes that relate exclusively to the operations and activities of unregulated entities or Alabama Gas Corporation. First, Respondents have not yet even redacted any materials, so OPC is effectively requesting that the Commission eradicate Respondents' rights to any redaction, no matter how sensitive. Second, OPC has not yet made arrangements to review the Board Minutes that the Company has offered to make available to OPC and assess what, if anything, has been redacted.

16. Finally, OPC takes issue with the Respondents objection to DR 1005 which seeks *each* and *every* financial report produced by the Respondents during 2014 or 2015. Respondents objected on the grounds that seeking to identify, gather and reproduce the literally thousands of financial reports that may be produced by the Respondents on matters both large and small is overly broad and would be extremely burdensome to comply with. Indeed, such a DR request appears designed to simply harass the Respondents. For example, it would require the Respondents to produce thousands of pages of bank reconciliation reports that show daily changes in bank balances, thousands of pages of financial reports relating to the use of financial instruments, the Company's Gas Supply Incentive Program and other gas supply transactions (matters that may be relevant to an ACA proceeding but not an over-earnings complaint); and thousands of pages relating to daily receipts and disbursements from other transactions done in the normal course of business. There is simply no reason why the Respondents should have to gather and provide such information simply because OPC has not taken the time or made the effort to tailor its request to something more reasonable and pertinent.

17. For all of the foregoing reasons, Respondents respectfully submit that the Commission should consider OPC's Motion to Compel along with Respondents' Motion to

Dismiss, and deny the Motion to Compel in the event it grants the Motion to Dismiss, subject to OPC's right to seek discovery upon good cause shown, as required by Section 386.450.

WHEREFORE, Respondents respectfully request that (a) the Commission consider and decide OPC's Motion to Compel at the same time and in the same manner as it considers and decides Respondents' Motion to Dismiss and (b) upon such consideration, dismiss OPC's Complaint and deny its discovery requests.

Respectfully Submitted,

/s/ Rick Zucker

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing pleading was served on the parties of record in this case on this 5th day of July, 2016 by United States mail, hand-delivery, email, or facsimile.

/s/ Rick Zucker