BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Laclede Gas	)	
Company's Tariff to Increase its	)	**File No. GR-2010-0171**
Annual Revenues for Natural	)	Tariff No. YG-2010-0376
Natural Gas Service	)	

LACLEDE GAS COMPANY'S RESPONSE IN OPPOSITION TO STAFF'S MOTION TO ADD PARTIES

COMES NOW Laclede Gas Company ("Laclede" or "Company") and for its Response in Opposition to Staff's Motion to Add Parties, states as follows:

1. More than four months after the intervention deadline in this case and less than a week before its direct testimony was due, the Staff of the Missouri Public Service Commission ("Staff") filed a Motion in this case on May 4, 2010, requesting that the Commission summarily order that all seven of Laclede's unregulated affiliates be made parties to this case. [1]

2. As discussed more fully below, Staff's Motion should be denied for several reasons. First, there is no legal basis, and Staff has cited none, which permits this Commission to involuntarily join parties to a Commission proceeding under the circumstances prevailing here. Second, even if the Commission did have the authority to compel such a result, the Staff's effort to have it done at this late date is grossly inappropriate given the advanced stage of these proceedings. Third, there is absolutely no discovery-related justification for such an action, given the extraordinary level of cooperation that Laclede and its affiliates have shown in addressing Staff's information

[1]Laclede's affiliates include The Laclede Group, Inc., Laclede Energy Resources, Inc., Laclede Gas Family Services, Inc.; Laclede Venture Corp; Laclede Development Company; Laclede Investment, LLC, and Laclede Pipeline Company.

needs in this case – efforts that have permitted the Staff to fully audit and make recommendations on all matters relating to Laclede's transactions with its affiliates. Fourth, Staff's Motion is simply another in a series of impermissible efforts by certain Staff members to eliminate the very ability of utilities, like Laclede, to engage in affiliate transactions that are expressly permitted by the Commission's affiliate transactions rules. The Staff has attempted to accomplish this unlawful objective in various ACA proceedings by proposing pricing standards for such transactions that are directly contrary to those set forth in the Commission's affiliate transactions rules and that would have the inexorable effect of making it economically impossible for any utility to engage in such transactions. Unfortunately, the Staff is now seeking to further penalize Laclede for the Company's principled opposition to these lawless activities by filing a Motion in this case that would serve no purpose other than to unnecessarily complicate Laclede's efforts to recover its distribution costs in a general rate case proceeding. Such efforts should not be condoned by the Commission. For all of the reasons, Staff's Motion should be denied.

Lack of Authority for Relief Requested

3. In its Motion, the Staff cites absolutely no legal authority for the proposition that the Commission may order Laclede's unregulated affiliates to become parties to this case. The Commission does not have plenary power limited only by statutory prohibition. Rather, as a creature of the legislature, the Commission has only the powers expressly granted by statute.[2] The Staff can cite to no statutory authority to support the position that the Commission can join unregulated parties to a rate case.

[2] ***State ex rel. Beaufort Transfer Co. v. Public Service Comm'n***, 593 S.W.2d 241, 246 (Mo App. W. D. 1979; ***State ex rel. Gulf Transp. Co. v. Public Service Comm'n***, 658 S.W. 2d 448, 452 (Mo. App. W.D. 1983)

Since there is no such statutory authority, there is likewise no corresponding Commission rule. The Commission itself has previously acknowledged that there is no such rule that would purport to give it the authority to join parties involuntarily.[3]

4. Nor can the Commission's authority be found in the Rules of Civil Procedure, which permit courts to join parties in a civil proceeding under certain circumstances. In fact, the Commission has explicitly determined that the civil rules governing joinder of parties do not apply to the Commission, and cannot be relied upon as a source of authority for any comparable Commission power.[4] The Commission's definition of what constitutes a "party" under its Rules of Practice and Procedure is also inconsistent with the notion that entities can be made parties without their consent in that the term is limited solely to entities, such as an applicant or complainant, who has voluntarily initiated a proceeding or an entity who has voluntarily sought to intervene in a Commission proceeding.[5]

5. Given the absence of any explicit authority for the kind of joinder powers presumed by Staff in its Motion, the Commission's previous attempts to exercise such power have, for the most part, been extremely limited, typically involving situations where the entities being joined were already subject to the Commission's regulatory

[3]*See* ***Duke Manufacturing Co., Complainant v. McLeodUSA Telecommunications Services, Inc., Respondent***, Case No. TC-2008-0191; Order Granting Staff's Motion to Join AT&T Missouri as a Party, p. 3 (March 11, 2008), in which the Commission granted a Staff Motion to join a regulated telecommunications carrier, AT&T Missouri, in a complaint proceeding in which it had been alleged by the Respondent that AT&T Missouri was the source of the service problems that were the subject of the complaint.

[4]*Id* at 2-3.

[5] 4 CSR 240-2.010 defines a "Party" as any …. "applicant, complainant, respondent, intervenor or public utility in proceedings before the Commission." Laclede's affiliates meet none of these definitions.

jurisdiction or were already parties to other, closely-related Commission proceedings.[6] Despite the fact that there is no judicial decision recognizing the Commission's authority to employ even this more limited use of joinder powers, the Staff would nevertheless have the Commission attempt to expand its use dramatically in this case by ordering the joinder of entities that have never been parties to Commission proceedings and that are beyond its regulatory jurisdiction. Laclede submits that in the absence of any explicit statute, rule, or other provision granting the Commission such powers, however, there is no basis for concluding that the Commission may take such action, especially outside of a complaint proceeding, and, in the process, impose on unregulated and unwilling entities the significant legal, administrative and other costs that effective participation in Commission proceedings require.

6. Perhaps in recognition of how such a seemingly unauthorized expansion of the Commission's powers would be viewed, the Staff attempts to support its position by alleging in its suggestions, as it has on numerous occasions in the past, that Laclede and its affiliates share some overlapping officers, are housed in the same building, and share some overlapping service territories. (Staff Suggestions, p. 2) As the Staff also

[6]In ***Duke Manufacturing,*** *infra*, for example, the party being joined was a regulated telecommunications carrier, AT&T Missouri. Similarly, in ***In re Sprint Missouri, Inc.*** Case No. IO-2003-0281, the parties being joined were also regulated telecommunications carriers. *Order Establishing Case, Directing Notice, and Joining Parties, but Declining to Establish a Procedural Schedule* (February 14, 2003). In ***In Re Laclede Gas Company,*** Case Nos. GR-2001-629; GT-2001-622, the parties being joined were already parties to the Commission cases that were being consolidated *Order Modifying Procedural Schedule and Joining Parties in Both Cases* (October 12, 2001). In one of the few cases in which the entity being joined was not a regulated utility or existing party to another case (but rather the Attorney General of the State of Missouri), the matter ultimately concluded with the Attorney General being dismissed as a party. ***Director of the Manufactured Housing and Modular Units Program of the Public Service Commission, Complainant v. Amega Sales, Inc., Respondent***, Case No. MC-2004-0079, *Order Granting Motion to be Dismissed as a Party* (May 25, 2004).

recognizes in its Suggestions, however, the sharing of corporate support services, including corporate governance, is expressly permitted by the Commission's affiliate transactions rules – a result that is inherently more efficient and cost effective for ratepayers since it allows common overhead costs to be spread over a larger base of corporate activities.[7] By its very nature, this means that some corporate officers will have some information regarding the activities of all the corporation's affiliates. Indeed, that is precisely why the affiliate transactions rules have pricing standards and other requirements to govern how the utility must operate and price its transactions with an affiliate so that ratepayers are adequately protected.[8] The Commission has repeatedly been required to force compliance with these rules in the face of attempts by the Staff to evade them.[9]

7. None of this explicitly permitted activity in sharing corporate services, however, converts a utility's affiliates into regulated entities that can be summarily forced to participate as parties in Commission proceedings. In fact, if the mere sharing of corporate services, including corporate governance, was sufficient to convert every affiliate into the kind of entity that can be involuntary joined as a party to a Commission proceeding (and thereby be made subject to all of the discovery obligations associated with being a party), there would be absolutely no need for the various provisions in the affiliate transactions rules that explicitly authorize access to affiliate records under certain

[7] 4 CSR 240-40.015(1)(D) and 4 CSR 240-40.016(2)(B).
[8] 4 CSR 240-40.015(2)(A).
[9] ***Re: AmerenUE***, Case No. EO-2004-0108, Order on Reconsideration Concerning Discovery (Mo. P.S.C. February 26, 2004); ***Re Great Plains Energy, Inc. et al.***, Case No. EM-2007-0374, 266 P.U.R.4th 1, 71 (Mo. PSC July 1, 2008); ***Re Union Electric Company dba AmerenUE***, Case No. ER-2007-0002, 257 P.U.R.4th 259, (Mo.P.S.C. May 22, 2007)

conditions.[10] In view of these considerations, it is clear that Staff has failed to articulate any legal authority by which the Commission could grant its requested relief.

Impropriety of Granting Relief at this Stage of the Proceedings

8. Even if one were to assume, *arguendo*, that the Commission did have the authority to grant the relief requested by Staff, it would be wholly inappropriate to do so at this stage of the proceedings. In those rare proceedings in which the Commission has exercised whatever limited power it has to join parties involuntarily, such action has been taken early in the litigation process.[11] Staff's Motion to join Laclede's seven corporate affiliates as parties comes five full months after this case was filed, four months after the intervention deadline, and less than a month before the technical conference is scheduled to begin. Moreover, the Motion contemplates that these seven additional parties would be added sometime after direct testimony has already been filed by the parties and during the very period that has been reserved for Laclede and the other parties to engage in settlement discussions, prepare their rebuttal testimony, and, in the case of the Company, conduct discovery for the first time on the direct cases filed by other parties.

9. To say the least, adding a host of new parties at this late stage of the proceedings would be highly disruptive to the procedural schedule and litigation process that has been long established in this case. Rather than focus on settling or litigating the issues that have actually been raised, resources would necessarily have to be diverted to

[10] 4 CSR 240-40.015(6).

[11] For example, in the ***Duke Manufacturing Co.*** case, *infra,* the Staff moved to add AT&T Missouri, a regulated carrier, as a party less than two months after the filing of a complaint alleging inadequate service by a regulated carrier, and only two weeks or so after the Answer had been submitted. *Id.* at 2. In ***In re Sprint Missouri Inc.*** *infra.,* the Commission sought to join regulated carriers as parties at the time the case was opened and before any procedural schedule was established, *Order Establishing Case, Directing Notice, and Joining Parties, but Declining to Establish a Procedural Schedule,* p. 1. The same approach of seeking to add parties very early in the process has also been followed in other cases where the issue of joinder has arisen.

determining how these new parties could possibly be accorded the same rights to discovery, to the filing of direct, rebuttal and surrebuttal testimony, and to the other procedural rights that the existing parties to this proceeding have already had an opportunity to at least partially exercise. The Commission would also have to sort out such issues as: (a) whether each of these seven parties would be permitted to file testimony recommending a return on equity and overall cost of capital which would then be used pursuant to Section 393.1015.4 (7) to develop an average return for future ISRS purposes; (b) whether and to what extent such parties would be allowed to recover the rate case expenses they will undoubtedly incur as a result of having been forced to participate involuntarily in these proceedings – a result that appears appropriate given that they are only being added because of their relationship to a utility that is normally entitled to recover such expenses; and (c) whether Laclede would also be permitted to join additional parties who are engaged in business activities similar to these affiliates to demonstrate that no undue preference has been provided to affiliated versus unaffiliated entities.

10. These are the kind of issues that neither the parties nor the Commission should have to deal with in any proceeding. But it is particularly inappropriate and detrimental to the legitimate interests of existing parties, as well as the Commission, to seek to introduce a morass of novel procedural and substantive issues at a point in a proceeding where over five of the seven months reserved for litigation preparation have already passed and where the utility is just now embarking on its very limited two-month opportunity to prepare its rebuttal and surrebuttal case. For this reason alone, Staff's Motion should be denied.

Failure to Provide any Discovery-Related Justification for Joining Parties

11. Staff's attempt to disrupt these proceedings through the forced addition of seven new parties is even more inexplicable and unwarranted given the Staff's wholesale failure to articulate any discovery-related rationale for its requested relief. In those limited instances where the Commission has ordered joinder, it has done so on the theory that such action is necessary to permit effective discovery of the entities being joined.[12] Although the civil joinder rules which the Commission has disclaimed as a source for its own authority to join parties would suggest that the mere need to conduct discovery is not an appropriate basis for joinder (*see* Rule 52.04(a)), such a rationale is, in any event, completely inapplicable here.

12. Even though Laclede strongly disagrees with Staff's approach to affiliate transactions, the fact remains that the Company has bent over backwards in this case to try and accommodate Staff's information needs in this area. For example, while it believes, and continues to believe, that it had no obligation to do so, Laclede arranged with its affiliates to let Staff: (a) review Board of Director minutes, presentations and other materials concerning its affiliates and their activities, (b) review both outside auditor and internal audit workpapers and reports concerning the activities and operations of its affiliates; (c) review Sarbanes/Oxley materials concerning the activities and operations of its affiliates; and (d) have access to other materials dealing with the strategic plans of such affiliates. Laclede has also answered over 50 data requests, with 119 subparts, relating to transactions with its affiliates and spent a significant amount of time meeting with the Staff in Jefferson City in an effort to further explain how the

[12] ***Duke Manufacturing,*** *Order Granting Staff's Motion to Join AT&T Missouri as a Party*, at p.4

Company allocates costs and prices transactions for services or goods provided to or received from its affiliates.

13. As a result of these efforts, the only discovery matter that required any Commission attention at all in this case was resolved in a relatively brief conference call with Judge Woodruff two months ago. Moreover, at no time during this proceeding, has the Staff filed any motion to compel with the Commission or submitted any other pleading which would suggest that Staff has been denied access to any relevant or even potentially relevant information. In fact, because of this cooperation, the Staff has been able to timely file direct testimony as well as a revenue requirement report in this case in which it has been able to make specific recommendations regarding Laclede's allocations of cost to its affiliates. (*See* Revenue Requirement Cost of Service Report, pages 38-53). Although Laclede disagrees with many of those recommendations, the salient point is that Staff has been given the information it needs to develop its position on these transactions and their associated costs.

14. Given the complete lack of any formal or even informal pleading in the record which would suggest that Staff's relevant and legitimate information needs have not been met in this proceeding, there is absolutely no basis or rationale for taking the kind of extraordinary action that Staff has requested. If the proof is in the pudding, the pudding in this case conclusively demonstrates that joinder of these seven parties would serve no purpose other than to significantly disrupt these proceedings and impair the ability of Laclede and other parties to address the real issues in this case in an orderly and sufficient manner that accords with their basic due process rights.

Staff's Motion Serves No Purpose Other than to Harass Laclede for its Principled Opposition to Staff's Unlawful Attempts to Circumvent the Commission's Own Rules

15. All of which raises the issue of why Staff has filed its Motion at this time. As previously discussed, Laclede believes that Staff's Motion is simply another in a series of impermissible attempts by certain Staff members to eliminate the very ability of utilities, like Laclede, to engage in affiliate transactions that are expressly permitted by the Commission's affiliate transactions rules. The Staff has attempted to accomplish this unlawful objective in various ACA proceedings by proposing pricing standards for such transactions that are directly contrary to those set forth in the Commission's affiliate transactions rules and that would have the inexorable effect of making it economically impossible for any utility to engage in such transactions.

16. Specifically, the Commission's affiliate transactions rules, and the Cost Allocation Manual that Laclede has implemented in compliance therewith, provide that purchases and sales of natural gas and capacity between Laclede and its marketing affiliate are to be priced based on the competitive market price for such items as determined by reference to marked price indices, prices offered by unaffiliated suppliers, etc.[13] Despite this clear direction, the Staff has nevertheless taken the position that such purchases should be priced based not on the fair market price or even on the cost to the utility for acquiring the supplies, but on the *affiliate's* cost of gas. Such a position is in direct conflict with the affiliate transactions rules because it would clearly preclude such

[13]Although the affiliate transactions rules also refer to the utility's fully distributed costs for acquiring such goods and services, market price and fully distributed cost in the wholesale natural gas market are one and the same for a Company like Laclede. Since the Company does not own any of its own gas production, like virtually every other LDC in the country, it must rely on purchases made from marketers and suppliers who sell gas in the wholesale market. As a result, Laclede's "cost" for procuring such supplies is equivalent to the competitive market price offered in the wholesale market.

lawful purchases from ever being made. Simply put, no affiliate, nor any other unaffiliated supplier for that matter, would ever agree to sell gas to an entity under circumstances where it can never receive any compensation for the risks it has undertaken or the services it has provided in making that sale.[14]

17. This glaring conflict between the standards invented by Staff for pricing such transactions and those set forth in the Commission's rules has only become more obvious with the passage in time. In a recent ACA proceedings involving Atmos Energy Corporation ("Atmos"), for example, Staff took essentially the same position regarding that utility's purchases of gas from its affiliate, Atmos Energy Marketing, LLC ("AEM") as it has with Laclede's purchases from LER. Specifically, on March 12, 2010, Staff witness David Sommerer filed direct testimony in Atmos' Case No. GR-2008-0364 in which he proposed to disallow approximately $360,000 in gas costs incurred by Atmos as result of purchases it made from AEM to provide gas supply to the Hannibal and Butler, Missouri areas. (Sommerer Direct testimony, p. 4).

18. Amazingly, Mr. Sommerer proposed this disallowance even though he acknowledged the applicability of the fair market pricing standard in the affiliate transactions rules and even though it was undisputed that Atmos had issued a Request for Proposal to a large number of gas supply marketers for its gas supply needs and had

[14]The Staff's position on sales made to an affiliate is equally designed to foreclose all such transactions. To that end, the Staff has taken the position that Laclede should sell gas supply to LER not at the higher of fair market price or even Laclede's fully distributed cost for such supplies, but at that price plus any profit that LER earned on its resale of gas supply. In other words, Staff contends that, despite the requirements of the Rules, LER should be precluded from having the same opportunity afforded to unaffiliated independent gas marketers to earn profits on gas supply acquired from Laclede for resale. Again, as Staff well knows, no firm would ever do business on such a basis and such discriminatory treatment is simply Staff's way of trying to prevent utilities from engaging in the kind of transactions that the Commission's own rules freely permit.

awarded AEM the gas supply contract only after AEM tendered the low bid for the Hannibal/Canton and the Butler systems. (Sommerer Direct testimony, p. 8). According to Mr. Sommerer, such a result was appropriate because the fair market price for any purchase made from an affiliate is not the price established through a competitive bidding process but instead is represented by the affiliate's cost of acquiring that gas without any markup of any kind for the services provided or risks undertaken by the affiliate in providing the supply. (Sommerer Direct testimony, p. 6). As Mr. Sommerer has stated in his sworn testimony: "Profits are disallowed because LDC's do not mark up the price of gas to their customers. What is to be passed through in the PGA charge is the actual invoiced cost of gas. If Atmos had purchased the gas itself, instead of through its affiliate, the actual cost of the gas, without profit, would be the basis for the Purchased Gas Adjustment charge to customers." (Sommerer Direct testimony, p. 9)

19. This is a patently false assertion of what the affiliate transaction rules require. If such a tortured construction was correct, then the rules would have to state that if a utility purchases a good or service from an affiliate then it is the lower of the *affiliate's* cost or the fair market price for the good or service that is to be used to price the transaction. They do not. If such a construction was correct, then Staff counsel would have to retract his admission at an earlier oral argument involving Laclede that affiliates are indeed permitted under the affiliate transactions rules to earn a profit when they sell gas to an affiliated utility.[15] He has not. If such a construction was correct, the

[15]See statement of Staff Counsel Thompson at October 1, 2009 Oral Arguments in Case Nos. GR-2005-0203 and GR-2006-0288 in which he stated "We understand, as Mr. Pendergast said, LER wouldn't sell the gas to Laclede if there wasn't some markup. I understand that. I think Staff understands that. The question is, how much markup?" (Transcript, p. 247). In fact, it is clear that Staff's main technical expert on this issue either does not understand that basic truism or has chosen to ignore it.

Commission would also have to revise the provisions of its affiliate transactions rules that prohibit utilities from treating their marketing affiliates differently from unaffiliated suppliers so as to provide that, unlike those unaffiliated suppliers, marketing affiliates may not make any profit on gas they sell to a utility in the wholesale market. It has not. Indeed, if such a tortured construction was correct, the Commission would have to clarify its rules to provide that affiliates are not to be considered separate and distinct companies but simply appendages of the utility that can only do business with the utility if they are willing to forgo all profits and compensation of any kind for the services they provide. It has not.

20. It could not be any clearer what Staff is up to here, namely the wholesale elimination – not through a rule change but through a retroactive assault on existing rules – of any ability by utilities to engage in lawful transactions that are freely permitted under those rules. Unfortunately, Laclede and its affiliates have had to endure nearly two years of legal expense, countless procedural skirmishes, trips to circuit court, and other diversions of their resources for one reason and one reason only – no one at the Commission will advise Staff's technical expert that he, like everyone else, has to comply with the plain wording and meaning of the Commission's duly promulgated rules. Instead, the Staff has simply ratcheted up this exercise in lawlessness by filing a baseless Motion in this case in an apparent attempt to further harass Laclede in yet another venue, as retribution for the Company's refusal to buckle under to this patently incorrect construction of the Commission's rules. The administrative process has indeed broken down here and steps to fix it cannot come soon enough. Laclede respectfully submits that the first step in that direction should be to deny Staff's Motion to Add Parties.

WHEREFORE, for the foregoing reasons, Laclede Gas Company respectfully requests that the Commission deny Staff's Motion to Add Parties.

Respectfully Submitted,

/s/ Michael C. Pendergast

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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing pleading was served on the General Counsel of the Staff of the Missouri Public Service Commission and the remaining parties to Case No. GR-2010-0171 on this 14 day of May, 2010, by hand-delivery, facsimile, email or United States mail, postage prepaid.

/s/ Gerry Lynch
Gerry Lynch