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 2004-2005 Actual Cost Adjustment	)	**Case No. GR-2005-0203**

APPLICATION FOR REHEARING OR, ALTERNATIVELY, REQUEST FOR RECONSIDERATION

COMES NOW Laclede Gas Company (hereinafter "Laclede" or "Company"), pursuant to 4 CSR 240-2.160(1) and (2) of the Commission's Rules of Practice and Procedure and, in support of its Application for Rehearing or, Alternatively, Request for Reconsideration of the Commission's November 4, 2009 Order Directing Laclede to Produce Information, 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 —over ten thousand pages of records that belong to Laclede's unregulated affiliate, Laclede Energy Resources, Inc. ("LER") – records that the Commission had previously determined its Staff was not entitled to obtain.

2. Amazingly, the Commission directed that such LER documents be provided even though: (a) no party has ever served any discovery request on LER; (b) LER is not even a party to these proceedings; and (c) the Commission disclaimed in the November 4 Order any applicability of the affiliate transactions rules and the Stipulation and Agreement in Laclede's Holding Company case, and relied instead on the very same

general rules of discovery which, as this Commission unanimously found in its January 19, 2009 Order in these cases, only requires Laclede to produce LER documents that are in Laclede's possession.

3. Even more amazingly, the Commission summarily dismissed as "red herrings" the substantive arguments that Laclede had made as to why the Staff was not entitled to obtain such information under the Commission's affiliate transactions rules and Laclede's CAM, as if the simple act of assigning pejorative, threadbare labels is a sufficient substitute for the Commission's legal obligation to articulate its reasons for deciding an issue in a particular way. All of this was done in support of an effort to obtain documents from an unregulated affiliate that does very little business with Laclede and that almost exclusively involve transactions between the unregulated affiliate and third parties other than Laclede.[1]

4. Laclede respectfully requests that the Commission reconsider and reverse this decision on the grounds that such decision is unreasonable, unsupported by any competent and substantial evidence, arbitrary and capricious, and contrary to the Commissions own rules governing discovery and affiliate transactions. Laclede further requests that such action be taken because the November 4 decision is the product of a

[1]As Laclede has previously explained to the Commission, LER's transactions with Laclede are a negligible part of LER's business. Since 2004 LER's sales to Laclede have never been more than 8% of LER's total sales to all buyers. In 2008 LER's sales to Laclede were less than 1% of LER's total sales. During that period, LER never purchased from Laclede more than 7% of LER's total gas and interstate pipeline capacity purchases, and in 2008 the percentage of LER's gas and pipeline capacity purchased from Laclede was less than 1% of LER's total purchases. The November 4, 2009 Order in Laclede's Actual Cost Adjustment ("ACA") cases was entered over the dissent of two of the five Commissioners. The Order purports to require Laclede to produce more than ten thousand pages of documents belonging to LER that pertain to purchases and sales between LER and entities other than Laclede.

highly irregular and prejudicial abuse of the administrative process that has repeatedly violated Laclede's due process rights.

5. The November 4, 2009 Order violates Laclede's due process rights in three significant ways. First, the Presiding Judge, acting alone or in concert with a minority of commissioners, did not follow the Commission's own procedures, but instead acted in a highly irregular, ad hoc and biased manner to prevent enforcement of a vote by a majority of the Commission that determined and reconfirmed on reconsideration that Laclede was not required to produce LER's documents. Second, when this manipulation of the process proved successful in thwarting the will of a majority of the Commission, the current majority of Commissioners, in voting to require Laclede to produce the very same LER documents, acted far in excess of its statutory authority and contrary to its own regulations and practices, which strictly limit the Commission's authority to investigate unregulated affiliates of regulated entities, and which afford utilities the right to an evidentiary hearing before Commission Staff ("Staff") recommendations are approved in ACA cases. Third, throughout this entire process, the Commission has simply ignored not only the substantive arguments made by Laclede as to why the Commission is not entitled to obtain such information under its own rules, but has also completely failed to address the very real and very serious allegations that Laclede has made regarding the improper conduct of these proceedings. Not only does this violate Laclede's due process rights, but it is also fundamentally inconsistent with the Commission's legal obligation to articulate in its Orders how controlling issues were decided. ***State ex rel. Noranda Aluminum, Inc. v. Public Service Comm'n***, 24 S.W.3d 243 (Mo. App. W.D. 2000);

State ex rel. GS Technologies Operating Co., Inc. v. P.S.C., 116 S.W.3d 680, 694 (Mo. App. 2003); §536.090 RSMo. (2000).

6. Because the Commission repeatedly refused to follow its own procedures, and disregarded a binding prior Commission vote that Laclede was not required to produce the LER records, the Commission has violated Laclede's due process rights. *See, e.g.,* ***Colyer v. State Bd. of Registration for Healing Arts,*** 257 S.W.3d 139, 145 (Mo. App. 2005); ***Derrickson v. Bd. of Educ. of the City of St. Louis***, 703 F.2d 309, 315 (8th Cir. 1983). At a Commission Agenda meeting on April 15, 2009, the Commission voted 3-2 that Laclede was not required to produce the LER documents, and that vote resolved the issue. Consistent with Commission practice, at the next Agenda Meeting on April 22, 2009, the Commission approved the order implementing the April 15, 2009 vote. The Presiding Judge, however, did not follow Commission procedure for routine, post-decision motions for reconsideration, precluding a timely vote on those motions and otherwise delaying the ultimate finality of the April 22, 2009 Order until after the publicly known retirement of one of the Commissioners who had voted in favor of Laclede's position. The motions for reconsideration were then left undecided for an additional five months, during which time a new Commissioner was seated.

7. On November 4, 2009, the Commission reversed the April 22, 2009 Order, and issued a new Order in which the new Commissioner voted with the two Commissioners who had voted against Laclede's position on April 15, 2009. These tactical maneuvers violated the Commission's own regulations, as well as statutes that limit the authority of the Presiding Judge and expressly state that the Commission shall

not unnecessarily delay the resolution of matters. R.S.Mo. § 386.240; 4 C.S.R. 240-2.120(1).

8. These serious procedural violations are more than sufficient reason to reconsider and reverse the November 4, 2009 Order. But the November 4, 2009 Order must also be set aside because it purports to give the Commission authority to investigate unregulated affiliates such as LER in violation of the Commission's statutory authority and the Commission's own rules, both of which expressly prohibit the Commission from investigating unregulated entities like LER.

9. Pursuant to R.S.Mo. §393.140(12), the Commission's authority to investigate unregulated affiliates is limited to examining transactions between the regulated entity and the unregulated affiliate. The Commission's own affiliate transaction rules, 4 C.S.R. 240-40.015, as well as the prior Commission Order approving the LG holding company structure, are equally clear that the Commission has no authority to investigate LER's transactions with entities other than Laclede. Forcing Laclede to produce documents that belong to an unregulated affiliate that is not subject to Commission jurisdiction, and that do not relate to transactions with Laclede, is an end run around the statutory limits on the Commission's authority and a further violation of Laclede's due process rights. See ***Gerling Global Reinsurance Corp. of America v. Gallagher***, 267 F.3d 1228, 1235 (11th Cir. 2001).

10. The arbitrary and capricious nature of the Commission's treatment is further illustrated by the imposition of a three business day deadline for Laclede to produce the LER documents — a timetable that would be impossible to meet even if Laclede had possession of LER's documents, which it does not. In fact, although the

Order was posted on the Commission's official website late on the day of Wednesday, November 4, the Company did not receive a certified copy of the order until today, the same day that the response is due.

11. In the November 4, 2009 Order, the three-member majority claims that the Commission is not basing its demand on any (non-existent) authority to investigate LER under the affiliate transaction rules. Instead, the majority claims to be acting solely under the "discovery…rules of civil procedure" (i.e., S.Ct.R. 56 et seq.) that apply to Commission proceedings. Nov. 4, 2009 Order at 2-3. If that were really the case, Laclede could not be required to produce LER documents. Laclede and LER are separate entities and a party like Laclede cannot be required to produce documents of a non-party. *E.g.*, ***Richardson v. Dir. of Rev.,*** 725 S.W.2d 141, 142 (Mo. App. 1987).

FACTUAL AND PROCEDURAL BACKGROUND

12. This dispute arises out of Laclede's ACA cases for 2004-05 and 2005-06 (Commission Case Nos. GR-2005-0203 and GR-2006-0288). An ACA case is an annual Commission procedure to determine whether gas costs incurred by Laclede in a designated prior annual period were properly included in customer rates that are subject to regulation by the Commission. Laclede is the entity that is the party to the Laclede ACA Cases. LER is not a party to those Cases.

13. During the course of the Laclede ACA cases, the Staff requested and Laclede provided numerous documents concerning transactions between Laclede and LER consistent with the Commission's affiliate transaction rules. The Staff, however, first requested the LER documents that are the subject of this Petition on July 25, 2008. The Staff sought to require Laclede to produce all of LER's gas supply and transportation

invoices, contracts, nomination records, general ledger and dealbooks, journals, sales data, and net margins achieved for all or portions of the relevant ACA periods, without regard to whether those documents related to transactions between Laclede and LER. Laclede had already produced to the Staff tens of thousands of documents relating to Laclede's purchases and sales of gas between Laclede and other entities, including purchase and sales made between Laclede and LER.

14. Laclede opposed the request for documents relating to LER's transactions with unrelated entities because, among other reasons, LER's transactions with entities other than Laclede are not subject to Commission regulation or the Commission's affiliate transaction rules. R.S.Mo. §393.140(12) and 4 C.S.R. 240-40.015 specifically state that the Commission may only investigate an unregulated entity's transactions with its regulated affiliate. Laclede also opposed the request because it was part and parcel of an effort by the Staff to circumvent the practices and procedures that the Commission has followed for years in ACA cases. Those practices and procedures always afforded the utility and other affected parties an opportunity to be heard, present and rebut evidence, cross examine witnesses, and otherwise exercise their due process rights before the Commission decided how to rule on a Staff ACA recommendation. In this case, one of those recommendations was Staff's suggestion that the Commission should open up an investigatory docket to explore whether Laclede has complied with the Commission's affiliate transactions rule in its dealings with LER.

15. The Staff's recommendation for such an investigation was premised on its "concerns" over the propriety of two transactions between Laclede and LER that the Commission has now relied on in its November 4, 2009 Order to compel the production

of LER information. Rather than follow the traditional ACA process and give Laclede the opportunity to demonstrate to the Commission why those concerns were baseless (and hence did not warrant such an investigation), the Staff sought to short circuit these procedures by requesting that the Commission order Laclede to produce the very kind of information that Staff would presumably seek in such an investigation.

16. Several rounds of briefing and argument by Laclede, the Staff and the Office of Public Counsel ("OPC") followed. The Commission initially granted the Staff's Motion to Compel on October 20, 2008. Laclede filed (in accordance with Commission procedure) a timely Motion for Reconsideration on October 30, 2008. The Commission denied Laclede's Motion for Reconsideration on December 17, 2008. Laclede and the Staff filed separate motions for clarification of the December 17, 2008 Order. After briefing on the motions for clarification and an oral argument, on April 15, 2009, a 3-2 majority of the Commission voted to rescind the October 20, 2008 Order and deny the Motion to Compel.

17. In accordance with Commission procedure, the Commission approved an Order implementing that vote on April 22, 2009. The Presiding Judge apparently disagreed with the Commission's April 15 decision, as did the Chairman of the Commission, who had voted with the minority on April 15, 2009. As the retirement of Commissioner Connie Murray, who had voted with the majority on April 15, 2009, was imminent, the Presiding Judge and, to a lesser extent, the Chairman of the Commission, proceeded to embark on a series of extraordinary, if not highly unusual, maneuvers that were contrary to Commission rules and procedures and that had the effect of nullifying the Commissioner's April 22, 2009 Order:

- Motions for reconsideration, and by extension, orders granting reconsideration, must set forth specific grounds for reconsideration. 4 C.S.R. 240-2.160(2). Following the April 15, 2009 vote, the Presiding Judge should have presented an order reflecting the Commission's vote and the reasons supporting it. He instead presented an extremely short, legally questionable proposed order that did not reflect the Commission's reasons for its vote. The Presiding Judge did so even though the Commission had clearly stated those reasons and Laclede had submitted proposed findings of fact and conclusions of law for the order.

- The Commission promptly and summarily denies motions for reconsideration that do not set forth new legal or factual arguments. See, e.g., Re: Laclede Gas Company, Case No. GT-2009-0026 (Application for Rehearing filed on Friday, April 24, 2009, and denied on Wednesday, April 29, 2009), and other cases cited infra. Pursuant to this practice, the Presiding Judge should have placed the Staff and OPC motions for reconsideration (which stated no new arguments) on one of the Commission's upcoming agendas (May 13 or 21) for disposal. The motions were not placed on any agenda until May 27, when, incredibly, they were listed as a "discussion item," rather than as an "Order." As discussed below, this maneuver prevented a final vote and implementation of the Commission's decision at the May 27 meeting to reject the motions for reconsideration.

- Although on May 20, 2009, Laclede filed a request for the Commission to move the matter along by placing the motions for reconsideration on the May 21, 2009 Agenda, the Presiding Judge and the Chairman not only failed or refused to do so but, at the May 21 Agenda meeting, the Chairman attempted to cancel the May 27, 2009 Agenda meeting.

- Under settled law, the Presiding Judge is not authorized to act in contradiction of the authorization of the Commission. R.S.Mo. § 386.240. At the May 27 meeting, the Presiding Judge indicated to the Commissioners that he believed they had erred in entering the April 22, 2009 Order. Commissioner Murray, who was expected to retire on or about June 1, specifically admonished the Presiding Judge for taking a position adverse to the Commission's vote.

- At the May 27, 2009 Agenda Meeting, the Commission discussed the Motions for Reconsideration and by a vote of 3-2 resolved to deny them. Later that day, Commissioner Murray and Laclede separately requested a special agenda meeting to be held on May 28 or 29, so that an order implementing the May 27 vote could be formally approved before Ms. Murray retired. The Chairman failed to respond to either request. Since the Chairman had been made aware that Commissioner Murray's

retirement was imminent, the result of his inaction was that the matter was not resolved before Commissioner Murray retired

- When the Presiding Judge raised the matter again at the June 3, 2009 Agenda Meeting for a vote to implement the Commission's May 27 decision, Commissioner Murray was gone. As both the Presiding Judge and the Chairman were well aware, also gone was the majority who had read the briefs, heard the oral argument, issued an order more than a month before to deny the Motion to Compel, and voted just the week before to reject the motions to reconsider that order.

- The matter was raised again on July 8, 2009, at which time the Chairman jokingly remarked in response to a 2-2 vote, "Where's Commissioner Murray when you need her?" The Presiding Judge next raised the motions for consideration after Commissioner Kenney (the new Commissioner who replaced Commissioner Murray) was seated on the Commission on July 29, 2009. On September 2, 2009, the Commission voted 3-2 to grant the Motions for Reconsideration and set the matter for another oral argument. This vote was implemented by order dated September 9, 2009, and the oral argument was scheduled on September 29, 2009 (and later rescheduled for October 1). Laclede filed a Motion to Rescind Order Granting Motions for Reconsideration on September 29, 2009. Laclede's motion was neither considered nor ruled upon by the Commission.

18. The Commission entered its Order Directing Laclede to Produce Information on November 4, 2009. Two of the five Commissioners dissented, with Commissioner Jarrett indicating that he would be issuing a separate dissenting opinion to follow.

A. <u>The Commission Violated Laclede's Due Process Rights by Failing to Provide Laclede an Opportunity for Hearing at a Meaningful Time and in a Meaningful Manner, and by Failing to Follow the Commission's Own Procedures.</u>

19. "[D]ue process requires that administrative hearings be fair and consistent with rudimentary elements of fair play." ***State ex rel. Fischer***, 645 S.W.2d at 43. "Procedural due process require the opportunity to be heard at a meaningful time and in a

meaningful manner." ***Colyer v. State Bd. of Registration for Healing Arts***, 257 S.W.3d at 145 (emphasis added). An agency such as the Commission violates the due process rights of the parties subject to its jurisdiction if it does not follow its own regulations or procedures. *Id*.; see also ***Derrickson v. Bd. of Educ. of the City of St. Louis***, 703 F.2d at 315.

20. The Commission here departed so dramatically from its usual procedures and acted in manner so at variance with impartial adjudication that Laclede was deprived of its right to be heard in a "meaningful manner." After a full briefing and oral argument, the Commission, in its April 15, 2009 vote, conclusively resolved in favor of Laclede the issue of the Staff's Motion to Compel Laclede to produce the LER documents. In addition to being fully consistent with the applicable laws, rules and regulations governing access to affiliate information, such action was also protective of Laclede's due process right to challenge, in an evidentiary hearing, the basis for the Staff recommendation and supporting allegations upon which the request to produce such documents was premised.

21. At that point, however, the Presiding Judge along with the Chairman prevented the Commission from following its own procedures, starting with entry of a summary April 22 Order that failed to provide any rationale supporting the Commission's April 15 ruling, and continuing with manipulation of the process whereby consideration of motions for reconsideration were artificially delayed in violation of Commission rules

until one Commissioner retired and a new Commissioner took office and voted to reverse the April 22, 2009 (Order. p. 2).

22. The Commission's Rules require that motions for reconsideration must "set forth specifically the ground(s) on which the applicant considers the order to be unlawful, unjust, or unreasonable." 4 C.S.R. 240-2.160(2); see also ***Re: Missouri-American Water Company,*** Case No. WR-2008-0311, Order Denying Motion for Reconsideration (October 24, 2008). This standard similarly requires that an order granting reconsideration be based on a specific legal or evidentiary basis. To that end, the Commission regularly denies motions for reconsideration and applications for rehearing where the movants or applicants fail to raise any new arguments in their pleadings. See, e.g., ***Re: Laclede Gas Company,*** Case No. GT-2009-0026, Order Denying Application for Rehearing (April 29, 2009); ***Re: Union Electric Company d/b/a AmerenUE,*** Case No. ER-2007-0002, Order Denying Missouri Industrial Energy Consumers Application for Reconsideration (Nov. 21, 2006); ***Re: Proposed Acquisition of AT&T Corporation by SBC Communications, Inc.***, Case No. TM-2005-0355, *Order Denying Request for Reconsideration* (May 3, 2005).

23. The Commission's September 9, 2009 Order, which granted the Motions for Reconsideration filed by the Staff and the OPC, did not comply with these rules and procedures. Remarkably, the Commission's September 9, 2009 Order conceded that the April 22, 2009 Order was not "unlawful, unjust, or unreasonable," which are the only grounds on which the Commission is allowed to grant a Motion for Reconsideration. 4 C.S.R. 240-2.160(2). Rather, having run out the clock on Commissioner Murray, the

[2] Whether the Presiding Judge acted on his own or at the direction of others was never clear to Laclede. In either event, Commission procedures were not followed.

September 9, 2009 Order confirmed that the delay was engineered improperly for that purpose by stating blithely that reconsideration was being granted solely because of the change in the composition of the Commission. ("Now a fifth Commissioner has joined the Commission and this issue may be settled").

24. Commission rules require that motions for reconsideration setting forth no new arguments or issues of fact should be disposed of promptly; the Presiding Judge must "take appropriate action to avoid unnecessary delay in the disposition of cases…." 4 C.S.R. 240-2.120(1). For example, when the Commission determined that no new issues had been raised in an application for rehearing filed by Laclede in another recent case, the Commission took less than three business days to schedule and complete a vote on an order denying the application. *See* ***Re: Laclede Gas Company***, Case No. GT-2009-0026 (Application for Rehearing filed on Friday, April 24, 2009, and denied on Wednesday, April 29, 2009). Similarly, in Case No. EX-2009-0252, an application for rehearing filed on May 22, 2009 was rejected 19 days later, on June 10, 2009.

25. Because of the actions of the Presiding Judge, the Commission failed to comply with the rule of avoiding unnecessary delay. The motions for reconsideration were filed by the Staff and OPC on May 1, 2009 and May 4, 2009, respectively. The Presiding Judge and all of the Commissioners expressed their concurrence with Laclede's assessment that no new issues had been raised in these motions. Under normal circumstances, that would have resulted in the prompt issuance of an order denying motions for reconsideration within a few days or, at most, within a few weeks of when the motions were filed.

26. That did not happen in this case, even in the face of repeated requests for the Commission to do so. The Presiding Judge failed to place the motions for a vote on either the Commission's May 13, 2009 Agenda Meeting or its May 21, 2009 Agenda Meeting.[3] When the motions finally were placed on the Commission's May 27, 2009 Agenda, they were noted as a "discussion item" rather than as an order denying motions for reconsideration and/or clarification, which ostensibly precluded entry of an order implementing that day's vote denying the motions before Commissioner Murray's retirement.

27. The Chairman not only ignored Laclede's May 20, 2009 request for expedited treatment, but also unsuccessfully attempted to cancel the May 27 Agenda Meeting.[4] He then failed or refused to honor Commissioner Murray's request to permit a final vote on the Motions, either at the May 27 Agenda Meeting, when a majority of Commissioners clearly and unambiguously expressed their decision that those Motions should be denied, or at a special agenda meeting on May 28 or May 29, 2009. Meanwhile, the Presiding Judge kept the matter alive for several months,[5] until after July 29, 2009, when a new Commissioner had been seated, permitting a reversal of the earlier majority and producing a 3-2 vote to require Laclede to produce the LER documents.

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[3]The only reason given for not scheduling a prompt vote was the Presiding Judge's assertion that he was awaiting a Staff reply to the short response filed by Laclede to the motions on May 8, 2009. However, such a reply is not allowed by the Commission's rules, nor had the Staff requested the opportunity to file such a reply at the time the Presiding Judge made such assertion.

[4]The Chairman's attempt to cancel the May 27 Agenda Meeting was thwarted by another commissioner, who noted that there was not just one, but two motions for expedited treatment pending before the Commission.

[5]The Presiding Judge raised the matter again at the July 8, 2009 agenda meeting, which resulted in another 2-2 tie vote. Arguably, this tie vote acts as yet a second Commission decision upholding the April 2009 Order, since a *majority* of the Commission at the July 8, 2009 vote did *not* vote in favor of reversing the April 2009 Order.

28. The statutes governing Commission procedure expressly state that the Presiding Judge's authority extends only to actions authorized by the Commission. R.S.Mo. § 386.240. The Presiding Judge's actions here violated that statute because they were not authorized by, and were directly contrary to, the Commission, and because he publicly disagreed with the Commission's position. In each of these instances detailed above, the Presiding Judge stepped far beyond the bounds of his statutory authority and thereby violated Commission procedures and regulations.

29. Finally, the Commission's own rules require that Commission proceedings be fair and impartial. 4 C.S.R. 240-2.120; see also State ex rel. Fischer, 645 S.W.2d at 43. Presiding officers of the Commission are likewise required to act in a fair and impartial manner. 4 C.S.R. 240-2.120(1). This requirement that the Commission and its officers act in a fair and impartial manner includes conducting proceedings that are meaningful and not instead merely meant to carry out a predetermined result or engineer a reversal of a duly decided issue.

30. The Courts have previously held that the Commission failed to provide an opportunity for hearing in a meaningful manner where it conducted a hearing after already determining the result. In ***State ex rel. Fischer***, the OPC claimed that its due process rights were violated where, although it was permitted to argue at hearing its position in a rate proceeding, the Commission had previously decided on the result prior to the hearing. 645 S.W.2d at 43. In particular, Laclede and other parties had stipulated to a rate structure. When the OPC objected to that rate structure, the Commission announced that it would hold a hearing on the matter, but it would be precluded from approving anything but the stipulated rate structure. *Id*. The trial court had entered

judgment affirming the Commission's order. Id. This Court reversed and ruled that because the Commission had already decided the matter prior to the hearing, the Commission's due process rights were violated because the Commission did not give the OPC an opportunity for hearing in a meaningful manner. *Id.*

31. The right to a meaningful hearing before an impartial decision-maker is a foundational element of due process rights, and a necessary component of a hearing "in a meaningful manner." *See* ***Mangels v. Pena,*** 789 F.2d 836, 838 (10th Cir. 1986) ("An impartial tribunal is an essential element of a due process hearing…."); and ***Miller v. City of Mission,*** 705 F.2d 368, 372 (10th Cir. 1983) (same); see also Goldberg v. Kelly, 397 U.S. 254, 271 (1970); ***Given v. Weinberger,*** 380 F.Supp. 150, 154-55 (S.D. W. Va. 1974); ***Borg-Johnson Elec., Inc. v. Christenberry***, 169 F.Supp. 746, 753 (S.D.N.Y. 1959); and Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1279 (1975) ("an unbiased tribunal is a necessary element in every case where a hearing is required").

32. Laclede's fundamental rights to an impartial adjudication in accordance with the Commission's own rules and procedures were repeatedly violated here. For a month and a half after the April 15, 2009 vote, the Presiding Judge and the Chairman essentially re-wrote the rules so that the will of the Commission majority was thwarted, and the finality of the Commission's decision was delayed until a new majority could rule in the manner the Presiding Judge and Chairman desired. If these tactics are legitimate, there can be no certainty about any Commission action, and parties that are regulated by the Commission can have no assurance that they can rely on a Commission order to remain in effect. That result is offensive to the fundamental principles of due process and requires reconsideration of the November 4, 2009 Order.

B. The Commission Violated Laclede's Due Process Rights by Acting Outside the Scope of Its Jurisdiction and Requiring Laclede to Produce Documents Belonging to LER, an Unregulated Affiliate of Laclede.

33. The manipulation of the Commission's rules to reverse a decision approved by a majority of Commissioners would be troubling enough and sufficient to reconsider the November 4 Order because of the blatant violation of due process. But such action is all the more necessary because the violations here are not merely procedural, but substantive. The Order entered by the new Commission majority is wholly outside the Commission's jurisdiction because the Commission is claiming the right to investigate Laclede's unregulated affiliate, LER, in direct violation of the statutes that define the scope of the Commission's jurisdiction and of the Commission's own regulations that limit its authority to investigate unregulated affiliates of regulated entities.

34. The Commission is an administrative body created by statute. ***Union Elec. Co. v. Public Service Comm'n***, 591 S.W.2d 134, 137 (Mo. App. 1979). The Commission has jurisdiction over "the manufacture, sale or distribution of gas, natural and artificial…" Mo. Rev. Stat. § 386.250(1) (2008). However, as an administrative body, the Commission "only has such powers as are expressly conferred by statute and reasonably incidental thereto." ***Union Elec. Co.***, 591 S.W.2d at 137. The Commission should reconsider its November 4 Order where, as here, it is attempting to act outside its jurisdiction.

35. Laclede is a regulated gas corporation as defined in R.S.Mo. §386.020 and 4 C.S.R. §240-40.015(1)(I) and is subject to Commission jurisdiction and regulation. LER is an affiliate of Laclede as defined by § 240-40.015(1)(A) and is not directly

subject to Commission jurisdiction. R.S.Mo. §393.140 sets forth the powers of the Commission with respect to gas, water, electricity and sewer service companies. Subsection 12 of §393.140 permits gas companies and other regulated utility companies to operate affiliated businesses that are not subject to the Commission's authority that otherwise is set forth in §393.140. Section 393.140(12) states in relevant part:

> In case any … gas corporation … engaged in carrying on any other business other than owning, operating or managing a gas plant … which other business is not otherwise subject to the jurisdiction of the commission, and is so conducted that its operations are to be substantially kept separate and apart from the owning, operating, managing or controlling of such gas plant ... , said corporation in respect to such other business shall not be subject to the provisions of this chapter and shall not be required to procure the consent or authorization of the commission to any act in such other business or to make any report in respect thereof. …

In other words, §393.140(12) permits gas companies and other regulated utilities to operate affiliated businesses that engage in non-regulated activities, and such affiliated businesses are neither subject to the jurisdiction of the Commission nor required to make reports to the Commission concerning those affiliated, non-regulated businesses. So long as the regulated utility company keeps the operations of its affiliate "substantially … separate and apart" from the regulated utility business, §393.140(12) "precludes regulation of a utility's affiliate…." *Id*.; *see also* ***State ex rel. Atmos Energy Corp. v. Public Service Comm'n,*** 103 S.W.3d 753, 764 (Mo. 2003).

36. Case law and Commission decisions interpreting §393.140(12) require that affairs of a utility and its affiliate must be much more substantially intertwined than are Laclede and LER before the affiliate may be subject to Commission jurisdiction. The fact of common ownership of a regulated utility and its affiliate does not give the Commission jurisdiction over the unregulated affiliate. See ***Staff of Mo. P.S.C. v.***

Missouri Pipeline Co., LLC et al., 2006 WL 1344906 (Mo. P.S.C. 2006) Rather, the affairs of a regulated utility and its affiliate have been held to not be "substantially kept separate and apart" when the utility and the affiliate engage in transactions with each other. In ***State ex rel. Atmos Energy Corp***., the Missouri Supreme Court held that a regulated utility and its affiliate were not "substantially separate and apart" because the regulated utility and the affiliate had engaged in transactions with each other. 103 S.W.3d at 764. The records sought by the Staff in this case, however, do not involve transactions between Laclede and LER, but instead relate to transactions between LER and third parties. As a result, those records do not pertain to affiliate transactions and therefore fall outside the scope of the Commission's jurisdiction.

37. The documents sought by the Staff likewise fall outside the scope of the affiliate transaction rules that specifically limit what records can be obtained from regulated entities regarding their unregulated affiliates. 4 C.S.R. 240-40.015(6)(B) permits the Staff to obtain affiliate-related records from Laclede "for the sole purpose of ensuring compliance with" the affiliate transaction requirements set forth in that rule, i.e., transactions between the regulated entity and its unregulated affiliate. The Staff has acknowledged, however that the documents at issue do not concern transactions between Laclede and LER. The Staff cannot possibly be seeking these records to determine whether Laclede complied with affiliate transaction rules – the "sole purpose" allowed by 4 C.S.R. 240-40.015 – and, as a result, the Staff's request exceeds the scope of its regulatory authority.

38. The Staff — abetted by a Presiding Judge and Chairman who have manipulated Commission procedures to nullify a vote to the contrary — seeks

voluminous documents that document transactions between LER and unrelated and unregulated third parties. The Staff contends that it is permitted to obtain such records because it is reviewing the "prudence" of certain costs incurred by Laclede. In utility cost recovery proceedings such as the Laclede ACA Cases, a utility is permitted to recover its costs from ratepayers if it is determined that those costs were reasonable, or prudent, under the circumstances. *See* ***State ex rel. GS Technologies Operating Co., Inc. v. P.S.C.,*** 116 S.W.3d 680, 694 (Mo. App. 2003); ***and State ex rel. Assoc. Nat. Gas Co. v. P.S.C.***, 954 S.W.2d 520, 529 (Mo. App. 1997). Under the prudence standard, a utility's costs are presumed to be prudent unless shown to be otherwise. *Id*.

39. As these cases demonstrate, the prudence standard is a standard for evaluating certain costs that are subject to regulation. It is not a grant of jurisdiction to the Commission. If it were, Section 393.140(12) and the Commission's own affiliate transaction rules would effectively be repealed. Moreover, the Commission completely failed in its November 4, 2009 Order to articulate in what way, under the undisputed facts of this case, Laclede could possibly be deemed imprudent even though it complied fully with the Commission's affiliate transactions rules and the CAM that was developed by Laclede and Staff in accordance with that Rule.

40. In ***Gerling Global Reinsurance Corp. of America v. Gallagher***, ***infra***, the Eleventh Circuit found a due process violation under analogous circumstances. There, a Florida statute permitted the Florida Insurance Commission to require insurers to report information about Holocaust-era insurance claims. *Id*. at 1229-30. The plaintiffs were six insurers that were affiliates of a German insurance company, which would have been subject to Florida reporting requirements if it were subject to Florida regulation. *Id*.

However, the German affiliate had no contacts with Florida and was not otherwise subject to Florida jurisdiction. *Id*. The regulated affiliates filed suit to prevent the Florida Insurance Commission from enforcing subpoenas that required them to produce documents of their unregulated affiliate. *Id*. at 1234.

41. The Eleventh Circuit agreed that the subpoenas violated the regulated entities' due process rights: "[W]e agree … that the statute's reporting provisions, as applied, violate legislative Due Process constraints." Id. at 1236. In particular, the court agreed with the plaintiffs that the reporting provisions violated their due process rights because they concerned records belonging to the German affiliate, which was outside the jurisdiction of the state of Florida. *Id*. at 1234-35.

42. The same reasoning applies here. Transactions between LER and unrelated third parties are outside the scope of the Commission's jurisdiction pursuant to R.S.Mo. §393.140(12) and 4 C.S.R. 240-40.015. As in ***Gerling***, the Commission's attempt to launch an investigation outside the scope of its jurisdiction violates the due process rights of Laclede, the regulated entity that has been ordered to produce the records of its unregulated affiliate.

CONCLUSION

For the foregoing reasons, Laclede Gas Company respectfully requests that the Commission reconsider and reverse its November 4 Order, and reinstate its April 22, 2009 Order denying the Staff's Motion to Compel, and grant Laclede such other and further relief as the Commission deems proper under the circumstances.

WHEREFORE, for the foregoing reasons, Laclede respectfully requests that the Commission grant this Application for Rehearing or, Alternatively, Request for Clarification.

Respectfully submitted,

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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 9th day of November, 2009.

/s/ **Gerry Lynch**
Gerry Lynch