

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

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

**In the Matter of the PGA filing of )  
Laclede Gas Company for 2005- ) Case No. GR-2006-0288  
2006. )**

**PROPOSED THIRD ORDER COMPELLING DISCOVERY**

Issue Date:

Effective Date:

On October 20, 2008, this Commission issued its Order Granting Staff's Motion to Compel. To date, Laclede has refused to comply with this direct Commission order. Laclede is a gas corporation regulated by this Commission. The Commission is charged with assuring that Missouri consumers pay only just and reasonable rates, and any unjust and unreasonable rate is prohibited. Section 393.130 RSMo.

Staff filed a Motion to Compel on September 18, 2008. In response to Laclede's concerns, expressed in the discovery conference about the volume of documents sought, Staff limited the number of documents to be produced. On October 20, 2008, the Commission issued its Order Granting Motion to Compel directing Laclede to provide the documents. In its Order, the Commission found the documents requested to be relevant to Staff's analysis of the ACA periods at issue here.

Laclede's response to the Commission's Order was a Motion for Reconsideration and request for an evidentiary hearing. On December 17, 2008, the Commission denied the Motion for Reconsideration. On January 5, 2009, Laclede sought clarification of the Commission's Order Granting Motion to Compel. Laclede claimed that by compelling production of documents, the Commission had implicitly decided that

an investigation into Laclede's affiliate transactions with LER should take place. For its part, Staff suggests the Commission has not, nor should it make any decision as to Staff's request for an investigation.

On January 21, 2009, the Commission responded with an Order clarifying its position and directing Laclede to produce the documents by February 4, 2009: "to the extent that Laclede is in possession of the information." On February 5, 2009, Laclede produced a limited number of documents. Staff states that none of these documents are responsive to the documents requested by Staff.

The issue before the Commission at this time is not whether Laclede's Cost Allocation Manual (CAM) is in compliance with the Commission's affiliate transactions rule, but whether this Commission may investigate the gas purchasing decisions by a regulated utility by compelling discovery. The answer to the later question is that the Commission has broad powers of discovery. Commission rule 4 CSR 240-2.090(1) states that discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court. Under the rules of civil procedure, "it is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."<sup>1</sup>

Staff seeks information concerning LER, Laclede's affiliate. Many of the concerns set out in Staff's memorandum have to do with LER and how LER acquires natural gas. In its memorandum in Case No. GR-2005-0203, after discussing discretion in sourcing supply, Staff specifically states: "[t]his discretion in sourcing supply could result in gains

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<sup>1</sup> Missouri Rules of Civil Procedure, Rule 56.1.

for LER that should be allocated to Laclede's ACA." Additionally, in Case No. GR-2006-0288, Staff describes in its memorandum a transaction wherein Laclede may have shared the benefit of a sale with LER, thus receiving less than fair market value. Staff has demonstrated that in order to answer these questions, it must have access to the information it seeks. The Commission, therefore, concludes that the information Staff seeks appears reasonably calculated to lead to the discovery of admissible evidence.

In these Actual Cost Adjustment (ACA) cases Staff's responsibility is to make recommendations to the Commission concerning the prudence of Laclede's gas purchasing practices. In pursuit of that answer, Staff seeks discovery of documents related to gas purchases and sales to Laclede's affiliate LER to determine if these affiliate deals were prudent, or if the transactions resulted in unjust and unreasonable rates.

Staff's request to open an investigation into Laclede's compliance with the Commission's affiliate transactions rule is a separate issue from the prudence of Laclede's gas purchasing activities and, one which the Commission will not address or grant in this Order. It would also be premature for the Commission to make any determination concerning Laclede's compliance with Commission's affiliate transactions rules or, as Laclede asserts, to find Laclede's CAM complies with the requirements of the Commission's affiliate transactions rules. These are not the issues presently before the Commission.

Neither the Commission's own affiliate rules or Laclede's CAM may act to limit the Commission's ability to compel production of relevant documents in this ACA case. The matter before this Commission is solely a discovery matter and the Commission

has found: Under the rules of civil procedure, “it is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” *Order Granting Motion to Compel*, October 20, 2008.

Additionally, in its October 20, 2008 *Order Granting Motion to Compel* in holding that “discretion in sourcing supply could result in gains for LER that should be allocated to Laclede’s ACA” and that “Laclede may have shared the benefit of a sale with LER, thus receiving less than fair market value,” the Commission recognized the relevance of the requested documents.

This Commission’s January 21, 2009 *Order Regarding Request for Clarification* made it clear that if Laclede possessed the records sought by Staff, Laclede was required to produce them:

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

...

The Commission has directed Laclede to produce the information requested by Staff. Laclede is reminded that under Section 386.570, RSMo 2000, the Commission is allowed to seek penalties against Laclede for failure to comply with a Commission order. To this end, the Commission will again direct Laclede to produce information set out in the *Order Granting Motion to Compel* issued on October 20, 2008.

Missouri’s rules concerning a party’s possession of documents are broad. Rule 58.01(a) “...is not limited to documents only in the possession of a party. Instead, Rule 58.01(a) provides that “[a]ny party may serve on another party a request (1) to

produce...any designated documents...which are in the possession, custody *or control* of the party upon whom the request is served....” *Hancock v. Shook*, 100 S.W.3d 786, 796 (Mo.banc 2003) (emphasis in original).

The Missouri Supreme Court *en banc* in Hancock court continued: The “basic test of the [Rule 58.01] is ‘control’ rather than custody or possession....Control does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party’s control when that party has the right, authority, or practical ability, to obtain the documents from a non-party to the action....[This Commission] may require [Laclede} to produce documents held by [LER] if [Laclede] has the “practical ability to obtain the documents....” *Id.* at 796-797. There is no dispute that Laclede has “possession” of the documents as defined by the Missouri Supreme Court.

This Commission agrees with Staff that Laclede has the right, authority, and practical ability to provide the documents requested by Staff because Kenneth Neises is Executive Vice President-Energy and Administrative Services for Laclede Gas and also Vice President for LER. As an officer and employee of both Laclede Gas and LER, Mr. Neises has access to the LER information

For its response, Laclede argues that the issue of relevance of the materials sought must be determined by whether Laclede has complied with the Commission’s affiliate transactions rules and whether Laclede’s CAM provides a basis for determining the prudence of its gas purchasing practices. This Commission has already determined the documents sought to be relevant.

This is a preliminary Order Compelling Discovery. In this Order the Commission addresses only the discovery matter squarely before it for decision. The Commission declines to make any decision concerning the adequacy of Laclede's CAM until that matter is before the Commission. The Commission also will not make any decision in regard to whether Laclede has complied with the Commission's affiliate transactions rules as such a decision would be premature. The Commission has made no determination regarding that issue and makes no decision here. These issues may be presented to the Commission for decision after the discovery process is complete.

THE COMMISSION ORDERS THAT:

1. The Staff of the Commission's motion to compel is granted as to the documents listed in Staff's September 18, 2008 Motion to Compel.
2. Laclede Gas Company shall produce all documents as set out in the Staff's September 18 Motion to Compel no later than May 15, 2009.

Respectfully submitted,

**/s/ Lera L. Shemwell**

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### **Certificate of Service**

I hereby certify that copies of the foregoing have been emailed, mailed, hand-delivered, or transmitted by facsimile to all counsel of record this 14<sup>th</sup> day of April, 2009.

**/s/ Lera Shemwell**

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