

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

**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 February 24, 2010 Order Directing General Counsel to Seek Enforcement of Commission Order (the "Order"), states as follows:

1. On November 4, 2009, the Commission issued an order in the above captioned cases in which it voted, 3 to 2, to require Laclede to produce — on three business days notice — a multitude 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. On February 24, 2010, the Commission issued the Order, again by a vote of 3-2, finding that Laclede has failed to comply with the November 4 Order and directing its general counsel to seek enforcement of the November 4 Order in Circuit Court.

SUMMARY

2. Laclede requests that the Commission grant rehearing on this matter and reconsider the Order. The Company asserts that the Order is arbitrary and capricious, unlawful and unreasonable because:

- Laclede has in fact complied with the November 4 Order, along with the Commission's January 21, 2009 Order in this case, by producing all of the documents in its possession that are responsive to the Staff's request. Although it is Staff's position that Laclede must produce LER records documenting LER's agreements and transactions with unrelated third parties, the Commission's January 21, 2009 Order, previous Commission decisions, and case law hold otherwise.
- The Order unlawfully and unreasonably seeks to enforce a November 4 Order in a manner that would require Laclede to take action that Laclede has no legal authority to take, which in any event was impossible to perform in the extremely limited time-frame provided by the November 4 Order and, assuming *arguendo* that Laclede had the legal authority to turn over documents in LER's possession, would have required LER to violate binding contractual agreements with numerous third parties;
- The Order unlawfully and unreasonably seeks to enforce a November 4 Order that is, itself, invalid and unlawful because it attempts to enforce a method of discovery that this Commission has unanimously decided is not authorized by law and is not available under the present circumstances;

- The Order has been unlawfully and unreasonably entered without affording Laclede an evidentiary hearing and a full opportunity to demonstrate that it has, in fact, complied with the November 4 Order. Instead, the Commission has authorized its General Counsel to seek remedies based solely on Staff’s unsworn and baseless allegations regarding Laclede’s supposed failure to comply with the November 4 Order. In addition, the Order has inadequate findings of fact and conclusions of law.
- The Order represents an abuse of discretion by the Commission, because it was made effective immediately upon issuance, effectively precluding Laclede from having a fair opportunity to seek rehearing before it became effective. *State ex rel. Office of the Public Counsel v. Public Service Commission*, 236 SW3d 632 (Mo. 2007)

Each of these errors is addressed in greater detail below:

ARGUMENT

3. The Company complied with the November 4 Order. It has produced all responsive LER records in its possession, in accordance with the January 21, 2009 Order, in which the Commission unanimously recognized that Laclede is only required under the general rules of discovery to provide LER information “to the extent that Laclede is in possession of the information.” As the Commission stated:

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.

Order Regarding Request for Clarification, p. 1 (emphasis added).

4. This aspect of the January 21, 2009 Order was not challenged by Staff or OPC, the two other parties to these proceedings. It therefore remains “the law of the case” and must be followed. And that is precisely what Laclede has done by repeatedly advising the Commission of whether, and to what extent, the requested LER documents are or are not in its possession, and by providing any documents that it may have had.

5. Moreover, Laclede has no authority or obligation to require LER to produce the voluminous records requested by Staff and approved by the Commission. First, it would have been impossible for anyone, including LER, to gather and provide the documents within the compressed, three business day window permitted by the November 4 Order. Second, because many of these documents were subject to confidentiality and notice provisions involving third parties, it would have been impossible to produce the documents within the three business day window without breaching these agreements.

6. It is axiomatic that orders, rules, statutes and other legal requirements must be construed in a way that does not produce unreasonable, absurd or impossible results. (*Sisco v. Board of Trustees of the Police Retirement System of St. Louis*, 31 S.W.3d 114 (Mo App. E.D. 2000). Laclede submits that any construction of the November 4 Order which assumes that either Laclede or LER could have complied with such a massive undertaking in such a short period of time is inconsistent with this rule of construction and must be rejected as a basis for any enforcement action

7. Nor does the fact that there is a common officer who has authority over both the operations of Laclede and LER require Laclede to obtain documents in LER’s

possession and control. Because any corporate structure that has affiliated companies ultimately has to have a common officer at some point near the top of the corporate pyramid, the fact that one exists says nothing as to whether that officer can or must exert undue influence over one corporate entity solely for the benefit of another one. To the contrary, as the Western District Court of Appeals recently determined, in evaluating what action to take in a particular situation, a corporate board or officer has to make independent decisions that are consistent with its or his fiduciary duty to the entity in question. *State ex rel. Public Counsel v. Public Service Commission*, 274 S.W.3d 569, 582 (Mo. App. W.D. 2009). In effect, Staff is suggesting that Mr. Neises, as an officer of Laclede, should force LER to provide such information to Laclede simply because he is also an officer of LER, in the process ignoring the best interests of LER and its suppliers and customers, and whether there is any legitimate legal basis to support Staff's view.

8. The Order should be reheard because it is improper to seek enforcement of an order that relies on a discovery method (i.e. the submission of data requests to Laclede) that the Commission has determined to be unauthorized by Missouri law. The lawful method for seeking information under these circumstances is for the Commission to issue a subpoena to LER. Laclede bases that conclusion not on its own view of the law, but on the legal decisions and holdings that have been previously and repeatedly expressed by the Commission itself. According to the November 4 Order, the Commission has required production of documents based upon general discovery rules. As explained below, it is indisputable that a submission and enforcement of data requests to Laclede cannot be used.

9. Subsequent to November 4 the Commission referenced a different source as its authority to seek the LER documents. In its pleadings in November and December 2009 before the Western District Court of Appeals and Missouri Supreme Court, the Commission stated that it was seeking such records based on the authority granted by R.S.Mo § 386.450 which provides that:

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.

R.S.Mo. § 386.450 (emphasis added).

10. As indicated by the underscored language, however, this statutory provision only requires that a corporation, person or public utility provide accounts, papers or records that are actually “kept” by that entity in its offices. Absolutely no allegation has been made in these proceedings that LER’s records are “kept” by Laclede. In fact, LER’s records are kept by and are in the possession of LER, not Laclede. Accordingly, in providing whatever records it keeps, Laclede has fully complied in these proceedings with its obligations under this statute as well.

11. Given these facts, it is clear that the Commission should rehear the Order because Staff has failed to take the proper course of action to obtain such information from LER, and that is by the issuance of a subpoena directly to LER, rather than through

the issuance of data requests indirectly to Laclede.¹ This course of action has been available over the many months that Staff has been intent on obtaining LER's information through a different party, namely Laclede. To this day, Staff is not prejudiced from pursuing this course of action.

12. Such an approach was recently endorsed by a unanimous Commission in another proceeding involving a prudence audit – in this instance a prudence audit of expenditures relating to an electric generating plant. In denying a Staff Motion to Compel answers to Staff data requests in that case, the Commission determined that a subpoena was the only discovery vehicle available for obtaining information in those instances where it is sought from a non-party, like LER, or where an investigation is being conducted outside the context of a contested case. As the Commission explained:

The Commission has recognized the party – non-party distinction and has declared that data requests cannot be directed to non-parties in a contested case.^[9] However, the Commission has also recognized that Staff and the Public Counsel may use data requests outside of the context of a contested case pursuant to the specific statutory authority in Section 386.450, RSMo 2000,^[10] which provides:

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.

Data requests, by definition, are informal written requests for documents and information, and when used outside of the framework of a

¹The Staff is certainly conversant with how to use the subpoena process in connection with obtaining information from Laclede affiliates, like LER. It has served LER directly in the past and recently deposed the Laclede Group's Corporate Secretary pursuant to a Subpoena Duces Tecum issued by the Commission and served to the Laclede Group.

contested case discovery rules do not provide any means to compel production of the information requested. Use of data requests in a non-case audit fall under the Commission's investigatory power, and production of documents in this procedural context can only be compelled by use of a subpoena as provided for in Sections 386.440 and 536.077, RSMo. Section 536.077 delineates the enforcement mechanism of subpoenas as follows:

The agency or the party at whose request the subpoena is issued shall enforce subpoenas by applying to a judge of the circuit court of the county of the hearing or of any county where the witness resides or may be found for an order upon any witness who shall fail to obey a subpoena to show cause why such subpoena should not be enforced, which said order and a copy of the application therefor shall be served upon the witness in the same manner as a summons in a civil action, and if the said circuit court shall, after a hearing, determine that the subpoena should be sustained and enforced, said court shall proceed to enforce said subpoena in the same manner as though said subpoena had been issued in a civil case in the circuit court. The court shall permit the agency and any party to intervene in the enforcement action. Any such agency may delegate to any member, officer, or employee thereof the power to issue subpoenas in contested cases; provided that, except where otherwise authorized by law, subpoenas duces tecum shall be issued only by order of the agency or a member thereof.^[11]

The proper procedure for Staff to have followed was to seek production of the disputed documents by means of a subpoena and its enforcement.

In Re: Kansas City Power and Light, Case No. ER-2009-0086, Order Regarding Staff's Motion to Compel (December 9, 2009) (emphasis added, footnotes omitted).

13. Given this Commission's unanimously expressed view of the legal parameters governing its authority to compel the production of information in ***Kansas City Power and Light***, *supra*, it is clear that Staff was required to use a subpoena in the event the Commission believed that it was entitled to obtain the LER information at issue. It is undisputed that LER is not a party to these proceedings. Moreover, like the prudence audit being undertaken in the ***Kansas City Power and Light*** case, it is also clear that the Commission considers these proceedings to still be in some kind of investigation

stage, as evidenced by its persistent refusal to honor Laclede's request for an evidentiary hearing and the other procedural safeguards afforded by a contested case until the Staff's investigation is completed. While either one of these factors alone would mandate the use of a subpoena to obtain such information, together they conclusively compel such a result.

14. In addition to being compelled by the decision and legal analysis endorsed by the Commission in *Kansas City Power and Light*, the use of a subpoena is also the proper discovery vehicle because it is also the only one that permits LER, as a non-party, an opportunity to protect its rights in the manner provided by law. LER has indicated in its pleadings before the Western District Court of Appeals, that it has significant concerns regarding the legality and reasonableness of the information request at issue here, including the difficulty of notifying numerous suppliers and customers of the request for such information pursuant to confidentiality provisions.² That is precisely why the General Assembly has provided a means for the Commission and affected entities to obtain an enforcement hearing in the circuit court in the event there is a dispute over whether certain information should be provided. Laclede respectfully submits that the Commission has no authority under the law to short-circuit these protections by seeking such information from LER indirectly through Laclede. Indeed, that is the very legal principle that the Commission recognized in its own recent decision in the *Kansas City Power & Light* case. Given these considerations, there is simply no lawful basis for authorizing the General Counsel to seek enforcement of a data request that the Commission has since affirmatively held is completely unauthorized by Missouri law.

²Without a direct request from a governmental agency to produce documents, the confidentiality provisions described by LER in its pleadings raise doubt as to whether LER could even provide certain documents to Laclede without causing LER to breach its confidentiality obligations.

15. The Commission should reconsider the Order because it was entered without providing Laclede a hearing on the issue of whether it had complied with the November 4 Order. A hearing would provide Laclede the opportunity to challenge Staff's bald and baseless assertion that Laclede has failed or refused to comply with the November 4 Order. For example, Laclede would demonstrate at the hearing that the confidentiality provisions in the LER agreements are between LER and third parties and that *Laclede* is not legally entitled to have access to LER information that is protected pursuant to those agreements simply because Laclede is an affiliate.

16. Because there was no evidentiary hearing, there is insufficient evidence from which to make findings of fact. Accordingly, the Order is deficient in its findings of fact and conclusions of law. In essence, the Commission has ordered its General Counsel to seek remedies against Laclede based solely on Staff's unsworn allegations. The Commission should reconsider the Order based on this failure to make findings of fact and conclusions of law. **§536.090** RSMo. 2008; *State ex rel. Noranda Aluminum, Inc. v. Public Service Comm'n*, 24 SW3d 243 (Mo. App. W.D. 2000)

17. Due process demands that Laclede receive an evidentiary hearing to determine whether the Company has complied with the Commission's November 4 Order, and if not, whether Staff has been prejudiced as a result. *State ex rel. Missouri Highway and Transportation Comm'n. v. Pully*, 737 S.W.2d 241 (Mo App. E.D. 1987) Because the Commission has not afforded Laclede an opportunity to present evidence of its compliance with lawful orders, as opposed to the Commission simply accepting Staff's unsupported conclusions, the Order is premature, unreasonable and unlawful.

18. Finally, the Order represents an abuse of discretion by the Commission, because it was made effective immediately upon issuance, effectively precluding Laclede from having a fair opportunity to seek rehearing before it became effective. This type of “quick-pitch” is prohibited by *State ex rel. Office of the Public Counsel v. Public Service Commission*, 236 SW3d 632 (Mo. 2007).

CONCLUSION

For the foregoing reasons, Laclede Gas Company respectfully requests that the Commission grant rehearing or, alternatively, reconsideration of its February 24, 2010 Order, and after doing so, reverse the Order and find that the Company has complied with the Commission’s November 4, 2009 Order, and grant Laclede such other and further relief as the Commission deems proper under the circumstances.

Respectfully submitted,

/s/ Michael C. Pendergast

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CERTIFICATE OF SERVICE

Gerry Lynch hereby certifies that the foregoing pleading has been duly served upon the General Counsel of the Staff and the Office of the Public Counsel by email or United States mail, postage prepaid, on this 5th day of March, 2010.

/s/ Gerry Lynch

Gerry Lynch