BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Laclede Gas Company's Purchased Gas Adjustment for 2004-2005	))	**Case No. GR-2005-0203**
In the Matter of Laclede Gas Company's Purchased Gas Adjustment for 2005-2006	))	**Case No. GR-2006-0288**

LACLEDE GAS COMPANY'S REQUEST FOR MEDIATION, RESPONSE IN OPPOSITION TO STAFF'S REQUEST FOR CLARIFICATION, AND ALTERNATIVE REQUEST FOR ORAL ARGUMENT

COMES NOW Laclede Gas Company (hereinafter "Laclede" or "Company") and submits this request for mediation, response to the Staff pleading entitled "Notice to the Commission of Laclede's Continued Refusal to Produce Documents, Motion for Clarification, and Motion for Further Commission Orders" (sometimes referred to as the "Staff's Motion"), which was filed in this case on February 19, 2009, and alternative request for oral argument. In support thereof, Laclede states as follows:

BACKGROUND AND SUMMARY OF RELIEF REQUESTED

1. On February 19, 2009, the Staff filed a pleading with the Commission in which it purports to take Laclede to task for simply complying with the terms of a Commission Order that the Staff now seeks to have "clarified" in a way that would support the result Staff wants. Specifically, Staff complains that, consistent with the Commission's January 21, 2009 Order Granting Clarification, Laclede provided "only" documents that were in Laclede's possession, rather than the LER documents that the Staff has asked for. According to Staff, since Laclede had never made an issue of whether the subject LER documents were in its possession, it should now be required to produce such documents. Indeed, Staff goes so far as to suggest that Laclede and the

undersigned counsel have breached prior assurances and agreements, including the provisions of the July 9, 2001 Stipulation and Agreement in the Laclede's Restructuring proceeding, Case No. GM-2001-342 (the "2001 Stipulation"), by simply stating that the affiliate records requested by the Staff were not in Laclede's possession.

2. Laclede rejects in the strongest possible terms Staff's pejorative characterization of the Company's actions regarding this matter. Any bad faith conduct on this issue has been committed by Staff, who has (i) misrepresented the terms of the 2001 Stipulation; and (ii) distorted the provisions of the Commission's affiliate transaction rules. Further, while Laclede has focused on producing information pertaining to the standards set forth in the affiliate transaction rules, Staff has refused to even meet with Laclede to discuss this relevant information. In view of these considerations, and for the reasons discussed more fully below, the Commission should:

- Require that the parties participate at the earliest possible time in a supervised mediation process so that a fair and diligent effort can be made to determine whether the information provided by Laclede is or is not the kind of information which satisfies and demonstrates compliance with the existing standards and requirements of the Commission's affiliate transactions rules and the Cost Allocation Manual that Laclede has developed pursuant to those rules;
- Determine that Staff has failed to provide any substantive basis for its Motion that the Commission clarify its January 21, 2009 Order in this case; or

- Alternatively, schedule oral argument on the legal issue of what the Commission's affiliate rule standards really mean and what they really require in terms of the information necessary to show compliance with such standards so that some sense of certainty can be provided to Laclede and other utilities that have to operate under those rules.

Staff has misrepresented the terms of the 2001 Stipulation.

3. Staff's Motion selectively references or quotes from the 2001 Stipulation to support its assertion that Laclede waived its right to object to the production of affiliate records on the grounds that records are not within its possession. What Staff does not acknowledge – indeed what it has intentionally sought to conceal from the Commission – is the fact that the 2001 Stipulation also states that Laclede's commitment to produce affiliate records extends only to those records "as may be reasonably required to verify compliance with the CAM [Cost Allocation Manual]" that was developed in connection with that case. (See Section IV, paragraph 2, of the 2001 Stipulation).

Staff has distorted the provisions of the Commission's affiliate transaction rules.

4. This explicit limitation on Staff's access to affiliate records is also found in the Commission's affiliate transactions rules which restrict Staff's access to those records that are "necessary to ensure compliance" with the rule's various provisions and other requirements. *See* 4 CSR 240-40.015(6)(A) and (B). However, the Staff makes at least two notably incomplete representations to the Commission that would have the effect of completely changing the meaning of the rules to make it appear that all LER records are Laclede records and are therefore subject to unlimited discovery.

5. Staff inaccurately and incompletely cites the affiliate transaction rules, in particular, 4 CSR 240-40.016(6) and (7), in support of its claim that Laclede is, in effect,

required by law to have possession of all of LER's records so that these can be available for any purpose. (Staff Motion, pp. 5-6). Staff claims, and this is a *direct quote* from its Motion, that 4 CSR 240-40.016(6) and (7) provide that:

> …a regulated gas corporation shall make available the books and records of its parent and any other affiliated entities…. The Commission shall have authority to review, inspect and audit books, accounts and other records kept by a regulated gas corporation or affiliated entity….Records under this rule shall be maintained by each regulated gas corporation for a period of not less than six (6) years.

(Staff Motion, pp. 5-6).

6. This is a gross distortion of the affiliate transaction rules, which assuredly do not make all records of any affiliate wide open based upon any pretext. Instead, specific categories of documents are available to the Staff under 4 CSR 240-40.016(6)(A):

> (1) costs associated with affiliate transactions that are incurred by the parent or affiliate and charged to the regulated gas corporation;
> (2) methods used to allocate costs between entities;
> (3) descriptions of costs not subject to allocation to affiliate transactions;
> (4) descriptions of the types of services that corporate divisions or centralized functions provided to an affiliate that is accessing the gas corporations contracted services or facilities;
> (5) names and job descriptions of employees from the regulated entity that transfer to the non-regulated entity;
> (6) evaluations of the effect on reliability of services resulting from access by an affiliate to regulated contracts and/or facilities;
> (7) policies regarding the availability of customer information; and,
> (8) documents relating to use of derivatives. (*Id*).

It is immediately apparent that the categories of documents listed do not extend to sales records of an affiliate and third parties. And, in fact, LER's contracts with third parties comprise most of the information sought by Staff.

7. The Staff further ignores the fact that access to records of affiliated entities pursuant to 4 CSR 240-40.016(7) is restricted to investigation to determine compliance

with affiliate transaction rules. Section 4 CSR 240-40.016(7)(A) states that "to the extent permitted by applicable law, and pursuant to established commission discovery procedure a regulated gas corporation shall make available the books and records of its parent and any other affiliated entities when required in the application of this rule." Likewise, 4 CSR 240-40.016(7)(B)(1) states that "the commission shall have the authority to review, inspect and audit books, accounts and other records kept by a regulated gas corporation or affiliated entity for the sole purpose of ensuring compliance with this rule...." 4 CSR 240-40.016(7)(B)(2) is even more direct in its limitation that any investigation of the operations of a regulated company or affiliated entity and their relationship to each other is for "the sole purpose of ensuring compliance with this rule." Since there has been no allegation of any violation of affiliate transaction rules, the Staff's incomplete citation to these provisions is entirely unhelpful.

Laclede has focused on producing information pertaining to the standards set forth in the affiliate transaction rules, but Staff has refused to meet with Laclede to discuss this relevant information.

8. Pursuant to the discussion above, the determining factor in whether the Staff has a legal right to obtain affiliate records is not whether such documents happen to be in possession of the utility, but whether the records are in fact necessary to ensure compliance with the market pricing, costing and other requirements established by the affiliate transactions rules, and the CAM that Laclede has submitted in compliance with those rules.

9. That is exactly why Laclede's pleadings in this proceeding have devoted so much space to discussing the pricing standards set forth in the affiliate transactions rules and Laclede's CAM, and to describing the market pricing and other relevant data

that the Company *has* provided to Staff in an effort to demonstrate its compliance with those requirements. Indeed, Laclede has not only provided such information, but also held, and offered to hold, additional meetings at its offices in St. Louis or at the Commission's offices in Jefferson City to go over examples of specific transactions and the information that demonstrates how such transactions comply with the Commission's affiliate transaction rules.

10. As shown by the February 4, 2009 letter to Staff Counsel attached hereto (not including materials sent the next day) – a letter which Staff did not see fit to attach to its most recent pleading – Laclede requested yet another meeting with Staff so that the parties could review and discuss additional information regarding Laclede's compliance with these standards. Staff declined the Company's request, however, even though the information Laclede wanted to provide and discuss conclusively establishes that, even based on Staff's theory, Laclede's transactions with LER during the subject ACA periods were fully consistent with the market pricing standards set forth in Laclede's CAM and the Commission's affiliate transactions rules. (See attached letter, pp 2-3).[1]

11. **_____

[1]Any discussions between Staff and Laclede regarding the broader issues of how the standards in Laclede's CAM should be interpreted, the degree to which those standards are consistent with the Commission's affiliate transactions rules, and how such standards should be revised in the future, if at all, have also come to a complete and utter standstill. This is particularly regrettable given the agreement that the parties had reached in Laclede's last general rate case proceeding under which the same parties to these ACA cases committed to meeting in an effort to discuss any concerns they may have with the Company's CAM and its compliance with the Commission's affiliate transactions rules. (*See* paragraph 23 of the Unanimous Stipulation and Agreement in ***Re Laclede Gas Company***, Case No. GR-2007-0208 wherein the parties agreed to "begin meeting to discuss any issues or concerns they have may have relating to Laclede's Cost Allocation Manual ("CAM"), the compliance of the CAM with the Commission's affiliate transactions rules, and transactions between Laclede and its affiliate."). Even though the Staff explicitly agreed to engage in such discussions as part of the Stipulation and Agreement in Case No. GR-2007-0208, it has refused over the past several months to meet with the Company to discuss these related matters – a circumstance that has further impaired the parties' ability to make any progress in these cases.

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12. **

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13. Laclede does not believe that the Staff should be permitted to turn a blind eye to information and data that demonstrates the Company's historical compliance with these standards simply because the Staff desires to obtain records that are not necessary, by the very terms of those standards, to demonstrate such compliance.[2] This is particularly true since the Staff has completely failed to articulate why the information provided by Laclede is not sufficient to demonstrate the Company's compliance with its CAM and the Commission's affiliate transactions rules.

REQUEST FOR MEDIATION

14. Accordingly, Laclede believes that the most appropriate course of action at this stage is not for the Commission to further embroil itself in this issue, but to direct that the parties participate in a Commission-authorized mediation process to be supervised by a regulatory law judge or other third party of the Commission's own choosing. Such mediations are expressly authorized by Section 4 CSR 240-2.125(4). And Laclede believes that mediation could be productively employed in this case to facilitate the kind of constructive discussions regarding the meaning of the standards set forth in the Commission's affiliate transactions rules and Laclede's CAM, and the degree to which the specific information provided by Laclede has demonstrated or not demonstrated its compliance with those standards. Quite frankly, those are discussions that the parties, including Staff, have already agreed to conduct and the Commission should insist that the parties satisfy their obligations in this regard before it devotes additional resources and time of its own to this matter.

[2]Nor should the Staff be permitted to breach the assurances it gave under the Rate Case Stipulation and Agreement that it would engage in good faith discussions over these affiliate standards and issues.

15. At the end of the mediation process, which Laclede believes should be commenced immediately, the parties should be required to report back to the Commission with a joint pleading specifying whether they have reached agreement on what the standards in the Commission's affiliate transactions rules and Laclede's CAM mean and, if not, what their respective views of the meaning and significance of those standards are. The parties should also be required to report back on whether the information provided by the Company has demonstrated compliance with what they believe these standards require and, if not, what additional information they believe is required to demonstrate such compliance and why. At a minimum, such an exercise should serve to significantly narrow and clarify, if not completely eliminate, the matters at issue in these ACA cases. Laclede accordingly requests that the Commission establish such a mediation process as soon as possible.

RESPONSE IN OPPOSITON TO MOTION FOR CLARIFICATION

16. Laclede hereby incorporates the statements in paragraphs 1-13 above. In direct violation of the 2001 Stipulation and the provisions of the Commission's affiliate transactions rules, Staff continues to seek information that goes well beyond what is necessary to verify compliance with Laclede's CAM and the Commission's affiliate transactions rules – information that presumes a set of standards and requirements that are, in fact, directly contrary to those actually approved by the Commission. Moreover, Staff has continued on this course even though it now seems to acknowledge in its latest pleading that the entire legal basis for its information requests resides in the provisions of the Commission's affiliate transaction rules. (Staff Motion, pp. 1-2; paragraph 2).

17. The extent of Staff's effort to overreach is clear. The Commission in its Order of January 21, 2009 held that Staff's ability to investigate affiliate transactions "is limited to information that is relevant to these ACA cases." (January 21, 2009 Order, p. 2, emphasis supplied). The Commission therefore ordered Laclede to produce documents "to the extent Laclede is in possession of the information…." (*Id*.). The Commission Order contains significant and entirely appropriate discovery limitations. The Commission rightly concluded that an unrestricted detour into the commercial transactions of LER and its third party customers is a vast overreaching and completely unnecessary and inappropriate considering the limited scope of the issues pending the in ACA cases.

18. Staff's argument that Supreme Court Rule 58.01(a) provides justification to order production of LER documents is equally misguided.[3] Rule 58.01(a) states that documents within the scope of Rule 56.01(b)[4] in the "possession, custody or control" of a party may be discoverable. The Commission in its January 21, 2009 Order clearly limited the scope of production to documents in the "possession" of Laclede rendering consideration of the additional terms "custody or control" unnecessary. The Commission, like courts, can limit or restrict discovery based on relevance and other considerations and this is clearly what the Commission determined to do.

19. The Staff cited from a Missouri Supreme Court case for the proposition that a party's documents in the hands of a third party can be discoverable under Rule

[3] These are not Laclede documents in possession of LER; rather they are LER contracts and documents with its own customers and suppliers.

[4] Rule 56.01(b), in pertinent part, states that discovery may be regarding any matter that is relevant to the subject matter and that the party seeking discovery has the burden of establishing relevance.

58.01.[5] No one disputes this principle; one cannot expect to protect documents from disclosure by giving them to a third party. But those are not the facts present here. Instead, Staff is seeking to force LER, through Laclede, to produce LER contracts with third parties. The production sought by Staff simply is not provided for by any authority.

20. The extent of Staff's efforts to obtain affiliate information based on an unauthorized and unsupported construction of the Commission's affiliate transactions rules can also be gleaned from a comparison of the affiliate standards the Commission has actually approved and the affiliate standards presumed by Staff's adjustment and its corresponding request for information. For example:

(a) Purchases Made From an Affiliate

1. Commission-approved Standard: When a utility purchases goods or services from an affiliate (such as the gas supply purchases made by Laclede from LER in this case), the Commission's affiliate transactions rules provide that the goods or services must be purchased at:

> "the lesser of – A. The fair market price; or B. The fully distributed cost to the regulated gas corporation to provide the goods or services for itself . . ." 4 CSR 240-40.015(2)(A)1.

Consistent with this standard, Laclede has provided Staff with information,

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[5] The case, Hancock v. Shook, 100 S.W.3d 786 (Mo. 2003), dealt with a farmer who failed to disclose records related to medical care of his livestock that were in the hands of his veterinarian and, as a sanction, was prevented from introducing these as evidence. The case does not stand for the proposition that, as Staff would argue, the farmer could have been required to produce records of other farmers just because they also were in the hands of his veterinarian.

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2. Staff's Proposed Standard

This additional information should have resolved the issue under the applicable standard in the affiliate transactions rule since it is clear that Laclede purchased gas at a fully competitive, market based price. It has not for one reason and one reason only: Staff has an entirely different standard to govern instances where a gas utility buys gas from an affiliate. Under the standard upon which Staff's adjustment is premised, however, such purchases must be made at the lowest cost of gas available to the affiliate, without any consideration of what other suppliers are charging and with absolutely no markup or compensation for the services provided or risks undertaken by the affiliate in

providing the gas supply. That is decidedly NOT what the Commission's affiliate transactions rules say. In fact, to be consistent with Staff's proposed adjustment, the standard in the Commission's rule would have to be rewritten to provide that when a utility purchases gas supply from an affiliate it must compensate the affiliate at:

> "the lesser of – A. The fair market price; B. The fully distributed cost to the regulated gas corporation to provide the goods or services for itself; or (C) **_____
> _____
> _____
> _____
> _____** . . .

This wholesale, de-facto re-writing of the standards set forth in the Commission's affiliate transaction rules is clearly impermissible. Yet it is the very standard on which Staff's proposed adjustment in this case is based and on which its request for all of LER's gas supply invoices and transportation contracts is premised. Laclede respectfully submits that it should not and cannot be required to provide information that is based on such a patently unlawful and unsupported application of the Commission's own rules. Indeed, the very act of requesting such information, particularly in the absence of any effort to reconcile that request with these explicit standards, makes a mockery of the Commission's rules and should not be tolerated.

(b) Sales Made to an Affiliate

1. <u>Commission-approved Standard</u>

The same impermissible variance exists between the Commission-approved standards for sales made to an affiliate and the standard being urged by Staff in this case for sales of gas supply and transportation capacity made by Laclede to LER. Under the Commission's approved standard such sales must be made at:

> "the greater of – A. The fair market price; or B. the fully distributed cost to the regulated gas corporation." 4 CSR 240-40.015(2)(A)2.

Consistent with this standard, Laclede has not only provided Staff with relevant ** _____ _____ _____ _____ _____ ** When Staff indicated that it was not interested in meeting with Laclede, the Company nevertheless sent Staff illustrative data that further establishes that such transactions were consistent with this standard – information that Staff mentions in its pleading but does not address in any detail.

2. Staff's Proposed Standard

Once again, the Staff is apparently not interested in evaluating data which shows that Laclede's sales of gas and transportation capacity to LER were consistent with fair market pricing because with its ACA adjustment it has invented a new and different standard to govern such transactions. As discussed at length in previous Laclede pleadings, the revenue migration theory raised by Staff in this case presumes that Laclede's sales of gas and capacity to LER in interstate commerce should not be evaluated based on the fair market price at the time the sale was made but rather on any margins that LER may have subsequently made to third parties based on its use of such gas or capacity. This too presumes a standard for governing such transactions that is nowhere to be found in the Commission's affiliate transactions rule. Indeed, for Staff to prevail that standard would have to be rewritten to provide that when a utility sells gas supply or transportation capacity to an affiliate it must do so at:

> "the greater of – A. The fair market price, **_____
> _____
> _____
> _____**; or B. the fully distributed cost to the regulated gas corporation." 4 CSR 240-40.015(2)(A)2.

Again, it is simply impossible to reconcile such a standard with the explicit language of the Commission's own rules and Staff should not be permitted to obtain information, including data relating to what LER made on its sales to third parties, based on such an obviously incorrect and unsupported interpretation of the Commission's rule provisions.

(c) <u>Other Staff Rule Violations</u>

The complete and impermissible disconnect between the pricing standards in the Commission's affiliate transactions rules and the standards that Staff would have the Commission impose on Laclede in this case is just the tip of the iceberg. For example the Commission's Marketing Affiliates Transactions rule contains numerous "non-discrimination standards" (*see* 4 CSR 240-40.016(2)) that are designed to ensure that the gas utility treats both affiliated and non-affiliated suppliers in a non-discriminatory manner. Notably, the rule provides that such non-discrimination standards control "when a similar standard overlaps." 4 CSR 240-40.016(2)(A). Thus subsection (I) of Section (2) provides that :

> "A regulated gas corporation shall not make opportunity sales [i.e. of temporarily unneeded gas supply or capacity] . . . to a marketing affiliate unless such supplies and/or capacity are made available to other similarly situated customers using nonaffiliated marketers on an identical basis using non-affiliated marketers."

Here is how this provision would have to be rewritten to accommodate the revenue migration theory underlying Staff's ACA adjustment:

> "A regulated gas corporation shall not make opportunity sales [i.e. of temporarily unneeded gas supply or capacity] . . . to a marketing affiliate unless such supplies and/or capacity are made available to other similarly situated customers using nonaffiliated marketers on an identical basis using non-affiliated marketers, **_____ _____ _____ _____ _____ _____ _____ _____ **"

Similarly, subsection (J) of the Commission's Marketing Affiliate Transactions rule would have to be rewritten as follows:

> "A regulated gas corporation shall not make condition or tie agreements (including prearranged capacity release) for the release of interstate or intrastate pipeline capacity to any service in which the marketing affiliate is involved under terms not offered to non-affiliated companies and their customers, **_____ _____ _____ _____ _____ _____ _____ _____ **"

Presumably, an entirely new paragraph would also have to be added to these non-discrimination standards to make it clear, as Staff has proposed in this case, that such standards do not apply – in fact that discrimination is affirmatively required – when a gas corporation purchases gas supplies from an affiliated marketer rather than a non-affiliated marketer: Perhaps the following would do:

> **_____ _____ _____ _____ _____ _____

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_____.**

Of course, if the Commission wanted to maintain parity between affiliated and non-affiliated marketers it could simply mandate that the gas corporation apply the last sentence on a non-discriminatory basis to all marketers. The problem with such an approach, of course, is that no marketer would ever sell any gas to Laclede under such an absurd set of conditions. Yet that is the very standard that underlies Staff's proposed adjustment in this case.

Finally, the Commission would undoubtedly have to reword the last section of the Marketing Affiliates Transactions rule (Section 12) which purports to maintain consistency with state and federal antitrust laws. The following would capture perfectly the effect of Staff's proposed adjustment in this case.

> "Nothing contained in this rule and no action by the commission under this rule shall be construed to approve or exempt any activity or arrangement that would violate the antitrust laws of Missouri or of the United States or to limit the rights of any person or entity under those laws, **_____
> _____
> _____
> _____
> _____
> _____**

Once again, if the Commission wanted to apply this standard on a non-discriminatory basis, it could presumably try and have gas corporations establish such conditions for all sales of gas and capacity that they make, but then what marketer would ever buy gas or capacity under such a condition? And exactly how on earth would such a condition ever be monitored, administered and enforced even in the unlikely event it was not blatantly anti-competitive to impose such a condition.

21. With its latest filing, the Staff has acknowledged that its access to LER information is governed by the terms and provisions of the affiliate transactions rule – indeed that the rule and its provisions form the legal basis for the information requests at issue. As the foregoing has demonstrated, however, it is clear that Staff's proposed adjustments in this case, as well as the information it is seeking to support of those adjustments, simply cannot be squared with these approved Commission standards.

22. Given these considerations, there is simply no basis or justification for granting Staff's Request for Clarification. Such relief would simply allow Staff to continue to ignore the rule provisions that this Commission has explicitly approved to govern affiliate transactions. Laclede submits that the Staff, as well as the utilities the Commission regulates, are equally obligated to honor and comply with such rules and it is time that the Commission made the Staff do so. Laclede further submits that if the Staff does not do so, it should be subject to the same sanctions that it has proposed be applied to Laclede if its Motion for Clarification is granted and Laclede fails to provide the information it seeks.

ALTERNATIVE REQUEST FOR ORAL ARGUMENT

23. In the event the Commission is not inclined to order mediation or deny the Staff's Motion for Clarification in its entirety, Laclede further requests in the alternative that the Commission schedule oral argument on the legal issue of what the Commission's affiliate rule standards really mean and what they really require in terms of the information necessary to show compliance with such standards. Laclede respectfully submits that there is a real and abiding need to reach some level of certainty on these

critical issues and to do so sooner rather than later. Oral argument would assist in achieving that objective.

WHEREFORE, for the foregoing reason, Laclede respectfully requests that the Commission grant its request to establish a mediation process for the purposes described herein and deny Staff's Motion for Clarification as well as any other relief requested by Staff in such Motion, or alternatively, schedule an oral argument on the matters addressed herein.

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 2nd day of March, 2009.

/s/ **Gerry Lynch**
Gerry Lynch

FEBRUARY 4, 2009
LETTER FROM
LACLEDE COUNSEL TO STAFF COUNSEL

MATERIAL REMOVED AS

HIGHLY CONFIDENTIAL