BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public Service Commission, Complainant,	)	
v.	)	Case No. GC-2011-0006
Laclede Gas Company, Respondent.	)	

LACLEDE GAS COMPANY'S
MOTION FOR RECONSIDERATION
AND APPLICATION FOR REHEARING

COMES NOW Laclede Gas Company ("Laclede" or "Company") and, pursuant to Section 386.500 (RSMo 2000) and 4 CSR 240-2.160 of the Commission's Rules of Practice and Procedure, submits its Motion for Reconsideration and Application for Rehearing of the Commission's February 4, 2011 Report and Order Regarding Motions for Summary Determination (the "February 4 Order"). In support thereof, Laclede states as follows:

1. In the February 4 Order, the Commission granted Staff's Motion for a Summary Determination on Staff's complaint that Laclede has violated the Stipulation and Agreement in Case No. GM-2001-342 ("2001 Agreement") by stating that certain affiliate information requested by Staff in Case Nos. GR-2005-0203 and GR-2006-0288 (the "ACA Cases") is not within Laclede's custody, control and possession. Although the Commission authorized its General Counsel to pursue penalties against Laclede in Circuit Court based on this alleged violation, it stated that its purpose was not to impose a harsh punishment on Laclede, but instead to have Laclede comply with the 2001 Agreement and the Commission's discovery orders.

2. Laclede appreciates the Commission's statement that its purpose in issuing the Order is not to impose a harsh punishment on Laclede. Laclede also fully understands the need to comply with both the 2001 Agreement and the Commission's discovery orders. As explained more fully below, Laclede firmly believes that it has done just that; it has fully complied with the 2001 Agreement, the Commission's discovery orders in the ACA Cases and the Cole County Circuit Court's Judgment and Writ of Mandamus in Case No.10AC-CC00170.

3. As Laclede has discussed on numerous occasions, it is in fact the Staff, and not Laclede, that has repeatedly failed to abide by the 2001 Agreement and the Commission's prior discovery orders. All the while, Laclede has never asked anything more of the Commission than an opportunity to demonstrate in an evidentiary hearing the correctness of its position that Staff's adjustments in the ACA Cases *and* its associated information requests are improper and irrelevant under the 2001 Agreement, the CAM that was endorsed by the Staff and implemented as a result of that agreement, and the Commission's affiliate transactions rules.[1]

4. Unfortunately, the Commission has once again denied Laclede that opportunity by issuing an order that summarily accuses Laclede of violating the 2001 Agreement while simultaneously and impermissibly cancelling the evidentiary hearing that would have given Laclede an opportunity to prove that no such violation has occurred. In addition to unlawfully depriving the Company of its right to an evidentiary hearing (Section 386.420 RSMo 2008), the Commission's Order is unlawful,

[1] See Exhibit 1 which is a copy of Laclede's Position Statement in this case and which is hereby incorporated by reference herein. It provides what Laclede believes to be the appropriate construction of the 2001 Agreement, together with a summary of the Staff actions that have been taken contrary to that Agreement.

unreasonable, arbitrary and capricious for the following reasons:

(a) ***The Order erroneously and impermissibly seeks to penalize Laclede for not producing information in alleged violation of the 2001 Agreement, when it is the Commission itself that has repeatedly stated that Laclede's obligation to produce such information should be governed by the rules of civil procedure and not by the 2001 Agreement.***

5. No party has argued more vigorously than Laclede for the right to have the discovery issue that is the subject of Staff's complaint resolved in accordance with the 2001 Agreement and the CAM that Staff endorsed. Despite Laclede's arguments, this Commission decided that the instant discovery dispute should *not* be resolved pursuant to the terms of that agreement, but instead pursuant to the discovery rules of civil procedure, which rules explicitly limit production of documents or things to those that "are in the possession, custody or control" of the party to whom the request is served. (Supreme Court Rule 58.01) In fact, the Commission made this crystal clear in its January 21, 2009 Order in the ACA Cases in which it stated that Laclede was compelled to provide the information requested by Staff "[t]o the extent that Laclede is in possession of the information."

6. In its February 4 Order, the Commission asserts that the language in the January 21, 2009 Order was never intended to relieve Laclede of its obligation to provide the requested information, even if the information was not in Laclede's possession. Laclede respectfully submits that this conclusion simply cannot be reconciled with the clear and unambiguous language of the January 21, 2009 Order itself. Nor can it be reconciled with the Commission's discussion of that order at the agenda meeting during which it was voted on. Contemporaneous notes of that agenda meeting make clear that

the "possession" language was intentionally added to the Order once the Commission decided that it would seek such information not pursuant to the affiliate transactions rules or the CAM, but pursuant to the discovery rules of civil procedure. In fact, after the Order was revised at the suggestion of Commissioner Jarrett to include such language, Commissioner Murray observed that it was a "good catch" and Commissioner Gunn observed that under the rules of civil discovery, a party is only required to provide information that is in its possession, and that the January 21 Order flowed from these rules of discovery. Given this historical record and the explicit language of the January 21 Order itself, it is simply untenable to suggest that the Commission did not intend to relieve Laclede of any obligation it may have otherwise had to provide information that was not in its possession.

7. The fact that the Commission's resolution of this discovery dispute was premised solely on an application of the general rules of civil discovery and without reference to the 2001 Agreement or CAM is further underscored by its November 4, 2009 Order in the ACA Cases in which the Commission explicitly rejected the argument by Staff and OPC that the discovery dispute should be resolved pursuant to the 2001 Agreement. To the contrary, the Commission concluded that the 2001 Agreement and the Affiliate Transactions Rules were red-herrings and that the dispute must be resolved pursuant to the rules of civil procedure. As the Commission stated at page 2 of that order:

> Additionally, Staff and Public Counsel have asserted that Laclede is bound under an agreement reached in Case No. GM-2001-342 to provide the information Staff seeks.
>
> The Commission emphasizes that Staff's discovery request is not an investigation under the Commission's Affiliate Transaction rule nor is it a complaint through which Staff or Public Counsel seeks enforcement of the

> agreement reached in Case No. GM-2001-342. These issues have but served as red herrings in what is a discovery request governed by the rules of civil procedure. Mirroring what was set out in the Commission's initial order granting Staff's motion to compel, 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.

8. As the above language makes clear, Laclede was instructed clearly and without reservation to produce information in accordance with rules of civil procedure and not pursuant to the 2001 Agreement. Laclede took the Commission at its word and responded in accordance with the Commission's directive. Laclede respectfully submits that it is wholly inappropriate to seek penalties against a utility that has done nothing more and nothing less than comply with the plain meaning of the Commission's own orders. Indeed, such action is unlawful, impermissible and constitutes the very essence of arbitrary and capricious action.

(b) *the Order erroneously seeks to penalize Laclede even though the Company has fully complied with the very discovery rules of civil procedure which the Commission said should govern production of the disputed information – rules which both the Commission and the Circuit Court have previously recognized only require Laclede to furnish information that is within its custody, control or possession.*

9. Although the Commission's Order authorizes the Commission's General Counsel to seek penalties, there is absolutely nothing in the Order to suggest that Laclede has failed to do what it was ordered to do by the Commission in its prior orders governing this matter; namely provide all of the information in the Company's possession that was responsive to Staff's request. As discussed above, this Commission had previously recognized that under the discovery rules it elected to use to govern this dispute, a party is only required to provide information that is within its custody, control

or possession. Those were and remain the operative rules under which Laclede was proceeding and against which its compliance should be judged.

10. Nor is that just Laclede's opinion. After reviewing the same Commission orders that Laclede has cited, the Circuit Court of Cole County also reached the same conclusion regarding what information Laclede was required to provide in order to satisfy its obligations under those orders. Specifically, on June 25, 2010, the Cole County Circuit Court issued its Judgment and Writ of Mandamus (the "Judgment") in Case No. 10AC-CC00170 in direct response to the Commission's effort to seek enforcement of its November 4, 2009 Order in the ACA Cases. In the Judgment, the Court stated that, despite the lack of findings by the Commission in its order, the Court would take the PSC at its word and issue the writ requiring Laclede to state that it had produced all of the information sought "that is within Laclede's possession, custody and control." Clearly, the Court understood the Commission's prior orders in the same way Laclede did, and just as the Company has complied with those Commission orders, so too has it complied with the Circuit Court's Judgment, a judgment that was sought and received by the Commission. Given this compliance, there is no lawful basis for seeking penalties against Laclede.

(c) *the Order erroneously and impermissibly violates the law of the case by seeking to require Laclede to produce information under terms that are in direct conflict with the Court's Judgment.*

11. Contrary to the conclusions reached in the Order regarding Laclede's discovery obligations, the Judgment instructed Laclede to provide the disputed information only to the extent it was "in the possession, custody or control" of Laclede. Because that Judgment was never appealed by the Commission, it has become the "law

of the case" and its terms cannot now be varied by simply issuing an Order that so obviously conflicts with it. *See e.g.* ***State ex. rel Alma Telephone Co. v. Public Service Comm'n,*** 40 S.W. 3d 381, 388 (Mo. App. W.D. 2001) Indeed, what the Commission seeks to do with its February 4 Order is penalize Laclede for obeying the lawful Judgment and Writ of a Circuit Court that was acting at the direct behest of the Commission itself. Clearly, it is wholly impermissible, arbitrary and capricious for a regulatory agency to not only disregard a lawful order of a Circuit Court but to also seek to punish another party for actually having complied with it.

(d) *the Order erroneously interprets the 2001 Agreement by giving it a construction that cannot be reconciled with the factual assertions that have been made by Laclede in both its pleadings and prefiled testimony in this case; a circumstance that makes summary determination impermissible.*

12. As the Commission recognized in the February 4 Order, summary determination of the kind granted in the Order is only permissible under the Commission's own rules if the "pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact." That prerequisite simply does not exist for the facts asserted by Staff in support of its motion for summary determination. Contrary to what Staff asserted in its Motion, Laclede has repeatedly argued that the CAM, as used and referenced in the 2001 Agreement, is the sole and exclusive mechanism for determining the ratemaking treatment to be afforded the affiliate transactions at issue in the ACA Cases.

12. Among other things, Laclede based this conclusion on the factual nature of the transactions at issue, the specific scope, language and clear applicability of the CAM to such transactions, and the complete absence of any articulation by the Staff of any

other "ratemaking, financing, safety, quality of service" or "other regulatory" consideration; all of which indicated that the CAM was the sole and exclusive mechanism for determining how such transactions should be priced and the kind of information that Laclede was required to provide to Staff. (See Krieger Direct, p. 9; Buck Rebuttal, p. 3). Rather than permit an evidentiary hearing to be held to consider these factual assertions and issues, the Commission's February 4 Order simply rejects them and accepts at face value Staff's vigorously disputed contention that there was some ratemaking or other issue aside from the CAM and its applicability to the transactions that warranted the production of the information it sought. In fact, rather than determining whether the CAM is, or is not, exclusively applicable to the transactions at issue, the February 4 Order goes so far as to state that it is not even addressing how the CAM operates or how it should be applied. (February 4 Order, p. 13). Laclede respectfully submits that as a matter of law, no interpretation of the 2001 Agreement is even possible without delving into these factual matters regarding the scope, nature and applicability of the CAM to the transactions and information requests at issue. Given the existence of these genuine issues of material fact, there is no lawful basis upon which the Commission could have granted Staff's motion for summary determination.

(e) *the Order erroneously and impermissibly concludes that Laclede violated the 2001 Agreement by objecting to the provision of information on the grounds that it was not within its custody, control or possession.*

13. Contrary to the conclusion reached in the Order, Laclede has never objected to the provision of any information sought by Staff on the grounds that such

information is not within its custody, control or possession. (Krieger Direct, p. 9)[2] Instead, Laclede has simply followed the dictates of this Commission and the Circuit Court in identifying which information it was required to provide under the orders issued by those bodies. Again, Laclede should not and cannot be penalized for complying with the orders of the Commission and the Circuit Court.

WHEREFORE, for the foregoing reasons, Laclede Gas Company respectfully requests that the Commission reconsider and reverse its February 4, 2011 Order in this case, or grant rehearing on the matter by rescheduling the hearing previously cancelled by the Commission's February 4, 2011 Order.

Respectfully submitted,

/s/ Michael C. Pendergast
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ATTORNEYS FOR
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing pleading was served on the Staff and on the Office of the Public Counsel, on this 10th day of February, 2011 by hand-delivery, fax, electronic mail or by regular mail, postage prepaid.

/s/Rick Zucker

[2] See also the February 10, 2011 Dissent of Commissioner Terry M. Jarrett to the February 4 Order.

EXHIBIT 1

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The Staff of the Missouri Public Service Commission, Complainant,	)	
v.	)	Case No. GC-2011-0006
Laclede Gas Company, Respondent.	)	

STATEMENT OF POSITION OF LACLEDE GAS COMPANY

COMES NOW Laclede Gas Company ("Laclede" or "Company"), and submits its Statement of Position in the above captioned case. Laclede's positions are presented in the same order as the List of Issues previously submitted by the parties.

List of Issues

1. In two Laclede ACA cases, Case Nos. GR-2005-0203 and 2006-0288, Staff has submitted to Laclede information requests seeking certain information from Laclede Energy Resources, Inc. ("LER"). Laclede has provided Staff with certain LER information, but has responded that it does not have possession, custody or control of other LER documents that may be responsive to this request.

(a) Is Staff precluded by prior Commission Orders from complaining that Laclede has violated its obligations under the Stipulation and Agreement in Case No. GM-2001-342 by virtue of its response to Staff's information request?

(b) If Staff is not precluded from pursuing such a complaint, has Laclede violated its obligations under the Stipulation and Agreement in Case No. GM-2001-342 by virtue of its response to Staff's information request?

EXHIBIT 1

Statement of Positions

Issue 1(a)

Prior Commission orders issued in Case Nos. GR-2005-0203 and GR-2006-0288 (the "ACA Cases") found that Laclede should produce LER information that is in Laclede's possession,[3] and further found that Staff's request for LER information was not made or allowed pursuant to the Stipulation and Agreement in GM-2001-342 (the "2001 Agreement"), but instead was made and allowed pursuant to the discovery rules of civil procedure.[4] Laclede responded to the discovery requests in accordance with the rules of civil procedure and produced all responsive information that was in its possession, custody or control. The orders in the ACA Cases preclude Staff from bringing a complaint that Laclede violated its obligations under the 2001 Agreement by responding to those information requests in the ACA Cases pursuant to the rules of civil procedure.

On the subject of affiliate transactions, the 2001 Agreement is clear. Section VI.1 of the 2001 Agreement directs Laclede to conduct and account for affiliate transactions in accordance with the CAM. Section IV.2 assures to Staff the right to access information reasonably required to verify Laclede's compliance with the CAM. (Direct Testimony of Patricia Krieger, pp. 6-7)

On the subject of gas supply affiliate transactions, the CAM is also specific and clear. These transactions must pass a market test, so that the utility does not buy gas from an affiliate above market price, nor sell gas to an affiliate below market price. The CAM language effectively mirrors the Commission's own affiliate transaction rules (the

[3] Order Regarding Request for Clarification, dated January 21, 2009.
[4] Order Directing Laclede to Produce Information, dated November 4, 2009.

"Rules").[5] All of these documents are designed to protect the utility ratepayer by ensuring that the utility's deal with the affiliate is comparable to what the utility could have gotten from a non-affiliate. In other words, the affiliate guidelines seek to make the utility indifferent between dealing with its affiliate or a non-affiliate. (Direct Testimony of Patricia Krieger, pp. 3-5)

So in performing its analysis, Staff could have followed the path set by the 2001 Agreement, the CAM and the Rules, by simply obtaining the data necessary to do a fair market price comparison in order to verify compliance with the CAM. Had it done so, the Commission's rules and policies would have been honored, the utility ratepayers would have been protected, and the taxpayer would have received the value of his tax dollar.

But Staff did not do that. Staff instead ignored the 2001 Agreement, the CAM and the Rules and set out to do what it called a prudence analysis, but what was really an effort to gather LER's data so that it could remove any returns that LER earned in its business dealings with Laclede. This complies with neither the Commission's rules nor its policies. In effect, the Staff proceeded to follow its own policy that an affiliate not be permitted to profit from a transaction with the utility, regardless of market price. (Krieger, p 10; Direct Testimony of Michael Cline, pp. 6-7) So when Staff was questioned by the Commission about how its analysis corresponded with the CAM that was intended to guide affiliate transactions, Staff replied that its investigation wasn't into compliance with the CAM, but was instead into whether Laclede paid too much for the

[5] The Rules actually require a comparison between the fair market price and fully distributed cost (FDC), but as has been explained by Staff in GC-2008-0364, and by Laclede most recently in GC-2011-0098, FDC is either inapplicable to gas transactions because Laclede does not produce its own gas, or FDC will always fall outside of fair market price because it is the equivalent of fair market price with added cost.

gas it bought from LER.[6] Of course this is an absurd statement, as the CAM is the very document designed to determine whether Laclede paid too much for gas it bought from LER.

The Staff made it clear that it did not intend to be constrained by the information limits set forth in the 2001 Agreement and the Rules. Staff's view was that it was entitled to LER records, not pursuant to the controlling affiliate transaction regulations, but pursuant to its own view of prudence. Although Laclede agreed to and did tender information necessary for Staff to determine a fair market price for the gas supply affiliate transactions, Laclede objected to those requests for affiliate records which were premised on a pricing standard that was contrary to those endorsed by the 2001 Agreement, the CAM and the Rules. (Cline, pp. 4-6) However, on November 4, 2009, the Commission issued an order in the ACA Cases, determining that Staff could seek such LER information, not under the 2001 Agreement or the Rules, both of which it considered to be red herrings, but instead under the general discovery rules of civil procedure. Obviously, Laclede disagreed with the Commission on this point, but the decision was made. So be it.

The discovery rules of civil procedure require Laclede to produce information that is responsive to the requests and that is in Laclede's possession, custody or control. Laclede produced such information, but frankly disclosed to the Staff and the Commission that a large portion of the proprietary LER information sought by Staff was not in Laclede's possession, custody or control. The Commission sent the case to the Cole County Circuit Court to enforce the November 4, 2009 Order, and the Court agreed

[6] Case Nos. GR-2005-0203; GR-2006-0288; March 26, 2009 Oral Argument Tr. at 16-17.

that Laclede should produce whatever responsive documents were in its possession, custody or control, which of course Laclede had already done.

In the November 4, 2009 Order, the Commission permitted the Staff to depart from the affiliate transaction provisions in the 2001 Agreement in seeking documents. The Staff cannot now collaterally attack that order and claim that the 2001 Agreement terms do not apply when it comes to asking the questions, but do apply when it comes to answering them. Section 386.550 RSMo prohibits Staff from collaterally attacking Commision orders and seeking a different result here on the same issue that was decided in the ACA Cases.

Staff may claim that its discovery request qualifies under Section IV.2 of the 2001 Agreement as "other" information relevant to "other" regulatory authority, and that Laclede may not object to these information requests on the grounds that the information is not within Laclede's possession or control. Staff is wrong because the matter at issue is not about "other" information pursuant to "other" regulatory authority, but is specifically affiliate transaction information pursuant to the Commission's authority to regulate affiliate transactions. As stated above, the 2001 Agreement is clear that the Staff is only entitled to affiliate information as may be reasonably required to verify compliance with the CAM. Staff recognized the applicability of the 2001 Agreement and the CAM, and purposely sought to avoid these authorities. The Commission also recognized the need to address the applicability of the 2001 Agreement in the November 4 Order, and did so by specifically stating that the 2001 Agreement did not apply to Staff's discovery request. Having avoided the applicability of the 2001 Agreement to affiliate transactions, Section 386.550 RSMo precludes Staff from attacking the

November 4 Order and having the Commission find in this case that the 2001 Agreement applies to the discovery requests after all.

Issue 1(b)

For the same reasons set forth above, even if the Staff is permitted to pursue this complaint, Laclede has not violated its obligations under the 2001 Agreement by virtue of its response to Staff's information request. Section IV.2 of the 2001 Agreement unambiguously entitles Staff to afffiliate information necessary to ensure compliance with the CAM. Laclede has provided such information to Staff, even in the face of Staff's refusal to consider it. (Cline, pp. 4-8) Staff seeks information that Staff admits is unrelated to the 2001 Agreement and the CAM. While Laclede has vigorously disputed Staff's right to ignore the 2001 Agreement's requirements regarding affiliate transactions, Staff has nevertheless received the Commission's authority to do so for purposes of Staff's information request. Since the authority granted to Staff in this regard emanates from the discovery rules of civil procedure, and not from the 2001 Agreement, it follows that the terms of the 2001 Agreement do not apply to Staff's information request, and Laclede may respond to that request in accordance with the rules of civil procedure.

WHEREFORE, for the foregoing reasons, Laclede Gas Company respectfully requests that the Commission accept for its consideration this Statement of Position.

Respectfully submitted,

/s/ Michael C. Pendergast
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EXHIBIT 1

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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing pleading was served on the parties to this case on this 4th day of February, 2011, by hand-delivery, e-mail, fax, or by United States mail, postage prepaid.

/s/ Gerry Lynch