LACLEDE GAS COMPANY
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AREA CODE 314
342-0513

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March 2, 1987

Mr. Harvey G. Hubbs
Secretary
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

Re: Case No. AO-87-48 - In the matter of the investigation of the revenue effects upon Missouri utilities of the Tax Reform Act of 1986.

Dear Mr. Hubbs:

Pursuant to the Commission's Order of January 30, 1987 in Case No. AO-87-48, Ordered 2 thereof, enclosed for filing with the Commission find the original and fourteen (14) copies of the Comments of Laclede Gas Company Regarding Staff's Alternative Proposals for Interim Rates. The other information subject to be filed in this proceeding on or before March 2, 1987 is being submitted under separate cover. Please see that same is filed and brought to the Commission's attention.

Enclosed also find an additional copy of such Comments to be stamped filed and returned in the pre-addressed stamped envelope provided.

Thank you for your assistance.

Very truly yours,

Gerald T. McNeive, Jr.

GTM:sll

Enclosures

cc: Office of the Public Counsel
All Parties of Record

FILED

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PUBLIC SERVICE COMMISSION

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the investigation of the revenue effects upon Missouri utilities of the Tax Reform Act of 1986.) Case No. AO-87-48

COMMENTS OF LACLEDE GAS COMPANY REGARDING STAFF'S ALTERNATIVE PROPOSALS FOR INTERIM RATES

The Commission's Order of January 30, 1987 in Case No. AO-87-48 directed public utility companies subject to the Commission's jurisdiction ("Companies") to respond to the Staff's interim tariff filing proposal. Pursuant to that Order, Laclede submits these Comments.

Staff's proposed alternatives would require the Companies to file tariffs superseding all prior tariffs, and stating that all tariffs, rates and charges in effect as of July 1, 1987 are either: (1) interim, subject to refund in their entirety; or (2) interim, subject to refund, only to the extent that there has been a reduction in revenue requirement due to the Tax Reform Act of 1986 ("TRA"). Laclede presumes that the Commission Order directing a Company tariff filing to effectuate either alternative would not be preceded by a full rate case hearing.

Laclede, in its Comments filed December 15, 1986, stated that it wishes neither to benefit financially, nor suffer a loss, as a result of the actual effect of the TRA on Laclede's revenue requirements. It remains Laclede's intention to work with the Staff to develop a mechanism under which any windfall which Laclede may actually receive due to the TRA can be

returned to ratepayers, and to effectuate any such mechanism in the most timely practicable manner.

Given this intention, it is apparent that the Staff and Laclede share the same goal. However, Laclede believes that the interim rate proposal alternatives submitted by the Staff are totally inappropriate, and would unconstitutionally deprive utilities of their property without due process of law even if such alternatives were authorized by statute (which, for the reasons described in Section 3 of these Comments, they are not).

1. A Commission Order Summarily Rendering Approved and Effective Utility Rates and Charges Interim, In Whole Or In Part, and Subjecting Them to Full or Partial Refund, Strikes at the Very Foundation of Utility Regulation and as Such Would be Totally Inappropriate.

The Commission has traditionally established approved and effective rates and charges for a utility only on the basis of a careful procedure which normally includes, a detailed filing of supporting documentation by the utility, a thorough investigation by the Staff, Public Counsel and other interested parties, and a hearing wherein the Commission considers all relevant factors bearing on such rates and charges. In return for, and upon this bedrock of rates and charges which the Commission approves and makes effective as a result of this process, the utility is able to offer and maintain its service to the public. The sudden and summary undercutting of that foundation would necessarily weaken the utility's financial structure, and would create a substantial contingent

liability1/ of indeterminate magnitude (albeit that under the Staff's second alternative, the maximum amount of that contingent liability might be estabilished).

Rates which are summarily rendered interim, and subject to refund, would be financially suspect, and would give rise to great uncertainty in the minds of the utility's current (and potential) shareholders, bondholders and other creditors, and would also create considerable concern among the utility's employees, customers and ratepayers. When its rates are approved and effective, a utility should be permitted to operate according to current plans, and to make future plans to meet the needs of its constituencies, with the firm knowledge, and in reliance on the fact, that current rate levels will be maintained, unless and until they are changed prospectively by means of the carefully prescribed ratemaking hearing process, after due consideration of all relevant factors . Quite the opposite would be true if existing lawfully approved rates were suddenly and summarily destabilized and rendered interim, subject to refund.

1/ In this regard, it should be noted that the Natural Gas Act reflects the public policy against forcing a regulated entity to bare the risk of reduced interim rates. It does not sanction the use of an administrative agency order whereby existing rates may be summarily made interim by the Federal Energy Regulatory Commission ("FERC"), or whereby lowered rates might be placed summarily into effect on an interim basis at the behest of the FERC. 15 USCA 717d. The Natural Gas Act only provides a mechanism whereby increased rates may be collected subject to refund. 15 USCA Section 717c.

A utility's undertaking to serve is predicated upon the expectation that its capital will be protected from erosion and continue to earn an appropriate return. One foundation of that expectation requires that approved and effective rates will not, once established, be summarily and involuntarily made interim, subject to refund, without observing procedural and substantive hearing requirements equivalent to those under which the rates were initially determined by the administrative agency.

2. The Staff's Alternatives Would Result in an Unconstitutional Deprivation of a Utility's Property Without Due Process of Law in Violation of the Constitutions of the United States and the State of Missouri.

A utility's approved and effective rates and charges embody a constitutionally protected property right. The dissolution of approved and effective rates, and the summary rendering of such rates as interim and subject to refund, would involve an unconstitutional deprivation of that property right, without due process of law. Thus, even if, as is not the case, a Missouri statute were purportedly to authorize such action, such legislation would be invalid under both the United States and Missouri Constitutions. As the Missouri Supreme Court stated in Straube v. Bowling Green Gas Co., 227 S.W.2d 666, 671 (Mo. 1950): "When the established rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislation or court action without violating the due process provisions of the State and Federal Constitutions. Mo. R.S.A.,

Const. Art. 1, Sec. 10; USCA Const. Amend. 14". (emphasis supplied).

In State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 58 (Mo. 1979) (sometimes hereinafter called the "UCCM Case"), the Missouri Supreme Court concluded that the Commission may not, in the absence of observing the normal ratemaking safeguards: "redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process. See Arizona Grocery Co. v. Atchison, Topeka & Santa Fe R. Co., 284 U.S. 370, 389-90, 52 S.Ct. 183, 76 L.Ed. 348 (1932); Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23, 31, 46 S.Ct. 363, 70 L.Ed. 808 (1926); Lightfoot v. City of Springfield, 361 Mo. 659, 236 S.W.2d 348, 353 (1951)."

In the UCCM Case, the Court refused to require the utility to refund monies collected during the pendency of a lawfully effective fuel adjustment clause, despite the fact that such clause was prospectively invalidated by the Court. A summary2/ requirement that a utility's approved and effective rates and charges be made interim, subject to refund, would suffer the same constitutional infirmity as that which the Court found to

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2/ Under the Staff's alternative proposals there would, for example, be no full and fair hearing, and all relevant ratemaking factors would not be considered. The constitutional requirement for such types of factors in ratemaking proceedings was recently emphasized in Jersey Central Power & Light Company v. Federal Energy Regulator Commission, Case No.82-2004 (D.C. Cir., February 3, 1987).

exist with respect to the requested refund in the UCCM Case, in that it would constitute state action whereby the utility should, without due process of law, be deprived of the revenues to which it is entitled under previously existing lawful rates and charges.

This constitutional inhibition on summary Commission ratemaking actions of this type reflects the public policy considerations described in Section 1 of these Comments.

3. The Commission Lacks the Statutory Authority Summarily To Order that A Utility's Existing Approved and Effective Rates, Either In Whole or In Part, Be Made Interim, and Subject to Refund.

Staff's suggested alternatives for resolving its expressed concerns are also unauthorized and legally invalid under relevant Missouri statutes. This lack of statutory authority is described in detail in the remaining portions of these Comments.

A. The Commission's Powers Are Limited to Those Conferred by Statute.

Missouri courts have repeatedly held that the Commission's powers are limited to those conferred by statute, either expressly or by clear implication, as necessary to carry out the powers specifically granted. State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, supra at 49 (Mo. 1979); State ex rel. City of West Plains v. Public Service Commission, 310 S.W.2d 925, 928 (Mo. 1958). As the Missouri Supreme Court pointed out in State ex rel. Utility Consumers Council of Missouri Inc. v. Public Service Commission,

supra, at page 49, citing, and in part quoting, State ex rel. Kansas City v. Public Service Commission, 301 Mo. 179, 257 S.W. 462 (1923): "While these statutes are remedial in nature, and should be liberally construed to effectuate the purposes for which they were enacted, 'neither convenience, expediency or necessity are proper matters for consideration in the determination of' whether or not an act of the Commission is authorized by the statute."

B. The Commission Has Power to Grant Interim Rate Increases Under the "File and Suspend" Procedures Where a Utility Files for a Rate Increase.

Missouri law authorizes the Commission to make certain interim changes in rates in the context of rate increases applied for by utilities pursuant to the "file and suspend" method of ratemaking. The Commission has the power in a proper case to grant such interim rate increases within the broad discretion implied from the Missouri "file and suspend" statutes (Sections 393.140(11) and 393.150 R.S.Mo. 1986)3/. State ex rel. Laclede Gas Company v. Public Service Commission, 535 S.W.2d 561, 567 (Mo. App. 1976).

The Court in State ex rel. Laclede Gas Company v. Public Service Commission, supra at 566, summarized the Commission's interim rate change authority pursuant to the "file and suspend" statutes as follows:

> "The 'file and suspend' provisions of the statutory sections ... [Sections 393.140(11) and

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3/ All citations are to Revised Missouri Statutes, 1986, unless otherwise indicated.

393.150] lead inexorably to the conclusion that the Commission does have discretionary power to allow new rates to go into effect immediately or on a date sooner than that required for a full hearing as to what will constitute a fair and reasonable permanent rate. This indeed is the intended purpose of the file and suspend procedure. Simply by non-action, the Commission can permit a requested rate to go into effect. Since no standard is specified to control the Commission in whether or not to order a suspension, the determination as to whether or not to do so necessarily rests in its sound discretion." State ex rel. Laclede Gas Company, supra at 566. (emphasis supplied)

Even though vested with a degree of discretion to grant interim rate increases under the "file and suspend" procedure, such interim rate changes traditionally have been granted only with great reluctance by the Commission. Indeed, the Commission's exercise of such authority has been limited only to extraordinary emergency circumstances where the applicant utility has conclusively demonstrated extreme financial need. State ex rel. Laclede Gas Company v. Public Service Commission, supra at 566; Re Missouri Public Service Company, Case No. 18,502, 20 Mo.P.S.C. (N.S.) 244, 249-250 (1975).

C. Under the Commission's Complaint Procedure, the Commission Does Not Have Power either: (a) to Require Involuntary Interim Rate Changes; or (b) to Make Lawfully Authorized Rates Subject to Refund.

While the "file and suspend" provisions of Sections 393.140(11) and 393.150 clearly empower the Commission to grant certain interim rate increases, the only remaining procedure lawfully available to the Commission for changing rates (namely, the Commission's statutory authority under Section 393.140(5) to prescribe just and reasonable rates after a hearing had upon its own motion upon complaint)

provides absolutely no authority for the Commission to change rates on an interim basis.

Section 393.140(5) provides in pertinent part as follows:

> "(5) Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges ... of any such ... corporations are unjust [or] unreasonable ..., the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force ...." (emphasis supplied)

Likewise, companion statutory provisions, such as Section 386.390 (regarding complaint procedures before the Commission generally, on its own motion or otherwise), and Sections 393.260 and 393.270 (regarding complaints as to the quality and price of utility service), unlike the "file and suspend" statute, contain no hint whatsoever of Commission authority to change rates on an interim basis. Instead, these complaint provisions clearly anticipate and require full investigation, hearing and consideration of all relevant factors, before the issuance of a Commission order mandating a rate change. Moreover, the Courts in State ex rel. Laclede Gas Company v. Public Service Commission, supra at 568, and State ex rel. Fischer v. Public Service Commission, 670 S.W.2d 24, 26-27 (Mo. App. 1984), indicated that any Commission authority to provide interim rates would have to be implied from, and be limited to the context of, the "file and suspend" statutory procedure.

In addition to proposing that existing rates be declared interim, the Staff has also proposed that such rates be made subject to refund. The complimentary nature of interim rates and future refunds is obvious, but each is a separate and

distinct element of a rate determination. However, while the Commission's authority to increase rates at the behest of a utility on an interim basis under the "file and suspend" procedure has, under certain circumstances, met with judicial approval; we are not aware of any situation in which a Missouri appellate court has approved a Commission attempt to force interim rates upon a utility, and require that such mandated interim rates be subject to refund. In fact, Missouri courts have repeatedly concluded that the Commission has no power to promulgate an order requiring a pecuniary reparation or refund. State ex rel. Laundry, Inc. v. Public Service Commission, 34 S.W.2d 37, 46 (Mo. 1931); Straube v. Bowling Green Gas Co. v. Public Service Commission, supra at 668; Katz Drug Co. v. Kansas City Power & Light Co., 303 S.W.2d 672, 679 (Mo. App. 1957).

The voluntary acquiescence of the utility, rather than the statutory power of the Commission to force a utility to grant refunds, has been the source of previous refunds. Most often, a utility's filing for interim relief (a rate increase request), to the extent it is successful, becomes the subject of a stipulated settlement and agreement among the parties (the "Stipulation"), which Stipulation is submitted for the Commission's approval. Such Stipulation sometimes contains a provision whereby the utility seeking interim relief voluntarily agrees that the interim rates will be placed into effect, subject to refund. In these circumstances, the Commission's authority to make the granted interim rate increase subject to

refund has not been tested by the courts, since the utility, as well as the other parties who agreed to such refund, are unable to challenge it, and only the utility would have an interest in doing so. Thus, the legality of making rates subject to refund, even where an interim rate increase is involved, has never been expressly approved by the courts. In State ex rel. Southwestern Bell Telephone Company v. Public Service Commission, 645 S.W.2d 44, 48-49 (Mo. App. 1982), a typical case where the utility had agreed to subject interim approved rates to refund, the court rejected the manner in which the Commission used a prospective rate design to determine the amount of the refund due. However, the question of the Commission's authority to mandate a refund of interim rates was not in issue.

If the existing applicable Commission statutory complaint procedures do not permit the Commission to determine interim rate changes, and it is clear they do not; then it logically follows that there does not exist, nor is there a need for, any complimentary authority on the part of the Commission, in the context of Commission complaints, to make provision for interim rate refunds.

D. A Commission Determination that Existing Rates Be Made Interim, Subject to Refund, Constitutes a Rate Determination within the Meaning of Section 393.140(5), and Therefore Cannot Be Used as a Purported Device to Avoid Substantive Legal Safeguards.

Despite Staff's desire to avoid the time constraints imposed by the necessity for a full hearing and the requirement that all relevant ratemaking factors must be considered in

setting rates, Staff forthrightly has refrained from any suggestion that a redetermination of currently filed rates (from non-refundable to interim refundable) without a change in the amount of actual current charges is not a rate determination within the meaning of Section 393.140(5). Indeed any such suggestion would clearly be both logically and legally flawed.

By definition, an interim rate which is placed into effect subject to refund under a Stipulation raises the danger that the utility may be subsequently required to renounce its rights to revenues arising under such interim rate increase, whereas non-interim rates are not subject to that risk. Thus, an obvious and significant difference exists between the financial exposure attendant to rates which are interim and subject to refund, and those which are not.

Legally, the broad, generic provisions and requirements of Section 393.140(5) clearly encompass not only the numerical rate or charge to be made, but its entire character, including its permanent or interim (subject to refund) nature. A Commission order determining that a utility's lawfully authorized permanent rates or charges must be made interim subject to refund is a "determination" within the meaning of Section 393.140(5) and requires compliance with all of the procedural prerequisites of that statute. State ex rel. Laclede Gas Co. v. Public Service Commission, supra at 568. Any such Commission order must also comply with the requirement that the Commission, in making decisions on rates, take into account all

relevant factors. State ex rel. Missouri Water Co. v. Public Service Commission, 308 S.W.2d 704, 718-719 (Mo. 1957).

E. Applicable Complaint Protections, Procedures, and Requirements May Not Be Circumvented by Requiring Utilities Involuntarily to File Interim Rates.

The Commission may not lawfully circumvent the existing limitations of the statutory complaint provisions by ordering utilities to file interim tariffs under "file and suspend" provisions, since the decision to file a proposed new rate is, by the terms of such provisions, legally and logically the voluntary prerogative of the utility's management. State ex rel. Jackson County v. Public Service Commission, 532 S.W.2d 20, 32 (Mo. 1975). The Commission has no authority to take over the general management of any utility State ex rel. Laclede Gas Company v. Public Service Commission, 600 S.W.2d 222, 228 (Mo. App. 1980), appeal dismissed 101 S.Ct. 848, 449 U.S. 1072, 66 L.Ed.2d 795. Neither the convenience, expediency, nor objective to be achieved by the Commission's ordering utilities involuntarily to file tariffs rendering their rates and charges existing as of July 1, 1987, all, or in part, interim, subject to refund, would warrant or justify such an unauthorized intrusion upon a utility's constitutionally protected property rights. State ex rel. Harline v. Public Service Commission of Missouri, 343 S.W.2d 177, 181-182 (Mo. App. 1960).

Absent a voluntary mutual agreement on an appropriate mechanism for giving recognition to the effects of the TRA (which Laclede has previously offered to do), the Commission

must necessarily pursue resolution through the statutory complaint procedures previously mentioned. In so doing, the hearing process must take into account all relevant factors concerning an appropriate level of rates, and must comply with the standards of constitutional due process (including, but not limited to, the opportunity for a full and fair hearing at a meaningful time and in a meaningful manner. State ex rel. Fischer v. Public Service Commission of Missouri, 645 S.W.2d 39, 43 (Mo. App. 1982)).

Conclusion

In conclusion, Laclede submits that the Staff's alternatives: (1) are totally inappropriate in that they would (A) result in an an abrogation of the principle whereby utilities are entitled to recover approved and effective rates in return for their commitment to provide utility service, and (B) create untenable financial and operational uncertainties in the utility industry; (2) would give rise to an unconstitutional deprivation, without due process of law, of a utility's property right in its approved and effective rates; and (3) are beyond the statutory authority of the Commission to implement, in that they would summarily force a public utility to make its existing rates, in whole or in part, interim and subject to refund, which determination of rates pursuant to the statutorily prescribed complaint procedure must be made only after a full investigation and hearing, and consideration of

all relevant factors relating to the rate to be charged for the utility service involved.

Respectfully submitted,

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