BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public Service Commission, Complainant,	)	
v.	)	Case No. GC-2011-0098
Laclede Gas Company, Respondent.	)	

REPLY OF LACLEDE GAS COMPANY
TO LERA SHEMWELL'S RESPONSE

COMES NOW Laclede Gas Company ("Laclede" or "Company") and for its reply to Lera Shemwell's response to Laclede Gas Company's suggestions in opposition to the application to intervene, states as follows:

1. On July 25, 2011, Ms. Shemwell filed a response to Laclede suggestions in opposition to her earlier application to intervene in which she revealed the true nature and purpose of her application. In resisting her intervention, Laclede had made clear that its Counterclaim in this case had been filed against the Staff and not against Ms. Shemwell personally. Laclede further asserted that Ms. Shemwell had studiously avoided advocating the legally frivolous position that certain Staff members have repeatedly taken – namely that marketing affiliates may make no profit whatsoever on purchases they make from a utility. As a result, Laclede stated that there was no justification for Ms. Shemwell to intervene personally in this case – assuming such intervention was appropriate under any circumstances – in order to protect herself from the kind of potential disciplinary action that Ms. Shemwell and Ms. Shemwell alone has raised as a potential concern.

2. In response, Ms. Shemwell makes little or no effort to address the specific reasons given by Laclede as to why she has no personal exposure. Instead, she spends five pages of her pleading trying to indict herself for the omissions of others while exaggerating and misrepresenting the relief that Laclede has actually requested in its Counterclaim.[1] She concludes by doing what was apparently the real purpose of her application all along – namely to take a second or even third bite of the apple and once again seek dismissal of Laclede's Counterclaim months after the Commission rejected her previous efforts to achieve a similar result and barely a few weeks before the hearing. (See page 3 of her July 25 Response, in which she asserts that one of the "real solutions" to this matter is to dismiss Laclede's Counterclaim).

3. In any event, despite her past statements in which she seemed to distance herself from Staff's position that a marketing affiliate may not make a profit on its dealings with a utility (See Laclede July 21 Response, pp. 1-2), Ms. Shemwell now states at page 2 of her pleading that she "concurs with Staff's position in this case." With this admission, Ms. Shemwell has eliminated any reason for her to separately intervene in this case, or even to have withdrawn from it for that matter. In effect, she has acknowledged that her position and the position of the Staff on the issues raised in this case are identical. If that is true, then Ms. Shemwell's interests are identical to Staff's, and she would be fully protected by simply doing the job that she is paid to do, namely representing the Staff for which she works by advocating Staff's position and

[1]For example, at page 3 of her Response, Ms. Shemwell cites *Ingram v Horne*, 785 S.W.2d 735 (Mo.App. W.D. 1990) for the proposition that a motion rather than a counterclaim is the best procedural device for pursuing sanctions pursuant to Rule 55.03. Such an assertion might have some relevance if Laclede was *actually* seeking sanctions against Ms. Shemwell in this case, but it isn't. Instead, all that Laclede is seeking is an order from the Commission finding that Staff's position that an affiliate can make no profit on its dealings with a utility is contrary to the law and instructing Staff not to pursue such meritless positions in the future. Ms. Shemwell cannot transform Laclede's request for relief into a motion for sanctions.

demonstrating in the hearing room that Staff's claims have merit and are not frivolous. Simply put, there is NOTHING to be accomplished by permitting Ms. Shemwell to intervene personally at this late stage of the proceedings so she or her attorney can double team the Company and make the same arguments in support of the same positions that Ms. Shemwell would presumably make in her capacity as Staff counsel.

4. Under Ms. Shemwell's theory, every Staff attorney in the case should withdraw from the case and intervene individually. Every attorney who then substituted for withdrawn counsel would promptly have to do the same. Ultimately, Staff would have no one left to represent them, because every Staff counsel would be individual parties to the case, all arguing that Staff's pleadings and testimony contained good faith contentions.

5. If Staff counsel believes in good faith that Staff's position is not frivolous, then counsel should so argue. If such counsel does not believe in good faith that Staff's position is meritorious, then that counsel should so inform the client, and if the client continues to insist that the position be taken, then counsel should withdraw from the case (or at least from that issue), as Ms. Shemwell has.

6. Conversely, it would be fundamentally unfair to Laclede to provide Ms. Shemwell with yet another opportunity to argue for dismissal of Laclede's Counterclaim or to subject Laclede to the burdens of addressing the interests of an entirely new party less than 3 weeks from the date when the evidentiary hearings in this case are scheduled to commence. Even if Ms. Shemwell's Application to Intervene had some merit, which it does not, there is absolutely no excuse for her delay in seeking such relief. Laclede's counterclaim has been on file since December 10, 2010. The counterclaim itself is

expressly about Staff's failure to make good faith contentions in its pleadings and testimony regarding the pricing of affiliate transactions. There have been no significant changes to any facts or arguments involved in the counterclaim. So Ms. Shemwell's attempt to tie her awareness of a problem to the Commission's May 26, 2011 order denying Staff's motion to dismiss the counterclaim is a red herring. If she thought the matter created a disciplinary issue for her, that issue existed regardless of whether or when the Commission decided that the claim against the Staff could go to hearing.

6. Another reason that the May 26 date is not significant is that Ms. Shemwell was well aware that Laclede's counterclaim was likely to survive a motion to dismiss. Laclede raised a similar counterclaim in Case No. GC-2011-0006, a case in which Ms. Shemwell was directly involved. In denying reconsideration of its order dismissing Laclede's counterclaim in that case, on December 1, 2010, the Commission stated that an allegation that Staff violated the frivolous pleadings rule could state a claim.

7. Moreover, the May 26 order only occurred on that late date because Staff did not file a formal motion to dismiss the counterclaim until April 18, 2011, more than four months after the counterclaim was filed, and less than two months before the case was originally scheduled for hearing. Ms. Shemwell should not be permitted to create an issue this late in the case and then file for intervention after the first and second scheduled dates for the hearing, and only 30 days before the current setting.

8. In addition, even if the May 26 date was meaningful, Ms. Shemwell offered no explanation as to why she then waited until July 11 before seeking intervention. Following the May 26 order, Ms. Shemwell did not attempt, either on

behalf of herself or the Commission Staff, to seek timely reconsideration of the Commission's Order. Nor did she seek to intervene on a timely basis. Instead, she waited over 45 days after the Commission issued its Order to file her Application to Intervene. As a consequence of this delay, Laclede's ability to prepare for the forthcoming hearings in this case are now being compromised by its need to respond to the matters that have been raised by Ms. Shemwell at the last minute. Given all of these considerations, Ms. Shemwell's Application to Intervene should be denied on the grounds that it is untimely.

9. As the Commission recited in the December 1, 2010 order referenced above, Laclede concedes that parties are free to make nonfrivolous arguments in support of their positions. Laclede would add that parties are also free to make losing arguments, as long as those arguments have a good faith basis under the facts and the law. Certainly when it comes to affiliate transactions, reasonable minds can differ on what comparable transactions best represent the fair market price of an affiliate transaction. Laclede's goal in filing this counterclaim was to dispense with the bad faith arguments that affiliate transactions should be prohibited entirely or that affiliates should be denied any opportunity to earn a profit in transactions with utilities, and to at least move the discussion back into the ballpark of what constitutes a fair market price.

10. As for Ms. Shemwell's attorney's assertion that Laclede has been "cavalier" in its approach to this matter, all Laclede has ever wanted is to have its gas supply affiliate transactions judged by the standards in the Affiliate Rules and the CAM, that is, by a fair market price as that term is commonly understood. Prior to this case, Staff has brazenly refused to do so, seeking instead to eliminate in their entirety

transactions between gas utilities and their marketing affiliates by taking different positions in different ACA cases, all of which are designed to deny such affiliates (in contrast to all other marketers) any opportunity to be compensated for the risks they have undertaken and services they have provided in connection with such transactions. It is this persistent effort by the Staff to effectively outlaw transactions that are explicitly contemplated and allowed by the Commission's Rules that has fueled Laclede's Counterclaim.

11. Fortunately, consistent with Staff counsel's occasional representations to the Commission that utility affiliates, like other marketers, should be permitted to earn a profit on such transactions, Staff's subject matter expert in this case has now provided to Laclede a definition that Laclede is willing to accept for how to calculated fully distributed cost (FDC) for energy-related transactions. When combined with the CAM's fair market pricing provisions for gas supply affiliate transactions (that have not been challenged by Staff in this case), this definition should permit Laclede and its affiliate to conduct transactions on a basis that is both feasible and fully protective of ratepayer interests. Assuming that Staff is willing, like Laclede, to make a modification to Laclede's CAM that includes Staff's own definition of how FDC should be calculated for energy-related transactions, there should be no further need to pursue Laclede's Counterclaim and any concerns Ms. Shemwell has will have been mooted. Until that matter is resolved, however, it would be inappropriate and fundamentally unfair to permit Ms. Shemwell to revisit and relitigate Laclede's right to maintain its counterclaim in this case.

12. Finally, Mr. Landwehr mistakenly asserts that Laclede's tactic is to intimidate Staff and its attorneys by raising the frivolous pleading rule. In the long institutional memory of Laclede, the Company has never raised such an argument before, and hopes to never have to raise it again. Notwithstanding Mr. Landwehr's disdain, there is a line that can be crossed between making a good faith argument under the law, and taking the law into your own hands. It is not Laclede's place to decide whether that line has been crossed, but in a case such as this, it is Laclede's place to raise the issue.

WHEREFORE, Laclede Gas Company respectfully renews its request that the Commission issue an order denying Ms. Shemwell's application to intervene.

Respectfully submitted,

/s/ Michael C. Pendergast
Michael C. Pendergast #31763
Vice President and Associate Gen. Counsel
Rick Zucker #49211
Assistant General Counsel - Regulatory

Laclede Gas Company
720 Olive Street
Room 1520
St. Louis, MO 63101
(314) 342-0532
(314) 421-1979 (Fax)
mpendergast@lacledegas.com

ATTORNEYS FOR LACLEDE GAS COMPANY

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 26th day of July, 2011, by hand-delivery, e-mail, fax, or by United States mail, postage prepaid.

/s/ Gerry Lynch