

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of Laclede Gas Company's Verified)
Application to Re-Establish and Extend the Financing)
Authority Previously Approved by the Commission) **File No. GF-2015-0181**

STAFF'S RESPONSE TO LACLEDE'S MOTION FILED NOVEMBER 6, 2015

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and respectfully submits *Staff's Response to Laclede's Motion Filed November 6, 2015* ("Response"):

1. On November 6, 2015, Laclede Gas Company ("Laclede") filed a pleading in this case which it titled *Laclede's Motion to Clarify or Amend the Commission's September 29 Order* ("Motion"). In its Motion, Laclede re-argues and re-hashes its position regarding the previous discovery dispute in this case which was resolved by the Commission's *Order Granting Motion for Expedited Treatment, Order Granting Motion to Compel, and Order Granting Protective Order* ("Order") issued on September 29, 2015, and attempts to re-open matters resolved by the Commission's Order. The Commission should not allow this, and should deny Laclede's Motion.

2. Although denominated by Laclede as a motion "to clarify or amend" in an apparent attempt to avoid the provision on the timing of filings contained in 4 CSR 240-2.160, the Motion is effectively a motion for reconsideration of the September 29th Order. Commission Rule 4 CSR 240-2.160(2) provides that:

(2) Motions for reconsideration of procedural and interlocutory orders may be filed **within ten (10) days of the date the order is issued**, unless otherwise ordered by the commission. Motions for reconsideration shall set forth specifically the ground(s) on which the applicant considers the order to be unlawful, unjust, or unreasonable. At any time before a final order is issued, the commission may, on its own motion, reconsider,

correct, or otherwise amend any order or notice issued in the case.
(emphasis added)

Since the Order was issued on September 29, 2015, and Laclede's Motion was filed on November 6, 2015, the Motion was untimely and should be denied.

3. Laclede's Motion attempts to eviscerate much of the substance of the Commission's Order of September 29. One of Laclede's requests in its Motion is that the Commission "remove the discussion on privilege [from the September 29th Order] and to find that ordered paragraph 1 is effective except where it conflicts with ordered paragraph 2." Another of Laclede's requests in its Motion is that the Commission "remove the portion [of the September 29th Order] that decides the relevance issue," because "it is not consistent with the legal principle encouraging settlements" based on Laclede's argument that the discovery dispute resolved in the Order was based on a settlement agreement.

The Commission should recognize that the Order was *not* based on a settlement agreement. Had there been a settlement agreement, there would have been no need for Staff to file a motion to compel in the first place, or to file a reply to Laclede's response to Staff's motion to compel. In fact, Staff filed its reply to Laclede's response to Staff's motion to compel ("Staff Reply") on the same day (September 16, 2015) that it filed its response to Laclede's motion for a protective order ("Staff Response") as ordered by the Commission on September 9. Although Staff's Response stated that, "subject to the considerations and conditions" set forth in the Staff Response that Staff "would not object" to the Commission issuing a protective order, *Staff would have preferred* that the Commission simply grant Staff's motion to compel – as reflected in Staff's Response which also stated "**If the Commission decides to issue a protective**

order it should provide that. . . “ (emphasis added) The Commission’s Order did both – it granted Staff’s motion to compel *and* granted a protective order with certain conditions.¹

In its original motion to compel² filed on August 26, 2015, as well as the Staff Reply³ filed on September 16, 2015, Staff discussed at length why the information which was the subject of the discovery dispute which led to the Commission’s September 29th Order was both *relevant* to this case and *not privileged*, Laclede’s assertions to the contrary notwithstanding. Regarding the issue of relevance, the Commission’s September 29th Order correctly found that:

The issue decided by the 2010 order is distinguishable from the issue here. In the 2010 order, the Commission found the intent of the financing authority statute is “to restrict long-term financing to allowable purposes.” As Staff correctly notes in its Reply to Laclede’s Response to Staff’s Motion to Compel in this case, the dispute in that earlier case was regarding allowable projects, which is different than the focus of Staff’s discovery. **More importantly, Laclede’s interpretation of the Commission’s 2010 order would render meaningless the statute’s provisions that the requested financing be “necessary” and “reasonably required” for those allowable purposes. Thus, the analysis in this case must be distinct from that on which the 2010 order rested.**

Laclede’s relevance argument rests on the Commission’s 2010 order. But, as discussed above, because the Commission has distinguished this case from the 2010 case, **Laclede’s relevance argument fails.** (emphasis added)

Regarding the issue of privilege, the Commission’s September 29th Order also correctly found that:

. . . The work-product privilege precludes an opposing party from discovering materials created or commissioned by counsel in preparation

¹ The condition of which Laclede now complains was suggested by Laclede, rather than Staff. This will be addressed further below.

² *Statement Describing Discovery Concerns, Motion to Compel and Motion for Expedited Treatment*, filed August 26, 2015.

³ *Staff’s Reply to Laclede’s Response to Staff’s Motion to Compel*.

for possible litigation. Because documents can be created for more than one purpose, courts can conduct an inquiry into “the primary motivational purpose behind the creation of the document.” [citations omitted]

The primary purpose for which Laclede created the documents at issue was not for litigation, but to allow credit rating agencies to review Laclede’s financial situation and assign it a credit rating. Laclede has not shown that the documents were prepared for litigation, prepared by an attorney, or provided to an entity whose interests are aligned with that of Laclede. (emphasis added)

The Order then stated “The Commission will grant Staff’s motion to compel.” Since one purpose/result of the Commission’s Order was to grant the motion to compel, the Order’s discussion of and findings concerning relevance and privilege were and are necessary components of the Order and should not be summarily removed as now sought by Laclede.

Further refuting Laclede’s current assertions that the Order was based on some sort of “settlement agreement” regarding the protective order and that the discussion and findings concerning relevance and privilege should be removed from the Order are certain statements in Laclede’s own motion for a protective order and Laclede’s response to Staff’s motion to compel, both filed on September 8, 2015. In Laclede’s motion for a protective order, paragraph 2 stated **“Should the Commission nevertheless determine that such information is potentially relevant to the matters at issue in this proceeding,** Laclede seeks a protective order,” while paragraph 12 of Laclede’s response to Staff’s motion to compel stated **“Should the Commission reject Laclede’s position that the information requested by Staff is not relevant to the matters at issue in this proceeding, and also reject Laclede’s assertion of privilege for this information,** the Company is separately seeking a Protective Order.” (emphasis added) The Commission granted Laclede a protective

order based squarely on the circumstances set forth by Laclede, and Laclede should not now be heard to complain.

The Commission should also note that much of Laclede's current argument that the Commission should "remove the discussion on privilege" from the Order is based on Laclede's position that ordered provision 2(d) of the Order conflicts with the Order's discussion on privilege – a discussion which Laclede describes as an "implication that the Laclede documents are not privileged." However, Laclede's Motion recognizes in paragraph 3 that one of the conditions under which Staff stated Staff "would not object" to the Commission issuing a protective order was that the order state that it "was not finding the previously redacted information *to be privileged*," (emphasis added) and also recognizes in paragraph 4 that it was *Laclede* which asked the Commission to state in the order that it "was not making *any* finding as to whether or not the information is privileged." (emphasis in Laclede Motion) Ordered provision 2(d) states that "The Commission makes no finding about whether the previously redacted information is privileged." In other words, the Order adopted Laclede's suggested condition that the Commission state it was not making *any* finding, rather than Staff's suggested condition that the Commission state it was not finding the information *to be privileged*. Laclede should not be allowed to seek removal of the discussion on privilege in the body of the Order based on getting the condition that it sought. However, *if* the Commission believes there is a conflict between the Order's discussion on privilege and ordered provision 2(d), Staff would suggest that rather than removing the discussion on privilege as requested by Laclede, the Commission should change ordered provision 2(d) to reflect Staff's suggested condition rather than Laclede's condition, which would clearly

eliminate any conflict. Staff would also note that at the bottom of page 3 of the Order, the Commission stated that it was granting the protective order with the conditions suggested by Staff, even though ordered provision 2(d) was suggested by Laclede – therefore, changing ordered provision 2(d) to reflect Staff’s suggested condition rather than Laclede’s would be more in line with the apparent intent of the Order.

4. Finally, one point regarding Laclede’s position that, due to the Commission’s Order, “[s]ettlement agreements will be discouraged.” As addressed above, there was no settlement agreement. What there was, however, was a transparent attempt by Laclede to essentially “negotiate” a settlement on terms acceptable to Laclede via formal pleadings filed with the Commission. Although Staff supports the settlement agreement process, Staff submits that action such as that taken by Laclede should, in fact, be discouraged, and Laclede should not be given another bite at the apple.

WHEREFORE, Staff respectfully requests the Commission deny Laclede’s Motion filed herein on November 6, 2015, and take such other action consistent herewith as set forth above as the Commission deems proper.

Respectfully submitted,

/s/ Jeffrey A. Keevil

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to counsel of record this 9th day of November, 2015.

/s/ Jeffrey A. Keevil