

**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 REPLY TO**  
**LACLEDE'S RESPONSE TO STAFF'S MOTION TO COMPEL**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through counsel, and respectfully submits the following *Reply to Laclede’s Response to Staff’s Motion to Compel* (“Reply”):

1. On August 26, 2015, Staff filed its *Statement Describing Discovery Concerns, Motion to Compel and Motion for Expedited Treatment* (“Motion”) in this case.

2. On September 8, 2015, Laclede Gas Company (“Laclede”) filed its *Response to Staff’s Motion to Compel* (“Response”).

3. Staff attached to its Motion the data requests at issue, and Laclede's objections to those data requests. In the Motion, Staff discussed at some length why the information sought by the data requests is relevant to this case and why that information is not privileged, contrary to Laclede's objections. This Reply will attempt to not repeat at length the arguments made in Staff's Motion but will address why the Commission should reject Laclede's Response. However, Staff would refer the Commission to its original Motion for a complete explanation of why the information sought by the data requests is relevant to this case and why that information is not privileged.

4. In its Response, Laclede claims the requested information is not relevant; arguing in essence that Laclede's projected financial information covering the period for which Laclede has requested financing authority in this case and which Laclede has previously provided to other outside parties is not relevant, based on Laclede's interpretation of a Commission order in a previous Laclede finance case. As stated above, Staff's Motion explains in detail why the requested information is indeed relevant. As for Laclede's interpretation of the Commission order in a previous finance case, Laclede's interpretation ignores important language of the statute involved.

5. Section 393.200.1 RSMo states:

A gas corporation, electrical corporation, water corporation or sewer corporation organized or existing or hereafter incorporated under or by virtue of the laws of this state may issue stocks, bonds, notes or other evidences of indebtedness payable at periods of more than twelve months after the date thereof, **when necessary** for the acquisition of property, the construction, completion, extension or improvement of its plant or system, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations or for the reimbursement of moneys actually expended from income, or from any other moneys in the treasury of the corporation not secured or obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation, within five years next prior to the filing of an application with the commission for the required authorization, for any of the aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its accounts and vouchers of such expenditure in such manner as to enable the commission to ascertain the amount of money so expended and the purposes for which such expenditure was made; provided, and not otherwise, that there shall have been secured from the commission an order authorizing such issue, and the amount thereof, and stating the purposes to which the issue or proceeds thereof are to be applied, and that, in the opinion of the commission, the money, property or labor to be procured or paid for by the issue of such stock, bonds, notes or other evidence of indebtedness is or has been **reasonably required** for the purposes specified in the order, and that except as otherwise permitted in the order in the case of bonds, notes and other evidence of indebtedness, such purposes are not in whole or in part reasonably chargeable to operating expenses or to income. (emphasis added)

6. Based on its Response, Laclede's interpretation of the previous Commission order (which addressed the foregoing statutory provision) is that Laclede needs only to fill out the "chart" provided by the Commission with dollar amounts related to "allowable purposes" for financing, and nothing more. Laclede's interpretation reads out of the statute the "*when necessary*" and "*reasonably required*" provisions of the statute set forth above. Staff does not believe such an interpretation is consistent with the statute, or the previous Commission order<sup>1</sup>, and should be rejected by the Commission.

7. As stated in Staff's Motion, in cases before the Commission, discovery may be obtained by the same means and under the same conditions as in civil actions in circuit court.<sup>2</sup> In circuit court, "it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."<sup>3</sup> For the reasons set forth in Staff's Motion, the requested information is relevant, Laclede's objection notwithstanding.

8. In its Response, Laclede also claims the requested information is privileged work product. Work product is distinguishable from attorney-client privilege. While the attorney-client privilege protects disclosures by the client to the attorney and is absolute in all but the most extraordinary situations, work product "is designed to prevent a party from reaping the benefits of his opponent's labors ... for the same or a related cause of action." *State ex rel. Friedman v. Provaznik*, 668 S.W.2d 76, 80 (Mo. banc 1984). The work product privilege precludes an opposing party from discovering

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<sup>1</sup> The Order upon which Laclede relies focused on allowable purposes for financing. (See 2010 Order, p. 11)

<sup>2</sup> 4 CSR 240-2.090(1).

<sup>3</sup> Mo. Sup. Ct. R. 56.01.

materials ***created or commissioned by counsel*** in ***preparation for possible litigation***. *Id.* (emphasis added) If relevance either has been established or is uncontested and a party claims that a privilege precludes disclosure, “[t]he party asserting the privilege usually has the burden of proof to show that the privilege applies.” John T. Hundley, *Annotation, Waiver of Evidentiary Privilege by Inadvertent Disclosure—Federal Law*, 159 A.L.R. Fed. 153 (2000); see Friedenthal et al., *Civil Procedure* sec. 7.4 (3d ed.1999), cited by *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. 2004).

9. According to Laclede, the requested information is privileged because it is based on the company’s analysis and conclusions regarding the likely outcome of future rate case litigation. However, Laclede’s own cited case law supports Staff’s position that the documents are not work product and are not subject to any evidentiary privilege. According to *In re Pfizer Inc. Securities Litigation*, 1993 WL 561125 (S.D. NY 1993), a case cited by Laclede in its Response, “a fundamental condition for work product privilege to apply is that the documents were created ‘in anticipation of litigation’”. Recognizing that documents may be created for more than one purpose, the threshold issue as to the applicability of work product protection has been described as requiring an inquiry into “the primary motivational purpose behind the creation of the document.” *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir.), *cert. denied*, 454 U.S. 862 (1981). *Accord Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir.1983) (quoting *Janicker v. George Washington Univ.*, 94 F.R.D. 648, 650 (D.D.C.1982)); *Barrett v. United States Banknote Corp.*, No. 91 Civ. 7420, 1992 U.S. Dist. LEXIS 9980, at \*3 (S.D.N.Y. July 6, 1992); *Hardy v. New York News, Inc.*, 114

F.R.D. 633, 644 (S.D.N.Y.1987). If the primary motivating purpose is other than to assist in pending or impending litigation, then the document does not receive work product protection. See *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (Temp.Emer.Ct.App.1985), cited by *In re Pfizer Inc. Sec. Litig.*, No. 90 CIV. 1260 (SS), 1993 WL 561125, at \*3 (S.D.N.Y. Dec. 23, 1993).

10. The primary purpose for which Laclede created the documents at issue was for the purpose of allowing credit rating agencies to review Laclede's financial situation and assign it a credit rating. At no point has Laclede offered or shown that the documents were prepared for litigation, prepared by an attorney, or provided to an entity whose interests are aligned with that of the Company. Going one step further, the information sought within the already partially disclosed document contains aggregate data compiled from many possible sources and would serve mainly a business purpose, namely to apprise credit agencies of Laclede's expected cash flow as it relates to the amount of debt and the interest expense related to the debt. As the Eighth Circuit has found "The individual figures lose their identity when combined to create the aggregate information. Furthermore, the aggregates are not even direct compilations of the individual figures. The purpose of the work product doctrine—that of preventing discovery of a lawyer's mental impressions—is not violated by allowing discovery of documents that incorporate a lawyer's thoughts in, at best, such an indirect and diluted manner." *Simon v. G.D. Searle*, 816 F.2d 397 at 402 (8th Cir.), cert. denied, 484 U.S. 917 (1987).

11. Blanket assertions of work product are insufficient to invoke protection. *State ex rel. Faith Hosp. v. Enright*, 706 S.W.2d 852, 856 (Mo. banc 1986). In order to

invoke work product protection, the party opposing discovery “must establish, via competent evidence, that the materials sought to be protected (1) are documents or tangible things, (2) were prepared in anticipation of litigation or for trial, and (3) were prepared by or for a party or a representative of that party.” *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. 2004). Laclede’s blanket assertion of work product privilege must fail.

**WHEREFORE** Staff respectfully requests the Commission accept this *Reply to Laclede’s Response to Staff’s Motion to Compel* and also requests that the Commission issue an order on the matters contained herein and in Staff’s Motion filed on August 26, 2015 no later than September 30, 2015 compelling Laclede to provide full, complete, and unredacted responses to Staff’s data requests attached to Staff’s Motion.

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 16<sup>th</sup> day of September, 2015.

**/s/ Jeffrey A. Keevil**