

**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 ) **File No. GF-2015-0181**  
Authority Previously Approved by the Commission )

**STAFF'S STATEMENT DESCRIBING DISCOVERY CONCERNS,  
MOTION TO COMPEL AND MOTION FOR EXPEDITED TREATMENT**

**COMES NOW** the Staff of the Missouri Public Service Commission (Commission), by and through counsel, and respectfully submits the following statement of discovery concerns, motion to compel and motion for expedited treatment in this case:

1. On July 28, 2015, the Commission issued its *Order Setting Procedural Schedule* (Order), which adopted the jointly proposed *Recommendations Regarding Procedural Schedule Order*.

2. Paragraph 6 of the Commission's *Order* provides:

Workpapers will be submitted within one business day of filing testimony and will include all calculations, along with studies and documents cited in testimony.

3. Pursuant to the Commission's *Order*, Laclede Gas (Laclede) filed the Direct Testimony of Lynn D. Rawlings on July 28, 2015. Per the Commission Order, workpapers for Ms. Rawlings were due on July 29, 2015. To date, the workpapers of Ms. Rawlings have not been provided to Staff despite Staff's requests to the Company to produce those workpapers. The workpapers of the Company witness are necessary for Staff and other interested parties to confirm the information contained within both the Company's Application for Financing Authority and Ms. Rawlings' testimony. Without the workpapers the Company is asking everyone to simply "take it on faith" that what they have provided is "the truth, the whole truth, and nothing but the truth". However, in

order for Staff to give the Commission a full evaluation of Laclede's Application, Ms. Rawling's workpapers are necessary. Therefore, Staff is requesting the Commission issue an Order compelling Laclede to provide Staff and other interested parties the unedited and unredacted workpapers of Ms. Rawlings within 3 days of its order ruling on this motion and at least 2 weeks prior to the hearing set on this matter to permit Staff and others the opportunity to review and address the information contained in the workpapers.

4. Staff's discovery concerns also involve objections raised by Laclede to data requests submitted by Staff seeking certain financial information of Laclede to verify and evaluate whether the amount requested in the Application for Financing Authority is reasonably required pursuant to Section 393.200.

5. Specifically, Staff submitted the following data requests to which Laclede has objected: 0002, 0017, 0018, 0020, and 0024. These data requests are attached hereto as Attachment A and incorporated by reference. Laclede's objections are attached hereto as Attachment B and incorporated by reference.

6. Generally, these data requests seek financial information directly related to Laclede, in the direct possession and control of Laclede, and calculated to produce relevant information for Staff to determine the reasonableness and necessity of the Financing Authority requested by Laclede. The data directly permits Staff and the Commission the ability to determine whether the amount of debt requested to be issued by Laclede may cause an impairment of the company's credit standing. In the instant Application, Laclede is requesting financing authority to be allowed to issue debt and equity through 2018. Consequently, just as rating agencies do for purposes of

evaluating potential credit concerns, Staff is seeking to review and understand Laclede Gas' projected financials over the period of the requested financing authority.

7. Staff also seeks the goodwill impairment analysis of Laclede which indicates whether the current value assigned to Laclede's acquisition of the Missouri Gas Energy assets is still justified by projected cash flows from these assets. If it is not justified, then Laclede would have to write down this asset and make a corresponding reduction to the amount of equity it shows on its books and communicates to investors. This would have an adverse effect on Laclede's financial condition and its ability to issue debt. In order to recommend a reasonable amount of debt authority to the Commission, Staff needs to understand Laclede's current financial condition, which includes of the dollar value assigned to goodwill.

8. Lastly Staff seeks the unredacted projected financials provided to third party credit agencies to evaluate whether or not the requested financing authority is for the purposes and reasonable needs of the regulated utility and not the unregulated holding company, the Laclede Group.

9. 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>1</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. The party seeking discovery shall bear the burden of establishing relevance."<sup>2</sup>

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

<sup>2</sup> Mo. Sup. Ct. R. 56.01.

10. The Commission should determine that Staff has met its burden regarding relevance as it relates to the projected financials of Laclede and the goodwill analysis of the MGE assets. As the Commission stated in *In the Matter of Union Elec. Co., d/b/a Ameren Missouri's Tariff to Increase Its Annual Revenues for Elec. Serv.*, "The purpose of discovery in civil litigation, as well as before the Commission, is to eliminate concealment and surprise, to assist litigants in determining facts prior to trial, and to provide litigants with access to proper information through which to develop their contentions and to present their sides of the issues as framed by the pleadings."<sup>3</sup> Laclede's own pleadings and testimony filed in the case put the relevance of the information sought by Staff squarely at issue. The information requested by Staff is reasonably calculated to lead to the discovery of admissible evidence regarding the amount of financing this Commission should authorize over the next three years. Laclede's Application seeks financing authority of \$550 million over the period ending September 30, 2018, a three year forecasted time frame, without specifically identifying when common stock may be issued<sup>4</sup> or the amount of debt securities it will issue<sup>5</sup>. Additionally, Ms. Rawlings makes factual assertions in her direct testimony relying on projected information for Laclede in making her recommendation that the \$550 million financing request is reasonable and also that Laclede will not "likely need to utilize the full financing capacity approved under the authority"<sup>6</sup> putting squarely into relevance the reasonableness of the authority request in the first place. Laclede's own application is a projected need for the next three years. Staff simply asks that the projected financials

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<sup>3</sup> ER-2012-0166, 2012 WL 3900371, at \*1 (Aug. 31, 2012).

<sup>4</sup> Verified Application of Laclede Gas Company, GF-2015-0181, (April 15, 2015) page 4.

<sup>5</sup> *Id.* page 6.

<sup>6</sup> Rawlings Direct, page 6-7, lines 3-23 and 1-15.

be provided, in unedited and unredacted form, to permit Staff to evaluate fully the projected financial information over the period of the requested financing authority and the reasonableness and necessity of Laclede's request based on such clearly relevant information.

11. Staff also requests that this Commission find that any claim of privilege over the requested information, under any type of privilege claim, be denied. Laclede has provided information to Staff, in many instances, in redacted form, selecting what information from documents it chooses to disclose. Additionally, the information Staff seeks (projected financials and the goodwill analysis) have been disclosed in their entirety and in unredacted form to third party credit rating agencies. Disclosure of otherwise privileged information can constitute waiver.<sup>7</sup> The party cannot be allowed to selectively disclose, that is, to reveal in a self-serving way part of a purported privileged communication, while withholding the rest. In *Health Midwest Development v. Daugherty*, 965 S.W.2d 841, 843 (Mo. banc 1998), the Supreme Court of Missouri characterized all privileges as impediments to the truth and declared that, as such, they are to be strictly construed.

12. Laclede has placed directly “at issue”, by requesting a forward looking financing authority through 2018, its projected cash flows, revenues, and financials which are relied upon by Laclede when coming up with the amount of financing authority requested from this Commission. Missouri courts have found waiver to exist in a number of circumstances, and the “at issue” waiver is prominent among them. The “at issue” waiver has been described as occurring “ ‘when the privilege holder makes assertions in a litigation context that put its otherwise privileged communications in

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<sup>7</sup> 8 Wigmore, Evidence § 2327 (McNaughton rev. 1961).

issue.’ ” *Resolution Trust v. Massachusetts Mut. Life Ins.*, 200 F.R.D. 183, 191 (W.D.N.Y.2001). The fact that Missouri recognizes and applies the “at issue” waiver doctrine is best illustrated by *State ex rel. McNutt v. Keet*, 432 S.W.2d 597 (Mo. banc 1968), and its progeny. *McNutt* held that a party waives his or her physician-patient privilege in any case where such party voluntarily files a pleading that places his or her physical or mental condition in issue. *Id.* at 601. See also *Sappington v. Miller*, 821 S.W.2d 901, 904 (Mo.App.1992) (holding waiver of attorney-client privilege may be found where client places the subject matter of the privileged communication in issue). Laclede cannot subsequently hide behind a purported privilege when it has itself placed the very issue in controversy by its own filings.

13. Fairness also dictates that production of the unredacted documents be provided to Staff overcoming any claim of privilege by Laclede. Privilege may also be waived when invoked in some fundamentally unfair way. The so-called “fairness doctrine” is grounded in the notion that it is unfair to permit a party to make use of privileged information as a sword when it is advantageous for the privilege holder to do so, and then as a shield when the party opponent seeks to use privileged information that might be harmful to the privilege holder. *In re von Bulow*, 828 F.2d 94, 101 (2nd Cir.1987) supported by *State ex rel. St. John's Reg'l Med. Ctr. v. Dally*, 90 S.W.3d 209 (Mo. Ct. App. 2002). The rationale is that a party should not be able to use a privilege to prejudice an opponent's case or to disclose some selected communications for self-serving purposes. *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2nd Cir.1991). Accordingly, a privilege may be waived when a party asserts a claim that in fairness requires examination of protected communications. *Id.* at 1292. The Commission

should find that Staff requires examination of any purportedly privileged communications, and that fairness dictates that those communications be turned over in their entirety without redaction.

14. Finally, any claim of privilege grounded on attorney/client privilege should likewise be denied. The attorney-client privilege “prohibits the discovery of confidential communications, oral or written, between an attorney and his client with reference to litigation pending or contemplated.” *Ratcliff v. Sprint Mo., Inc.*, 261 S.W.3d 534, 546 (Mo. App. W.D.2008). The party asserting attorney-client privilege bears the burden of proof to demonstrate that the privilege applies. *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. banc 2004). A blanket assertion of privilege is not sufficient. *Id.* Instead, “[t]he party claiming the privilege must supply the court with sufficient information to enable the court to determine that each element of the privilege is satisfied.” *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 70 (Mo. App. S.D.1997). Here if such claim by Laclede is asserted, it must demonstrate to the Commission that the communication sought by Staff was prepared with reference to pending litigation or contemplated litigation. But it cannot bear this burden as the material sought by Staff, the unredacted projected financials and good will analysis, were prepared and provided to third party credit rating agencies for the purpose of procuring appropriate credit ratings. That is not for the purpose of litigation. Nor was the communication prepared by an attorney on behalf of the client.. None of the elements of the attorney/client privilege can be met here.

15. Staff requests that the Commission expedite its ruling on the motions contained herein as a delay in ruling on the requested information hampers the ability of

the parties to prepare and present their case before the Commission. This matter is currently sent for hearing on October 14, 2015. Staff would request that the Commission issue an order on the matters contained herein no later than September 30, 2015. That would permit Staff and other interested parties two weeks to review and prepare for the hearing on this matter.

**WHEREFORE,** Staff respectfully requests this Commission order Laclede to comply with this Commission's *Order* of July 28, 2015 and compel it to provide to Staff the workpapers relied upon by Ms. Rawlings in the filing of her direct testimony. Additionally, Staff also respectfully requests that the Commission issue an order compelling Laclede to provide full, complete, and unredacted responses to Staff's data requests attached hereto as Appendix A. Finally Staff respectfully requests that the Commission afford this motion expedited treatment and issue an order on the matters contained herein no later than September 30, 2015.

Respectfully submitted,

**/s/ Cydney D. Mayfield**

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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by First Class United States Mail, postage prepaid, to all counsel of record this 26<sup>th</sup> day of August, 2015.

**/s/ Cydney D. Mayfield**

**LACLEDE GAS COMPANY**  
**Case No. GF-2015-0181**

Please specify when the Laclede Group and Laclede Gas Company last met with rating agencies. Please provide all materials provided to and received from the rating agencies in preparation for the meetings, at the meetings and subsequent to the meetings.

**Response to Data Request No. 0002**

Subject to the objection submitted yesterday, please see the attached highly confidential redacted information that was given to the rating agencies in June 2014. Reports from the rating agencies have been provided to Staff pursuant to the Report and Order issued in GF-2009-0450.

Signed by: Glenn W. Buck

**LACLEDE GAS COMPANY**  
**Case No. GF-2015-0181**

Please indicate when Laclede Gas Company last updated its projected financial statements. Please provide these financial statements in their native electronic format. If this format is not in Excel, please indicate the software used to develop Laclede Gas Company's financial projections.

**Response to Data Request No. 0017**

Subject to the objection filed on August 5, 2015 and the discovery stipulation previously sent to Staff, please see the response to DR 0018. Please note that the financial statements referenced are done in Hyperion Strategic Finance (not in Excel).

Signed by: Glenn W. Buck

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**LACLEDE GAS COMPANY**  
**Case No. GF-2015-0181**

In response to Data Request No. 2, Laclede Gas Company provided redacted information from a June 2014 rating agency presentation. Has Laclede Gas Company and/or Laclede Group provided any presentations to any rating agencies since its June 2014 meeting? If so, please provide all materials provide to and received from the rating agencies for the more recent presentation. If no meetings/presentations have occurred since June 2014, please indicate when Laclede Gas Company and/or Laclede Group next plans to meet with the rating agencies.

**Response to Data Request No. 0018**

Subject to the objection filed on August 5, 2015 and the discovery stipulation previously sent to Staff, please see the attached highly confidential redacted rating agency study.

Signed by: Glenn W. Buck

**LACLEDE GAS COMPANY**  
**Case No. GF-2015-0181**

Please provide the underlying spreadsheets that contain the financial data needed to compute Laclede Gas Company's and Laclede Group's credit metrics contained on page 7 of the document Laclede Gas Company provided in response to Staff Data Request No. 2.

**Response to Data Request No. 0020**

Subject to the objection filed on August 5, 2015, the underlying financial data for these metrics are contained in the discovery issues currently at hand. If the unredacted information is provided, subject to the protections of the discovery stipulation that has previously been sent to Staff, that financial data will be readily gathered from this information. The calculation of funds from operations, as defined by Laclede, is net income plus depreciation and deferred income taxes.

Signed by: Glenn W. Buck

**LACLEDE GAS COMPANY**  
**Case No. GF-2015-0181**

Please provide the Goodwill Impairment Analysis Laclede Gas Company and/or Laclede Group performed on its Missouri gas distribution properties as of July 1, 2014, the results of which were attached to Laclede Gas Company's February 28, 2015, monthly report provided in relation to Case No. GM-2013-0254.

**Response to Data Request No. 0024**

Subject to the objection filed on August 5, 2015 and the discovery stipulation previously sent to Staff, please see the attached redacted highly confidential Goodwill analysis.

Signed by: Glenn W. Buck



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April 27, 2015

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Re: Case No. GF-2015-0181; Objection to Staff Data Request ("DR") Nos. 1-3

Dear Cydney:

Pursuant to 4 CSR 240-2.090(2), I am writing to object to DR Nos. 1-3 in the above referenced financing case. The reason for our objection is that the information sought by these DRs is not reasonably calculated to lead to the discovery of admissible evidence.

In its June 16, 2010 Order in Case No. GF-2009-0450, the Commission laid out a detailed interpretation of Section 393.200 RSMo, the statute governing long-term financing authority. The Commission's analysis resolved the issue of how to approach financing authority and what factors are relevant to that approach. In short, financing authority may cover moneys previously expended for the construction, completion, extension or improvement of Laclede's plant or system that have not been reimbursed by long-term financing, plus projected capital expenditures plus the payoff or refinancing of current obligations. The complete projected financial statements requested by Staff in the DRs are simply not relevant to the specific factors identified by the Commission.

In preparing and filing this case, Laclede has done the following:

- (i) Provided to Staff all of the information necessary to perform the analysis required by the law;
- (ii) Met with Staff to discuss the outcome of this analysis;
- (iii) Provided further information to Staff in connection with Staff requests for other financial information;
- (iv) Reduced the time frame of its requested financing authority from its preferred level to a shorter time frame more in line with that suggested by Staff;
- (v) Reduced the amount of the authority requested to an amount well below the amount authorized by statute.

With respect to the requested authorization amount of \$550 million, we direct your attention to three succinct facts: (i) Laclede has nearly doubled in size with the 2013 acquisition of MGE; (ii) Laclede has significantly increased its capital expenditure budget since 2012 to accelerate its safety programs; and (iii) Laclede received three-year financing authority of \$350 million in the year 2000. Given these facts, it is clear that the \$550 million authority requested in this case is, when compared on a similar basis, ***significantly lower than the authority granted 5 and 15 years ago.***

Given the fact that Laclede has already voluntarily provided more information than is necessary to support its requested authorization in this case, Laclede does not believe it is necessary or appropriate to provide the entirety of its projected financial statements that, among other items, contains data on future earnings and expected rate case outcomes. This is particularly true where the party requesting such information is also a party to rate case proceedings. Under such circumstances, the information requested is in the nature or indicative of litigation strategy, which is privileged. Laclede believes that sharing this information with Staff is neither relevant nor appropriate.

Notwithstanding the foregoing, Laclede is willing to provide Staff selected projected financial information that will aid in Staff's understanding of Laclede's future financing expectations. That information is being provided contemporaneously herewith.

In summary, Laclede has made a request for financing authority in a very conservative amount and time frame which, when combined with the usual restrictions and conditions to which Laclede agrees, should alleviate any reasonable concerns of financial risk. Given this state of affairs, it is our hope that Staff will not insist on pursuing information demands that are irrelevant and unnecessarily intrusive.

Cydney, please let me know if you have any questions regarding this matter.

Sincerely,

/s/ Rick Zucker





Laclede Gas Company  
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August 5, 2015

VIA ELECTRONIC MAIL  
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Re: Case No. GF-2015-0181; Objection to Staff Data Requests ("DRs")

Dear Cydney:

On July 28, 2015, Laclede filed direct testimony in the referenced case, which filing triggered shortened data request response times. On July 29, Staff issued 41 DRs, of which only one, DR No. 47, directly addressed Laclede's direct testimony.

Pursuant to 4 CSR 240-2.090(2), I am writing to object to thirteen of these DRs. The reason for our objections is that certain DRs seek information that is not reasonably calculated to lead to the discovery of admissible evidence, that is privileged, or that is overly broad and unduly burdensome.

First, I want to express Laclede's concern over the harsh approach Staff is taking toward Laclede in this case. As has been the case for at least the past 15 years, Laclede has sought and obtained, with Staff's concurrence, the equivalent of a "shelf" registration, allowing the Company to issue long-term debt and equity over a specified period of time (generally 3 years), with a specified dollar limit (\$350 million in 2000, \$500 million in 2007, \$518 million in 2010), and with certain limiting conditions.

Laclede views this approach as a more appropriate, beneficial and efficient way to regulate financing authority than an approach where the Company is required to file a financing application each time it seeks to attract long-term capital. It is appropriate because it allows management the discretion to operate the Company in the normal course of business, while still maintaining regulatory oversight. It is beneficial because it allows the Company the ability to react quickly to market circumstances in a way that can lower costs and benefit customers. It also provides for the Company to seek authority on a less stressful schedule where time is not of the essence. We will provide more detail on real-life benefits in our response to Staff DR 47. Finally, it is efficient, because it allows for fewer financing cases, resulting in reduced burdens on the resources of Staff, the Company, Public Counsel, and the Commission, as the parties do not have to react to each long-term financing request. These reduced burdens are accompanied by reduced expenses, which ultimately benefit Laclede's customers, who pay the costs of both the utility and the regulator. The reduced

burdens also permit the parties, including the Staff's Financial Analysis Unit, to do other important work or meet other demands on its time.

Laclede understands that Staff would now rather have Laclede apply to the Commission for permission each time it wishes to attract long-term capital. While Laclede disagrees with Staff's position, Laclede has made substantial efforts to make concessions to Staff in the spirit of compromise. Laclede does not think that its disagreement should be met with an onerous response wherein Staff gathers 41 DRs, many of which are irrelevant, burdensome or seek privileged information, and holds them until the first day of the shortened response time. Laclede believes that Staff's position, and its approach to Laclede in this case, are simply not in the best interests of our customers or Missouri taxpayers.

In its June 16, 2010 Order in Case No. GF-2009-0450, the Commission laid out a detailed interpretation of Section 393.200 RSMo, the statute governing long-term financing authority. The Commission's analysis resolved the issue of how to approach financing authority and what factors are relevant to that approach. In short, the Commission decided that financing authority may cover moneys previously expended for the construction, completion, extension or improvement of Laclede's plant or system that have not been reimbursed by long-term financing, plus projected capital expenditures, plus the payoff or refinancing of current obligations.

Laclede objected to the first set of Staff DRs in this case that sought information clearly beyond the direction given by the Commission in the 2010 Order, but Laclede nevertheless provided information in response. In issuing its second set of DRs, Staff has, in many cases, taken that information one step further from relevance.

Laclede therefore objects to DRs 16-18, 26 and 40, which seek information on future cash flows, DR 20 on underlying spreadsheets for credit metrics, DRs 21-23 on rating agencies, DRs 24 and 25 on goodwill impairment analyses, DR 27 on deferred tax liability, and DR 30 on debt limits. Again, notwithstanding these objections, we will be providing certain information in response to these DRs. I should note that the scope of such information is also subject to whatever agreement the parties reach on the stipulated discovery language that Laclede previously provided to Staff.

Cydney, Laclede remains hopeful that the parties can continue their communications and come to an agreement to resolve this matter. Please let me know if you have any questions regarding this letter.

Sincerely,

/s/ Rick Zucker

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