BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Laclede Gas Company to Change its Infrastructure System Replacement Surcharge in its Laclede Gas Service Territory	))))	**Case No. GO-2016-0333**
In The Matter of the Application of Laclede Gas Company to Change its Infrastructure System Replacement Surcharge in its Missouri Gas Energy Service Territory	))))	**Case No. GO-2016-0332**

LACLEDE GAS COMPANY AND MGE'S MOTION TO STRIKE AND RESPONSE TO OPC'S MOTION TO STRIKE

COME NOW Laclede Gas Company ("Laclede" or "Company"), and its Missouri operating unit, Missouri Gas Energy ("MGE"), and in support of their Motion to Strike and Response to OPC's Motion to Strike state as follows:

MGE'S MOTION TO STRIKE

1. MGE moves to strike the portions of OPC's brief pertaining to whether hydrostatic testing should be capitalized or expensed, and requests that the Commission make no finding on this issue. MGE's motion is based on the fact that OPC improperly raised the capital vs. expense issue for the first time during the hearing, thus denying MGE its due process right to notice of the claims against it, and an opportunity to be heard in a meaningful manner. The Commission and the courts made it clear in a recent KCPL rate case that it is inappropriate and contrary to the Commission's rules to raise an issue for the first time in surrebuttal testimony prior to the hearing, much less at the hearing itself.[1] ***(In the matter of Kansas City Power and Light Company's Request for***

[1] *See* the Commission's rule on evidence, 4 CSR 240-2.130(7) – "Direct testimony shall include all testimony and exhibits asserting and explaining that party's case-in-chief."

Authority to Implement a General Rate Increase for Electric Service v. Public Service Commission, WD 79125 consolidated with WD 79143 and WD 79189 (Opinion Issued September 6, 2016, p. 20)).

2. The controversy begins with the fact that OPC did not raise any of its issues until 10 days past the statutory deadline. Accordingly, Laclede argued in Issue #1 that none of OPC's issues should be heard in this ISRS case. However, if the Commission finds against Laclede on Issue #1 and proceeds to decide Issue #2 on the ISRS eligibility of hydrostatic testing to establish a maximum allowable operating pressure (MAOP), MGE requests that the Commission decide Issue #2 solely on the grounds raised by OPC in its direct testimony, wherein OPC claimed that the costs of hydrostatic testing are ineligible for ISRS under paragraph 5(b) of Section 393.1009 RSMo, because the testing neither improves the line nor enhances its integrity. If the Commission finds in favor of OPC on these grounds, it need not reach the capital vs. expense issue. If the Commission finds in favor of MGE on the grounds raised by OPC in direct, and the Commission determines to decide that the costs of hydrostatic testing should be expensed and not capitalized, Laclede may suffer an unfair result, as discussed below.

3. OPC never raised the issue of whether hydrostatic testing was a capital project prior to the hearing. OPC did not raise the issue in its December 9 motion for hearing, in its December 16 direct testimony, or even in its December 28 position statement, just three business days before the hearing. Instead, the first time OPC argued that the hydrostatic testing costs should not be capitalized was in the hearing room.

4. OPC's motive in raising the issue on January 3, and not earlier, is suspect. OPC witness Hyneman testified at the January 3 hearing that he was an expert on accounting for hydrostatic testing. Specifically he testified as follows:

> I'm absolutely certain that their -- the cost of the hydro testing needs to be charged to expense. I've done a lot of research on that. I've read a lot of FERC orders and discussions. There's only one exception that FERC says that you can capitalize hydro testing, and that is if you're doing it in a major rehabilitation project, not in an ongoing service line replacement program or ISRS that MGE is doing. So there is no indication at all. In fact, FERC has specifically prohibited this type of hydro testing to be capitalized. I'm absolutely convinced of that.
> (Tr. 238)

If the Commission takes Mr. Hyneman at his word that he had done so much research and read so many FERC orders that, right or wrong, he had grounds to be "absolutely certain" and "absolutely convinced" that hydrostatic testing should be expensed, then why wasn't that point offered in OPC's December 9 or December 28 pleadings, or at least in Mr. Hyneman's own December 16 direct testimony? By not raising it sooner, OPC denied MGE the right to be apprised of the claims against it, and a fair opportunity to have a meaningful hearing at the Commission.

5. This type of trial by ambush is unreasonable and unfair to the other parties. It violates their right to due process and should not be condoned by the Commission. It also shortchanges the Commission because it impedes the arguments and evidence from being fully vetted for the Commission's decision. For example, after the hearing was over, Laclede managed to cite and attach to its brief FERC Accounting Release No. 8 (AR-8), which clearly indicates that the specific type of hydrostatic testing performed by MGE qualifies for capitalization. The way OPC raised this issue however left no opportunity for the Commission to hear Laclede explain its point, or hear OPC try

and rebut it. Accordingly, the Commission should not decide ISRS eligibility on this issue.

6. In an administrative proceeding, due process is provided by affording parties the opportunity to be heard in a meaningful manner. The parties must have knowledge of the claims of his or her opponent, [and] have a full opportunity to be heard, and to defend, enforce and protect his or her rights." *Weinbaum v. Chick,* 223 S.W.3d 911, 913 (Mo. App. S.D.2007). MGE prepared its case without knowing that OPC planned to argue at the hearing that the costs were not ISRS eligible because they should be expensed and not capitalized. MGE's right to cross examination at the hearing is not meaningful if the company is not afforded an opportunity to prepare a defense. For these reasons, the matter of capitalization versus expense should be stricken from the parties' briefs and not determined by the Commission in this case.

7. In assessing whether to decide the capital vs. expense issue, MGE submits that the Commission bear in mind the significant financial consequences potentially flowing from any determination in these cases that hydrostatic testing costs should be expensed rather than capitalized. If, in spite of the contrary position taken by the Company, its independent auditors and the Staff, the Commission determines that this particular type of hydrostatic testing should be expensed, Laclede recognizes that some level of hydrostatic testing costs could be reflected in rates in the Company's next general rate case which is anticipated to be filed in April of this year. In the meantime, however, such a determination, if upheld on appeal, could confront Laclede with the very real possibility of having to write-off the $1.8 million in hydrostatic testing costs incurred during the ISRS period in this case .

8. Laclede submits that such a result would be singularly inappropriate under the specific circumstances prevailing in these cases because:

- Laclede could be faced with a significant financial loss based on the adoption of a party's position on an accounting issue that was not raised until the day of the evidentiary hearing. As discussed above, fundamental notions of due process as well as the Commission's evidentiary rules are specifically designed to ensure that parties have an adequate opportunity to evaluate and respond to claims that can have an adverse impact on their interests. That decidedly did not happen in this case on the issue of whether hydrostatic testing costs should be capitalized or expensed. One way to mitigate the harm from this serious deprivation of due process would be to not reach the issue of whether such costs should be expensed or capitalized. At a minimum, such action would permit the issue to be more fairly and fully considered in the Company's next rate case with the requisite due process safeguards that should be accorded parties affected by such determinations, and be implemented on a prospective basis.
- Imposing this kind of potential financial loss on Laclede as a result of determining that hydrostatic testing costs should be expensed rather than capitalized would also be inappropriate because the Company capitalized these costs based on a good faith belief that this was the appropriate treatment to accord such costs. That belief was based on the Company's interpretation of a relevant FERC accounting release (AR-8), the opinion of its auditors, an interpretation by Staff, and finally, on the fact that such costs had been referenced in the ISRS plans submitted to OPC over the past three years and included in prior ISRS charges without objection from any party, including OPC. Given these consideration, if there is to be a precipitous change in

how such costs are treated, it should be done in a manner that does not result in the kind of financial loss that could occur if the issue is decided adverse to MGE.

- Avoiding a portion of the financial loss resulting from any determination that hydrostatic costs should be expensed, is also warranted as a matter of good public policy. In effect, MGE incurred these one-time hydrostatic testing costs for the express purpose of establishing the Maximum Allowable Operating Pressure (MAOP) of the transmission line in a manner consistent with applicable regulations and PHMSA advisory bulletin guidance, thereby allowing the lines to remain in service and avoiding the far more expensive cost of replacing such facilities. As a result of these prudent and cost-effective actions, the costs that MGE is seeking to recover in its ISRS charges in this case are significantly lower than they otherwise would have been. The Company does not expect, and is not requesting, to benefit in any way from the fact that it has managed its safety expenditures in such a way. By the same token, however, the Company respectfully submits that penalizing a utility for having acted in such a prudent and reasonable manner – a manner that unquestionably saved its ratepayers money – would be contrary to any enlightened notion of sound public policy.

9. For all of the reasons stated above, MGE requests that the Commission grant its Motion to Strike and make no determination in these cases that hydrostatic testing costs, should be expensed rather than capitalized. Indeed, even if the hydrostatic testing costs are deemed by the Commission not to be includible in ISRS charges, refraining from making such a determination, and thereby avoiding the potentially pernicious financial results discussed above, would be in full accord with the safety and prudence goals of the ISRS Statute. Moreover, such an approach would permit this issue

to be addressed in the MGE's next rate case proceeding where all parties would have the benefit of the due process protections that are essential to determining such matters in a lawful and just way

RESPONSE TO OPC'S MOTION TO STRIKE

10. Laclede respectfully requests that the Commission deny OPC's Motion to Strike filed on January 10, 2017.

11. In its Motion, OPC notes Laclede's argument that OPC has admitted that it is subject to the 60 day notice period, and that OPC has admitted this point (i) in testimony in these ISRS cases, (ii) in prior pleadings to the Commission, and (iii) in arguments made at the Court of Appeals and Supreme Court. OPC moves to strike only the arguments to the two appeals courts, leaving the evidence in this case and the prior pleading filed with the Commission unchallenged. In support of its Motion, OPC claims that it did not have an opportunity to rebut such allegations during the hearing and was thus deprived of its rights.

12. Contrary to OPC's assertion, however, the Company made references to these OPC representations on numerous occasions both before and during the hearing. These include references included in the Company's Statement of Position, which was filed on December 28, 2016, three business days before the hearing, and in Laclede's opening statement on the day of the hearing. (Tr. 9, line 1 – Tr. 10, line 3). Further, the transcript shows that Laclede Counsel even provided a handout to the Commission of these representations. Given this background, OPC had a full opportunity to respond to what Laclede has said regarding OPC's prior inconsistent statements, and its Motion to Strike should accordingly be denied.

13. The Commission is permitted to take judicial notice of Laclede's cites to filed pleadings. Section 536.070(6) states that agencies shall take official notice of all matters of which the courts take judicial notice. Reviewing courts, such as courts of appeals, will notice their own records. (***Perkel v. Stringfellow***, 19 S.W.3d 141, (Mo. Ct. App. S.D. 2000) (stating that court of appeals may take judicial notice of its own records when justice so requires and taking judicial notice of appellant's prior appeal of dissolution of marriage judgment.) Further, Missouri courts of appeal have noticed the records of cases appealed to the Missouri Supreme Court. (***Johnson v. State***, 581 S.W.2d 847, 848 (Mo. Ct. App. E.D. 1979)

14. Finally, in its motion to strike, OPC offered arguments attempting to distinguish OPC's quotes that it is subject to the 60-day statutory deadline, and OPC even went so far as to cite and question Laclede's arguments in other cases, the very action that OPC objects to in its motion to strike. Having filed a pleading attempting to answer Laclede's argument and make arguments of its own, OPC can no longer maintain a motion to strike Laclede's arguments.

WHEREFORE, Laclede Gas Company and its operating unit, MGE, respectfully request that the Commission grant MGE's Motion to Strike for the reasons stated herein and make no finding as to whether hydrostatic testing costs should be expensed or capitalized, and that the Commission deny OPC's motion to strike.

Respectfully submitted,

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ATTORNEYS FOR LACLEDE GAS COMPANY AND MISSOURI GAS ENERGY

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing pleading was served on the General Counsel of the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel, on this 16th day of January, 2017 by hand-delivery, fax, electronic mail or by regular mail, postage prepaid.

/s/ Rick Zucker