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May 17, 2002

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, Missouri 65102

RE: *In the Matter of the Application of Laclede Gas Company for an Accounting Authority Order, Case No. GO-2002-429*

Dear Mr. Roberts:

Enclosed for filing with the Commission are the originals and requisite copies of the Reply Of Laclede Gas Company To Staff's May 7, 2002 Report And Public Counsel's April 22, 2002 Reply.

Thank you for your attention to this matter.

Sincerely,

James M. Fischer

/jr

Enclosures

cc: Office of the Public Counsel
Dana K. Joyce, General Counsel
Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Laclede Gas Company for an Accounting Authority Order Authorizing the Company to Defer for Future Recovery Consideration its Just and Reasonable Costs of Providing Public Utility Service that would otherwise be Un-recovered due solely to the Extraordinary Impact of Record Warm Weather on the Company's Operations	)))))))	Case No. GA-2002-429

REPLY OF LACLEDE GAS COMPANY TO STAFF'S MAY 7, 2002 REPORT AND PUBLIC COUNSEL'S APRIL 22, 2002 REPLY

COMES NOW Laclede Gas Company ("Laclede" or "Company") and for its Reply to the Staff's May 7, 2002 Report and to Public Counsel's April 22, 2002 Reply in the above-captioned case, states as follows:

1. This matter revolves around Public Counsel's inclusion in a press release of information that the Company believed was protected from disclosure by the Commission's Protective Order in this case. Laclede has carefully evaluated both the pleadings filed by Public Counsel as well as the Report that the Staff was directed to file on this matter during the prehearing conference.

2. Based on those submissions, Laclede again asserts its belief, as it has in its previous pleading and at the April 30 prehearing conference, that Public Counsel did not knowingly violate the Commission's standard protective order (the "Protective Order") in this case or the requirements of §386.480. Laclede also believes that it is fair to conclude from Staff's Report that the Company itself could have been more expansive in the information which it sought to protect in its Application, although such action would

have run counter to what the Company believed was a common goal of making as much information as possible publicly available.

3. As discussed below, however, none of these considerations diminish the need for procedures that, consistent with the clear intent of the Standard Protective Order, would require that a party (the "Disclosing Party") wishing to make a disclosure relating to information that has been designated as protected by another party (the "Designating Party"), first consult with the Designating Party and, if necessary, obtain a decision from the Commission prior to making such a disclosure. In fact, by suggesting so many avenues for how the substance of designated information can be fully or partially disclosed without taking such steps, both the submissions of Staff and Public Counsel simply point out the need for such procedures.

Background

4. To put its response in perspective, Laclede believes it would be helpful to briefly reiterate the following background information. On March 8, 2002, Laclede filed its Verified Application for Accounting Authority Order (the "Application") along with a Motion for Protective Order (the "Motion"). In the Application and the Motion, Laclede sought to protect from public disclosure the impact on Laclede's earnings of the extraordinarily warm winter weather experienced up to the end of February. Laclede designated this information for protection because (i) the designated amount was material and had not yet been disclosed to the investing public; and (ii) the winter period had not yet ended, so the figure represented an incomplete assessment of the extraordinary effect of the winter of 2001-02. On March 15, 2002, the Commission approved the Motion, and issued the Protective Order.

5. On March 20, 2002, Public Counsel filed a motion opposing the Application, consisting of five pages of argument, plus a three page affidavit. In its motion, Public Counsel argued the merits of the Application. It never once approximated or in any other way disclosed the information Laclede designated as proprietary. However, on March 21, 2002, Public Counsel issued a press release identifying an amount sought by Laclede ("more than $10 million") that approximated the amount designated for protection.[1]

6. After a subsequent exchange of letters and pleadings, on April 15, 2002, Laclede filed a Reply (the "April 15 Reply") to Public Counsel's Response to Laclede's Motion to Strike Public Counsel's Motion to Dismiss the Application. In the April 15 Reply, Laclede hoped to achieve a result that clarified procedures regarding disclosure of confidential information to avoid such problems in the future. Specifically, Laclede asked the Commission to issue an order:

> directing that when a party desires to disclose information that: (a) provides any quantification of an amount, percentage, or other specific figure that has been designated as highly confidential or proprietary by another party or (b) conveys the substance or nature of any other specific factual matter that has been so designated, then such party shall first consult with the designating party before making the disclosure; [and]
>
> further directing that if, upon consultation, a disagreement arises as to the disclosure of such information, the parties shall seek, on as expeditious a basis as is reasonably practical, an order from the Commission resolving such issue prior to disclosure.

Further, Laclede agreed that an order clarifying disclosure procedures would moot its request to strike Public Counsel's Motion to Dismiss Laclede's Application.

[1] The close of the winter season and the prior public quantification of an approximation of the amount subject to the Company's AAO request has obviously eliminated any rationale for maintaining the confidentiality of the matters that were designated as proprietary by the Company.

7. On April 22, 2002, Public Counsel filed its Reply (the "April 22 Reply") to Laclede's April 15 Reply. In the April 22 Reply, Public Counsel characterized Laclede's proposed solution as vague and unreasonable,[2] and a "radical proposal."[3]

On May 7, 2002, Staff filed its Report on Laclede's Motion to Strike the Office of the Public Counsel's Motion to Dismiss (the "Report"). In the Report, Staff made a number of useful observations, including its statements: that the Protective Order provides an appropriate procedure for a party to challenge a claim of confidentiality; that the release of protected information cannot be justified by an argument that the information was improperly designated as confidential in the first instance; and that there are remedies other than those afforded by §386.480, that the Commission can pursue for any violation of a Protective Order. Nevertheless, the Staff concluded that OPC's press release did not violate the Protective Order, apparently because (i) Laclede did not specify a precise figure in the Application, but instead "couch[ed] its claim in terms like 'exceeded', 'more [than]', 'approximately', and 'by more than"; and (ii) Staff does not necessarily concur that the press release "'closely approximated' a number designated as proprietary."[4]

Public Counsel's April 22 Reply

8. Public Counsel's April 22 Reply contains only one new argument that need be addressed. One month after publicly approximating protected information in a press release, Public Counsel suggests that the information which the Company designated for protection was not entitled to protection after all. According to Public Counsel, this result is mandated because Public Counsel was able to obtain information in another case that, when combined with information submitted in the Application,

[2] April 22 Reply at ¶1.
[3] *Id.* at ¶15.

allegedly allowed it to piece together an approximation of the designated information through public sources.[5] In effect, Public Counsel is now arguing that in addition to its "order of magnitude" theory for why its actions were appropriate, that such disclosure is also permissible if a party can thereafter provide some ex *post facto* explanation of how the information could have been estimated from a comparison of filed information in various cases.[6]

Staff's Report

9. As previously noted, Laclede agrees with certain portions of Staff's Report. For instance, Laclede agrees with Staff that Paragraph S of the Protective Order prohibits use of protected information for purposes other than preparing for and conducting the subject proceeding.[7]

10. However, other portions of the Report contain serious inconsistencies. First, Staff correctly states that the Protective Order provides an appropriate procedure for a party to challenge a claim of confidentiality. These means are covered in paragraph B of the Protective Order.[8] But Staff then suggests that, in effect, a party may simply choose to ignore this procedure and make public references to protected information. In

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[4] Report at ¶8-9.

[5] The reference in the Application cited by Public Counsel was not filed on a proprietary basis by Laclede due to the Company's concerted efforts to minimize the amount of information subject to the Protective Order. To the extent Public Counsel has indicated that it shares the goal of maximizing the public disclosure of information, such a goal is not furthered by actions which penalize those efforts at openness by using the information left unprotected to attack the status of the protected information.

[6] *Id.* at ¶2-6. In this case, a party would have to make a number of assumptions to arrive at such an approximation based on what was said in the Company's Application. In any event, Laclede believes that Staff has provided the appropriate rejoinder to this argument. Specifically, Laclede agrees with paragraph 7 of Staff's Report that the "release of protected information cannot be justified by an argument that the information was improperly designated as confidential in the first instance."

[7] Report at ¶1.

[8] Report at ¶7. Paragraph B provides that during the course of discovery a party may designate requested information as confidential, and must provide the grounds for such designation. The requesting party may file a motion challenging the designation, to which the designating party may respond.

such a case, Staff warns that the Disclosing Party bears the risk that the public reference may violate the substantive requirements of the Protective Order.[9] However, Staff does not address the Disclosing Party's violation of procedural requirements, referred to in Paragraph 7 of the Report, by failing to first seek permission to publicly reference confidential information.

11. Laclede also agrees with Staff's statement in Paragraph 7 of the Report that "release of protected information cannot be justified by an argument that the information was improperly designated as confidential in the first instance." But then Staff contradicts itself in the very next paragraph by claiming that any perceived violation by Public Counsel should be mitigated, if not exculpated, because Public Counsel could have used unprotected information to estimate Laclede's claim.

The Procedural Issue

12. The main issue in this matter has been and remains a *procedural* one: that is, whether a Designating Party may be assured that Disclosing Parties will not provide a public estimate, approximation, order of magnitude, range, or other manner of disclosure of protected information on a unilateral basis, but only after due process. In this case, due process includes an opportunity for the Designating Party to object to such disclosure.

13. The position of Staff that a Disclosing Party may make a disclosure and simply take its chances that such disclosure is proper, is unfair to the Designating Party. It is unfair because if the disclosure turns out to be improper the potential harm is likely to be irreparable. Once highly confidential or proprietary information has been disclosed, it cannot be "undisclosed." Therefore, it is crucial for parties to follow appropriate

[9]Report at ¶5-6.

procedures *before* attempting any disclosure. The correct procedure for a Disclosing Party that believes that information designated for protection is publicly available in another format is for that party to file with the Commission a motion challenging the designation pursuant to Paragraph B of the Protective Order.[10] The incorrect procedure would be for the Disclosing Party to publicly disclose an approximation of the designated information and later produce an *ex post facto* justification that such disclosure was proper because the Disclosing Party can partially reconstruct the designated information using publicly available data.

The Substantive Issue

14. With respect to the substantive issue of what information should be protected, the positions of Staff and Public Counsel, taken together, would effectively gut the Protective Order. As stated above, Staff apparently believes that Laclede is not entitled to the protection it sought because it did not "specif[y] a precise figure in its application."[11] Thus, protection is unavailable for any amounts that must be approximated. Meanwhile, Public Counsel has repeatedly argued that Laclede was entitled to protect only the exact amount designated in its pleading. Taken together, these positions offer protection for, at most, a precise figure, exactly quantified and then only on a very limited basis.

15. The argument that designation of a quantified amount provides protection for only the exact number quantified is unreasonable. Taken to its logical extreme, a Disclosing Party could publicize the amount within a $1 "range" without violating the standard protective order. For example, assume a party designated a figure of $9,638,527

[10] Of course, if the parties first conferred on the issue and reached agreement, there would be no need to seek Commission resolution.

as proprietary. Certainly, no one could reasonably argue that it is acceptable to publicize the amount as being in the range between $9,638,526 and $9,638,528. Yet because this disclosure did not mention the exact figure to be protected, it would arguably meet Public Counsel's standard. Staff, on the other hand, seems to suggest that such disclosure may be appropriate if the approximation varies by as little as 15% to 20% from the actual number. Laclede believes that such disclosures, however, cannot be reconciled with either the purpose or spirit of the Protective Order. Contrary to the result urged by Public Counsel and sanctioned by Staff, a Commission order, including protective orders, should be interpreted to give effect to their purpose and spirit.[12]

16. Similarly, it is unreasonable to offer no protection for confidential information that is approximated. Just because a figure cannot be precisely quantified does not mean that the information represented deserves no protection. Instead, common sense should prevail in how the scope of protection is interpreted. And common sense has a chance to prevail only when the parties follow procedural requirements by addressing the matter *before* making public disclosure.

Conclusion

17. The solution set forth in paragraph 6 above does nothing more than formalize an initial common sense step to the procedures set forth in Paragraph B of the Protective Order by requiring parties to communicate before seeking Commission

[11] Report at ¶8.
[12] See Chase Industries, Inc., v. Frommelt Industries, Inc., 806 F. Supp. 1381, 1386 (N.D. Iowa 1992).

resolution of a confidentiality dispute. Consistent with Commission rules, Laclede's request also clarifies that such procedures apply from the time a pleading is filed.[13]

18. Both Public Counsel and Staff emphasize the need to keep the public informed.[14] Laclede agrees with this principle, but maintains that the very purpose of a protective order is to maintain the confidentiality of information that for well recognized reasons, including the potential harm to the Company or the public that could be caused by disclosure, has already been deemed worthy of protection. Elevating the need to publicize such information over the need to maintain confidentiality eviscerates the entire protective order process.

19. On those occasions where the Designating Party in good faith believes that certain information should be protected because of its proprietary or highly confidential nature, the parties must follow proper procedures in handling this information. This means conferring with the Designating Party, and if necessary, seeking Commission resolution prior to any public disclosure. The ultimate arbiter of whether such information should be disclosed is the Commission. Laclede reiterates its request for the Commission to order the remedy requested in the April 15 Reply.

WHEREFORE, for the foregoing reasons, Laclede Gas Company respectfully requests that the Commission issue an Order directing the parties to comply with the procedures set forth in Laclede's April 15 Reply in this case and repeated in paragraph 6 above. If the Commission so orders, Laclede further requests that the Commission determine that Laclede's Motion to Strike is moot.

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[13] There should be no question that the standard protective order applies to this case, because Laclede's Motion for Protective Order was filed pursuant to 4 CSR 240-2.085(2), which expressly covers protective orders for "pleadings, testimony or briefs," including a "pleading which initiates a case."

[14] April 22 Reply at ¶ 1, 15. Report at ¶5.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing Reply was served on the General Counsel of the Staff of the Missouri Public Service Commission and the Office of the Public Counsel on this 17th day of May, 2002 and to all parties of record in this case by hand-delivery or by placing a copy of such Reply, postage prepaid, in the United States mail.

James M. Fischer