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Missouri Public Service Commission

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~~ GA-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 Public Counsel's Response In Opposition To Motion To Strike.

Thank you for your attention to this matter.

Sincerely,

James M. Fischer

James M. Fischer

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**

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| 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 PUBLIC COUNSEL'S RESPONSE IN OPPOSITION TO MOTION TO STRIKE**

**COMES NOW** Laclede Gas Company ("Laclede" or "Company") and for its Reply to the Response filed by the Office of the Public Counsel ("Public Counsel") in Opposition to Laclede Gas Company's Motion to Strike, states as follows:

1. On April 4, 2002, Public Counsel filed its Response in Opposition to Laclede Gas Company's Motion to Strike and Request for Oral Argument. In its pleading, Public Counsel asserts that the Commission should deny Laclede's request that the Commission strike Public Counsel's Motion to Dismiss on the grounds that Public Counsel had violated the Protective Order issued in this case. In support of its position, Public Counsel argues that it did not violate the Protective Order in this case and that, even if it did, the only sanction available to the Company for such a violation is to pursue the filing of charges against Public Counsel under §386.480 (RSMo. 2000). Public Counsel is incorrect on both counts.

2. Before addressing the substance of Public Counsel's assertions, however, Laclede wants to make clear its belief that no member of the Office of the Public Counsel

intentionally violated any requirement of the Commission. Based on what Public Counsel has said in its pleadings and its discussions with the Company and on what Laclede knows about the character of the individuals involved, the Company does not believe and does not contend that Public Counsel knowingly violated any legal duty or obligation. Indeed, it is for that very reason that Laclede has no intention of pursuing an action against Public Counsel under §386.480 (RSMo. 2000). Nor does Laclede wish to have its comments construed as an attack on either Public Counsel's integrity or reputation. To the contrary, having so recently seen its own reputation for fair dealing assaulted in a very public and very one-sided way, Laclede is particularly sensitive to the harm that can be done when the goal is to portray someone else's actions in the worst possible light. As discussed below, Laclede has also made an effort to develop language the would hopefully prevent a reoccurrence of this situation, while permitting the Commission to reach an expeditious resolution of the Company's request based on the pleadings of all the parties.

3. But while Laclede is more than willing to acknowledge Public Counsel's good faith belief that it has honored its legal obligations, neither the Company nor the Commission can afford to let Public Counsel's views of those obligations stand. In effect, Public Counsel is suggesting three things about how the Commission's process for protecting confidential information works and the role that Public Counsel plays in that process. First, Public Counsel would have the Commission conclude that when one of its protective orders or §386.480 (RSMo. 2000) bars the disclosure of proprietary or confidential information, it nevertheless permits Public Counsel (and presumably any other party) to freely approximate, hint at, provide "order of magnitude" estimates of, or

suggest in some other "ballpark" manner, what the nature or magnitude of the information sought to be protected is. So long as the *exact* figure, percentage or amount is not revealed, no violation has occurred.[1] Second, Public Counsel would have the Commission believe that neither the party who has designated the information as proprietary nor the Commission itself has any advance role to play in determining whether Public Counsel's characterization of the protected information is appropriate or harmful. Rather, it is up to Public Counsel and Public Counsel alone to determine this critical issue, based on its unilateral judgment of what and how much may be said about a matter that has been designated as proprietary or confidential. Finally, in the event Public Counsel errs in the exercise of its unilateral judgment and publicly announces a fact or an estimate or some other item of information that transgresses the bounds of confidentiality, then the Commission is once again powerless to do anything about it. The Commission may not strike Public Counsel's pleadings or impose any other regulatory sanction no matter how serious or even willful the violation of the Commission's protective order may have been. Instead the Commission's sole remedy (and the sole remedy available to the offended party) is to try and convince a prosecuting attorney to pursue misdemeanor charges against the individuals involved. As an

[1]Contrary to Public Counsel's assertion at page 4 of its Reply, Laclede is unaware of any "common practice" before the Commission under which parties are free to disclose whatever "order of magnitude" estimate of a confidential figure they may unilaterally determine is appropriate. Moreover, the examples previously provided by Public Counsel in no way support such a proposition in that they involve the use of an approximation in the middle of a litigated hearing under circumstances where the Company had an opportunity to object to such disclosure, but chose not to, based on the staleness of the historical data that was being referred to, the degree to which such data had previously been disclosed, and the harm that would be caused by disclosure. Those circumstances are markedly different from a situation, such as this one, where an "estimate" of a confidential figure involving very recent data is set forth in the lead provisions of a press release without any consultation with the Company or any opportunity to object. In any event, a Company's choice to decline objecting to one or two disclosures under specific circumstances does not constitute a "common practice."

institution, however, the Office of the Public Counsel is free to continue operating beyond any effective sanction -- indeed beyond any sanction at all by the Commission.

4. Such a view of how the system for protecting confidential information is supposed to work is breathtaking in its attribution of almost unlimited discretion to Public Counsel to determine whether and how much may be revealed about confidential information and its complete evisceration of any power on the part of the Commission to say otherwise. It is also impossible to square with any reasoned interpretation of the law. Contrary to Public Counsel's assertion, the prohibition against disclosing information that has been designated as proprietary, whether found in the protective order in this case or within the ambit of §386.480, cannot be rendered a nullity by simply interpreting it as only foreclosing the disclosure of the specific amount or percentage that has been so designated. And yet that is precisely the impact that Public Counsel's suggested approach would have. Consider, for example, a utility that has designated as confidential the fact that one of its supply contracts for a particular good or service is 11% below the prevailing market price for such an item. Assume further that any disclosure of this fact would void the favorable arrangement because of the supplier's concern over how its other customers might react. Despite these considerations, however, Public Counsel would have the Commission believe that it is perfectly free to announce to the world that the utility has a favorable supply contract for that item that is more than 10% below the prevailing market price. So long as no mention was made of the specific 11% percent figure, no disclosure of the information, nor corresponding violation of a protective order would have occurred.

5. Obviously, such a narrow interpretation of what constitutes disclosure would render meaningless those very provisions of the Commission's protective order that have been designed to prevent such disclosures. The Commission need not and should not accept such tortured interpretations of the meaning and effect of its protective orders. As one court observed in rejecting a claim that a confidentiality order only precluded disclosure of the specific documents that had been sealed:

> Moreover, given the orders' context, audience and nature, Mr. Messina's interpretation of them is unreasonable. The prohibition of an order must be subject to reasonable interpretation, and, while a court cannot expand the terms of the order, it may look to the nature of the original proceedings to interpret and apply it. United States v. Greyhound Corp., 508 F.2d 529, 532, 537 (7th Cir. 1974). Courts are not and should not be compelled to accept "twisted interpretations" or "tortured constructions" of an order. *Id.* at 532. Furthermore, a court order is issued to be obeyed. In effectuating this purpose, a court should not interpret the order in such a way as to render it a nullity. *Id.* at 533. Rather an order should be interpreted to give effect to its purpose and spirit. See Chase Industries, Inc., v. Frommelt Industries, Inc., 806 F. Supp. 1381, 1386 (N.D. Iowa 1992). Mr. Messina's construction of the orders is tortured. N12. He interprets the seal as doing nothing more than regulating the public's access to the physical items on file at the clerk's office. Such an interpretation would render the sealing order a nullity by allowing the public to have the words, ideas, and facts contained in protected materials, while denying them access only to the documents which contained them. The purpose of the order is not fulfilled and the conduct at which it is aimed is not curtailed if Mr. Messina's interpretation is accepted.
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> ***Grove Fresh Distribs. v. John Labatt Ltd.,*** 888 F. Supp 1427, 1438-39 (N.D. Illinois 1995) (footnote omitted).

Public Counsel's "anything may be disclosed as long as you don't disclose the specific figure" argument is equally untenable and equally destructive to the letter, spirit and purposes of the Commission's protective orders.[2]

[2] In fact, the use of an approximation can be even more damaging than the disclosure of the exact amount. As Public Counsel itself recognizes at page 3 of its Response, its disclosure advised the public that the

6. So too is Public Counsel's attempt to eviscerate the Commission's role in determining whether and when protected information may be disclosed and to sanction parties where they unilaterally ignore such procedures. The framework established under both Missouri statutes and the Commission's own protective orders clearly contemplate that Commission approval for disclosures will be sought and obtained before such disclosures are made. (*See* §386.480 which provides that non-public information shall not be disclosed by any officer or employee of the Commission Staff or the Office of the Public Counsel "except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding" and Paragraphs B, N and O of the Protective Order issued in this case on March 15, 2002).

7. And contrary to Public Counsel's position, the Commission has not hesitated in the past to provide a remedy where such requirements have been violated, including where the offending party is Public Counsel.[3] Indeed, to accept Public Counsel's argument at face value one must conclude that the same Commission which the courts have found is lawfully authorized to impose sanctions on utilities for violations of its discovery orders (*see* ***State ex rel. Arkansas Power & Light Company v. Public Service Commission,*** 736 S.W.2d 457, 460 (1987)), is somehow powerless to do so when it is Public Counsel that has violated a Commission order.

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impact of weather had caused the Company to underrecover its costs by at least $10 million while leaving open the possibility that it could be $20 or even $50 million. In other words, Public Counsel's disclosure not only revealed how significant the minimum impact of weather was on Laclede's recovery of its costs, but implied to both the investment community and Laclede's customers that it could be significantly greater. Laclede fails to understand how a disclosure that creates that kind of "its significant but may be far worse" impression is appropriate.

[3]*See* ***Re: Southwestern Bell Telephone*** 6 Mo.P.S.C.3d 493 (1997), in which the Commission ordered that certain confidential information be returned to Southwestern Bell because of its improper disclosure by Public Counsel in violation of a Commission protective order and the requirements of §386.480. It should be noted that Southwestern Bell also requested that the Commission strike the testimony using such confidential information, which request was mooted when the Commission struck the testimony as irrelevant.

8. Public Counsel provides nothing in its Response, however, to explain how such disparate treatment of parties appearing before the Commission can be justified. Instead, it simply notes that its employees are already subject to misdemeanor charges under §386.480 in the event they improperly disclose non-public information and that the bringing of such charges is therefore the exclusive remedy or sanction for any such disclosure.[4] None of the language in §386.480, however, says anything about it being an exclusive remedy or sanction for violations of non-disclosure obligations. Moreover, as Public Counsel well knows, both utilities and their employees are also subject to fines and criminal penalties in the event they fail to produce documents when ordered by the Commission (§386.460); alter their books and records or provide false information (§386.560) or violate other laws, orders or rules (§386.570). Unless the Commission is prepared to find that it is likewise powerless to enforce discovery sanctions against utilities because of the existence of these separate statutory provisions, then it must reject Public Counsel's unsubstantiated argument in this case regarding the effect of §386.480.

9. In short, there is simply no legal basis for Public Counsel's view of how the process for protecting confidential information is supposed to work. Moreover, such a view, if adopted, would generate numerous disputes that would have to be resolved by the Commission or the courts, while simultaneously impairing the free exchange of information in the discovery process that is so critical to the Commission's regulatory mission. Laclede, like other utilities regulated by the Commission, furnishes both the Commission Staff and the Office of the Public Counsel with a plethora of information

[4] Public Counsel is also incorrect in suggesting that none of the discovery sanctions are appropriate because this involves an alleged protective order violation rather than a discovery matter. Such a view ignores the fact that protective orders are considered part and parcel of the discovery process, as evidenced by the fact

that, because it involves competitively-sensitive matters, non-public financial or strategic data or employee or customer-specific information, requires proprietary or confidential treatment in accordance with long-standing Commission precedent. Moreover, such information increasingly relates not only to services and activities that are directly regulated by the Commission but also to unregulated activities that are beyond the Commission's jurisdiction.

10. In the event this free flow of information is to be maintained, however, it is imperative that parties furnishing such information have adequate assurances that such information will not be publicly disclosed unless and until the procedures and laws that have been specifically established to govern such matters have been exhausted. They need to know that when the Commission issues a protective order, such as the one granted in this case, that explicitly requires notice and Commission approval before a party may disclose information that has been designated as proprietary or confidential by another party, that such procedures mean something and will, in fact, be exhausted. And they need to know that these assurances have not been rendered meaningless because parties are free to interpret for themselves what constitutes disclosure and because the Commission is utterly powerless to impose any sanction if they do so in an inappropriate or unauthorized manner.

11. For all of these reasons, the Commission should reject the arguments made by Public Counsel in its Response to the Company's Motion to Strike. And it should do so in a way that lets all parties know how their confidential information will be treated in the future. Specifically, the Commission should make it abundantly clear that in the

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that they are addressed in the General Provisions Governing Discovery of the Missouri Rules of Civil Procedure. *See* Rule 56.01(c).

event any party desires to disclose information in the future 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) that 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. The Commission should also indicate 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. In short, given the considerations discussed above, the Commission should require that parties steer a conservative course, and err on the side of seeking consultation when in doubt.

12. Laclede believes that both of these steps are already contemplated by the Protective Order in this case. In view of the disclosure that nevertheless took place in this matter, however, and the views that Public Counsel has expressed regarding its non-disclosure obligations, Laclede would submit that such a directive is both necessary and appropriate. Moreover, it would provide at least some of the assurances that Laclede has sought regarding steps that would avoid a reoccurrence of this problem in the future. Finally, to bring this matter to a conclusion, Laclede wishes to advise the Commission that in the event it provides such direction the Company would not object to a Commission finding that Company's Motion to Strike Public Counsel's Motion to Dismiss is now moot. Laclede continues, of course, to assert that the Commission should reject the relief requested in that Motion to Dismiss for the reasons stated in the Company's previous Response to that Motion.

**WHEREFORE**, for the foregoing reasons, Laclede Gas Company respectfully requests that the Commission issue an Order:

(1) 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;

(2) 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; and

(3) finding that such action moots Laclede's Motion to Strike Public Counsel's Motion to Dismiss.

Respectfully submitted,

Michael C. Pendergast

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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 15th day of April, 2002 by hand-delivery or by placing a copy of such Reply, postage prepaid, in the United States mail.

James M. Fischer