

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 19th day of  
April, 2007.

|  |   |                                     |
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| In the Matter of Missouri Coalition for Fair<br>Competition, | ) |                                     |
|  | ) |                                     |
|  | ) |                                     |
| Complainant,   | ) |                                     |
|  | ) |                                     |
| v.   | ) | <b><u>Case No. GC-2007-0169</u></b> |
|  | ) |                                     |
| Laclede Gas Company,   | ) |                                     |
|  | ) |                                     |
| Respondent.  | ) |                                     |

**ORDER GRANTING SUMMARY DETERMINATION**

Issue Date: April 19, 2007

Effective Date: April 29, 2007

**Syllabus:** This order grants, on the basis of the undisputed evidence before the Commission and the governing law, summary determination in favor of Respondent, Laclede Gas Company, on the formal complaint filed against the company by Complainant, the Missouri Coalition for Fair Competition.

**Background and Procedural History**

The Missouri Coalition for Fair Competition ("MCFC") filed a formal complaint against Laclede Gas Company ("Laclede") on October 26, 2006. The gist of the allegations in the complaint was that the Commission improperly determined, in Case No. GE-2000-826, that Fidelity Natural Gas, Inc. ("Fidelity") was entitled, under § 386.756.7, RSMo Cum. Supp. 1999, to continue providing the same types of heating, ventilation, and air conditioning

services (“HVAC services”) Fidelity had provided before August 28, 1993. For this reason, according to the complaint, Laclede should be required to produce, in this case, “sufficient and satisfactory evidence that Fidelity provided HVAC Services to customers within its service area prior to the date of August 28, 1993,” which “must be in the form of service tickets or customer invoices – documenting customer names, addresses, and services provided.” If Laclede cannot or will not provide such evidence, says the complaint, the Commission should not allow Laclede to provide HVAC services in the former Fidelity service territories, even though Laclede purchased Fidelity’s Missouri service territories in 2006.<sup>1</sup>

On October 27, 2006, the Commission notified Laclede of the complaint and allowed it thirty days in which to answer as provided by Commission Rule 4 CSR 240-2.070(7). Laclede filed its answer to MCFC’s complaint on November 27, 2006. In this pleading, Laclede moved for dismissal of the complaint with prejudice on two independent grounds: (1) that the complaint is an improper collateral attack on a previous determination by the Commission in Case No. GE-2000-826, which is prohibited by Section 386.550, RSMo 2000;<sup>2</sup> and (2) that Laclede had attached to its answer an exhibit containing a variety of “sufficient and satisfactory” documentary evidence clearly and conclusively establishing that Fidelity did, in fact, provide HVAC services to customers in its service area prior to August 28, 1993. Nevertheless, despite the passage of well over three months, MCFC has not responded to Laclede’s motion in any way.

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<sup>1</sup> See Order Approving Unanimous Stipulation and Agreement for the Sale of Assets and Granting a Certificate of Public Convenience and Necessity, *In the Matter of the Joint Application of Fidelity Natural Gas, Inc. and Laclede Gas Company*, Case No. GM-2006-0183 (Feb. 21, 2006).

<sup>2</sup> This statute states: “In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.”

On November 29, 2006, pursuant to Commission Rule 4 CSR 240-2.070(10), the Commission ordered its Staff to conduct an investigation into the legal and factual issues set out in the parties' pleadings and to file a report discussing the results of that investigation. On December 6, 2006, Staff filed an investigation report, with attached verified memorandum, recommending that Laclede's motion for dismissal of MCFC's complaint with prejudice be granted on both grounds posited by Laclede. In preparing this report, Staff reviewed all available pertinent information, including Laclede's responses to five data requests Staff had propounded, the relevant portions of the case file in Case No. GE-2000-826 (including Fidelity's pleadings, the Staff recommendation, and the Commission's Notice Recognizing Exemption), the relevant statutes, and the service orders submitted by Laclede in its answer. MCFC has not filed any response to Staff's investigation report and verified memorandum.

In its Order Directing Filing issued December 14, 2006, the Commission ordered MCFC to file a pleading "showing cause why its complaint against Laclede Gas Company should not be dismissed with prejudice on the basis of the pleadings currently before the Commission." However, despite the mandatory nature of the order and the fact that the Commission clearly stated that the reason for it was to determine "whether it is appropriate, as requested by Laclede and recommended by Staff, to completely and finally dispose of" MCFC's complaint in a summary manner, MCFC did not comply.

### **Summary Disposition**

Commission Rule 4 CSR 240-2.117, which is titled "Summary Disposition," authorizes the Commission to decide all or any part of "a contested case by disposition in the nature of summary judgment or judgment on the pleadings."

One type of summary disposition permitted under this rule, called “summary determination,” is authorized by Commission Rule 4 CSR 240-2.117(1), which provides, in relevant part:

(A) Except in a case seeking a rate increase or which is subject to an operation of law date, any party may by motion, with or without supporting affidavits, seek disposition of all or any part of a case by summary determination at any time after the filing of a responsive pleading, if there is a respondent, or at any time after the close of the intervention period.

\* \* \*

(E) The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest. An order granting summary determination shall include findings of fact and conclusions of law.

The other type, called “determination on the pleadings,” is authorized by Commission Rule 4 CSR 240-2.117(2), which states, in its entirety:

Except in a case seeking a rate increase or which is subject to an operation of law date, the commission may, on its own motion or on the motion of any party, dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest.

Although this case could conceivably be decided using either procedure, the Commission shall render its decision in this matter by way of summary determination under 4 CSR 240-2.117(1).

This is not a case seeking a rate increase, or a case subject to an operation of law date. Moreover, the procedural history of this particular case and the contents of the parties’ pleadings, testimony, discovery, affidavits, and memoranda on file, including the exhibits attached to Laclede’s answer and the recommendation attached to Staff’s Investigation Report in this matter, make it plain that the merits of this controversy can be

fairly and fully decided in a summary manner since they show that no genuine issue of material fact remains for hearing and one of the parties is entitled to a determination in its favor as a matter of law. Moreover, the public interest clearly favors the quick and efficient resolution of this matter by summary determination without an evidentiary hearing<sup>3</sup> inasmuch as “[t]he time and cost to hold hearings on [a] matter when there is no genuine issue as to any material fact would be contrary to the public interest.”<sup>4</sup> Therefore, the Commission will finally dispose of this case on the basis of the law and the undisputed facts before it.

### **Findings of Fact and Conclusions of Law**

Laclede is a gas corporation and a public utility as defined in Section 386.020, RSMo 2000, and is subject to the Commission’s jurisdiction under Section 386.250, RSMo 2000.

Section 386.754(2), RSMo Cum. Supp. 1999, defines “HVAC services” as “the warranty, sale, lease, rental, installation, construction, modernization, retrofit, maintenance or repair of heating, ventilating and air conditioning equipment.” Section 386.756.1, RSMo Cum. Supp. 1999, provides that a utility may not engage in HVAC services unless it provides them through an affiliate or is entitled to an exemption as specified in Sections 386.756.7 or 386.756.8. Meanwhile, Section 386.756.7, RSMo Cum. Supp. 1999, provides: “A utility engaging in HVAC services in this state five years prior to August 28, 1998, may continue providing, to existing as well as new customers, the same types of services as those provided by the utility five years prior to August 28, 1998.”

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<sup>3</sup> See, e.g., Determination on the Pleadings, *The Staff of the Missouri Public Service Commission v. Taney County Utilities Corporation*, Case No. WC-2004-0342 (Oct. 19, 2004).

<sup>4</sup> Determination on the Pleadings, *In the Matter of the Application of Aquila Inc. for an Accounting Authority Order Concerning Fuel Purchases*, Case No. EU-2005-0041 (Oct. 7, 2004).

On June 16, 2000, in Case No. GE-2000-826, Fidelity filed a verified request for the Commission to recognize and find that, because Fidelity had been providing HVAC services since it commenced business in 1992, Fidelity qualified for the exemption to continue providing those services after August 28, 1998, pursuant to § 386.756.7, RSMo Cum. Supp. 1999. Fidelity's filing was supported on the oath of its President, John T. Davis.<sup>5</sup>

On August 16, 2000, Staff recommended approval of the exemption requested by Fidelity in Case No. GE-2000-826. Staff's conclusion, which was that Fidelity qualified for the § 386.756.7 exemption for the specific types of HVAC services listed in Attachment A to its recommendation, was based on its review of the law, Fidelity's pleadings, and Fidelity's responses to Staff's data requests.

On August 31, 2000, in Case No. GE-2000-826, the Commission issued its Notice Recognizing Exemption, in which it stated: "[Fidelity] is entitled to the exemption for the services listed in Staff's recommendation. Based on Staff's Recommendation, the Commission recognizes that Fidelity Natural Gas, Inc. is entitled to the exemption established by Section 386.756(7), RSMo Supp. 1999." The Notice Recognizing Exemption was formally approved by a unanimous 5-0 vote during the Commission's August 31, 2000 agenda session, and the case was closed the following day.

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<sup>5</sup> The Commission takes official notice of these facts, which are demonstrated by its own records, pursuant to Section 536.070(6), RSMo 2000. This statute states, in relevant part, that in any contested case: "Agencies shall take official notice of all matters of which the courts take judicial notice." Since courts may take judicial notice of their own records in other prior proceedings on their own motion or at the request of a party, *see In re Estate of Ayers*, 984 S.W.2d 193, 196 (Mo. App. S.D. 1998); *State ex rel. Callahan v. Collins*, 978 S.W.2d 471, 474 (Mo. App. W.D. 1998), and may also take judicial notice of their own original records in supplementary proceedings that are ancillary to the current proceeding, *Turner v. State*, 669 S.W.2d 642, 644 (Mo. App. S.D. 1984), the Commission may take official notice of its own records in cases it decided.

On February 21, 2006, in Case No. GM-2006-0183, the Commission issued an Order Approving Unanimous Stipulation and Agreement for the Sale of Assets and Granting a Certificate of Public Convenience and Necessity. This order approved the sale of certain natural gas-related assets of Fidelity located in Missouri to Laclede with certain conditions agreed to by the parties and granted Laclede a certificate of convenience and necessity to conduct natural gas service in the service area previously served by Fidelity.<sup>6</sup>

The documents attached as an exhibit to Laclede's November 27, 2006 answer to MCFC's complaint are duplicate copies of fourteen different Fidelity service orders dated before August 28, 1993. They contain all of the categories of information requested by MCFC in its complaint, and in the form requested by MCFC – namely, “service tickets or customer invoices – documenting customer names, addresses, and services provided.”

Laclede moved for dismissal of MCFC's complaint with prejudice on November 27, 2006 – which was more than 90 days ago. However, MCFC has taken no action whatsoever in this case since filing its petition on October 26, 2006.

### **Decision**

In conjunction with its motion for dismissal with prejudice, Laclede attached to its answer an exhibit containing a variety of entirely uncontroverted documentary evidence clearly and conclusively establishing that Fidelity did, in fact, provide HVAC services to customers in its service area prior to August 28, 1993.<sup>7</sup> Therefore, contrary to the bare legal conclusions in MCFC's complaint, Fidelity was, as a matter of law, entitled to take

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<sup>6</sup> The order is completely silent as to the HVAC services previously provided by Fidelity, and does not indicate whether Laclede was entitled to subsume the benefit of Fidelity's § 386.756.7 exemption as previously recognized by the Commission in Case No. GE-2000-826.

<sup>7</sup> As noted above, these documents fully comply with MCFC's request, in its complaint, that Laclede “provide sufficient and satisfactory evidence,” in the form of “service tickets or customer invoices – documenting customer names, addresses, and services provided,” that “Fidelity provided HVAC Services to customers within its service area prior to the date of August 28, 1993.”

advantage of the exemption established by Section 386.756.7, RSMo Cum. Supp. 1999, just as the Commission determined on August 31, 2000 in Case No. GE-2000-826. Accordingly, a summary determination against MCFC under Commission Rule 4 CSR 240-2.117(1) is warranted.

This leaves only the independent claims of Laclede and Staff that MCFC's complaint should be dismissed with prejudice as it amounts to a collateral attack on the final decision of the Commission in Case No. GE-2000-826, which is prohibited by Section 386.550, RSMo 2000. While these claims may well have substantial legal merit,<sup>8</sup> the Commission need not and does not resolve that issue.

**IT IS ORDERED THAT:**

1. Respondent Laclede Gas Company is granted summary determination in its favor on the formal complaint filed against it on October 26, 2006 by Complainant, the Missouri Coalition for Fair Competition.
2. This order shall become effective on April 29, 2007.

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<sup>8</sup> Section 386.550, which has long been held by Missouri appellate courts to be "declaratory of the law's solicitude for the repose of final judgments," *State ex rel. Harline v. Public Serv. Comm'n*, 343 S.W.2d 177, 184 (Mo. App. W.D. 1960), provides that "final Commission orders are conclusive in all collateral actions or proceedings," *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24, 39 (Mo. App. W.D. 2005), and "makes a [final] decision of the Commission immune to collateral attack." *State ex rel. Ozark Border Elec. Coop. v. Public Serv. Comm'n*, 924 S.W.2d 597, 601 (Mo. App. W.D. 1996). Meanwhile, MCFC's complaint is clearly collateral to the proceedings in Case No. GE-2000-826 within the meaning of Section 386.550, as it is not an extension of that action, but is instead a much later separate, independent action which is subsidiary to it. See *State ex rel. Mo. Div. of Transp. v. Sure-Way Transp., Inc.*, 884 S.W.2d 349, 353 (Mo. App. W.D. 1994).



3. This case may be closed on April 30, 2007.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written in a cursive style.

Colleen M. Dale  
Secretary

( S E A L )

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur

Lane, Regulatory Law Judge