

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 4th day of
February, 2011.

The Staff of the Missouri Public Service Commission,)	
)	
)	
Complainant,)	
)	
v.)	
)	
Laclede Gas Company,)	
)	
Respondent.)	

File No. GC-2011-0006

**REPORT AND ORDER REGARDING
MOTIONS FOR SUMMARY DETERMINATION**

Issue Date: February 4, 2011

Effective Date: February 14, 2011

Syllabus: This order grants summary determination in favor of the Staff of the Commission. It also denies Laclede Gas Company's motion for summary determination.

Background and Procedural History

On July 7, 2010, the Staff of the Commission filed a complaint against Laclede Gas Company. Laclede filed its answer to that complaint on August 9. Laclede filed a counterclaim against Staff on September 22, which the Commission dismissed on November 3. An evidentiary hearing on Staff's complaint is scheduled for February 22-25, 2011.

Staff filed a motion for summary determination on December 15. Laclede responded on December 22 by filing its own motion for summary determination. Both motions were

accompanied by supporting legal memorandums. Staff filed suggestions in opposition to Laclede's motion for summary determination on January 12, 2011. Laclede filed its response to Staff's motion on January 14.

FINDINGS OF FACT

Based upon undisputed facts, the Commission makes these Findings of Fact.

1. This complaint is brought by the Staff of the Missouri Public Service Commission, acting through the Chief Staff Counsel.

2. Laclede Gas Company is a Missouri general business corporation in good standing, incorporated on March 2, 1857 as The Laclede Gas Light Company. Its principal place of business is located at 720 Olive Street, St. Louis, Missouri 63101.

3. Laclede is a natural gas distribution company that serves approximately 630,000 residential, commercial, and industrial customers in the City of St. Louis and ten other counties in Eastern Missouri.

4. Laclede is a "gas corporation" as defined by section 386.020(18), RSMo 2000, and is a "public utility" as defined by section 386.020(43), RSMo 2000.

5. Laclede is a wholly-owned subsidiary of The Laclede Group, Inc., a Missouri general business corporation in good standing, incorporated on October 18, 2000. The Laclede Group's principal place of business is located at 720 Olive Street, St. Louis, Missouri. The Laclede Group is a public utility holding company.

6. Laclede Energy Resources, Inc., is a Missouri general business corporation in good standing. It was incorporated on May 28, 1981 and its principal place of business is located at 720 Olive Street, St. Louis, Missouri 63101. Laclede Energy Resources is also a wholly-owned subsidiary of The Laclede Group.

7. Laclede Energy Resources engages in the marketing of natural gas and is not regulated by this Commission.

8. From time to time Laclede purchases natural gas from Laclede Energy Resources.

9. On December 1, 2000, Laclede applied to this Commission for authority to restructure itself as a holding company with subsidiaries. The Commission assigned that application File Number GM-2001-342.

10. Laclede's application for authority to restructure was resolved through a stipulation and agreement, which the Commission approved on August 14, 2001. The approved stipulation and agreement was signed by Laclede and by The Laclede Group, Inc.

11. The approved stipulation and agreement provided that Laclede would be authorized to restructure itself, subject to certain conditions set forth in the stipulation and agreement.

12. Subsection VI.1 of the approved stipulation and agreement provides in part:

Upon implementation of the Proposed Restructuring, transactions involving transfers of goods or services between Laclede Gas Company and one or more of the Company's affiliated entities shall be conducted and accounted for in compliance with the provisions of a Cost Allocation Manual ("CAM") ...

13. Section IV of the approved stipulation and agreement is entitled "Access to Information Conditions."

14. Subsection IV.2 can be divided into three portions. The first portion states:

Upon request, Laclede Gas Company and The Laclede Group, Inc. agree to make available to Staff, Public Counsel and PACE,¹ upon written notice during normal working hours and subject to appropriate confidentiality

¹ PACE was an affiliation of the labor unions that represented Laclede's employees.

and discovery procedures, all books, records and employees of the Laclede Group, Inc., Laclede Gas Company and its affiliates as may be reasonably required to verify compliance with the CAM and the conditions set forth in this Stipulation and Agreement.

15. The second portion relates to PACE and establishes special terms regarding the provision of information to the unions. That portion is not relevant to this case.

16. The third portion of IV.2 once again concerns the sharing of information with Staff and Public Counsel. The third portion states:

Laclede Gas Company and The Laclede Group, Inc. shall also provide Staff and Public Counsel any other such information (including access to employees) relevant to the Commission's ratemaking, financing, safety, quality of service and other regulatory authority over Laclede Gas Company; provided that Laclede Gas Company and any affiliate or subsidiary of The Laclede Group, Inc. shall have the right to object to such production of records or personnel on any basis under applicable law and Commission rules, excluding any objection that such records and personnel of affiliates or subsidiaries: (a) are not within the possession or control of Laclede Gas Company; or (b) are either not relevant or are not subject to the Commission's jurisdiction and statutory authority by virtue of or as a result of the implementation of the Proposed Restructuring.

17. A discovery dispute arose between Staff and Laclede during proceedings related to two actual cost adjustment (ACA) cases, GR-2005-0203 and GR-2006-0288. In such ACA cases, Laclede's estimated cost of procuring gas supplies on an annual basis is adjusted to reflect Laclede's actual cost to obtain those supplies, which costs are further adjusted to exclude any imprudent costs.

18. In examining Laclede's actual costs for procuring gas supplies, Staff was particularly concerned with Laclede's purchase of gas supplies from its affiliate, Laclede Energy Resources.

19. On October 20, 2008, acting in case numbers GR-2005-0203 and GR-2006-0288, the Commission granted Staff's motion to compel Laclede to produce certain information and documents concerning Laclede Energy Resources.

20. After the Commission denied Laclede's request to reconsider its October 20, 2008 order, Laclede filed a Request for Clarification on December 26, 2008. That motion asked the Commission to conduct an evidentiary hearing before allowing Staff to investigate Laclede Energy Resources.

21. On January 21, 2009, the Commission clarified its October 20, 2008 order compelling Laclede to produce documents by stating:

The Commission has ordered Laclede to produce information about its affiliate according to the rules of discovery not under the Commission's Affiliate Transaction Rule. Although it is true that by granting Staff's motion, Staff is permitted to investigate Laclede's affiliate transactions, such investigation is limited to information that may lead to evidence that is relevant to these ACA cases. To the extent that Laclede is in possession of the information, the Commission clarifies its order compelling Laclede to produce the information requested by Staff.

The Commission specifically denied Laclede's request for a hearing and again ordered Laclede to produce the information it was ordered to produce in the October 20, 2008 order.

22. At various times throughout the ACA cases, Staff has confirmed that it is seeking information from Laclede regarding the prudence of its gas purchases from Laclede Energy Resources and that its investigation is not aimed at determining whether Laclede violated the affiliate transaction rule or its Cost Allocation Manual.

23. On April 22, 2009, after hearing still more arguments from the parties, the Commission reversed its position and issued an Order Denying Motion to Compel,

concluding “the information Staff seeks is not reasonably calculated to lead to the discovery of admissible evidence.”

24. Staff and Public Counsel asked the Commission to reconsider its April 22, 2009 order, and on September 9, 2009, the Commission granted reconsideration and ordered the parties to present additional oral argument.

25. Finally, after hearing additional argument, the Commission issued an order on November 4, 2009, that again directed Laclede to produce the information that Staff sought. In its order, the Commission stated:

The Commission emphasizes that Staff’s discovery request is not an investigation under the Commission’s Affiliate Transaction rule nor is it a complaint through which Staff or Public Counsel seeks enforcement of the agreement reached in Case No. GM-2001-342. These issues have but served as red herrings in what is a discovery request governed by the rules of civil procedure. Mirroring what was set out in the Commission’s initial order granting Staff’s motion to compel, Commission rule 4 CSR 240-2.090(1) states that discovery may be obtained by the same means and under the same conditions as in civil actions. Under the rules of civil procedure, “it is not grounds 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.” (citations omitted).

26. Laclede did not comply with the discovery request to Staff’s satisfaction and on February 24, 2010, the Commission directed its General Counsel to seek enforcement of the Commission’s order in circuit court.

27. The Commission’s General Counsel proceeded to file a petition for a writ of mandamus in the Circuit Court of Cole County, seeking to compel Laclede to comply with the Commission’s discovery orders.

28. During the course of an oral argument held on May 11, 2010, before the Honorable Paul C. Wilson, Judge of Division II of the 19th Judicial Circuit, Cole County,

Michael Pendergast, legal counsel for Laclede, argued to the court that Laclede should not be compelled to give Staff the documents of Laclede Energy Resources it seeks because those documents were not in the possession, custody, or control of Laclede. Pendergast told the circuit court that Laclede was taking that position under the general rules of civil discovery as the Commission had, in its previous orders declared that the affiliate transaction rule, the Cost Allocation Manual, and the stipulation and agreement did not control Staff's discovery request.²

29. On June 25, 2010, the Circuit Court of Cole County issued a Judgment and Writ of Mandamus that ordered Laclede to file a return by July 30, 2010, indicating that it has "produced all of the information sought by the PSC Discovery Order that is within its possession, custody or control." Laclede filed the required return on July 30, 2010.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

Jurisdiction

This Commission has jurisdiction and authority over gas corporations that provide service within Missouri.³ The Commission has authority to hear and decide complaints brought against public utilities operating in Missouri.⁴

² The transcript of the proceedings before the circuit court are attached to Staff's complaint. Laclede's argument is found on pages 13 and 14 of the transcript.

³ Section 393.140, RSMo 2000.

⁴ Section 386.390, RSMo 2000.

Authority to Seek Penalties for Violation of Commission Orders

The relevant portion of section 386.570.1, RSMo 2000, provides:

[a]ny corporation, person or public utility which ... fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission in a case in which a penalty has not herein been provided for such corporation, person or public utility, is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.

Section 386.570.2, RSMo 2000, indicates that every violation of a Commission order is a separate and distinct offense and that each day's continuance of a violation is also a separate and distinct offense.

Section 386.570.3, RSMo 2000, provides that for purposes of enforcing this penalty provision, the acts of an employee of a public utility, acting within the scope of his or her employment, are to be deemed the acts of the public utility.

Section 386.600, RSMo 2000, allows the Commission's General Counsel to bring an action in circuit court to recover a penalty for the violation of a Commission order.

Standard of Review for Summary Determination

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."

Commission Rule 4 CSR 240-2.117(1), 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.

This is not a case seeking a rate increase, or a case subject to an operation of law date. Moreover, as set out below, to grant summary determination in this case will not be “otherwise contrary to law” since no genuine factual dispute remains for hearing,⁵ one of the parties is entitled to a determination in its favor as a matter of law,⁶ and the contents of the parties’ pleadings make it plain that the merits of this controversy can be fairly and fully decided in a summary manner. Moreover, the public interest clearly favors the quick and efficient resolution of this matter by summary determination without an evidentiary hearing⁷ 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.”⁸ Therefore, the

⁵ *Determination on the Pleadings, In the Matter of the Cancellation of the Certificate of Service Authority and Accompanying Tariff of ConnectAmerica, Inc.*, Case No. TD-2003-0582 (Nov. 4, 2004). See also *Order Denying Motion for Determination on the Pleadings, Tony Walker v. Kansas City Power & Light Company*, Case No. EC-2006-0451 (Aug. 28, 2006) (*denying request for determination on the pleadings under 4 CSR 240-2.117(2) as contrary to law and the public interest where it was obvious that the parties did not agree on the essential facts underlying the complainant’s claim for relief*); *McGuire v. Dir. of Revenue*, 174 S.W.3d 87, 89 (Mo. App. E.D. 2005) (*a motion for judgment on the pleadings should be denied where there is a genuine issue of material fact on the face of the pleadings*).

⁶ *Determination on the Pleadings, In the Matter of the Cancellation of the Certificate of Service Authority and Accompanying Tariff of ConnectAmerica, Inc.*, Case No. TD-2003-0582 (Nov. 4, 2004); *Neel v. Strong*, 114 S.W.3d 272, 274 (Mo. App. E.D. 2003) (“A motion for judgment on the pleadings is properly granted . . . if, from the face of the pleadings, the moving party is entitled to judgment as a matter of law.”).

⁷ 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).

⁸ *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).

Commission may finally dispose of this case on the basis of the law and the undisputed material facts before it.⁹

DECISION

Staff alleges that Laclede has violated Section IV.2 of the stipulation and agreement by which the Commission granted Laclede authority to reorganize itself under a holding company structure. Specifically, Staff contends Laclede violated the stipulation and agreement by arguing to the circuit court that the Laclede Energy Resources documents sought by Staff were not in the possession, custody, or control of Laclede.

Laclede counters by arguing that in its string of orders regarding Staff's discovery requests, the Commission has decided that in seeking discovery, Staff was proceeding under general civil discovery principles and that therefore the requirements of the stipulation and agreement do not apply in this case.

The first step in evaluating the parties' arguments is to take a closer look at the stipulation and agreement. The first portion of subsection IV.2 of the approved stipulation and agreement requires Laclede and The Laclede Group, Inc. to make available to Staff, Public Counsel, and PACE all records of all affiliates "as may be reasonably required to verify compliance with the CAM and the conditions set forth in the Stipulation and Agreement."

By its clear terms, that portion of the stipulation and agreement requires Laclede and its affiliates to turn over documents that are connected to an investigation into compliance with the Cost Allocation Manual and the conditions set forth in the stipulation and agreement. Staff has repeatedly indicated that it is not seeking documents from Laclede as

⁹ 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).

part of an effort to verify compliance with the Cost Allocation Manual, the stipulation and agreement, or the affiliate transaction rules. If this first portion of subsection IV.2 were the entire agreement, Laclede would be entitled to prevail on its motion for summary determination.

However, the agreement embodied in subsection IV.2 does not end with the first portion. In the third portion of that subsection, Laclede and The Laclede Group agree that they will provide Staff and Public Counsel any other information that is “relevant to the Commission’s ratemaking, financing, safety, quality of service and other regulatory authority over Laclede Gas Company.”

This portion of the agreement is not limited to situations in which Staff, Public Counsel, or PACE are seeking to verify compliance with the Cost Allocation Manual or the terms of the stipulation and agreement. Instead, it applies to general discovery requests. It allows Laclede, The Laclede Group, and any affiliated company the right to object to the production of such records on any lawful basis with two exceptions. Laclede, The Laclede Group, and affiliated companies are not allowed to object that the records are “not within the possession or control of Laclede Gas Company,” and they are not allowed to object that the records are no longer relevant or subject to the Commission’s jurisdiction and statutory authority because of the restructuring.

When Laclede restructured and formed a holding company with attendant unregulated affiliates, a portion of the business Laclede conducts was transformed into unregulated activity that might evade the Commission’s review. In effect, this portion of the subsection allows Staff and Public Counsel the same access to business records related to Laclede’s activities as they would have had before the restructuring.

When Laclede argued to the circuit court that it should not have to produce documents belonging to Laclede Energy Resources because it did not have possession or control of those documents, it was asserting a defense that it had relinquished under the explicit requirements of the third portion of section IV.2 of the stipulation and agreement.

Laclede attempts to avoid that conclusion by arguing that Staff is collaterally attacking the Commission's previous orders, as well as the order issued by the circuit court, which found that Staff is seeking to compel Laclede to produce documents under the general rules of civil discovery. But those orders are not inconsistent with the Commission's conclusion that Laclede has violated the stipulation and agreement.

Only the first portion of subsection IV.2 of the stipulation and agreement is limited to discovery related to compliance with the Cost Allocation Manual and the terms of the stipulation and agreement. The third portion of that subsection, the portion that is relevant in this case, applies to the discovery requests Staff has made under the general rules of civil discovery.

Laclede also argues that in one of its previous orders, the Commission explicitly limited Laclede's obligation by requiring it to produce those documents in its possession. The sentence in question is found in the Commission's January 21, 2009 Order Regarding Request for Clarification. That order is quoted extensively in paragraph 21 of the Findings of Fact section of this order, but the particular sentence in question states "[t]o the extent that Laclede is in possession of the information, the Commission clarifies its order compelling Laclede to produce the information requested by Staff."

The Commission did not intend to relieve Laclede of its obligation to produce documents by including that sentence in the body of its order. Laclede had not asked the

Commission for clarification regarding its obligation to produce information not in its possession and the only actual clarification the Commission ordered was a denial of Laclede's request for an evidentiary hearing. Furthermore, in that order, the Commission once again required Laclede to comply with Staff's discovery requests. In any event, the Commission has never set aside the stipulation and agreement and its limitation on Laclede's ability to challenge discovery requests.

Thus, when Laclede argued to the circuit court that it does not have possession of documents belonging to its affiliate, Laclede Energy Resources, to avoid compliance with Staff's discovery request, it violated the explicit terms of the stipulation and agreement. When the Commission approved that stipulation and agreement it became an order of the Commission, and the violation of that order subjects Laclede to the penalty provisions of Section 386.570.

The Commission emphasizes that this order resolving Staff's complaint is not about the interpretation of the Cost Allocation Manual or the affiliate transaction rules. Laclede would like to argue again that the information Staff seeks is not relevant, but that question is not currently before the Commission. Ultimately, the questions about the applicability and interpretation of the Cost Allocation Manual and the affiliate transaction rules will be resolved in the underlying ACA cases, but not in this complaint.

The Commission has found that Laclede is subject to a penalty for its violation of the stipulation and agreement and the order that approved that stipulation and agreement. The Commission will authorize its General Counsel to seek such a penalty in circuit court, but the Commission is not seeking to impose a harsh punishment on Laclede for its past

actions. Rather, the Commission wants to emphasize to Laclede that it must comply with the stipulation and agreement and with the Commission's orders regarding discovery.

THE COMMISSION ORDERS THAT:

1. The Motion for Summary Determination filed by the Staff of the Commission is granted.
2. The Motion for Summary Determination filed by Laclede Gas Company is denied.
3. The Commission's General Counsel is authorized to proceed to circuit court to pursue appropriate penalties against Laclede Gas Company.
4. With Summary Determination having been granted, the remaining procedural schedule, including the evidentiary hearing scheduled for February 22-25, 2011, is canceled.
5. This order shall become effective on February 14, 2011.

BY THE COMMISSION

(S E A L)



Steven C. Reed
Secretary

Clayton, Chm., Gunn, and Kenney, CC., concur;
Davis and Jarrett, CC., dissent, with dissenting opinion
of Jarrett to follow.

Woodruff, Chief Regulatory Law Judge