

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 26th day of May, 2011.

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

File No. GC-2011-0098

ORDER DENYING STAFF'S MOTION FOR SUMMARY DETERMINATION, DENYING STAFF'S MOTION TO DISMISS COUNTERCLAIM, AND DENYING LACLEDE'S MOTION FOR LEAVE TO FILE MOTION FOR SUMMARY DETERMINATION

Issue Date: May 26, 2011

Effective Date: May 26, 2011

The Commission's Staff filed a complaint against Laclede Gas Company on November 22, 2010. The three remaining counts of that complaint¹ allege that Laclede's Cost Allocation Manual (CAM) fails to comply with the Commission's affiliate transaction rules because it does not require Laclede to use asymmetrical pricing for its transactions with its gas marketing affiliate; that Laclede failed to obtain Commission approval of its CAM; and that Laclede failed to annually submit its CAM to Staff. Laclede filed a counterclaim to Staff's complaint on December 12, alleging that Staff does not have a good

¹ Counts I and V of the complaint have previously been dismissed.

faith, non-frivolous argument for its position and therefore is in violation of Commission Rule 4 CSR 240-2.080(7).

On April 8, 2011, Staff filed a motion for summary determination, alleging that there are no genuine issues as to any material fact and that Staff is entitled to relief as a matter of law. Laclede timely responded to Staff's motion for summary determination on May 9. Meanwhile, on April 18, Staff filed what it described as a renewed motion to dismiss Laclede's counterclaim for failure to state a claim upon which relief can be granted. Laclede's responded to that motion on April 28 and at the same time requested leave to file its own motion for summary determination. Finally, on May 10, Staff replied to Laclede's motions. While this exchange of motions has occurred, the parties have continued to prefile testimony and have moved toward an evidentiary hearing, which is scheduled to begin on June 9.

Staff's Motion for Summary Determination

Commission Rule 4 CSR 240-2.117(1)(E) allows the Commission to grant a 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.

In Count II of its complaint, Staff contends that Laclede's CAM fails to comply with the asymmetrical pricing standard of the affiliate transaction rules in that it fails to take into account fully distributed costs in determining the pricing of its gas purchase transactions with its affiliate. Laclede counters that the CAM does take into account fully distributed costs, but that as a matter of fact, a calculation of fully distributed cost would be

meaningless because, in this context, fully distributed cost will always be more than fair market price.

In Count III of its complaint, Staff contends that Laclede has violated the affiliate transaction rules by failing to use a commission-approved CAM. Laclede acknowledges that it has never formally submitted its CAM to the Commission for approval, but argues that the rule does not require formal approval and contends, as a matter of fact, that the Commission has in effect approved the CAM.

In Count IV of its complaint, Staff contends that Laclede has violated the affiliate transaction rules because it has not resubmitted its CAM to Staff each year. Laclede denies that annual resubmission of the CAM is required by the rule and contends, as a matter of fact, that it has met all requirements for submission of its CAM.

A motion for summary determination is appropriate only if a party can demonstrate that there is no genuine issue as to any material fact. Staff has not made that demonstration in this case. Therefore, the Commission will deny Staff's Motion for Summary Determination.

Staff's Motion to Dismiss Counterclaim

Laclede's counterclaim alleges that Staff has violated Commission Rule 4 CSR 240-2.080(7) in that it has failed to assert a good faith, non-frivolous argument for its positions. In its April 18 renewed motion to dismiss Laclede's counterclaim, Staff argues that the Commission should dismiss Laclede's counterclaim because the affiliate transaction rules and Laclede's CAM impose no obligation on Staff and therefore it is not possible for Staff to violate either the rules or the CAM. In its May 10 pleading, Staff adds an argument that it complied with Commission Rule 4 CSR 240-2.080(7) when its attorney signed its complaint

and that the Commission need not look beyond the existence of that signature to determine that Staff has brought its complaint in good faith.

The Commission has the authority to decide this matter on the pleadings pursuant to Commission Rule 4 CSR 240-2.117(2), which states:

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.

The Commission's rules do not establish standards for when it is appropriate to dispose of a case on the pleadings, so the Commission will instead look to Missouri's civil procedures for guidance.

In indicating when a case may be disposed on the pleadings, the Missouri Supreme Court has stated that for purposes of the motion, all facts stated in the challenged pleading are accepted as true. If those assumed facts are insufficient as a matter of law, the trial court may properly grant a motion for judgment on the pleadings.²

Contrary to Staff's assertion, Staff, as a party to this proceeding, is bound to comply with the good faith requirements established in the rule. If the facts Laclede alleges are taken as true, Laclede has stated a claim upon which relief can be granted. Therefore, the Commission will deny Staff's motion to dismiss Laclede's counterclaim.

Laclede's Request for Leave to File Motion for Summary Determination

As part of its April 28 response to Staff's motion to dismiss Laclede's counterclaim, Laclede requested leave to file its own motion for summary determination. Commission Rule 4 CSR 240-2.117(1)(A) provides that a motion for summary determination cannot be

² *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 134 (Mo 2000).

filed less than 60 days before the start of the hearing except by leave of the Commission. In this case, the hearing is set to begin on June 9.

The rule's 60-day limitation on filing motions for summary determination exists to allow the Commission and the other parties a sufficient time to respond to such a motion before the start of the hearing. The filing of a motion for summary determination now, a mere two weeks before the start of the hearing, would not allow sufficient time for response. Therefore, the Commission will deny Laclede's request.

THE COMMISSION ORDERS THAT:

1. Staff's Motion for Summary Determination is denied.
2. Staff's Renewed Motion to Dismiss Laclede's Counterclaim is denied.
3. Laclede's Request for Leave to File a Motion for Summary Determination is denied.
4. This order shall become effective immediately upon issuance.

(S E A L)

BY THE COMMISSION



Steven C. Reed
Secretary

Gunn, Chm., Clayton, Davis, Jarrett,
and Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge