

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 3<sup>rd</sup> day of  
November, 2010.

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

**File No. GC-2011-0006**

**ORDER DISMISSING COUNTERCLAIM OF LACLEDE GAS COMPANY  
FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE  
GRANTED**

Issue Date: November 3, 2010

Effective Date: November 13, 2010

The Commission's Staff filed a complaint against Laclede Gas Company (Laclede) on July 7, 2010, alleging that Laclede violated a Commission order by failing to comply with the terms of a Commission approved stipulation and agreement. Specifically, Staff alleges Laclede violated a provision in a stipulation and agreement by arguing to the Circuit Court of Cole County that Laclede did not have in its possession certain documents held by its affiliated gas marketing company, Laclede Energy Resources, Inc. (LER). According to Staff's complaint, the approved stipulation and agreement that resolved Laclede's application to restructure itself as a holding company, File No. GM-2001-342, included a provision by which Laclede and its affiliates waived any objection to discovery requests that asserted that records of affiliates or subsidiaries are not in the possession of Laclede.

Laclede answered Staff's complaint on August 8, and an evidentiary hearing regarding Staff's complaint is set to begin on February 22, 2011.

On September 22, Laclede filed a counterclaim against Staff. In its counterclaim, Laclede alleges that Staff, and in particular, Staff's Procurement Analysis Department, has unfairly targeted Laclede's gas supply procurement arrangements with Laclede's affiliated gas marketing company, LER. Laclede claims Staff has done so by proposing to disallow a substantial portion of the company's gas cost recovery costs as part of the company's actual cost adjustment. Laclede contends those supply arrangements comply with the Commission's affiliate transaction rules and with Laclede's Cost Allocation Manual. Laclede's counterclaim argues that by challenging those supply arrangements in its actual cost adjustment audit, Staff has violated the affiliate transaction rules and the Cost Allocation Manual.

The Office of the Public Counsel was first to respond to Laclede's counterclaim when, on September 28, it filed a motion to dismiss. Staff filed its own motion to dismiss on October 4. Laclede responded to both motions to dismiss on October 8.

In addition, on October 26, Laclede filed a pleading entitled Motion for Commission to Take Notice of Staff's Admission of Staff's Own Violation of the Commission's Affiliate Transactions Rules. That motion reiterated Laclede's counterclaim argument that Staff has violated the affiliate transaction rules by seeking to prohibit affiliate transactions that are allowed under the rules. It cites Staff's answer to the counterclaim, which Staff filed on October 25, as further support for that argument. Staff responded to Laclede's motion on October 28 and Public Counsel responded the next day.

The gist of Public Counsel's argument in its motion to dismiss Laclede's counterclaim is that the affiliate transaction rules and Laclede's Cost Allocation Manual impose no obligation on Staff and, therefore, it is not possible for Staff to violate either the rules or the Cost Allocation Manual. Staff concurs in Public Counsel's argument and raises additional objections to Laclede's counterclaim. Public Counsel's chief argument is dispositive and the Commission will not address the other arguments raised by Public Counsel and Staff.

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 on that question.

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.<sup>1</sup>

Laclede's counterclaim asserts that Staff has violated the affiliate transaction rules and Laclede's Cost Allocation Manual. The Commission's general affiliate transaction rule for gas utilities is 4 CSR 240-40.015. In addition, the Commission has promulgated a more specific rule controlling gas marketing affiliate transactions at 4 CSR 240-40.016. An

examination of those rules reveals that they impose numerous and detailed requirements on gas utilities that wish to engage in transactions with affiliated companies. The rules also establish evidentiary standards to allow the Commission to determine whether an affiliate transaction is proper under the rules. The rules do not, however, require the Commission's Staff to take any action, or to refrain from any action.

Similarly, Laclede's complaint describes its Cost Allocation Manual as containing pricing standards that mirror those of the rules, while providing "more definite and practical detail in certain matters, including how to determine the fair market price of gas supply purchases and sales."<sup>2</sup> But again, the Cost Allocation Manual does not require the Commission's Staff to take, or refrain from taking any action.

What Laclede is really arguing is that in its Actual Cost Adjustment (ACA) review of Laclede's gas costs, and in its review of the gas costs of another gas utility, Atmos Energy Corporation, Staff has taken a position that is contrary to the fair market pricing provisions of the rules and the Cost Allocation Manual. According to Laclede, Staff's position would render the affiliate transactions rules and the Cost Allocation Manual meaningless by making it impossible for a gas utility to engage in transactions with its marketing affiliate. Staff would do so by taking any profit earned by the affiliate back from the regulated company as an imprudent expense.

Certainly, Staff, as well as the Commission itself, is bound by the requirements of the affiliate transaction rules. If Staff's position is contrary to the standards set forth in those rules, the Commission will reject that position in the appropriate ACA review cases. However, Laclede's claim that Staff's position is inconsistent with the rules and the Cost

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<sup>1</sup> *State ex rel Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 134 (Mo 2000).

Allocation Manual does not state a claim that Staff has violated the rules. Since neither the affiliate transaction rules, nor the Cost Allocation Manual, impose any obligation on Staff, the Commission cannot find Staff in violation of either. Simply put, advocating a position before the Commission that may be contrary to the requirements of a Commission rule does not, by itself, place the advocate of that position in violation of the rule.

Through its counterclaim and motion for the Commission to take notice, Laclede is really asking the Commission to issue an advisory opinion telling Staff that the position it has taken in the ACA cases is incorrect. The Commission may ultimately agree with Laclede that the position Staff has asserted is inconsistent with the affiliate transaction rules and Laclede's Cost Allocation Manual, but the proper forum for resolving that question is in those ACA cases, rather than as a counterclaim in Staff's complaint.

**THE COMMISSION ORDERS THAT:**

1. The counterclaim of Laclede Gas Company is dismissed.
2. Laclede Gas Company's Motion for Commission to Take Notice of Staff's Admission of Staff's Own Violation of the Commission's Affiliate Transactions Rules is denied.

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<sup>2</sup> Counterclaim of Laclede Gas Company, Paragraph 7.

3. This order shall become effective on November 13, 2010.

**BY THE COMMISSION**

( S E A L )

A handwritten signature in black ink, appearing to read "S. C. Reed", written in a cursive style.

Steven C. Reed  
Secretary

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

Woodruff, Chief Regulatory Law Judge