

**BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI**

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

Case No. GC-2011-0006

**STAFF’S MOTION TO DISMISS
LACLEDE’S COUNTERCLAIM**

COMES NOW the Staff of the Missouri Public Service Commission, by and through the Chief Staff Counsel, and hereby moves the Commission to dismiss the Counterclaim of Respondent Laclede Gas Company (“Laclede”), stating:

Introduction

1. This case arises from Staff’s complaint against Laclede for violation of a Stipulation and Agreement approved by the Commission in Case No. GM-2001-0342. Staff seeks a determination that Laclede has violated the Stipulation and Agreement and the authority to seek penalties for the violation.

2. Laclede counterclaims that Staff has acted in violation of the Commission’s Affiliate Transaction Rules, 4 CSR 240-40, 015 and 016, and Laclede’s own Cost Allocation Manual (“CAM”) by “[making] recommendations, [asserting] disallowances and [seeking] discovery” with respect to transactions between Laclede and its unregulated affiliate, Laclede Energy Resources

("LER"). Laclede seeks a determination that Staff has violated the Commission's rules and Laclede's CAM and an order directing Staff to comply with them in the future.

Laclede's Failure to State a Claim

3. Public Counsel filed his Motion for Order Dismissing Laclede's Counterclaim on September 28, 2010, in which Public Counsel points out that Staff is unable to violate the Commission's Affiliate Transaction Rules because those rules neither require any action, nor forbid any action, by Staff. Staff agrees with Public Counsel's analysis. Staff further agrees with Public Counsel that Staff's adoption of an interpretation of a rule that Laclede dislikes is not itself a violation of the rule. After all, the Commission may or may not adopt Staff's interpretation in any given case.

4. As Public Counsel also points out, Laclede's complaint that Staff has violated its CAM is even more meritless because Laclede's CAM, unlike the Affiliate Transaction Rules, has not been approved by the Commission. Laclede's unapproved CAM is therefore nothing more than a suggestion that the Commission may or may not choose to follow.

Lack of Subject Matter Jurisdiction

5. Laclede contends that its counterclaim against the Staff is authorized by § 386.390.1, RSMo,¹ and Commission Rule 4 CSR 240-2.070, which respectively provide in pertinent part as follows:

¹ All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri ("RSMo"), revision of 2000.

Complaint may be made by . . . any corporation or person . . . by petition or complaint in writing, setting forth any act or thing done or omitted to be done **by any corporation, person or public utility**, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission

Section 386.390.1 (emphasis added).

Formal Complaints. If a complainant is not satisfied with the outcome of the informal complaint, a formal complaint may be filed. Formal complaint may be made by petition or complaint in writing, setting forth any act or thing done or omitted to be done **by any person, corporation or public utility**, including any rule or charge established or fixed by or for any person, corporation or public utility, in violation or claimed to be in violation of any provision of law or of any rule or order or decision of the commission. * * * Any public utility has the right to file a formal complaint on any of the grounds upon which complaints are allowed to be filed by other persons and the same procedure shall be followed as in other cases.

Rule 4 CSR 240-2.070(3) (emphasis added).

6. The authorities set out above and relied upon by Laclede expressly state that a complaint may only be brought against a “person, corporation or public utility.” The Staff is none of these things and therefore Laclede’s counterclaim must be dismissed because it is not authorized by law. Put another way, the Commission does not have subject matter jurisdiction over Laclede’s counterclaim because Staff is not a person, a corporation or a public utility within the intendments of § 386.390.1.

Suggestions in Support of Staff’s Motion to Dismiss

A motion to dismiss for failure to state a claim tests only the legal sufficiency of the complaint. J.R. Devine, ***Missouri Civil Pleading and Practice***

§ 20-3 (1986). All well-pleaded factual allegations in the complaint must be accepted as true and the facts must be liberally construed to support the complaint. **Nazeri v. Missouri Valley College**, 860 S.W.2d 303, 306 (Mo. banc 1993). Complainants enjoy the benefit of all reasonable inferences and the complaint should not be dismissed unless it shows no set of facts entitling them to relief. *Id.* A complaint under the Public Service Commission Law is not to be tested by the technical rules of pleading; if it fairly presents for determination some matter which falls within the jurisdiction of the Commission, it is sufficient.² **St. ex rel. Kansas City Terminal Railway Co. v. Public Service Commission**, 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925).

The Commission's Affiliate Transaction Rules impose obligations on regulated utilities and their affiliates; they do not impose any obligations on the Commission's Staff. Thus, as Public Counsel points out, Staff cannot violate those rules. Laclede's CAM, in turn, was never approved by the Commission. It has no mandatory force or effect and is no more than Laclede's suggestion to the Commission for allocating various costs. Staff cannot violate Laclede's CAM because Staff is not required to follow it.

Laclede has failed to state a claim against Staff because Laclede has not shown that Staff did anything that it was prohibited from doing or that Staff failed to do anything it was required to do. For this reason, Laclede's Counterclaim

² A careful reading of this case reveals its meaning to be that the factual allegations of an administrative complaint are generally to be judged against the standard of notice pleading rather than the stricter standard of fact pleading. See e.g. **Sorbello v. City of Maplewood**, 610 S.W.2d 375, 376 (Mo. App., E.D. 1980) ("The charges made against a public employee in an administrative proceeding, while they must be stated specifically and with substantial certainty, do not require the technical precision of a criminal indictment or information. It is sufficient that the charges fairly apprise the officer of the offense for which his removal is sought.").

must be dismissed.

Subject Matter Jurisdiction:

Subject matter jurisdiction is the authority of the tribunal to hear a particular class of case and grant the requested relief. J.R. Devine, ***Missouri Civil Pleading and Practice*** § 9-1 (1986). Lack of subject matter jurisdiction cannot be waived and any order issued in the absence of subject matter jurisdiction is absolutely void. *Id.*, at § 9-2. The Public Service Commission is a creature of statute and “[w]hatever power [it] has must be warranted by the letter of law or such clear implication flowing therefrom as is necessary to render the power conferred effective.” ***State ex rel. City of St. Louis v. Public Service Com’n of Missouri***, 335 Mo. 448, 457-58, 73 S.W.2d 393, 399 (*banc* 1934). A tribunal lacking subject matter jurisdiction can only dismiss the cause. ***State ex rel. Larkin v. Oxenhandler***, 159 S.W.3d 417, 420 (Mo. App., W.D. 2005) (“A circuit court lacking subject matter jurisdiction may take no action other than to dismiss the suit.”).

The provisions that Laclede asserts authorize its counterclaim – set out above, at ¶ 5 -- expressly and specifically restrict the Commission’s complaint power to actions against persons, corporations and public utilities. Because the Staff is not any of those things, the Commission lacks subject matter jurisdiction over the counterclaim and can only dismiss it.

The Commission is an administrative agency of the State of Missouri, created and empowered by the Public Service Commission Law to regulate public utilities. ***State ex rel. Gulf Transport Co. v. Public Service Com’n***, 658

S.W.2d 448, 465-466 (Mo. App., W.D. 1983) (“The Public Service Commission is constituted an administrative agency of the General Assembly entrusted to supervise the operation of common carriers and public utilities”). The Staff, however, is merely an organizational component of the Commission, created not by statute but by rule of the Commission. Rule 4 CSR 240-2.010(5) provides: “Commission staff means all personnel employed by the commission whether on a permanent or contractual basis who are not attorneys in the general counsel’s office, who are not members of the commission’s research department, or who are not law judges.”

The cited rule is only a definition; it is not an organizational charter. For reasons of procedural fairness in contested cases, Staff functions as a party and communicates with the Commission solely by means of formal pleadings, testimony and the like. Rule 4 CSR 240-4.020. But Staff is not a real party, it is simply the aggregate of the Commission’s expert employees who do its business. Staff is not an entity with any legal existence; it is not a corporate body or a political subdivision and it lacks the capacity to be sued. For this reason, Laclede’s Counterclaim against the Staff cannot be maintained and must be dismissed.

Laclede’s Real Complaint:

Laclede’s real complaint in this case is that Staff is tireless in its efforts to require Laclede to prove that it has not improperly used transactions between itself and its unregulated affiliate to enrich its shareholders at the expense of its captive ratepayers. On that charge, Staff pleads guilty. That is Staff’s job.

Consider, for a moment, the fact that gas utilities like Laclede do not sell natural gas at a profit to their customers. The natural gas is instead passed on at cost through the PGA-ACA process. But what if Laclede buys gas from LER, its unregulated affiliate? LER – owned by the same shareholders as Laclede – sells gas to Laclede *at a profit*. In such a case, even though Laclede subsequently passes the gas on to the ratepayers at its cost, that cost *nonetheless includes a profit to Laclede's shareholders*. While this transaction evidently seems like a perfectly reasonable business transaction to Laclede, to Staff it seems like an end run around the supposedly profitless PGA-ACA process and smacks of cross-subsidization.

Transactions between regulated utilities like Laclede and their unregulated affiliates are necessarily and unavoidably dangerous to the public interest. Why? Because they are not arms' length transactions. Both sides are controlled by the same interests – often the same person or persons – and the possibilities for improper manipulation are unlimited. Laclede's officers, just like LER's officers, are required by law to use their best efforts to enrich the shareholders. Staff has no choice but to subject such transactions to the highest degree of scrutiny. To the extent that Laclede finds such scrutiny inconvenient, it may refrain from such transactions.

WHEREFORE, by reason of all the foregoing, Staff prays that the Commission will dismiss Laclede's Counterclaim filed herein against the Staff, and grant such other and further relief as the Commission finds just in the premises.

Respectfully submitted,

s/ Kevin A. Thompson

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **4th day of October, 2010**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson