

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

The Staff of the Missouri Public Service Commission,	)	
	)	
Complainant,	)	
v.	)	Case No. GC-2011-0006
	)	
Laclede Gas Company,	)	
Respondent.	)	

**LACLEDE GAS COMPANY'S  
MOTION FOR RECONSIDERATION  
AND APPLICATION FOR REHEARING**

**COMES NOW** Laclede Gas Company (“Laclede” or “Company”) and, pursuant to Section 386.500 (RSMo 2000) and 4 CSR 240-2.160 of the Commission’s Rules of Practice and Procedure, submits its Motion for Reconsideration and Application for Rehearing of the Commission’s November 3, 2010 Order Dismissing Counterclaim of Laclede Gas Company for Failure to State a Claim Upon Which Relief Can be Granted (“Order”). In support thereof, Laclede states as follows:

1. The Commission should reconsider and reverse the Order or grant Laclede rehearing, because the Order arbitrarily and erroneously concludes that Laclede’s Counterclaim does not state a claim upon which relief can be granted. By preventing Laclede from having its day in court, the Order is unjust, unlawful and unreasonable.

2. Pursuant to Missouri Rule of Civil Procedure 55.05, Laclede has stated facts showing that it is entitled to relief and has made a demand for such relief. As Laclede has alleged, the Staff has a duty to comply with the Commission’s duly promulgated rules, and a duty to comply with the agreements it signs and the Commission orders approving those agreements. Laclede has also properly alleged that the Staff has breached those duties, and the Staff itself has admitted to facts confirming

those allegations. As a result of these breaches, Laclede has been, and continues to be, damaged. Laclede has therefore stated a claim upon which relief can be granted, and should have an opportunity to prove up its claim in a hearing before the Commission.

3. The Order errs in stating that advocating a position before the Commission that is contrary to a Commission rule does not place the advocate in violation of the rule. Commission Rule 2.080(7) prevents parties from making arguments that frivolously fly in the face of the plain language of a rule. The Commission has an obligation to ensure that its Staff complies with Commission rules and orders, not only in reaching final decisions on contested issues, but during the auditing process as well.

4. Finally, since filing the counterclaim, more facts have arisen which strengthen Laclede's case. The Commission should reconsider the Order in light of these facts.

### **BACKGROUND**

5. In the above referenced Complaint, the Staff alleged that Laclede's failure to produce certain proprietary documents of Laclede's affiliate, Laclede Energy Resources, Inc. ("LER"), is a violation of the Unanimous Stipulation and Agreement (the "Agreement") in Laclede's Holding Company Case (herein so called), Case No. GM-2001-342. The Agreement established Laclede's Cost Allocation Manual ("CAM"). The CAM, in turn, is to be used in tandem with the Commission's Affiliate Transaction Rules ("Rules") to govern the pricing of affiliate transactions, including the gas supply affiliate transactions between Laclede and LER that are at the heart of the issue in this and other cases.

6. In response to the Complaint, Laclede filed a Counterclaim alleging that Staff had violated the CAM and the Rules by refusing to apply to Laclede's affiliate

transactions the pricing standards contained in these controlling documents. Staff has openly divulged that it is applying a different standard. Rather than reviewing a sale of gas by LER to Laclede based on the fair market price of that sale, Staff asserts that the proper price should be LER's acquisition cost.

#### **STAFF'S DUTIES WITH RESPECT TO THE RULES AND THE CAM**

7. It is well settled that rules promulgated by administrative agencies are binding upon the agency itself, along with the general public. *Kabir v. Dept. of Social Services*, 782 S.W.2d 706, 708 (Mo.App.1989); *Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Mediation*, 695 S.W.2d 894, 897 (Mo. banc 1985). It therefore follows that if the general public is bound by Commission rules, and the Commission itself is bound by its rules, then the Commission's Staff is likewise obligated to obey those rules. The Commission recognized this reasoning in the Order, stating that "**Certainly, Staff as well as the Commission itself, is bound by the requirements of the affiliate transaction rules.**" (Order, p. 4, emphasis added) Because Staff is "bound by the requirements" of the Rules, it must therefore have a duty to obey them.

8. Staff also has a duty to obey Commission orders, including the Commission's August 14, 2001 Order approving the Agreement in the Holding Company Case (the "Holding Company Order"). The Holding Company Order approved the Agreement, which included a provision that Laclede would conduct its affiliate transactions "in compliance with the provisions of a Cost Allocation Manual ("CAM") which shall be submitted to Staff..." (Agreement, p. 10) The CAM was submitted to Staff on December 21, 2001, and has been in Staff's possession ever since. As a party to the Agreement, Staff is obligated to abide by the terms of the CAM.

9. At Staff's request, and in accordance with the Agreement, the CAM includes specific provisions for pricing gas supply affiliate transactions. In evaluating the pricing of such transactions, Staff is obligated to respect these provisions. In summary, Staff has a duty to comply with the Holding Company Order, which approved the Agreement and the use of the CAM to price gas supply affiliate transactions.

### **STAFF'S BREACH OF ITS DUTY**

10. Laclede has properly alleged that Staff has breached its duties under the Rules and the Holding Company Order. In evaluating gas supply affiliate transactions, Staff has declined to apply the pricing provisions of the Rules or the CAM. For instance, in reviewing purchases of gas by Laclede from LER, Staff declined to look at "comparables" for those purchases, and instead insists on seeing information regarding LER's acquisition cost for the gas it sold to Laclede. Although Staff at first justified its request by referring to its need to evaluate the "prudence" of these transactions, Staff has since revealed its true motivation, which is to eliminate affiliate transactions by eliminating any opportunity for an affiliate to be compensated above its cost of goods sold. This standard is plainly contrary to the pricing provisions in the Rules and the CAM.

11. In its Counterclaim, Laclede described the Staff's non-compliant pleadings and positions in a number of cases, including an Atmos ACA case (GR-2008-0364), and four Laclede ACA cases (GR-2005-0203, GR-2006-0288, GR-2008-0140, and GR-2008-0387). Since filing the Counterclaim, Staff has continued to contravene the terms of the Rules and the CAM. Laclede requests that the Commission take note of the following facts:

A. October 20, 2010 – In a hearing in an Atmos ACA Case, Case No. GR-2008-0364, Staff witness David Sommerer testified that in Staff’s view the utility’s fair market price equals the affiliate’s fair market price. This is just another way of saying that the affiliate is precluded from ever earning a profit on a transaction with the utility, which is emphatically not the standard in either the Rule or Laclede’s Commission-approved CAM.

B. October 25, 2010 - In its Answer to Laclede’s Counterclaim in this case, Staff admits that its position is that Laclede should buy gas from LER at LER’s acquisition price, and that any profit realized on sales of gas by Laclede to LER should inure to the benefit of ratepayers. Again, this emphatically is not the standard in either the Rule or Laclede’s Commission-approved CAM.

12. Staff and OPC may argue that Staff’s taking a position with respect to the Rules and CAM is just a matter of interpretation and cannot give rise to a complaint. Laclede agrees that all parties to a case are free to make nonfrivolous arguments in support of their positions. The problem is that Staff’s position is so clearly and distinctly divorced from the language of the Rules and CAM that Staff cannot in good faith make a serious argument in support of that position, and indeed, as indicated in paragraph 11B above, has even stopped trying.

13. In the Order, the Commission stated that “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.” (Order, p. 5) However, Laclede maintains that Commission rules do not permit a party free reign to advocate positions that are clearly contrary to the rules. Commission Rule 2.080(7) confirms that:

By presenting or maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, motion, brief, or other document filed with or submitted to the commission, an attorney or party is certifying to the best of the signer's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances that –

(A) The claim, defense, request, demand, objection, contention, or argument is not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(B) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(C) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(D) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.<sup>1</sup>

Staff has violated this rule because its claims, defenses and other legal contentions are not warranted by existing law and, absent a rulemaking proceeding which could only change the law prospectively, cannot be deemed to be either a nonfrivolous or procedurally valid argument for the extension, modification, or reversal of existing law or the establishment of new law. This is not a matter of reasonable interpretation by the Staff, but a clear-cut, retroactive and unauthorized modification of the affiliate transaction pricing standards from “fair market” to “affiliate cost.” Staff is well aware that the reversal of such a rule requires a rulemaking. Staff does not seem to care. As a result, Staff has violated Commission Rule 2.080(7). And by doing so, it has also violated Rules 40.015 and 40.016, and Section IX of the CAM pertaining to transfer pricing.

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<sup>1</sup> Commission Rule 2.080(7) is derived from Missouri Rule of Civil Procedure 55.03(c). Rule 55.03(d) provides for sanctions for violating 55.03(c). However, the Commission rules have no corresponding penalty.

14. Laclede is aggrieved by the Staff's violation of Commission Rules 2.080(7), 40.015 and 40.016, along with the Holding Company Order which established the CAM. Pursuant to Commission Rule 2.070(1), Laclede is entitled to complain about these violations and have its complaint heard by the Commission.

15. Moreover, consistent with the Commission's own conclusion in the Order that it and its Staff are bound by the obligations set forth in the Commission's Rules, the Commission has an obligation to ensure that its Staff is meeting that obligation by taking appropriate action when the Staff, as in this instance, is so clearly failing to do so. Entertaining and ruling upon a complaint or counterclaim that alleges such a failure is a permissible and necessary procedure for fulfilling that core obligation.

**LACLEDE IS ENTITLED TO RELIEF  
FOR DAMAGES CAUSED BY STAFF'S BREACH**

16. Contrary to what is implied by the Order's statement that Laclede is seeking an advisory opinion from the Commission with its Counterclaim, this is an existing and ongoing dispute that warrants resolution by the Commission. Simply put, Staff's breach of the Rules, the Holding Company Order, and the CAM has real world consequences. Laclede has been threatened with \$6 million in disallowances based on Staff's unlawful standard. Laclede has spent a substantial amount of time and money trying to explain to the Commission why the Staff's standard is incorrect, why its corresponding information requests are misguided, why Laclede cannot access the proprietary business records of LER, and how Laclede will have to expend significantly more resources responding to Staff's unlawful actions absent Commission action. And yet despite these damages, Laclede's request for relief was very modest: for the Commission to order Staff (i) to stop violating the Rules and the CAM, (ii) to apply the

proper fair market price standard to gas supply affiliate transactions, and (iii) to limit its data requests to information necessary to ensure Laclede's compliance with the Rules and the CAM. Since Laclede has stated facts entitling it to relief, the Commission should reverse the Order dismissing the Counterclaim and proceed to hearing on the claim.

### **SUMMARY**

17. If Staff was advocating a position on a Commission rule or order based on a reasonable good faith argument, that position may be unpersuasive, but it would not be a legal wrong. However, advocating a position on a frivolous basis, as Staff has been doing, *is* a legal wrong. Commission Rule 2.080(7) forbids it. In its pleadings and sworn testimony, Staff has not made serious arguments for an interpretation of the affiliate pricing rules or the CAM, but has unambiguously disregarded the provisions of those documents. Staff's advocating of these positions is not just unconvincing, it is legally wrong. The law says that for every wrong there is a remedy.<sup>2</sup> The remedy for this wrong is not just the likelihood that Staff's argument will ultimately fail after the expense and burden of a long discovery process, testimony and a hearing. That is the same remedy one would expect from just having the better of the argument. It unacceptably delays justice, providing no remedy at all.

18. The Staff is obligated to treat the Company in accordance with the duly promulgated rules of the Commission, and in accordance with documents approved by Commission order. Staff has a duty to do so. Laclede has clearly pled the existence of that duty and Staff's breach of that duty, entitling Laclede to relief, as provided in Rule 55.05 of the Missouri Rules of Civil Procedure. Justice demands that the Commission

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<sup>2</sup> "The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. 137, 163 (1803)



reconsider and reverse the Order or grant rehearing, because Laclede's Counterclaim states a claim upon which relief can be granted. Failure to do so is unjust, unreasonable and unlawful.

**WHEREFORE**, for the foregoing reasons, Laclede Gas Company respectfully requests that the Commission reconsider and reverse its November 3 Order dismissing Laclede's Counterclaim in this case, or grant rehearing on the matter.

Respectfully submitted,

/s/ Michael C. Pendergast

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ATTORNEYS FOR  
LACLEDE GAS COMPANY

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing pleading was served on the General Counsel of the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel, on this 12th day of November, 2010 by hand-delivery, fax, electronic mail or by regular mail, postage prepaid.

/s/Gerry Lynch