

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

Office of the Public Counsel,            )  
  )  
                  Complainant,                    )  
  )  
                                  v.                    )  
  )  
Laclede Gas Company, and                )  
Missouri Gas Energy,                    )  
  )  
                                  Respondents.                )

**Case No. GC-2016-0297**

**MOTION TO DISMISS**

COME NOW Respondents Laclede Gas Company (“Laclede” or “Company”), including its Laclede Gas (herein so called) operating unit, and Missouri Gas Energy, also an operating unit of Laclede (“MGE”), and submit this Motion to Dismiss the Complaint filed by the Office of the Public Counsel (“OPC”) in this case on April 26, 2016. The Commission should dismiss OPC’s Complaint as wholly devoid of any facts necessary to support its allegation that Respondents are overearning. In support thereof, Respondents state as follows:

**INTRODUCTION**

1. On April 26, 2016, OPC filed a complaint in which it alleged that Respondents’ rates are unjust and unreasonable in violation of §386.390.1 RSMo. OPC’s sole basis for its assertion is its claim that Laclede earned a 10.45% return on equity (ROE), allegedly derived from facts in a publicly available filing made by the Company with the Securities and Exchange Commission (“SEC”) in connection with its fiscal year ending September 2015 (“FY 2015”). (Complaint, ¶18) Having concluded erroneously that Laclede’s ROE is 10.45%, OPC cites a Regulatory Research Associates (“RRA”) publication in claiming that the alleged 10.45% ROE

is excessive compared to the average 9.6% awarded by state utility commissions in 2015. (Complaint, ¶¶18, 20, 22)

2. OPC's complaint should be dismissed by the Commission because OPC has failed to state a claim upon which relief can be granted. A complaint fails to state a claim upon which relief can be granted if, accepting the well-pleaded factual allegations as true, the complaint nevertheless fails to establish that the complainant is entitled to the relief sought. *See, e.g., Tari Christ v. Southwestern Bell Tele. Co. et al.*, 2003 Mo. PSC LEXIS 37 (Case No. TC-2003-0066, Order Regarding Motions to Dismiss, Jan. 9, 2003), citing *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993). In other words, the Complainant must allege facts that, if true, support the violation claimed. The Commission does not have to accept conclusions, and should disregard them. *Commercial Bank of St. Louis Co. v. James*, 658 S.W.2d 17, 21–22 (Mo. banc 1983) A motion to dismiss is properly granted where a complaint contains only conclusions and neither the ultimate facts nor any allegations from which to infer those facts. *Sofka v. Thal*, 662 S.W.2d 502, 509 (Mo. banc 1983)

3. Application of this standard demonstrates that OPC has failed, in several critical respects, to allege facts sufficient to support its contention that Respondents' rates are unjust or unreasonable in violation of Section 393.130.1 RSMo. These deficiencies can be summarized as follows:

- First, OPC's allegation that Respondents' rates are unjust and unreasonable is unsupported by any facts that would state such a claim. While there is an allegation that Laclede earned a 10.45% ROE in fiscal 2015, this derived figure is a mere conclusion, without any citation to the facts that support that conclusion. Neither Respondents' ROE is presented in the Annual Report filed with the SEC. Therefore, Complainant made a calculation that led it to conclude that Laclede had a 10.45% ROE in fiscal 2015.

Respondents cannot verify or respond to this conclusion without an identification of the underlying facts that Complainant used in its calculation. The 10.45% ROE therefore is not a well-pleaded fact that is to be accepted as true in deciding a motion to dismiss, but is rather a conclusion reached by Complainant's application of facts that were not provided in the Complaint. The Commission should consider such a conclusion to be unsupported by factual allegations, and should disregard the conclusion and grant this motion to dismiss for failure to state a claim. *Roth v. La Societe Anonyme Turbomeca France*, 120 S.W.3d 764 (W.D. Mo. 2003); See also *James* and *Sofka* above.<sup>1</sup>

- Second, in addition to omitting facts that supposedly support Complainant's ROE conclusion, the Complaint is devoid of any details or cost of service analysis – even a high level one – that would be necessary to provide either of the Respondents with adequate notice of the claims being made against it – a due process deficiency that calls for dismissal. While there is an allegation that “Laclede” earned a 10.45% ROE in fiscal 2015 based on an SEC filing, there is no factual allegation of overearning by either of the Respondent operating units, Laclede Gas and MGE, both of which have tariffed rates and both of which are alleged to be gas corporations under Missouri law. (Complaint, ¶¶2-3) Even if the 10.45% ROE is taken as true, it could be that both utilities are underearning, and the difference is made up by non-recurring or abnormal costs or revenues that would be excluded or adjusted for when rates are established.

---

<sup>1</sup> As explained in Laclede's Answer filed contemporaneously herewith, through discovery, Laclede has confirmed that OPC's conclusion that Laclede earned a 10.45% ROE is based on an egregious misapplication of income levels from one period to equity levels from a previous period (as well as an equally egregious failure to exclude a one-time gain from the sale of property – an exclusion which OPC has explicitly endorsed as appropriate in another proceeding). Simply correcting for these obvious errors would result in an ROE of 9.69% -- a figure that is lower than the ROE specified for ISRS purposes in Laclede's last rate case and within 9 basis points of the average ROE that OPC relies on in its Complaint. These arguments are appropriately made in a separate pleading, and are not relied on for purposes of this motion to dismiss.

- Third, assuming as true OPC's conclusion that Laclede's ROE for the fiscal year ended September 30, 2015 is 10.45%, and assuming as true that the average commission-authorized ROE for 2015 was 9.6%, then OPC has alleged in its Complaint that Laclede is overearning by 85 basis points, or less than 1%. In such case, OPC has failed to state a claim that Laclede's rates are unreasonable because its rates fall within the 1% zone of reasonableness that the United States Supreme Court and Missouri Courts have recognized as a barometer for assessing the fairness of ROE decisions. Rates that fall within the zone of reasonableness are, by definition, reasonable. OPC fails to state a claim by alleging that rates that fall within a zone of reasonableness are unreasonable.
- Fourth, OPC failed to state a claim that Respondents are overearning today or will be overearning in the future. Although OPC has received monthly financial reports from Laclede Gas and MGE, and also has surveillance reports, OPC alleged no facts regarding Respondents' ROEs, and only one conclusion (the Laclede ROE of 10.45%), which it admittedly drew from September 2015. OPC's eight-month old figure, even taken as true, makes no claim that Laclede is currently overearning. Instead, OPC is left to state that "[i]t is in the rate-paying public's best interest for the Commission to evaluate the Company's cost of service and revenue requirement to determine just and reasonable rates going forward." (Complaint, ¶20) In other words, having accused Laclede of overearning based on stale data, OPC now asks the Commission to use the Staff to find out if OPC's own factual allegations are indeed true.<sup>2</sup> The complaint against Laclede Gas and MGE should be dismissed for failure to state facts sufficient to constitute a claim that they are currently overearning.

---

<sup>2</sup> Staff's position is that, rather than having the Commission order Staff to "make OPC's case for it, OPC should have provided adequate support for its complaint in its initial filing." (Staff's Response to Complaint, filed May 20, 2016, par. 5)

- Finally, the Complaint should be dismissed for good cause, pursuant to 4 CSR 240-2.116(4). The good cause for dismissal stems from the fact that earnings complaint cases, like rate cases, demand a great deal of time, labor, money and resources. It diverts Company personnel away from their normal jobs; it burdens Staff personnel; it uses Commission and RLJ resources; it drives rate case (or complaint case) expense. The combined effort and cost of these resources are ultimately paid for by customers through their utility rates and taxes. A Company filing a rate case puts in months of work to prepare accounting schedules and testimony before making a filing. Likewise, before the expensive machinery of labor and resources is launched in an earnings complaint case, it is incumbent upon the entity filing a complaint to be well prepared to support at least a basic case for a rate reduction. Here, OPC has done no more than look at a public SEC filing and perform a calculation in order to allege a conclusion regarding ROE. This falls far short of the preparation that should be required, and the facts that should be alleged, to justify the expense of an earnings complaint case. Based on virtually no investigation, OPC has cried wolf and expects the Commission to summon the troops and come running. The Commission should decline to answer the cry and dismiss the Complaint for good cause.

Further good cause exists based on the manner in which the Complaint evolved. As discussed herein, the filing of the Complaint was politically motivated, rather than being a good faith effort to prevent a utility from over earning.

Each of these deficiencies will be discussed in greater detail below. Taken together or separately, they warrant dismissal of OPC's Complaint.

## ARGUMENT

1. **The Commission should disregard the alleged ROE of 10.45% because it is a calculated figure that is unsupported by underlying facts; as such, it is a conclusion that is not entitled to be treated as true for purposes of a motion to dismiss.**

In assessing the sufficiency of a complaint, all facts properly pleaded are assumed true. However, mere conclusions of the pleader not supported by factual allegations are disregarded. (See, e.g., *James, supra*; *Tari Christ v. Southwestern Bell Tele. Co. et al.*, 2003 Mo. PSC LEXIS 37 (Case No. TC-2003-0066, Order Regarding Motions to Dismiss, Jan. 9, 2003), citing *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993). In other words, the Complainant must allege facts that, if true, support the violation claimed. In this case, Complainant claims to have derived an ROE of 10.45% from Laclede's fiscal year 2015 Annual Report filed with the SEC. The Annual Report does not present ROEs, so Complainant had to identify underlying facts and apply a calculation to form a conclusion as to the ROE. Thus, in alleging the 10.45% ROE, the Complainant is alleging a conclusion not a fact. The alleged ROE is therefore not a well-pleaded fact, but a conclusion drawn from unpleaded facts. The Commission should disregard this conclusion. This leaves the Complainant with no factual allegation of earnings, and thus unable to state a claim that Respondents are overearning, or that their rates are not just and reasonable. As a result, this motion to dismiss should be granted.

2. **OPC's Complaint should be dismissed because it offers no evidence supporting its allegation of overearning, thereby failing to provide Laclede with adequate notice of the claims being asserted against it in violation of the Company's due process rights.**

Even though OPC predicates its claim that the Company's current rates are unlawfully excessive on a single ROE calculation, nowhere in its Complaint does OPC explain how it calculated this ROE or whether or how it determined its applicability or relevance to the Company's current financial situation. Nor does OPC offer any explanation of whether or how it took into account the myriad of normalization and other cost of service adjustments that would

need to be made to transform a per book ROE calculation to the kind of ROE that would result from the Commission ratemaking process. The Commission should not entertain an overearnings complaint that does not, on its face, even begin to set forth the basis for OPC's conclusion that Laclede is earning a 10.45% ROE.

OPC's Complaint fails to meet the fundamental standards of due process. The procedural due process requirement of fair trials by fair tribunals applies to an administrative agency acting in an adjudicative capacity, as the Commission is doing in this Complaint case. *State ex rel. AG Processing, Inc. v. Thompson*, 100 S.W.3d 915 (Mo.App.W.D. 2003); *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 59 (Mo. App. E.D.1990) (citing *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975); *Re: Great Plains Energy Incorporated, et. al.*, Case No. EM-2007-0374, Order Denying Motion to Dismiss (January 2, 2008). *See also Fischer v. Public Service Commission*, 645 S.W.2d 39 (Mo. App. W.D. 1982) (Due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play.)

One of the core elements of due process is the requirement that a party be given notice of the specific claims being asserted against it. As the Court observed in *Weinbaum v. Chick*, 223 S.W.3d 911, 913 (Mo. App. S.D. 2007), “[i]n an administrative proceeding, due process is provided by affording parties the opportunity to be heard in a meaningful manner. The parties must have knowledge of the claims of his or her opponent, [and] have a full opportunity to be heard, and to defend, enforce and protect his or her rights.” The adequacy of the notice and the hearing must be evaluated in the context of the specific procedure at issue, in this case, an administrative proceeding. *Colyer v. State Bd. of Registration for the Healing Arts*, 257 S.W.3d 139, 144 (Mo. App. W.D.2008).

In direct violation of this due process requirement, OPC has failed to provide Laclede with any meaningful notice or explanation of the basis for its claim that the Company is presently overearning. The paucity of information provided by OPC stands in stark contrast to the volume of information typically provided by the Company and other utilities when they file a general rate case and attempt to justify a rate increase. In addition to detailed accounting schedules that show the various costs, revenues and expenses that comprise the utility's cost of service, such information also includes direct testimony and schedules further explaining and justifying the treatment being afforded these items.

In comparison to information contained in complaints filed by other parties that this Commission has considered, the OPC Complaint is sorely wanting. For example, OPC's lack of information is dwarfed by the direct testimony and schedules submitted by Noranda Aluminum in its complaint against Union Electric d/b/a Ameren Missouri in 2014. *See Noranda v. Union Electric*, Case No EC-2014-0223. While the Commission ultimately determined that Noranda had failed to meet its burden of proof to show that Ameren Missouri was overearning, the information provided by Noranda as part of its complaint gave at least some insight into the basis for its allegation that Ameren was overearning.<sup>3</sup>

In contrast, the Complaint provides literally nothing in the way of facts to support an allegation that Laclede is overearning. OPC's failure to include with its Complaint even the most basic kind of testimony and schedules deprives the Respondents of the opportunity to respond or rebut the basis for OPC's allegation that they are overearning. This is a significant and impermissible violation of Respondents' due process right to be notified of the claims being asserted against them, and constitutes grounds for dismissing OPC's Complaint.

---

<sup>3</sup>The testimony filed by Noranda included both return on equity testimony and recommendations as well as accounting testimony and schedules reflecting the impact of such recommendations as well as numerous adjustments to Ameren Missouri's booked financial numbers.



3. **OPC’s Complaint should be dismissed because the ROE it claims Laclede is earning falls within the 1% “zone of reasonableness” based on OPC’s own alleged data.**

In its Complaint, OPC quotes two seminal decisions by the United States Supreme Court regarding the standards that should govern the establishment of a fair and reasonable ROE. *See Bluefield Waterworks and Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923); *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591 (1944). (Complaint, ¶14) However, the Complaint did not cite the seminal case of *Federal Power Comm’n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942), in which the United States Supreme Court first articulated the “zone of reasonableness.” Nor did it address the case of *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968), in which the Supreme Court of the United States stated that “courts are without authority to set aside any rate selected by the Commission which is within a ‘zone of reasonableness.’”

Simply stated, judicial precedent establishes that the zone of reasonableness extends 100 basis points, or 1%, above and below the national average ROE. If a Commission chooses an ROE within the zone of reasonableness, the courts will not question it. In *State ex rel. Public Counsel v. PSC*, 274 S.W.3d 569, 574 (Mo. App. W.D. 2009), the Court of Appeals rejected complaints by AmerenUE, Public Counsel, and others that Ameren’s return was either too high or too low. The Court upheld the Commission’s decision, finding that the Commission’s ROE of 10.2% was within the 1% zone of reasonableness around a national average of 10.36%. In so doing, the Western District declared that the Supreme Court “has instructed the judiciary not to interfere when the commission’s rate is within the zone of reasonableness.” *Id.*

The Commission has endorsed the concept of a 100-basis point zone of reasonableness in numerous rate cases. For example, in *Re Missouri Gas Energy*, Case No. GR-2009-0355 (2010), the Commission confirmed that the zone of reasonableness “extends from 100 basis

points above to 100 basis points below the recent national average of awarded ROEs.” Since the recent national average ROE for gas utilities was 10.11% at that time, the Commission found the zone of reasonableness in MGE’s case to be 9.11% to 11.11%. *See* Report and Order at 36.

The Commission noted that it “has wide latitude in setting an ROE within the zone of reasonableness.” *Id.* In fact, in one case the Commission approved an ROE that was 88 basis points above the national average. In *Re Kansas City Power & Light Co.*, Case No. ER-2006-0314 (2006), the Commission determined a zone of reasonableness from 9.37% to 11.37%, based on a national average of 10.37%. The Commission then approved a return on equity of 11.25%, which was 88 basis points above the national average and 12 basis points within the zone of reasonableness. *Id.*, Report and Order at 29-30.

Applying the law discussed in this section to the facts alleged by OPC demonstrates that Laclede’s rates are not unreasonable. Based on OPC’s allegation that Laclede is earning 10.45% and that the national average is 9.6%, OPC has alleged that Laclede’s earnings are 85 basis points above the national average. Assuming OPC’s allegations as true, that places Laclede’s earnings not only well within the zone of reasonableness, but *lower* within the zone than the rate afforded to KCP&L in Case No. ER-2006-0314.

Taking the fact alleged in the Complaint regarding the national average ROE as true, a Commission finding that Laclede’s ROE should be between 8.6% and 10.6% would be unassailable in court as being within the zone of reasonableness. Therefore, the alleged ROE of 10.45% is within the zone of reasonableness and is therefore presumptively reasonable. As a result, OPC has failed to state a claim upon which relief can be granted. While OPC accuses Laclede of charging unreasonable rates, the Complaint demonstrates just the opposite, that Laclede’s rates are not unreasonable.

Using the zone of reasonableness as a benchmark makes sense as both a legal and practical matter. For example, should OPC be permitted to bring an earnings complaint by alleging that Laclede is earning 9.61% compared to a national average of 9.6%? How about 9.62% or 9.63%? Laclede submits that the answers to these questions are no, because OPC could not carry the burden that rates are unreasonable. But where should the line be drawn? This difficult question has been elegantly answered by the courts and the Commission who, for nearly 75 years, have drawn the line at +/- 1%. (*See also State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561, 570-71 (Mo. Ct. App. K.C. 1976), finding that a utility earning an ROE within the zone of reasonableness could not successfully make a case for confiscation). In conclusion, ROEs alleged to be within the zone of reasonableness should be presumptively reasonable and any complaint that alleges an ROE within the zone of reasonableness should be summarily dismissed.

4. **OPC's Complaint should be dismissed because the ROE it claims Laclede is earning is based on a past period that ended eight months ago and there is nothing in OPC's Complaint to indicate that what Laclede is earning today or is likely to earn in the future is excessive.**

As previously discussed, OPC's complaint is premised on an ROE that OPC asserts Laclede achieved for the fiscal year beginning October 1, 2014 and ending September 30, 2015. To state a claim upon which relief can be granted, however, OPC would have to allege facts that indicate Laclede's rates are *currently* unjust or unreasonable and that Laclede is and will continue to be earning more than a fair and reasonable return in the future. As Missouri courts and the Commission have consistently recognized, in the absence of a statutory provision specifying a different treatment, utility rates must be established prospectively, based on a consideration of relevant factors showing what rates are necessary to recover the utility's expected cost of providing utility service, plus provide it with a reasonable opportunity to earn a

fair return on its investments made to provide such service. *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979). Under this prospective approach, retroactive ratemaking is prohibited: i.e., rates may not be set so as to permit a utility to recover past losses or require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate actually established. *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. at 31, 46 S.Ct. 363; *Lightfoot v. Springfield*, 236 S.W.2d at 348, 353 (Mo. 1953).

Under these legal standards, simply concluding that Laclede achieved an ROE during a past period that was higher than the ROEs authorized for a number of other utilities during that same period is not sufficient to state a claim upon which relief can be granted. Such an assertion says nothing relevant about what ROE Laclede is earning now or what ROE should be set prospectively. In fact, OPC's attempt to use a per book ROE achieved during a past period, particularly when combined with its extra-legal request that the Company be required to defer any earnings in excess of a specific ROE, smacks of the very kind of retroactive ratemaking that is prohibited by law. The Missouri Supreme Court has recognized that the return a utility earns "will necessarily vary from time to time" and that "[n]o maximum or minimum return was determined when the rate was established." *See, e.g., Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666, 671 (1950). Given these considerations, OPC's reliance on 2014-15 per-book earnings does not support or state a claim that *current* rates are unjust and unreasonable.

5. **OPC's Complaint should be dismissed for good cause shown under 4 CSR 240-2.116(4) because OPC's lack of effort in preparing this case does not justify the expense of time and resources required to process an earnings case, and because its allegations of excessive earnings appear to have been motivated by political considerations rather than a good faith assessment of Laclede's current financial condition.**

The paucity of effort by OPC in preparing the Complaint, the lack of factual information presented in the Complaint and the allegation of overearning within the zone of reasonableness combine to constitute good cause for dismissal of this case. Launching an earnings complaint case under these circumstances would set a bad precedent and send a signal to prospective parties that very little in the way of preparation or factual allegation is needed to launch the machinery of the Commission for their benefit.

Further good cause for dismissal arises from the fact that OPC's filing of the complaint was motivated by political considerations rather than a good faith belief that Laclede was overearning. In essence, OPC sought to give the legislature the impression that Laclede was overearning in order to discourage legislation that OPC opposed.

While OPC asserts in its Complaint that it contacted the Company prior to filing the Complaint (§5 of the Complaint), it was actually the Company that first contacted OPC after hearing an allegation from a member of the Missouri General Assembly that Laclede was overearning. This development occurred in the context of the Missouri General Assembly's consideration of legislation that would have extended from three to five years the frequency with which a gas corporation must file a rate case in order to continue using the ISRS mechanism. Notably, when OPC ultimately filed its Complaint, the fact that it had done so was prominently mentioned by opponents of the legislation during Senate debate.

OPC is free, of course, to petition the General Assembly and offer its opinion on matters of public policy that come before that body. It should not, however, be allowed to use the

Commission's regulatory processes and resources as a lever for pursuing its political objectives. The fact that OPC first mentioned its intention to pursue a complaint to members of the General Assembly rather than Laclede, and then rushed to file the Complaint during the last stages of the legislative session without the accompaniment of any testimony, accounting schedules, explanatory material, or even facts, suggests that this is exactly what OPC did. As will be shown in the Answer to the Complaint, OPC's use of a demonstrably inaccurate and artificially inflated ROE in its Complaint – a data point that was subsequently relied upon by opponents of the legislation – only underscores the political nature of OPC's actions.

These sordid facts can be confirmed through discovery, if necessary. Meanwhile, Laclede respectfully suggests that such transparently political maneuvers should not be rewarded with the presumption of veracity that is typically afforded to allegations set forth in a Complaint. Simply put, there is no reason to believe in light of this record, that OPC's Complaint has been motivated by a good faith assessment of Laclede's earnings rather than as a misguided attempt to use the Commission's regulatory processes to influence legislation. Accordingly, OPC's Complaint should be dismissed.

Respectfully Submitted,

**/s/ Rick Zucker**

Rick Zucker, Mo. Bar #49211  
Associate General Counsel - Regulatory  
Laclede Gas Company  
Missouri Gas Energy  
700 Market Street, 6<sup>th</sup> Floor  
St. Louis, MO 63101  
Telephone: (314) 342-0532  
Fax: (314) 421-1979  
Email: rick.zucker@spireenergy.com

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing pleading was served on the parties of record in this case on this 31st day of May, 2016 by United States mail, hand-delivery, email, or facsimile.

**/s/ Marcia Spangler** \_\_\_\_\_