

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

The Staff of the Missouri Public Service Commission,)	
)	
Complainant,)	
)	
v.)	Case No. GC-2011-0098
)	
Laclede Gas Company, Laclede Energy Resources and The Laclede Group,)	
)	
Respondents.)	

**JOINT MOTION TO DISMISS ON BEHALF OF
LACLEDE ENERGY RESOURCES, INC. AND THE LACLEDE GROUP, INC.**

COME NOW Laclede Energy Resources, Inc. (“LER”) and The Laclede Group, Inc., (“LG”) by counsel and, pursuant to 4 CSR 240 -2.070 (6), submit this Joint Motion to Dismiss and in support thereof, states:

INTRODUCTION

The Staff of the Missouri Public Service Commission (“Staff”) filed this ill-informed, unsubstantiated and misguided Complaint against Laclede Gas Company (“Gas Company” or “Laclede”), LER and LG claiming that there have been violations of the Missouri Public Service Commission (“MPSC” or “Commission”) Affiliate Transaction Rules (4 CSR 240-40.015, 4 CSR 240-40.016). LER and LG move to dismiss this Complaint for the reason that it utterly fails to state a claim upon which relief can be granted against either of these companies.¹

The Commission well-knows by now that its Staff has embarked on a crusade to overturn the transfer pricing and corporate support standards contained in the Affiliate Transaction Rules

¹ Laclede Gas Company will be filing its separate response to the Complaint.

with the intention to effectively prohibit most affiliate transactions.² The fact that the Affiliate Transaction Rules establish transfer pricing standards and permit sharing of corporate support, both lawfully enacted and fully complied with by all Respondents, has not deterred the Staff for a moment. The Staff should know, of course, that it cannot overturn a Rule by selective prosecutions; Staff should and does know that its remedy should it believe that the Affiliate Transaction Rules need changing would be to seek to implement a new rulemaking.

The present Complaint fails to set forth any allegation against LER or LG, even if assumed to be true, that could state a claim upon which relief could be granted. Most allegations raised by Staff address only Laclede Gas Company. Furthermore, on October 7, 2010, Staff filed a Motion for Leave to File Amended Complaint, ostensibly to set forth more specifically the relief it seeks in this matter. Though leave has not yet been granted by the Commission to file the Amended Complaint, the more “specific” relief requested by Staff completely fails to seek any remedy against LER or LG. Thus, the proposed Amended Complaint makes it even more clear that the Staff has failed to state a claim against either LER or LG.

As further shown below, LER and LG should be dismissed from this action.

ARGUMENT

The Staff Complaint makes only two allegations of purported rules violations against LER in its Complaint and directs just one such allegation against LG. First, the Staff claims that “The Laclede Group, Laclede and LER share common management resulting in, among other things, improper sharing of information in violation of the Rules prohibition against preferential treatment of affiliates.” (Complaint, Introduction, p. 1). Second, in paragraphs 40 – 46, Staff

² Most recently, the Staff has admitted on the record that its legal position is that transfer pricing for sales of gas by an affiliate to a utility should be the cost to the affiliate and that no affiliate of a utility should be permitted to earn any profit on a transaction with the utility. Staff’s Answer to Laclede’s Counterclaim, Case No. GC-2011-0006 (Oct. 25, 2010). This legal position directly violates the Commission’s Affiliate Transaction Rules regarding transfer pricing and therefore is invalid.

claims that LER as an affiliate may have access to information about Laclede that is not available to non-affiliates. (Complaint, pars. 40 – 46, pp. 10 – 11). Staff makes no attempt to support the first allegation with any claims of specific wrong-doing and, as shown below, cites to perfectly legal corporate support services as its only evidence of support for the second allegation. Where the Complainant either fails to provide even bare-bones allegations of some violation of law or alleges only performance of legal conduct, the Complaint fails to state a claim upon which relief can be granted. See, ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc. 1993).

Allegation contained in the “Introduction”

The allegation in the Introduction is obviously insufficient to state a claim upon which relief can be granted. The crux of this statement, that The Laclede Group, Laclede and LER share common management and therefore engage in improper sharing of information, is a patently unsupported syllogism, not a substitute for adequate pleading. As will be discussed more fully in connection with the allegations in paragraphs 40 – 46 of the Complaint, the Affiliate Transaction Rules expressly permit sharing of corporate support among all utility affiliates. The specific Affiliate Transaction Rules involved are the same for utility affiliates and utility marketing affiliates. Sections 4 CSR 240-40.015 and 4 CSR 240-40.016 each define “Corporate support” to include joint corporate oversight, governance, support systems and personnel, involving payroll, shareholder services, financial reporting, human resources, employee records, pension management, legal services, and research and development activities. (Id.). Likewise, Sections 4 CSR 240-40.015 (2)(B) and 4 CSR 240-40.016 (3)(B) each provide that except as necessary to provide “corporate support” functions, the regulated gas corporation shall conduct its business so as not to provide a preferential service, information or treatment to

an affiliate. (Id.). Thus, the allegation that Laclede, LER and LG “share common management” does nothing but state that these entities do exactly what is permitted by law. Staff has made the bald-faced allegation that information was improperly shared, but fails to cite even one such instance in its Complaint. Without substantially more than unsupported conclusions, these allegations fail to state a claim upon which relief can be granted.

Allegations in paragraphs 40 – 46

The allegations of paragraphs 40 – 46, while using more words than in the “Introduction” contain no greater information regarding what LER or LG are supposed to have done that violates any of the Commission’s Rules. Staff alleges that LER “**may**” be using interruptible supply which it sells to Laclede to meet Laclede’s firm gas sale requirements. (Complaint, par. 41)(emphasis in original).³ The use of the verb “may” in paragraph 41 conveys only an unknown, hypothetical possibility that the conduct complained of occurred. Further, there is no legal or logical connection between allegedly maybe using interruptible supply and supposed improper information sharing. It is impossible to determine from the Complaint in what way Staff contends that one thing has to do with the other.

Fatal imprecision in pleading and fundamental misunderstanding of the law continue in paragraph 42 of the Complaint. There, Staff asserts, without citing any facts, that LER has access to information about Laclede’s gas operations including gas buying strategies, hedging operations, gas purchasing needs, customer usage, suppliers, storage and peaking facilities and operations that no non-affiliated entity has access. (Complaint, par. 42). Stating a mere

³ Staff has failed to provide any evidence, such as a transaction confirmation or contract between LER and Laclede, that would support the claim that LER’s sales to Laclede were less than firm. Even if Staff’s allegation were true, the use of interruptible gas to supply firm gas to Laclede does not violate the Affiliate Transaction Rules and LER alone would bear the financial risk of any non-performance.

conclusion is not the same as providing a factual basis to support a claim. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc. 1993), supra.

In paragraph 43, Staff alleges that Laclede and LER share corporate directors and officers (however, no allegations are presented regarding LG). This, of course, is expressly permitted by Commission Rule. (See, 4 CSR 240-40.015, 4 CSR 240-40.016, 4 CSR 240-40.015 (2)(B) and 4 CSR 240-40.016 (3)(B)). In paragraph 44, Staff alleges that Mr. Kenneth J. Neises⁴ and other top and mid-level executives “have unreasonable conflicts of interest” because they supposedly have incentives to benefit both Laclede and LER. (Id.). These allegations describe a form of corporate governance that has been explicitly approved in the Affiliate Transaction Rules. Staff does not allege that anything improper has been done; only that an “unreasonable” conflict of interest exists by virtue of using a lawfully approved corporate structure. Following Staff’s logic in this Complaint, no utility could exist in a holding company system because, by definition, in any holding company system there must be a preeminent Board of Directors and executive managers responsible for overseeing all the businesses in the group which would result in an irresolvable conflict of interest. Of course, this is not the law.

The same kinds of insufficient allegations are contained in paragraph 45. There, Staff complains that Laclede attorneys represent Laclede and LER and therefore some advantage over non-affiliates exists. Whether or not such representation exists or there is an advantage to LER in being represented by Gas Company attorneys is irrelevant. Such an arrangement is expressly authorized by Missouri law and the Commission Affiliate Transaction Rules. Moreover, there are no facts in the Complaint even suggesting that there is an unfair (much less prohibited) advantage to competitors by such representation.

⁴ Mr. Neises retired on October 1, 2010.

The ultimate but legally and factually insufficient point of the Staff Complaint, as directed against LG and LER, is captured in paragraph 46. There, the Staff does not assert any wrong-doing; it does not assert that there are any rules or statutes violated; it does not identify any facts which could provide a basis to support a complaint; rather, Staff simply asserts that because of “*perceived*” conflicts and an “*ability*” by top executives potentially to share confidential information that respondents are in violation of the Commission’s Affiliate Transaction Rules. (Complaint, par. 46)(emphasis supplied). In adopting its rules, the Commission obviously rejected the notion that a potential for conflict or information sharing were sufficient reasons to prohibit common management, corporate support and legal representation because these very things are expressly permitted. In fact, that is precisely why the pricing standards in Rules which Staff has ignored exist to govern such transactions. Therefore the allegations set forth in paragraphs 40 – 46 of the Complaint are insufficient to state a claim upon which relief can be granted.

CONCLUSION

It is apparent that the Staff has not made a serious attempt to state a claim upon which relief could be granted as against either LER or LG. In fact, there are no statements of fact or law directed against LG and it should be dismissed with prejudice from this Complaint. With respect to LER, the Staff has only alleged that there are common officers between it and Laclede and that a potential for conflict of interest and information sharing exists. These are not facts. These are not even decent suppositions. With all due respect, the Staff has based this Complaint against LER and LG on the fact that it doesn’t like that the Affiliate Transaction Rules expressly permit shared corporate support, including joint management and legal services.

Of course, the Staff doesn't have to like the rules that govern affiliate transactions; but it is bound to follow them. The Commission should not permit its Staff to abuse the complaint process by use of specious allegations that, even if accepted as true, would not state a violation of any law or regulation. LG and LER respectfully request to be dismissed from this Complaint and for such other and further relief as may be warranted under the circumstances.

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CERTIFICATE OF SERVICE

The above pleading has been served upon parties of record by First Class Mail, facsimile, and or electronic mail this 8th Day of November, 2010.

/s/ William J. Niehoff