

**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 RESPONSE  
TO STAFF’S MOTION TO STRIKE AFFIRMATIVE DEFENSE**

COMES NOW Respondent, Laclede Gas Company (“Laclede”), and submits this response to the Staff’s motion to strike one of Laclede’s affirmative defenses, and in support thereof, states as follows:

1. On August 9, 2010, Laclede filed its Answer to Staff’s Complaint in this case. In its Answer, Laclede raised as its fifth affirmative defense that Staff’s complaint should be barred by the doctrine of unclean hands.

2. On January 12, 2011, Staff filed a motion to strike this affirmative defense on the grounds of insufficiency, as Staff claims that the defense was unsupported by facts. In its pleading, Staff quoted the Missouri Supreme Court’s recent description of the “Unclean Hands Doctrine:

“...the law strives to prevent opportunistic behavior...A party who participates in inequitable activity regarding the very issue for which it seeks relief will be barred by its own misconduct from receiving relief.”

3. In response, Laclede states that it amply supported the defense with factual allegations. In fact, in paragraph 21 of its Answer in this case, Laclede could hardly have made a clearer and more certain allegation of a clean hands defense. In that paragraph, Laclede made the same allegation that it has repeatedly made in this case – that Staff comes to enforce the 2001 Stipulation and Agreement with unclean hands, because Staff has refused to honor that

agreement's requirement to evaluate affiliate transactions in accordance with the pricing provisions of the CAM. And because Staff has unclean hands with respect to the 2001 Stipulation and Agreement, it should be barred by its own misconduct from trying to enforce that very same agreement against Laclede on the very same topic.

4. The following excerpt from paragraph 21 of Laclede's Answer leaves no doubt that Laclede has sufficiently pled the doctrine of unclean hands:

"Section IV.2 of the Stipulation and Agreement states that Laclede will make available the books and records of its affiliates **"as may be reasonably required to verify compliance with the CAM."** (emphasis added) Since the subject of the discovery dispute involves Laclede's purchase of gas from its affiliate, this section of the Stipulation and Agreement entitles Staff to obtain discovery of affiliate information reasonably required to verify compliance with the Company's Cost Allocation Manual ("CAM") which, among other things, establishes specific pricing standards applicable to such purchases. However, the Staff has expressly denied that the pricing standards of the CAM<sup>1</sup> apply to the discovery matter at issue in Laclede's ACA cases (Case Nos. GR-2006-0288 and GR-2005-0203). For example, during the March 26, 2009 oral argument in those cases, the Staff stated that it was pursuing pricing standards that differed from the standards set forth in the Rules and the CAM, as indicated in the colloquy below between Commissioner Murray and Staff Counsel Steven Reed:

COMMISSIONER MURRAY: So if there is -- and

22 at this point, I'd like to know, there is a specific way

23 that the Cost Allocation Manual provides for dealings with

24 an affiliate, correct?

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<sup>1</sup> The pricing standards of the CAM are consistent with those of the Rules.

25 MR. REED: Yes. That's right.

1 COMMISSIONER MURRAY: And it says the  
2 higher -- depending on whether it's a sale or a purchase,  
3 the higher of the fair market value or fully distributed  
4 costs.

5 MR. REED: Right. Yes.

6 COMMISSIONER MURRAY: Or the lower of those  
7 two things, right? So how does the information that Staff  
8 has sought reasonably relate to whether that CAM has been  
9 complied with?

10 MR. REED: The investigation isn't into  
11 compliance with the CAM. The investigation is whether  
12 Laclede paid too much to LER for the gas they bought.<sup>2</sup>

The discussion in the November 4, 2009 Order quoted below indicates that the Commission, erroneously or not, accepted Staff's position regarding the inapplicability of the CAM and the 2001 Stipulation and Agreement to the discovery dispute which is the focus of Staff's complaint.

As the Commission stated:

"The Commission emphasizes that Staff's discovery request is not an investigation under the Commission's Affiliate Transaction rule nor is it a complaint through which Staff or Public Counsel seeks enforcement of the [Stipulation and Agreement]. These issues have but served as red herrings in what is a discovery request governed by the rules of civil procedure."<sup>3</sup>

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<sup>2</sup> Case Nos. GR-2005-0203; GR-2006-0288; March 26, 2009 Oral Argument Tr. at 16-17.

<sup>3</sup> Case Nos. GR-2005-0203; GR-2006-0288; November 4, 2009 Order, p. 2

Thus, the Commission has considered the applicability of the Stipulation and Agreement to this discovery request, and found that the matter is governed by the rules of civil procedure and not the Stipulation and Agreement. *In sum, having expressly disavowed the applicability of the Stipulation and Agreement and the CAM to the issue at hand, it is inconceivable that Staff could maintain a complaint alleging that Laclede violated a discovery provision in that same Stipulation and agreement (sic).*” (Emphasis added)

5. It is difficult to imagine allegations that would more clearly state an unclean hands defense than the allegations set forth above from paragraph 21 of Laclede’s Answer. In short, Staff’s hands are doubly unclean. First, Staff sought to avoid application of the 2001 Stipulation and Agreement and the CAM to Laclede’s affiliate transactions by arguing to the Commission that its ACA discovery request was made not pursuant to those instruments, but instead pursuant to the general discovery rules of civil procedure. Having succeeded in rendering the 2001 Stipulation and Agreement and the CAM irrelevant, Staff now seeks to ignore the November 4, 2009 Commission Order adopting Staff’s position and revive one inapplicable clause of the 2001 Stipulation and Agreement while simultaneously ignoring the applicable substantive (CAM pricing standards) and procedural (discovery) requirements of that agreement. Staff’s actions clearly constitute the kind of “opportunistic behavior” and “inequitable activity” which, under the doctrine of unclean hands, should bar its request for relief in this proceeding.

6. Finally, Staff argues that the Commission is without the authority to grant equitable relief. However, Laclede is not requesting relief; rather Laclede is stating that Staff is not entitled to the relief Staff has requested because Staff comes into the case with unclean hands.

WHEREFORE, Respondent Laclede Gas Company respectfully requests that the Commission deny Staff's motion to strike Laclede's affirmative defense.

Respectfully submitted,

**/s/Michael C. Pendergast**

Michael C. Pendergast, Mo. Bar #31763  
Vice President and Associate General Counsel  
Rick Zucker, Mo. Bar #49211  
Assistant General Counsel - Regulatory

Laclede Gas Company  
720 Olive Street, Room 1516  
St. Louis, MO 63101  
Telephone: (314) 342-0533  
Fax: (314) 421-1979  
Email: mpendergast@lacledegas.com  
rzucker@lacledegas.com

**Certificate of Service**

The undersigned certifies that a true and correct copy of the foregoing Answer was served on the Staff and on the Office of Public Counsel on this 24th day of January, 2011 by United States mail, hand-delivery, email, or facsimile.

**/s/ Gerry Lynch**