

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

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| 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 THE  
MOTIONS TO DISMISS COUNTERCLAIM  
FILED BY THE OFFICE OF THE PUBLIC COUNSEL AND THE STAFF**

COMES NOW Laclede Gas Company (“Laclede” or “Company”), and files this response to the motions to dismiss Laclede’s counterclaim filed by the Office of the Public Counsel (“OPC”) on September 28, 2010, and by the Chief Staff Counsel on behalf of the personnel who represent the Commission Staff (“Staff”) on October 4, 2010, and in support thereof states as follows:

1. OPC’s motion (the “OPC Motion”) errs in depicting both the facts and the law and should be denied. Staff’s motion (the “Staff Motion”) adopts parts of the OPC Motion, and adds the argument that the counterclaim should be dismissed because a complaint cannot be brought against the Staff. Staff’s Motion is also without merit and should be denied.

2. On matters of fact, the OPC Motion errs by claiming that Laclede did not specify the provision of the Affiliate Transaction Rules (the “Rules”) or the Company’s Cost Allocation Manual (“CAM”) that Staff violated. Both Motions also mistakenly assert that Laclede’s counterclaim does not state a violation of the Rules, but instead describes a simple disagreement over rule interpretation.

3. As to matters of law, Staff erroneously argues that it cannot be the subject of any complaint or counterclaim. And even if it could, the Motions incorrectly state that Staff has no legal duty with respect to the Rules. Both Motions also mistakenly dismiss the CAM as being unapproved and therefore legally meaningless. Finally, the OPC Motion errs by asserting that the counterclaim is nothing more than a collateral attack on a previous Commission order.

4. Laclede has long asserted that Staff prefers to impose a pricing standard that would effectively eliminate affiliate transactions, rather than judge those transactions by the fair market pricing terms prescribed by the duly promulgated Rules and the Laclede CAM (both of which Staff actually championed or supported). On page 7 of the Staff Motion, in the section entitled “Laclede’s Real Complaint,” Staff illustrates this precise point when it states that:

“Transactions between regulated utilities like Laclede and their unregulated affiliates are necessarily and unavoidably dangerous to the public interest...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.”

Laclede welcomes the scrutiny necessary to protect its ratepayers. But the Commission has already assessed the level of “danger” to the public interest associated with affiliate transactions and the degree of scrutiny necessary to ensure that the public is adequately protected. In doing so, the Commission has explicitly decided to permit affiliate transactions and has prescribed the pricing standard by which these transactions should be scrutinized. It is not Staff’s place to change the pricing standard or the level of scrutiny. It is not Staff’s place to decide that “fair market price” is an inadequate standard, and that the affiliate should instead be required to sell goods and services to the

utility at cost. Commission orders are not subject to unilateral reversal or amendment by Staff personnel. The underlying message from Staff in the above quote is that the harassment will continue until Laclede, and other local distribution companies like Atmos, relinquish their rights to conduct business with their affiliates.

5. Perhaps most disappointing of all is the misplaced attack by OPC. Throughout this process, OPC has steadfastly supported Staff in its ongoing attempt to flout the Rules and the CAM. At first, this support was understandable, because in the initial ACA cases, Staff disguised its refusal to adhere to the fair market pricing provisions of the Rules and the CAM under the cloak of “prudence.” However, Staff’s true anti-Rules and anti-CAM position was flushed out in subsequent Laclede and Atmos ACA cases, all as recited in the counterclaim. The fair market pricing standards in the Rules and the CAM were designed to protect consumers from improper subsidies while permitting them to enjoy any benefits that arise from their utility doing business with its affiliate. If one in OPC’s shoes accepts the fact that Laclede’s assertions in the counterclaim could be true, such assertions paint a disturbing picture of a Staff running roughshod over Commission rules and the agreed upon CAM, and specifically circumventing the fair market pricing standards prescribed in those documents. If Laclede’s assertions are true, then Staff is robbing customers of the opportunity to benefit from appropriate affiliate transactions, while also wasting the resources of Missouri taxpayers and Laclede customers, most of whom are also OPC’s clients. Under such circumstances, it is disappointing, to say the least, that OPC would not only unquestioningly support Staff in this endeavor, but would actually lead the charge against the counterclaim by being the first to file a motion to dismiss it.

## **ERRORS OF FACT**

### **In the counterclaim, Laclede clearly identified the provisions that are being violated by Staff.**

6. In paragraphs 3 and 6 of the OPC Motion, OPC states that Laclede failed to specify the provision of the Rules and the CAM that it claims were violated by Staff. It is not possible to reconcile this statement with a fair reading of the counterclaim. In paragraph 5 of the counterclaim, the first paragraph under the heading “Facts,” Laclede recites the fair market pricing provisions of the Rules and specifically cites Section 4 CSR 240-40.015(2)(A) of the Rules. In paragraph 7, Laclede discusses the fair market pricing provisions of the CAM. The next 11 pages of the counterclaim contain specific allegations regarding the Staff’s failure or refusal to apply the fair market pricing provisions of the Rules and the CAM to affiliate transactions in Laclede’s (and Atmos’) ACA cases. It is inconceivable that one could read the counterclaim and not know what provisions Staff has been accused of violating.

### **The counterclaim asserts a violation of the Rules and the CAM, not just a difference of opinion.**

7. The Motions mistakenly claim that the subject of Laclede’s counterclaim is not a violation of the Rules, but a simple disagreement over rule interpretation between Laclede and the Staff. It is well-settled that an administrative rule has the force and effect of a statute. *Egan v. St. Anthony’s Medical Center*, 244 S.W.3d 169 (Mo. Banc 2008). Laclede is well aware of the rules of construction for statutes, rules and tariffs, and Laclede understands that ambiguities in a rule can lead to differing interpretations. However, in this case, Staff’s position unambiguously conflicts with the rule. For example, there is no way to view Staff’s position on affiliate pricing – i.e. that a sale of

gas from an affiliate to a utility be priced at the affiliate's cost – as a reasonable interpretation of the “fair market price” of that sale.<sup>1</sup> To the contrary, such a position, as Staff itself has now explicitly acknowledged in the Atmos case, is simply a back door way of precluding lawfully-permitted transactions with affiliates by making it utterly impossible for the affiliate to be compensated for the risks it has undertaken and the services it has provided in selling gas supply to the utility. As Laclede expressly stated in paragraph 11 of the counterclaim, “Staff’s position on affiliate pricing is not warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law.” Staff has done nothing in its Motion to demonstrate otherwise. In summary, Laclede has alleged that Staff is not attempting in good faith to construe the fair market pricing provisions of the Rules and the CAM; rather, Staff is ignoring them.

### **ERRORS OF LAW**

#### **Staff is not above the law; it is a person and can be the respondent in a complaint case.**

8. Formal complaints may be brought against persons, corporations, or public utilities. 4 CSR 240-2.070(3) Staff is certainly not a public utility. However, a “Person” includes a natural person, corporation, municipality, state or federal agency, and a partnership. 4 CSR 240-2.010(12) A “Corporation” includes a corporation, company, association, or any other entity created by statute which is allowed to conduct business in Missouri. 4 CSR 240-2.010(7) The “Commission staff” is defined as “all personnel

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<sup>1</sup> In its latest complaint against Laclede, GC-2011-0098, filed on October 6, 2010, the Staff itself defines fair market value as “the amount something would sell for in an open market between a willing buyer and a willing seller who are both knowledgeable, informed and prudent and who are acting independently of each other.”

employed by the commission...who are not attorneys in the general counsel's office,...members of the commission's research department, or...law judges." 4 CSR 240-2.010(5) Since Staff is comprised of personnel, Staff is a person or persons pursuant to Commission rules. Alternatively, as a group of personnel, Staff may also be considered an association, which is one of the groups comprising a Corporation under Commission rules. Finally, if Staff is considered to be part and parcel of the Commission,<sup>2</sup> then as part of a state agency, it is also a "person" under Commission rules. For any one or more of these reasons, Staff may be the respondent in a complaint.

9. Staff also cites Commission Rule 4 CSR 240-4.020 in support of its position that a complaint cannot be filed against it. (Staff Motion, p. 6) This rule defines "Person" as, among other things, any "entity or body that could become a party to a contested case." Since Staff can clearly be a party to contested cases, including complaint cases, it is a "Person" under this rule. 4 CSR 240-4.020(1)(L) As a "Person," Staff can be the subject of a formal complaint under Commission Rule 2.070(3).

10. Staff cannot have it both ways. Staff cannot be "a real party" when filing a complaint, but cease to be "a real party" when it is asked to answer for its actions. (Staff Motion, p. 6) Staff is not above the law.

**Like public utilities and the Commission itself, Staff is obligated to adhere to the Rules.**

11. The position of OPC and Staff, that Staff has no duties with respect to the Rules, is also mistaken. Administrative agencies, just like the general public, are bound by the terms of rules promulgated by them. *Kabir v. Dept. of Social Services*, 782

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<sup>2</sup> The Commission's Chief Staff Counsel states on page 6 of the Staff Motion that the Staff is "an organizational component of the Commission."

S.W.2d 706, 708 (Mo.App.1989) (quoting *Berry v. Moorman Mfg. Co.*, 675 S.W.2d 131, 134 (Mo.App.1984)). The rules of an agency have the force and effect of law and are binding upon the agency that adopted them. *Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Mediation*, 695 S.W.2d 894, 897 (Mo. banc 1985). It is axiomatic that if the general public is bound to follow Commission rules, and the Commission itself is bound to follow its rules, the Commission's Staff is likewise obligated to obey those rules. While some rules may apply to a gas utility, all rules apply to Staff.

12. OPC's statement that "Staff cannot violate the...Rules because those rules apply to the practices of regulated utilities" (OPC Motion, p. 2) again effectively argues that Staff is above the law. As stated above, Staff is not above the law. Laclede is required to conduct its business activities in compliance with the Rules, and Staff is required to perform its regulatory and auditing activities in compliance with the Rules. Like the Commission, the Staff is not empowered to diverge from the Rules at its discretion.

**The CAM has legal significance and Staff's violation of it states a cause of action.**

13. Staff and OPC are wrong to dismiss the CAM as meaningless. In fact, their assertions to that effect are themselves explicit violations of previous agreements they have entered into and that the Commission has approved. Pursuant to the Stipulation and Agreement, signed by Staff and OPC among others, and approved by the Commission on August 14, 2001 in Case No. GM-2001-342, Laclede was obligated to submit the CAM to Staff and Public Counsel in 2003, and Laclede did so. Both Staff and OPC have been in possession of the current CAM and the annual reports submitted thereunder since 2004. Moreover, the very same paragraph of the Stipulation and

Agreement cited by Staff in the complaint in this case states that Laclede agrees to provide affiliate records “as may be reasonably required to verify compliance with the CAM...” (Stipulation and Agreement, Section IV, paragraph 2, p. 8)

14. Pursuant to the Stipulation and Agreement, Staff, OPC and Laclede, among others, agreed to the creation of the CAM, the form of the CAM, and the use of the CAM to price and account for affiliate transactions. (*Id.* at pp. 8, 10)

15. The CAM has also been recognized and actively used in Laclede’s tariffs. Pursuant to Tariff Sheet R-42, approved by the Commission effective December 1, 2001, “OS-Sales (off-system sales) made to an affiliate of the Company shall be accounted for in accordance with the Company’s Cost Allocation Manual...”

16. For all of these reasons, the CAM does not exist in limbo, but is a living document with legal significance. Staff and OPC have agreed to, and the Commission has approved, the use of the CAM. Having done so, neither Staff nor OPC can now claim that the CAM is meaningless. Staff’s refusal to respect the terms of the CAM for the very purpose that Staff agreed to states a cause of action.

**The counterclaim is not a collateral attack on the Commission’s November 4, 2009 Order**

17. The OPC Motion also errs in its allegation that the counterclaim is a collateral attack on the Commission’s November 4, 2009 Order in Case Nos. GR-2005-0203 and GR-2006-0288, and that the counterclaim should be heard as a part of those cases. By its own terms, the November 4 Order stated that Staff’s discovery request is governed by the discovery rules of civil procedure and that the Rules and the Stipulation and Agreement in Case No. GM-2001-342 are red herrings. In the instant complaint case, Staff has placed the Stipulation and Agreement and the CAM directly at issue, and



the very paragraph of the Stipulation and Agreement cited by Staff in the complaint in this case states that Laclede agrees to provide affiliate records “as may be reasonably required to verify compliance with the CAM...” (Stipulation and Agreement, Section IV, paragraph 2, p. 8) Laclede cannot be found to have collaterally attacked the November 4 Order when the matter it raises was specifically disclaimed as not being covered by that Order. Moreover, Laclede is entitled to raise all grounds of defense to the complaint, including a counterclaim averring that it is Staff, and not Laclede, that is violating the Stipulation and Agreement and the CAM, as well as the Rules.

### **CONCLUSION**

18. The OPC and Staff Motions err in describing both the facts and the law. On matters of fact, Laclede clearly specified in the counterclaim the provision of the Rule and the CAM that it alleged Staff violated. In addition, the conflict over the affiliate pricing standard is not just a difference of opinion. The Staff’s standard as described in the counterclaim is not a good faith interpretation of fair market price, but a bold effort to eliminate all affiliate profits, and thus eliminate all affiliate transactions. As to matters of law, the Staff, whether it is viewed as group of persons who work for the Commission, an association, or as an arm of the Commission itself, has the same legal duty as the Commission, public utilities and other persons to comply with Commission rules. The statement in both Motions that the CAM has no legal significance is not only incorrect, but represents a breach of Staff’s and OPC’s obligations as signatories to the Stipulation and Agreement. Finally, the OPC motion errs by asserting that the counterclaim is nothing more than a collateral attack on the Commission’s November 4, 2009 Order in

the ACA cases. It is distinguishable from that order and is instead a direct and crucial part of Laclede's defense against Staff's complaint in this case.

WHEREFORE, Laclede respectfully requests that the Commission deny both OPC's and Staff's Motion to Dismiss Laclede's Counterclaim, and grant such other and further relief to which Laclede is justly entitled.

Respectfully submitted,

**/s/Rick Zucker**

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**Certificate of Service**

The undersigned certifies that a true and correct copy of the foregoing Response was served on the Staff and on the Office of Public Counsel on this 8th day of October, 2010 by United States mail, hand-delivery, email, or facsimile.

**/s/ Gerry Lynch**