

**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, The Laclede Group	)	
Respondents.	)	

**LACLEDE GAS COMPANY’S RESPONSE  
TO STAFF’S REPLY TO LACLEDE’S AFFIRMATIVE DEFENSE**

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

1. On December 10, 2010, Laclede filed its Answer to Staff’s Second Amended Complaint, Motion to Dismiss Counts I and V, and Counterclaim in this case. Staff has since withdrawn Count V and answered Laclede’s counterclaim. The Commission has dismissed Count I, but did not strike it. Laclede’s December 10 Answer included affirmative defenses, which Staff replied to on January 28, 2011. Staff’s January 28 Reply denies Laclede’s affirmative defenses, although the Staff also asks the Commission to dismiss these defenses. For the reasons stated herein, Laclede has properly raised these defenses and should be given the opportunity to prove its allegations.

2. Laclede’s December 10 Answer included the defenses of estoppel, laches and performance, and further asserts that Staff’s complaint is a collateral attack on the Commission’s order approving the Unanimous Stipulation and Agreement in Case No. GM-2001-342. Laclede will address Staff’s objections to each of these defenses below.

3. **Estoppel.** Staff purported to copy Laclede's allegation on estoppel into its January 28 Reply.<sup>1</sup> Staff's arguments against Laclede's estoppel claim are (i) estoppel cannot be applied to Laclede's CAM because the CAM was superseded by the Commission's affiliate transaction rules ("Rules"), (ii) Staff cannot waive the Rules, and Laclede cannot rely on Staff's interpretation of the Rules, and (iii) Laclede did not assert any facts that allege affirmative misconduct by Staff, which is an element needed to assert estoppel against a governmental entity.

4. Staff has erred on all three points. First, the estoppel claim by Laclede must apply to the CAM, because it is the CAM that Staff is complaining about. Staff's precise complaint is that Laclede's CAM does not comport with the Rules. Laclede's estoppel defense is based on its allegations that Laclede has relied on a CAM that, among other things, was (i) promoted by Staff in Case No. GM-2001-342 to be used as a safeguard for ratepayers; (ii) agreed to by Staff and approved by the Commission in that case; (iii) in Staff's possession since December 2001 without objection. The fact that the Rules also became applicable to Laclede in 2003 is completely beside the point, especially since the Rules themselves require the use of a CAM! Since the CAM has been in use since 2001, as required by both the Stipulation and Agreement in GM-2001-342 and by the Rules, the CAM cannot possibly be stale.

5. Second, Laclede's defense has nothing to do with waiver, so Staff's argument in paragraphs 6, 7 and 13 of its reply that neither the Company nor Staff can waive the Rules is inapposite. Laclede is not asking for a waiver, nor does it believe it needs one. Laclede's estoppel claim requests only that Staff should not be allowed to assert that Laclede has for the past 9 years violated the Rules based on its following a CAM that the Staff affirmatively

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<sup>1</sup> Staff committed a number of errors in the first sentence of its recitation that do not appear in paragraph 47 of Laclede's Answer. In addition, Staff omitted footnote 5 at the end of Laclede's paragraph 47.

supported. Laclede firmly believes that its CAM is fully consistent with the Rules, but if the Commission disagrees, the Commission's order should apply prospectively and not retroactively, given the degree to which the Staff has contributed to the existence of the CAM, and has knowingly permitted Laclede to use the CAM to conduct and account for affiliate transactions.

6. Third, Laclede properly alleged facts which support all of the elements of estoppel. Staff is correct in paragraph 7 of its Reply where it states that estoppel is "based upon the notion of good faith detrimental reliance upon a misleading representation. It is founded on the concept of fairness." The case law in this area supports an estoppel defense when necessary to avoid a manifest injustice. Laclede has alleged facts that establish both the affirmative conduct by Staff, as referenced in paragraph 4 above, and a manifest injustice. The very case cited by Staff in support of its Reply, *JGJ Properties, LLC v. City of Ellisville*, 303 S.W. 3d 642, 650-52 (Mo. App. E.D. 2010), is distinguished on the facts from the same court's finding in *State ex. rel Casey's General Stores, Inc. v. City of Louisiana*, 734 S.W. 2d 890 (Mo. App. E.D. 1987), wherein estoppel was upheld against the City of Louisiana. In *Casey's*, the company had been assured by city officials that nothing would prevent the operation of a convenience store on the property to be acquired. After the property was purchased, the City declared the parcel to be part of a residential area. (*Id.* at 893, 896) Likewise, in this case, Staff promoted the CAM, edited the CAM and required Laclede to make additions to the CAM, all in 2001. Moreover, Staff made affirmative representations to the Commission and Laclede that the CAM would be used to govern transactions between Laclede and its affiliates; told Laclede that it should instruct and train its employees to use the CAM when conducting such transactions, and made compliance with the CAM a part of its corporate code of conduct. Thereafter, the Staff received CAM annual reports every year without comment. After Laclede used the CAM for nine years,

and conducted affiliate transactions in compliance with the provisions of the CAM, Staff has now filed a complaint that the CAM has been in violation of the rules. Given these facts, it is difficult to conceive of a clearer case where a party has relied in good faith and to its detriment on governmental representations that, given Staff's current position that the CAM is unlawful, can only be characterized as having been highly misleading. These facts as alleged certainly support a finding that Staff be estopped from bringing its complaint.

7. **Laches**. Staff objects to Laclede asserting the equitable defense of laches (sic). Staff claims that Laclede has made mere conclusory allegations and has not alleged facts supporting the claim. Also, Staff argues that the Commission cannot grant equitable relief.

8. Laches is an inexcusable delay in asserting rights, and waiting an unreasonable time before seeking relief. *Mo. Pub. Serv. Corp. v. Fairbanks, Morse & Co.*, 95 F.2d 1 (8<sup>th</sup> Cir. 1938) Contrary to Staff's claim that Laclede has merely made an unsupported assertion of the defense of laches, Laclede has amply supported this allegation. The following are excerpts from Laclede's December 10 Answer that support an allegation of laches:

Par. 24: Since its creation in 2001, the CAM has specifically addressed gas supply affiliate transactions, providing for the pricing of such transactions to be based on Fair Market Price (FMP).

Par. 37: Since providing the CAM to Staff in December 2001, Laclede referred Staff to that CAM until 2004. Upon updating the CAM, Laclede provided the updated version to Staff in March 2004. The 2004 CAM is unchanged and has been in Staff's possession now for more than six years.

Par. 47: Finally, as stated in paragraph 37 above, Staff has had the CAM in its possession since 2001, and has had the CAM in its current form since 2004. So the Staff has had countless opportunities over the past nine years to advise the Company of any alleged deficiencies in the CAM, including the ones which it now claims violate the Rules. Despite having told the Company years ago that it would review the CAM page by page and alert Laclede to any problems it perceived, the Staff never articulated to the Company the kind of deficiency it says now exists in the CAM.

9. The Staff's claim, in paragraph 15 of its Reply, that the Commission cannot grant equitable relief, is at odds with its discussion in paragraph 7 of that same Reply, wherein Staff states that the Commission can approve a claim of estoppel which, like laches, is an equitable affirmative defense. The Staff offers no legal support for this distinction.

10. **Performance.** In its December 10 Answer, Laclede explained how it considered FDC in determining the pricing of gas supply affiliate transactions, but determined that FDC either did not apply (because Laclede did not produce gas supply for itself) or FDC would be equivalent to fair market price (because Laclede's "cost" to acquire gas for purchase or sale to LER would be made at a fair market price). This analysis is identical to the analysis Staff testified to at a hearing on October 20, 2010, in Atmos' ACA Case No. GR-2008-0364. (*See* Tr. 197-98) Thus, Laclede asserted that it had considered FDC in 2001, as required by the Rules, but came to the same conclusion as Staff did, that fair market price was the appropriate standard. Laclede alleges that, as a result, its CAM and its conduct represent performance of the FMP-FDC comparison in the exact manner required by the Rules.

11. In its Reply, Staff has made the completely unsupportable assertion that because Staff claims to have not seen any "facts or documentation" to support this defense, it must be dismissed. While Laclede believes that Staff has seen an abundance of documentation that would support this point, Laclede is not obligated to prove its defenses in its Answer. Having properly alleged facts that support this defense, Laclede is entitled to an opportunity to produce evidence at a hearing in support thereof. Likewise, having brought the complaint, Staff has the burden of proving its case.

12. **Staff's Claim is a collateral attack on the Commission's Order in Case No. GM-2001-342.** In its Answer, Laclede asserts that, by claiming the CAM violates the Rules,

Staff is collaterally attacking the Commission's order in GM-2001-342, which approved the CAM. Staff's argument in its Reply is that the Rules have superseded the CAM. In fact, the CAM is and always has been consistent with the Rules. And it is the Staff that has repeatedly ignored both. Moreover, Staff fails to note that the Rules were effective well in advance of the Order approving the Stipulation and Agreement and the CAM in GM-2001-342. The Rules (4 CSR-240-40.015 and 40.016) were both filed April 26, 1999 and became effective February 29, 2000. So in 2001, at the time that Staff amended, supported and required that Laclede use the pricing standards in the CAM, Staff was well aware of the pricing standards in the Rules. Those pricing standards did not change as a result of the decision in the *Atmos* case, or in the amended CAM delivered to Staff in March 2004. Thus, Staff has no room to attack the CAM's pricing standards without also attacking the Commission's order that sanctioned the CAM.

WHEREFORE, Respondent Laclede Gas Company respectfully requests that the Commission accept this Response, deny Staff's request to dismiss Laclede's affirmative defenses, and permit Laclede the opportunity to continue to assert those defenses at the hearing to be held in this case.

Respectfully submitted,

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**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 7th day of February, 2011 by United States mail, hand-delivery, email, or facsimile.

/s/ Gerry Lynch