

The Staff of the Missouri Public Service Commission,  
  
Complainant,  
  
vs.  
  
Laclede Gas Company,  
  
Respondent.

Laclede Gas Company, )  
)  
Respondent. )

**COMES NOW** the Staff of the Missouri Public Service Commission (“Staff”), by and through counsel, pursuant to Section 386.390, RSMo 2000,<sup>1</sup> and for its Reply to Laclede’s denominated Affirmative Defenses and in support of its Motion for Summary Determination, hereby denies the same and in further reply, states as follows:<sup>2</sup>

Laclede's first affirmative defense is a defense of law, based upon the language of § IV.2 of the Stipulation and Agreement in Case No. GM-2001-342, which is the very basis of Staff's *Complaint*. That provision states:

<sup>1</sup> All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (“RSMo”), revision of 2000.

<sup>2</sup> Paragraphs are numbered just as they are in Respondent's *Answer*. For each asserted defense, MGE's text is set out verbatim in **bold** and Staff's reply in normal text.

notice during normal working hours and subject to appropriate confidentiality and discovery procedures, **all books, records and employees of The Laclede Group, Inc., Laclede Gas Company and its affiliates as may be reasonably required to verify compliance with the CAM and the conditions set forth in this Stipulation and Agreement** and, in the case of PACE, to ensure that it continues to have the same degree and kind of access to information relevant to the investigating and processing of grievances and the enforcement of collective bargaining agreements, whether from affiliates or otherwise, as it currently has under Laclede's existing corporate structure. In addition to following standard discovery procedures, Staff's and Public Counsel's access to bargaining unit employees shall also be conditioned on Staff and Public Counsel providing reasonable notice to the employee's Union of their intent to seek such access and the right of such employee to be represented by the Union. **Laclede Gas Company and The Laclede Group, Inc., shall also provide Staff and Public Counsel any other such information (including access to employees) relevant to the Commission's ratemaking, financing, safety, quality of service and other regulatory authority over Laclede Gas Company;** provided that Laclede Gas Company and any affiliate or subsidiary of The Laclede Group, Inc. shall have the right to object to such production of records or personnel on any basis under applicable law and Commission rules, excluding any objection that such records and personnel of affiliates or subsidiaries: (a) are not within the possession or control of Laclede Gas Company; or (b) are either not relevant or are not subject to the Commission's jurisdiction and statutory authority by virtue of or as a result of the implementation of the Proposed Restructuring. (Emphasis supplied.)

Even a cursory consideration of the language of § IV.2 shows that Laclede's asserted defense must fail because verifying compliance with the CAM is not the only reason that Staff may seek information from entities in The Laclede Group. Section IV.2 also authorizes Staff to seek information "as may be reasonably required to verify compliance with . . . the conditions set forth in this Stipulation and Agreement[.]" Those conditions include:

§ III.1. The Laclede Group, Inc. represents that it does not intend to take any action that has a material possibility of having a detrimental effect on Laclede Gas Company's utility customers, but agrees that, should such detrimental effects nevertheless occur, nothing in the approval or implementation of the Proposed Restructuring shall impair the Commission's ability to protect such customers from such detrimental

effects.

Additionally, § IV.2 specifically requires Laclede and The Laclede Group to provide information “relevant to the Commission's ratemaking, financing, safety, quality of service and other regulatory authority over Laclede Gas Company[.]” Laclede’s first asserted affirmative defense is based upon a narrow reading of the Stipulation and Agreement that the language of that document simply does not support.

**2. Staff should be estopped from bringing a Complaint on this matter arising from the Stipulation and Agreement, because the Staff has expressly disavowed any connection between its discovery requests in the ACA cases and the CAM, which is the subject of Section IV.2 of the Stipulation and Agreement.**

Laclede’s second affirmative defense must fail for the reasons explained above. The Stipulation and Agreement grants Staff wide-ranging authority to seek information and that authority is not limited to ensuring compliance with the CAM. The reference to estoppel is superfluous and should be ignored.

**3. Staff should be estopped from bringing a Complaint on this matter arising from the Stipulation and Agreement, because the Commission’s November 4, 2009 Order in Case Nos. GR-2006-0288 and GR-2005-0203 specifically found the Stipulation and Agreement to be irrelevant to the discovery dispute.**

What the Commission actually said in the order upon which Laclede relies is this: “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 agreement reached in Case No. GM-

2001-342.” The present case, by contrast, *is* a complaint through which Staff seeks enforcement of the agreement reached in Case No. GM-2001-342. Consequently, nothing in that order is relevant to this proceeding and, certainly, no estoppel arises from it.

Estoppel is a doctrine under which a party may not change position to the detriment of another party which acted in reliance upon the first asserted position. It is an equitable affirmative defense based upon the notion of good-faith detrimental reliance upon a misleading representation.<sup>3</sup> It is founded on the concept of fairness. Equitable estoppel has three elements: “(1) an admission, statement or act inconsistent with the claim afterwards asserted and sued upon; (2) action by another party on the faith of such admission, statement, or act; and (3) injury to such other party, resulting from allowing contradiction of the admission, statement, or act.”<sup>4</sup> When an estoppel claim is made against the government, in addition to these three elements, the party must also show that the governmental conduct on which the claim is based constitutes affirmative misconduct.<sup>5</sup>

With these points in mind, it is clear that nothing in the Commission’s November 4, 2009, Order estops Staff from bringing this complaint.

**4. Staff’s Complaint has already been adjudicated by the Commission pursuant to its January 21, 2009 Order in Case Nos. GR-2006-0288 and GR-2005-0203 directing Laclede to produce information that was in its possession.**

What the Commission actually said in its January 21, 2009, *Order Regarding*

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<sup>3</sup> *Black’s Law Dictionary*, 570 (7<sup>th</sup> ed., 1999).

<sup>4</sup> *JGJ Properties, LLC v. City of Ellisville*, 303 S.W.3d 642, 650 -652 (Mo. App., E.D. 2010), *citing Fraternal Order of Police Lodge # 2 v. City of St. Joseph*, 8 S.W.3d 257, 263 (Mo. App., W.D.1999).

<sup>5</sup> *Id.*

*Request for Clarification* was this:<sup>6</sup>

The Commission has ordered Laclede to produce information about its affiliate according to the rules of discovery not under the Commission's Affiliate Transaction Rule. Although it is true that by granting Staff's motion, Staff is permitted to investigate Laclede's affiliate transactions, such investigation is limited to information that may lead to evidence that is relevant to these ACA cases. To the extent that Laclede is in possession of the information, the Commission clarifies its order compelling Laclede to produce the information requested by Staff.

Nothing in that paragraph purports to adjudicate Laclede's culpability for violation § IV.2 of the Stipulation and Agreement approved in Case No. GM-2001-342. The paragraph merely explains, in a straightforward way, that the Commission had granted Staff's motion to compel based on a traditional civil discovery analysis. One limitation on the scope of civil discovery is possession or control of the material sought to be discovered.

The present case, by contrast, is not concerned with traditional civil discovery but with Laclede's obligations under the Stipulation and Agreement approved in Case No. GM-2001-342. In § IV.2 of that Stipulation and Agreement, Laclede *waived* the objection of lack of possession or control; the basis of Staff's *Complaint* is that Laclede has asserted that objection despite that waiver.

#### **5. Staff is barred from any relief by the doctrine of unclean hands.**

The Clean-Hands Doctrine embodies the principle that a party may not seek equitable relief, or assert an equitable defense, if that party has itself violated an equitable principle, such as good faith.<sup>7</sup> This defense must fail because Laclede has not sufficiently pleaded the Clean Hands Doctrine. It is not sufficient to simply state the

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<sup>6</sup> At p. 2.

<sup>7</sup> *Black's*, *supra*, p. 244.

name; Laclede must also plead *facts* sufficient to show that Staff has unclean hands.

**6. Laclede states that its customers have not suffered any damages. To the extent that its customers have suffered damages, those damages were caused by Staff's own conduct by either negligently or willfully failing to follow Commission orders and rules, as more fully described above.**

Laclede's sixth and final affirmative defense must also fail because it is no affirmative defense at all. "An affirmative defense is one that wholly or partly avoids the cause of action asserted by the preceding pleading by new allegations that admit part or all of the cause of action, but avoids liability because of a legally sufficient excuse, justification or other matter negating the cause of action."<sup>8</sup> Damages to Laclede's customers are no part of Staff's cause of action and so Laclede's assertions in its sixth affirmative defense do not avoid or negate any necessary element of Staff's *prima facie* case.

**WHEREFORE**, having fully replied to Respondent's Affirmative Defenses, Staff prays the Commission will grant the relief sought in Staff's Complaint and Staff's Motion for Summary Determination; and grant such other and further relief as the Commission deems just in the premises.

Respectfully Submitted,

**/s/ Kevin A. Thompson**

Kevin A. Thompson  
Missouri Bar No. 36288  
Chief Staff Counsel

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<sup>8</sup> J.R. Devine, *Missouri Civil Pleading and Practice*, § 15-2 (1986).

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**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **16<sup>th</sup> day of December, 2010**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson