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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Office of the Public Counsel,	)	
	)	
Complainant,	)	
	)	
v.	)	**Case No. GC-2016-0297**
	)	
Laclede Gas Company, and Missouri Gas Energy,	)	
	)	
Respondents.	)	

RESPONSE TO COMPLAINANT'S REPLY TO LACLEDE'S MOTION TO DISMISS AND RESPONSE TO COMPLAINANT'S MOTION TO STRIKE

COME NOW Respondents Laclede Gas Company ("Laclede" or "Company"), including its Laclede Gas (herein so called) operating unit, and Missouri Gas Energy ("MGE") operating unit, and responds to Complainant's Reply to Respondents' Motion to Dismiss Complaint, and to Complainant's Motion to Strike. In support thereof, Respondents state as follows:

1. On May 31, 2016, Respondents filed their Motion to Dismiss Complainant's Complaint on a number of grounds, including Complainant's failure to state a claim upon which relief could be granted, and for good cause. On June 14, Complainant filed its Reply to the Motion to Dismiss and added its Motion to Strike (the "OPC Reply"). The OPC Reply wholly failed to rebut Respondents' Motion to Dismiss. Respondents will address some of the major shortcomings in this Response. First, Complainant is incorrect in asserting that it's Complaint alleged facts necessary to state a claim. Rather, Complainant alleged only a *factual conclusion* regarding Laclede's ROE, which the Commission must disregard. Second, even if the ROE conclusion is accepted as true, Complainant is mistaken in claiming that applying the zone of reasonableness standard is a "fact-based decision" that requires the Commission to weigh the

evidence. Respondents have requested that the zone of reasonableness standard be applied to establish that Complainant has not stated a claim *as a matter of law* given the facts alleged by Complainant. Third, in the one area where Laclede has asked the Commission to disregard Complaint's factual conclusion based on the Commission's own assessment of the facts, Complainant has mis-stated Respondent's argument as being that the Complaint should be dismissed solely because it requires a significant amount of resources. In fact, Respondent's request for dismissal based on good cause under Commission Rule 2.116(4)[1] asks the Commission to balance the benefits and costs of an earnings complaint based on the facts of this particular situation, and find that the Complaint is not a reasonable use of the Commission's and other parties' resources or a reasonable exercise of the Complainant's statutory discretion.

Failure to Allege Facts

2. Complainant and Respondents agree that, in ruling on a motion to dismiss, the arbiter accepts as true all well-pleaded facts. Laclede argued in its Motion to Dismiss and Answer that the 10.45% ROE alleged by Complainant is a conclusion rather than the kind of well-pleaded fact that the Commission must accept as true for purposes of determining a motion to dismiss. In response, Complainant claims that the 10.45% ROE is a fact, while the allegation that Laclede's rates are unreasonable is a conclusion. Complainant then takes the inconsistent position that the 10.45% ROE is a fact because it is both "observable" and can be demonstrated through a "simple calculation." (OPC Reply, pp. 4-5)

3. Complainant fails to distinguish between facts and factual conclusions. The SEC document that Complainant relied on is a fact, and contains facts. The facts set forth in the SEC document include Laclede's net income for fiscal 2015 and Laclede's common equity at the end of fiscal 2015. For that matter, the common equity at year end 2014, used inappropriately by

[1] 4 CSR 240-2.116(4)

Complainant, is also a fact. The ROE that Complainant calculated out of the SEC document is a factual conclusion; that is, a conclusion reached by the Complainant after applying a set of facts. Whether Laclede's rates are reasonable is a legal conclusion.

4. Complainant failed to include the SEC document with its Complaint. It failed to include the pages from that document that contained the salient facts. It failed to include the facts themselves from that document. Complainant provided no facts regarding Laclede's ROE. Instead, Complainant only alleged its own factual conclusion that the ROE is 10.45%.

5. For purposes of a motion to dismiss, facts are accepted as true, but mere conclusions of the pleader not supported by factual allegations are disregarded in determining whether a petition states a claim on which relief can be granted. ***Commercial Bank of St. Louis Co. v. James***, 658 S.W.2d 17, 21–22 (Mo. banc 1983) In ***Tolliver v. Standard Oil Co.***, 431 S.W.2d 159, 162 (Mo. Sup. Ct. 1968), the plaintiff was entitled to a letter from his employer providing the reasons for discharge. The plaintiff alleged that the letter he received "failed to state the true reason." Plaintiff failed to include the letter with his petition, failed to plead the contents of the letter or the reasons stated in the letter for the discharge. The Court upheld a motion to dismiss, finding that the plaintiff's allegation was "merely a conclusion and not a statement of facts showing that the pleader is entitled to relief." In another Missouri Supreme Court decision, a plaintiff who alleged that a car repair company performed "less than a full and complete repair" on his car, and did "less than a first class repair" had alleged only conclusions without supporting facts. ***Cady v. Hartford Accident and Indemnity Co.,*** 439 S.W.2d 483 (Mo. Sup. Ct. 1969) In yet another case, the plaintiff complained that an insurance company was treating two similar policies in a different manner. Unfortunately, Plaintiff's pleadings neither identified the policies nor incorporated either of them into his pleadings. The Court found that

the plaintiff's statement that the policies were nearly identical was a mere conclusion, unsupported by factual allegations, and must be disregarded. ***Dyer v. General American Life Ins. Co.,*** 541 S.W.2d 702 (Mo. Ct. App. – St. Louis 1976)

6. As in the above cases, Complainant alleged only the conclusion that the ROE was 10.45% without including the facts that supported its conclusion. Complainant itself illustrated this point in its Reply – the very fact that the ROE had to be demonstrated through a calculation contradicted its statement that the ROE was observable. (OPC Reply, p. 5) In fact, the ROE was not observable, and Complainant omitted the underlying facts that supported it. Laclede had no idea what facts Complainant relied upon to derive a 10.45% ROE, because Complainant did not allege the facts it chose to use, but only the factual conclusion it reached. Complainant states on page 5 of its Reply that the calculated ROE is a fact because it is "something that actually exists." As demonstrated herein, the calculated ROE is not a fact and it does not exist, except in the collective minds of Complainant. On page 4 of its Reply, Complainant claims to have "explained the facts that formed the basis for OPC's Complaint…" This is exactly what Complainant should have done, but did not do.

7. Finally, it is plainly evident that Complainant has alleged a factual conclusion and not a fact from Complainant's attempt, at pages 2-3 of its June 17 Reply to Staff's Response, to justify the appropriateness of its ROE calculation in the face of the criticisms levelled by the Company and Staff.[2] For example, Complainant takes issue with the Company's and Staff's conclusion that it is inappropriate to calculate Laclede's ROE by applying income that has been

[2] Complainant's attempt to justify the propriety of its ROE calculation in replying to a response supporting a Motion to Dismiss is also an illustration of how deficient its complaint is from a due process perspective. To provide proper notice to the Company, and give it an adequate opportunity to respond, all of these assertions should have been included in its Complaint rather than in a response filed after the Company has already submitted its answer and Motion to Dismiss. This deficiency alone warrants the Commission disregarding Complainant's attempt to justify its inflated ROE calculation.

realized over an entire fiscal year ending September 30, 2015 to equity balances that existed back on September 30, 2014. Similarly, it expresses disagreement with the Company's and Staff's conclusion that the one-time gains associated with the Company's sale of its Forest Park property sale should be excluded from the ROE calculation. For the reasons stated in its Motion to Dismiss and Answer, Laclede believes it and the Staff have reached the proper conclusions on these two issues and that the Commission should so find. The important point here, however, is that these differences among the parties in how Laclede's ROE should be calculated sharply illustrates that such ROE calculations are indeed conclusions, and not facts. To paraphrase an old saying, everyone is entitled to their own opinions, but not to their own set of facts, and the variations in ROE calculations demonstrate that Complainant's ROE calculation is properly characterized as a conclusion.

8. As a result, the Commission must disregard Complainant's mere conclusion that Laclede's ROE was 10.45%. This leaves Complainant with no facts supporting a claim that Laclede is overearning, and the Complaint must be dismissed for failure to state a claim.

Failure to Allege an ROE Above the Zone of Reasonableness

9. Even if the Commission accepts Complainant's ROE conclusion as true, Complainant is mistaken in claiming that applying the zone of reasonableness standard is a "fact-based decision" that requires an inappropriate weighing of the evidence. To the contrary, the zone of reasonableness is a legal standard that the Commission should apply in determining that Complainant has failed to state a claim that Respondents' rates are unreasonable.

10. Complainant's assertion that the Company earned a 10.45% ROE in its 2015 fiscal year, even if accepted as true, does not support a claim upon which relief could be granted because that ROE is within the 1% "zone of reasonableness" when compared to the 9.6% ROE

which Complainant alleges is reasonable today. Complainant acknowledges that the 1% zone of reasonableness concept has been invoked by the appellate courts as a benchmark for determining whether to interfere with a Commission decision relating to the reasonableness of a utility's existing rates. (OPC Reply, p. 7). Nevertheless, Complainant goes on to suggest that the concept is inapplicable here because there is no precedent for applying it in the context of a complaint proceeding. The absence of precedent is not a reason to ignore a common sense use of the "zone of reasonableness" as a standard for whether rates are reasonable. Further, the absence of precedent is not surprising given the likelihood that few earnings complaints exist where the complainant has alleged an actual ROE that is so close to what the complainant alleges is a reasonable ROE. The act that is without precedent may actually be Complainant's attempt to launch a complaint in a case where Complainant cannot even allege a material or persistent amount of overearning.

11. Complainant completely fails to explain why the courts can rely upon the zone of reasonableness to refrain from taking action regarding the reasonableness of a utility's rates, but the Commission cannot or should not rely upon it when making the threshold determination of whether to entertain a complaint. Simply put, using the zone of reasonableness as a legal standard is every bit as valid (if not more so) at the stage where the Commission decides whether to allow a complaint to move forward (with all of its attendant costs for the utility, the Staff and other parties), as it is at the stage where a reviewing court determines whether the Commission selected a reasonable ROE.

12. Indeed, Complainant itself provides affirmative policy support in its Reply for why the use of a zone of reasonableness is appropriate. Specifically, in an effort to address a different point made by Laclede and the Staff in their pleadings, Complainant cited rebuttal

testimony that had been submitted in a KCPL proceeding by Mr. Charles Hyneman, Complainant's Chief Public Utility Accountant ("Chief Accountant"), who was then a member of the Commission Staff. (See June 17 OPC Reply to Staff, pp. 2-3) As shown by the attached excerpt from that rebuttal testimony, Mr. Hyneman cited multiple occasions over the past twenty years in which KCPL's booked ROE had exceeded the average ROE authorized for electric utilities. In at least ten of those instances, the booked ROE was more than 100 basis points greater than the average ROE granted for electric utilities during the same period. And yet after noting this extensive history, Mr. Hyneman went on to conclude that these higher than average authorized returns did not establish a basis for any rate adjustment. As Mr. Hyneman testified: "Since I also do not believe that KCPL's high profit levels were unreasonable, I do not think that KCPL should have sought any adjustment to [lower] its rates." (Rebuttal Testimony of Charles Hyneman, p. 12, Case No. ER-2014-0370, May 7, 2015).

13. Given this recent and unqualified assessment by Complainant's Chief Accountant regarding the proper interplay between booked returns and rate adjustments, it is simply impossible to reconcile Complainant's opposition to the Commission's use of a zone a reasonableness in this complaint proceeding. This is especially true given the fact that the ROE complained about by Complainant in this case falls far more securely within the 1% zone of reasonableness (i.e. a mere 85 basis points above the ROE Complainant claims is reasonable today) than the ROE's that Complainant's Chief Accountant claimed did *not* trigger the need to adjust rates in the KCPL case. In short, while Complainant may not be preaching the use of any zone of reasonableness in this case, its Chief Accountant has robustly practiced it in others. The Commission should do likewise here by invoking the zone of reasonableness to dismiss the Complaint. Such an action is not only warranted on its own merits, but the Commission can be

confident that any such action would also be sustained on appeal given the degree to which Missouri appellate courts have themselves repeatedly relied on the zone of reasonableness when determining whether there is a basis for disturbing ordered and existing utility rates.

14. Because Complainant has failed to allege an ROE that falls outside of the zone of reasonableness, it's assertion that the Company earned a 10.45% return is not sufficient to state a claim upon which relief can be granted, even assuming it is true.

Failure to Refute Good Cause for Dismissing the Complaint

15. Respondents do not argue, as Complainant claims on page 8 of its Reply, that the Complaint should be dismissed solely because it requires a significant amount of resources. That is but one factor to be considered by the Commission. Indeed, in addition to the Commission Staff, even a prospective Intervenor like the Consumers Council of Missouri (CCM), has noted in this case the significant resource commitments required to participate in a proceeding of this nature. (See June 14 CCM Reply, p. 2) That said, Respondent's request for dismissal based on good cause under Commission Rule 2.116(4) asks the Commission to balance the benefits and costs of an earnings complaint based on all of the facts of this particular situation, and find that the Complaint is not a reasonable use of the limited resources of those affected by any decision to proceed with this Complaint or a reasonable exercise of the Complainant's statutory discretion.

16. In pursuing his duties, Public Counsel has the discretion to represent or refrain from representing the public in any proceeding. In exercising that discretion in any particular case, Public Counsel is required to consider the importance and extent of the public interest involved. Respondents assert that Public Counsel failed to consider the importance and extent of the public interest involved when it filed an overearnings Complaint that will exact a drain on the

resources of the Companies, the Staff, the Commission and Public Counsel itself, over an amount that, not counting the obvious errors in calculating ROE and ignoring the non-recurring income from the sale of the Forest Park facility, is at most 85 basis points. The Commission can rectify this situation by applying its own discretion to dismiss the Complaint for good cause.

17. Regarding the calculation errors, Respondents used the very same SEC source documents that Complainant used to demonstrate why the Commission should disregard Complainant's erroneous 10.45% ROE calculation.[3] By simply correcting for Complainant's two obvious errors, Laclede demonstrated that it's ROE for this period is 9.69% -- a figure that is lower than the ROE specified for ISRS purposes in Laclede's last rate case and within 9 basis points of the average ROE that Complainant relies on in its Complaint.

18. Staff also corrected these errors in its Response. Because those corrections resulted in an even lower ROE of 9.60%, the Staff joined in the Company's Motion to Dismiss. Moreover, as detailed in the Supplement to Answer filed by Laclede on this same date, the surveillance reports submitted by Laclede to Staff and Complainant have shown that Laclede has continued to earn booked return in the range of **_____** for the 12 months ended April 30, 2016 and May 31, 2016, respectively. Notably, these returns were achieved in a period that no longer included the one-time gain from the Forest Park properties.

19. As previously discussed, the Commission is free to disregard Complainant's ROE conclusion and it should. In attempting to support the egregious mismatch between income and equity that underlies its inflated ROE calculation, Complainant can do nothing more than cite to the rebuttal testimony of its own Chief Accountant in a KCPL rate proceeding when he was the

[3]As detailed in the Company's answer and Motion to Dismiss, Complainant's conclusion that Laclede earned a 10.45% ROE is based on an egregious misapplication of ending income levels from 2015 to equity levels at the beginning of that year, as well as an equally egregious failure to exclude a one-time gain from the sale of property – an exclusion which Complainant has explicitly endorsed as appropriate in another proceeding). Simply correcting for these obvious errors results in an ROE of 9.69%

sponsoring Staff witness.[4] Notably, Mr. Hyneman did not claim to be speaking on behalf of the Staff in his rebuttal testimony. Nor was he seeking to make recommendations regarding the establishment of actual rates in that case, but instead was only illustrating an historical comparison of earned returns versus an ROE average for electric utilities. His use of beginning equity balances in the KCPL proceeding therefore has no relevance to this proceeding, where a potential change to rates is at issue. Regardless, in its June 23 Reply, Staff explained how it calculates ROE, directly refuting Complainant's version of Staff's practice. The Commission should accordingly disregard Complainant's belated attempt to support an inflated ROE calculation and instead defer to the far more customary approach that its own Staff has advocated in this matter.

20. The Commission should also reject out of hand Complainant's attempt to defend its decision not to exclude the one-time gain from the sale of the Company's Forest Park properties on the theory that the Commission has not really adopted a general policy or practice of affording this kind of treatment to such gains. Complainant's attempt to make such an argument is, to be charitable, inexplicable given that Complainant not only recognized the existence of this policy in a recent Empire proceeding but affirmatively "urge[d] the Commission to continue with its general policy of accruing the gain or loss on dispositions of plant assets to the owners of the assets – utility shareholders." ***Re: Empire District Electric Company***, Case No. ER-2016-0023, Surrebuttal Testimony of Charles R. Hyneman, p. 23. In fact, Complainant even went so far as to note that Laclede had followed this very policy in connection with the gains from its Forest Park property, citing the same SEC documents that Complainant has relied

[4] Complainant included a quote and added its own emphasis. Complainant cited to the case that contained the quote, but did not identify the author, the type of testimony or even which of the 743 documents in that case's EFIS file contained the quote. Through a search of the EFIS file, Respondents were able to determine that the quote's author was OPC's own Chief Accountant, Charles Hyneman.

upon as the basis for its Complaint. (*Id.*) Given this background, Complainant's failure to exclude this one-time $7.6 million gain from the income it used to calculate the ROE in its Complaint is simply inexcusable.

21. Laclede also takes issue with Complainant's comments on the other matters raised in the Respondents' Motion to Dismiss, including its vague, incomplete and cryptic allusions to what transpired in the legislative process regarding the gas ISRS legislation as well as its ludicrous suggestions that its Complaint is necessary to capture synergies achieved by the Company as a result of its acquisition activities. Those synergies achieved from the 2013 and 2014 acquisitions are already reflected in the Net Income, and therefore would already be part of an ROE calculation.

22. Given all of the considerations discussed above that conclusively demonstrate Complainant's failure to state a claim upon which relief can be granted, Respondents believe additional discussion of these issues is unnecessary, except to state that Complainant's motion to strike should be denied. Respondents' discussion of the facts surrounding the filing of the Complaint is part and parcel of its argument that the Complaint should be dismissed by the Commission in its discretion and for good cause shown.

Wherefore, for all of the foregoing reasons, the Respondents renew their request that the Complaint be dismissed.

Respectfully Submitted,

/s/ Rick Zucker

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing pleading was served on the parties of record in this case on this 24th day of June, 2016 by United States mail, hand-delivery, email, or facsimile.

/s/ Marcia Spangler