

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

The Staff of the Missouri Public Service)
Commission,)

Complainant,)

vs.)

Laclede Gas Company,)

Respondent.)

Case No. GC-2011-0006

STAFF'S MOTION IN LIMINE

COMES NOW the Staff of the Missouri Public Service Commission, by and through the Chief Staff Counsel, and for its *Motion in Limine*, hereby moves the Commission to strike, or to rule inadmissible, portions of the pre-filed testimony of Respondent Laclede Gas Company ("Laclede") as specified below, because that pre-filed testimony is irrelevant. In support of its motion, Staff states:

Introduction

1. This case arises from Staff's *Complaint* of July 7, 2010, against Laclede for violation of a Stipulation and Agreement approved by the Commission in Case No. GM-2001-0342 ("2001 S&A"). Staff seeks a determination that Laclede has violated the 2001 S&A and authorization for the Commission's General Counsel to seek penalties for the violation.

2. On September 22, 2010, Laclede filed a counterclaim asserting that Staff has acted in violation of the Commission's Affiliate Transaction Rules, 4 CSR 240-40, 015 and 016, and Laclede's own Cost Allocation Manual ("CAM")

by “[making] recommendations, [asserting] disallowances and [seeking] discovery” with respect to transactions between Laclede and its unregulated affiliate, Laclede Energy Resources (“LER”), and seeking a determination that Staff has violated the Commission’s rules and Laclede’s CAM and an order directing Staff to comply with them in the future.

3. On November 3, 2010, the Commission dismissed Laclede’s counterclaim as failing to state a claim, stating “Laclede’s claim that Staff’s position is inconsistent with the rules and the Cost Allocation Manual does not state a claim that Staff has violated the rules.”¹ The Commission explained that Staff could not violate either the Affiliate Transaction Rules or Laclede’s CAM because neither imposed any obligations or prohibitions upon Staff.

Concerning a Motion in Limine

4. A motion *in limine* is, as Professor Devine says, “a special type of pre-trial motion designed to predetermine the admissibility or non-admissibility of trial evidence.”² Although there are no concerns with mistrials or jury-poisoning in administrative practice, a motion *in limine* is still useful as a way to alert the presiding officer and the Commissioners to major evidentiary battles: “[A] motion in limine has the salutary purpose of pointing out to the court and to opposing counsel anticipated evidence which may be objectionable.”³ A ruling on a motion

¹ Staff of the Mo. P.S.C. v. Laclede Gas Co., Case No. GC-2011-0006 (Order Dismissing Counterclaim of Laclede Gas Company for Failure to State a Claim Upon Which Relief May be Granted, issued Nov. 3, 2010) at pp. 4-5.

² J.R. Devine, Missouri Civil Pleading and Practice, § 32-5 (1986).

³ ***Robbins v. Jewish Hosp. of St. Louis***, 663 S.W.2d 341, 348 (Mo. App., E.D. 1983).

in limine is not definitive, however, and the tribunal may change its mind when the evidence is offered at hearing.⁴

[A motion *in limine* is] nothing more or less than a highfalutin' motion to suppress designated testimony or evidence. However, sustention of such a motion does not per se work as a permanent damnation of the evidence sought to be suppressed. Neither does sustention prevent the trial court from later changing its mind. The pre-trial ruling is interlocutory only. Additional information or trial-produced evidence may prompt the trial court to alter its pre-trial ruling by admitting the previously objected-to testimony.⁵

5. "Evidence is admissible if it is logically and legally relevant."⁶ Evidence is logically relevant "if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, or if it tends to corroborate evidence which itself is relevant and bears on the principal issue of the case."⁷ Legal relevance requires that the probative value of the evidence must outweigh its prejudicial effect.⁸

What Are the Issues Remaining in this Case?

6. With the dismissal of Laclede's counterclaim, the only issues remaining for trial are those framed by Staff's *Complaint* and Laclede's *Answer*, including its

⁴ ***State ex rel. Westfall v. Gerhard***, 642 S.W.2d 679, 681 (Mo. App., E.D. 1982); ***State v. Riggs***, 586 S.W.2d 447, 449 (Mo. App., S.D. 1979).

⁵ For these reasons, an objection or an offer of proof must be made at hearing so that the tribunal has the opportunity to consider such circumstances and developments and thus be able to make a fully-advised decision. ***Robbins***, *supra*. Where the evidence is not offered at trial or where an objection or offer of proof is not made, a motion *in limine* preserves nothing for appellate review. See ***Ratcliff v. Sprint Missouri, Inc.***, 261 S.W.3d 534, 551 (Mo. App., W.D. 2008).

⁶ ***State v. Crow***, 63 S.W.3d 270, 274 (Mo. App., W.D. 2001).

⁷ ***State v. Tisius***, 92 S.W.3d 751, 760 (Mo. banc 2002).

⁸ ***State v. Anderson***, 76 S.W.3d 275, 276 (Mo. banc 2002).

purported affirmative defenses, and Staff's *Reply to Laclede's Affirmative Defenses*. Determinations of admissibility, consequently, must be based upon relevance to these issues:

A. *Staff's Complaint and Laclede's Answer:*

1. Laclede, having bound itself in the 2001 S&A to not object to Staff's discovery requests on the grounds of non-possession, has repeatedly breached that promise in the course of the ACA Cases and related litigation.
2. Monetary penalties lie for the breach of the 2001 S&A because they are violations of a Commission order.

B. *Laclede's Affirmative Defenses:*

1. No breach ever occurred because Laclede has met its obligations under the 2001 S&A in that Laclede is bound only to provide information necessary to verify Laclede's compliance with its CAM and Laclede has done so.
2. Estoppel, because the announced purpose of Staff's discovery in the ACA Cases was not to verify Laclede's compliance with its CAM.
3. Estoppel, because the Commission determined in its November 4, 2009, Order in the ACA Cases that the 2001 S&A was irrelevant to the discovery sought by Staff.
4. Res judicata, because Staff's complaint has already been decided by the Commission in its January 21, 2009, Order in the ACA Cases directing Laclede to produce information that was in its possession.
5. Staff has unclean hands.⁹
6. Laclede's customers have suffered no damages other than those caused by Staff.

⁹ Staff has filed a motion to strike this purported affirmative defense because Laclede has never identified the factual basis for its contention that Staff has unclean hands.

What Evidence Does Staff Seek to Exclude?

7. On December 15, 2010, Laclede filed the Direct Testimony of Michael T. Cline. Staff believes that Laclede will seek to introduce Mr. Cline's testimony in the hearing on this matter if one is held.¹⁰ Staff hereby moves to exclude portions of Mr. Cline's testimony as follows:

- (1) Page 2, lines 10-14: As impermissible opinion testimony by a lay witness on the ultimate issue.¹¹
- (2) Pages 2, line 23, to page 3, line 3: (1) as a violation of the Parole Evidence Rule to permit the witness to orally vary the scope of the parties' written agreement;¹² and (2) as a violation of the Best Evidence Rule to permit the witness to testify as to the terms and content of the parties' written agreement where a duplicate of the written agreement is available.¹³ In this case, Laclede has attached a copy of the 2001 S&A to Witness Krieger's Direct Testimony as an exhibit.

¹⁰ Both Staff and Laclede have moved for summary determination and those motions are pending.

¹¹ "A lay witness generally cannot render an opinion as to the ultimate issue in a case." **Burrows v. Union Pacific R. Co.**, 218 S.W.3d 527, (Mo. App., E.D. 2007); **Mohr v. Mobley**, 938 S.W.2d 319, 322 (Mo. App, W.D. 1997).

¹² "The parole evidence rule prohibits use of oral evidence to contradict or change the terms of a written, unambiguous and complete contract absent fraud, common mistake, accident or erroneous omission." **Simpson v. Simpson**, 295 S.W.3d 199, 205 (Mo. App., W.D. 2009).

¹³ "The best evidence rule represents the law's preference of the best evidence capable of production, but the best evidence rule does not preclude the introduction of secondary evidence. . . . Generally, a court may allow the introduction of secondary evidence if the offering party demonstrates that the primary evidence is lost or destroyed, is outside the jurisdiction, is in the possession or control of an adversary, or is otherwise unavailable or inaccessible to him, or is voluminous or complicated." **Walton v. City of Berkeley**, 118 S.W.3d 617, 621 (Mo. App., E.D. 2003) (citations and internal punctuation omitted). None of those exceptions applies here.

- (3) Pages 3, line 4, through page 4, line 5: As irrelevant to any issue remaining in this case.¹⁴
- (4) Page 6, line 5, through page 8, line 9: As irrelevant to any issue remaining in this case.¹⁵
- (5) Page 8, line 1, through page 8, line 9: As an impermissible legal conclusion offered by a lay witness.¹⁶

8. On December 15, 2010, Laclede filed the Direct Testimony of Glenn W. Buck. Staff believes that Laclede will seek to introduce Mr. Buck's testimony in the hearing on this matter if one is held. Staff hereby moves to exclude portions of Mr. Buck's testimony as follows:

- (1) Page 2, line 15, through page 5, line 14: As irrelevant to any issue remaining in this case.¹⁷

9. On December 15, 2010, Laclede filed the Direct Testimony of Patricia A. Krieger. Staff believes that Laclede will seek to introduce Ms. Krieger's testimony in the hearing on this matter if one is held. Staff hereby moves to exclude portions of Ms. Krieger's testimony as follows:

- (1) Page 2, line 22, through page 3, line 2: As impermissible opinion testimony by a lay witness on the ultimate issue.¹⁸

¹⁴ Evidence is only admissible if it is logically and legally relevant. ***State ex rel. Westfall v. Gerhard***, 642 S.W.2d 679, 681 (Mo. App., E.D. 1982); ***State v. Riggs***, 586 S.W.2d 447, 449 (Mo. App., S.D. 1979).

¹⁵ See Note 14.

¹⁶ Neither expert witnesses nor lay witnesses may testify as to a conclusion of law. Expert testimony is inadmissible if it constitutes a conclusion of law. ***State v. Kinder***, 942 S.W.2d 313, (Mo. banc 1996); [***State v. Case***, 140 S.W.3d 80, 92 -93 (Mo. App., W.D. 2004).

¹⁷ See Note 14.

- (2) Page 4, line 6 through line 9: As an impermissible legal conclusion offered by a lay witness.¹⁹
- (3) Page 3, line 18, through page 7, line 10: As irrelevant to any issue remaining in this case.²⁰
- (4) Page 6, line 12 through line 16: (1) as a violation of the Parole Evidence Rule to permit the witness to orally vary the scope of the parties' written agreement;²¹ and (2) as a violation of the Best Evidence Rule to permit the witness to testify as to the terms and content of the parties' written agreement where a duplicate of the written agreement is available.²² The 2001 S&A is attached to Ms. Krieger's testimony as an exhibit. The Commission can read it for itself and determine what it means.
- (5) Page 7, line 13 through line 23: (1) as a violation of the Parole Evidence Rule to permit the witness to orally vary the scope of the parties' written agreement;²³ and (2) as a violation of the Best Evidence Rule to permit the witness to testify as to the terms and content of the parties' written agreement where a

¹⁸ See Note 11. Ms. Krieger is a fact witness, not an expert witness. At page 2, line 21, of her Direct Testimony, she notes that she intends to testify as to facts.

¹⁹ See Note 16.

²⁰ See Note 14.

²¹ See Note 12.

²² See Note 13.

²³ See Note 12.

duplicate of the written agreement is available.²⁴ The 2001 S&A is attached to Ms. Krieger's testimony as an exhibit. The Commission can read it for itself and determine what it means.

(6) Page 8, line 4 through line 21: As an impermissible legal conclusion offered by a lay witness.²⁵ The Commission may review its Order of August 14, 2001, and determine for itself whether that order approved Laclede's CAM or not. Additionally, this testimony is irrelevant to any issue remaining in this case.²⁶

(7) Page 8, line 22, through page 9, line 9: As irrelevant to any issue remaining in this case.²⁷

(8) Page 9, line 6, through page 11, line 2: (1) As impermissible opinion testimony by a lay witness on the ultimate issue,²⁸ and (2) as an impermissible legal conclusion offered by a lay witness.²⁹ The ultimate issue for the Commission's determination is whether or not Laclede has violated the 2001 S&A as charged by Staff. Ms. Krieger may not offer her opinion on that point. Likewise, Ms. Krieger's opinion as to

²⁴ See Note 13.

²⁵ See Note 16.

²⁶ See Note 14.

²⁷ See Note 14.

²⁸ See Note 11.

²⁹ See Note 16.

just what the 2001 S&A requires from Laclede is not competent and may not be received.

WHEREFORE, by reason of all the foregoing, Staff prays that the Commission will find that the cited portions of Laclede's pre-filed direct testimony are inadmissible for the reasons cited by Staff and, having so found, exclude the same from the record of this matter; and grant such other and further relief as the Commission finds just in the premises.

Respectfully submitted,

s/ Kevin A. Thompson
KEVIN A. THOMPSON
Missouri Bar Number 36288
Chief Staff Counsel

Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
573-751-6514 (Voice)
573-526-6969 (Fax)
kevin.thompson@psc.mo.gov

Attorney for the Staff of the Missouri
Public Service Commission.

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 **18th day of January, 2011**, 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