

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

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

Case No. GC-2011-0098

**STAFF’S REPLY TO
LACLEDE’S AFFIRMATIVE DEFENSES**

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), by and through counsel, pursuant to Section 386.390, RSMo 2000,¹ and for its Reply to Laclede’s Affirmative Defenses, hereby denies Laclede’s Affirmative Defenses and, in further reply, states as follows:

1. Herein, Staff answers Laclede’s Affirmative Defenses and urges the Commission to dismiss these defenses in that Laclede has failed to assert any excuse, justification or other matter negating the complaint its CAM violates the affiliate transactions rules.

2. 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.”²

¹ Unless otherwise noted. all statutory references are to the Revised Statutes of Missouri (“RSMo”)(2000), as currently supplemented.

² J. R. Devine, **Missouri Civil Pleading and Practice**, § 20-4 (1986).

47.³ For its affirmative Laclede asserts that Staff should be estopped from asserting that the CAM (Cost Allocation Manual) violations the Rules retrospectively, given the degree to which the CAM is the product of Staff’s own prior actions. After all, it was the Staff which agreed to and actively promoted the use of the CAM to govern the pricing affiliate transactions. It was the Staff which recommended that the CAM include provisions for determining the FMP the very kind of provisions that are now claimed to be inconsistent with the Rules. It was also the Staff which insisted that Laclede include the CAM in its corporate Code of Conduct, train its employees to adhere to the provisions of the CAM at all times, and subject its employees to discipline, including termination, for failure to adhere to the CAM. 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 . . .

3. Laclede’s first affirmative defense is an equitable claim, based on the idea Staff should be estopped from making a complaint because Staff has promoted the use of the CAM to govern pricing of affiliate transactions.

4. The fact that Staff may have promoted use of a CAM to govern affiliate transactions prior to the Commission’s promulgation of the Affiliate Rules is a stale claim which has been superseded by the Affiliate Rules.

5. It is, in fact, the Commission that, in adopting its Affiliate Transactions Rules,⁴ not only promotes, but requires use of a CAM to govern pricing of affiliate transactions.

. . . The regulated gas corporation shall include in its annual Cost Allocation Manual (CAM), the criteria, guidelines and procedures it will follow to be in compliance with the rule.

4 CSR 240-40.015(E)

6. The Commission’s rules are binding on Laclede and, while it may approach Staff for Staff’s interpretation, only the Commission’s interpretation of its rule is binding on Laclede.

7. In its paragraph 47, produced above, Laclede further claims Staff “should be estopped.” Estoppel is a doctrine under which a party may not change position to the detriment

³ Paragraphs are numbered just as they are in Respondent’s *Answer*. The Company’s text is set out **bold** and Staff’s reply in normal text.

⁴ 4 CSR 240-40.015 and 4 CSR 240-40.016 govern gas utilities and their affiliate transactions with a separate rule (016) for marketing affiliates.

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.⁵ 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.”⁶ As noted above neither the Company nor Staff can waive a Commission rule. Laclede knows or should know that only the Commission can waive its rules. Laclede’s defense that Staff has waived the Commission’s rules by its inaction must be denied.

8. Further, 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.⁷ This fact is Laclede has not asserted any fact to support a claim of affirmative misconduct.

9. **47. (cont.) 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. In fact, until this latest complaint, the Staff has not taken issue with the Company’s claims in pleadings and during oral argument that the Rules and Laclede’s CAM require that such transactions be based on FMP. To the contrary, the Staff itself has repeatedly taken the position in both Laclede and Atmos ACA cases that FMP is the relevant standard.**

⁵ *Black’s Law Dictionary*, 570 (7th ed., 1999).

⁶ *JGJ Properties, LLC v. City of Ellisville*, 303 S.W.3d 642, 650-652 (Mo. App., E.D. 2010), citing *Fraternal Order of Police v. City of St. Joseph*, 8 S.W.3d 257, 263 (Mo. App., W.D.1999).

⁷ *Id.*

10. It is the Company's responsibility to comply with the Commission's rules. Staff has repeatedly discussed its concerns with Laclede beginning in 2003. Staff also met with other utilities, but, unlike other meetings with gas utilities, the meeting with Laclede quickly involved heated rhetoric. Other Laclede meetings also became heated discussions, leading nowhere.

11. In an effort to reach some understanding, the Parties specifically included an Agreement in Laclede's 2007 rate case that the parties would meet to discuss Staff's issues with Laclede's CAM. In Case No. GR-2007-0208 paragraph 23 provides:

Within ninety (90) days of the effective date of the Commission's Report and Order in this case, Laclede, Staff and Public Counsel, shall begin meeting to discuss any issues or concerns they may have relating to Laclede's Cost Allocation Manual ("CAM"), the compliance of the CAM with the Commission's affiliate transactions rules and the transactions between Laclede and its affiliates. Such meetings shall not be construed as placing any restrictions on Staff's or Public Counsel's ability to investigate and file complaints concerning such matters.

12. As previously stated, many of the meetings that were held regarding this agreement were contentious and yielded no results.

13. Laclede cannot rely on Staff's actions to waive a Commission rule. Neither the Company nor Staff can waive a Commission rule. Laclede's equitable defense that Staff has waived the Commission's rules by its inaction must be denied.

14. **48. Laclede asserts the defense of latches.**

15. Respondent has not sufficiently pleaded the affirmative defense of latches. Latches is an equitable doctrine. Simply asserting the defense is inadequate. Mere conclusory allegations constitute inadequate pleadings.⁸ Professor Devine points out, "[i]n alleging an affirmative defense, care must be exercised to allege all elements of the defense."⁹ Additionally,

⁸ *Business Men's Assur. Co. of America v. Graham*, 891 S.W.2d 438 (Mo. App. 1994).

⁹ *Id.*

the Commission is an administrative tribunal and, as such, cannot grant equitable relief even if the claim were properly pled, which it is not in this case.

16. **49. Laclede asserts the defense of performance, as contrary to Staff's allegations, Laclede has taken FDC into account in pricing affiliate transactions.**

17. Laclede asserts it "has taken FDC into account in pricing affiliate transactions." This is not reflected in Laclede's CAM. Laclede has not referenced any documents submitted to Staff or OPC in which it demonstrates it has taken FDC into account. Laclede fails to provide any facts or documentation to support this defense so it must be dismissed.

18. **50. Laclede asserts that the Staff's claim that the CAM violates the Rules represents an impermissible collateral attack on the Commission's Order in Case No. GM-2001-342, which explicitly approved and required the use of the CAM to govern transactions between Laclede and LER. It also represents an equally impermissible attack on the provisions of Laclede's approved tariff sheets, which since 2001 have provided that the CAM should be used for purposes of pricing gas supply sales made to an affiliate.**

19. Laclede's argument that Staff's pleading constitutes an "impermissible attack" on the Commission Order in Case No. GM-2001-342 fails. The Stipulation and Agreement in Case No. GM-2001-342, regarding Laclede's use of the CAM,¹⁰ has been superseded by the Commission's adoption of the affiliate transactions rules. Laclede admits as much in the Introduction to its 2004 CAM, which states:

The CAM submitted by Laclede Gas Company [as a result of GM-2001-342] addressed some, but not all of the regulations adopted by the Commission in its Affiliate Transactions Rules, which were then under appeal. It was noted, however, that the [Krieger] CAM could be readily updated to reflect the outcome

¹⁰ The Parties agreed in the Stipulation in GM-2001-342 that the CAM "shall be in the form contained in the direct testimony of Patricia A. Krieger, provided that the CAM, and the information that the Company is required to maintain and submit thereunder, shall be revised and supplemented within 120 days of the approval of this Stipulation and Agreement to include any and all of the following information as required to administer, audit and verify the Transfer Pricing and Costing Methodologies set forth in Section VIII of the CAM or such other Transfer Pricing and Costing Methodologies **as may become applicable to the Company in the future.** The Affiliate Rules became applicable to the Company in 2003.

of any final judicial resolution of the Commission's affiliate transactions rules. This version of the CAM seeks to accomplish that goal.

20. The Order in GM-2001-342 approving the Stipulation and Agreement approved the provision that Laclede's CAM shall be revised to include "such other Transfer Pricing and Costing Methodologies **as may become applicable to the Company in the future.**

21. Notably Laclede's tariffs regarding off-system sales specifically state "the Company shall" comply with the Commission's affiliate transactions rules:

33. Off-System Sales

(1) Definitions:

Off-system marketing Sales (OS-Sales) are herein defined as any company sale of gas . . . made to parties at locations off the Company's distribution system. Subject to any waivers or approved modifications, OS-Sales made to an affiliate of the Company shall be accounted for in accordance with the Company's Cost Allocation Manual or, if and when applicable, the Commission's affiliate transactions rules.

Laclede tariff Original Sheet No. R-42.

22. Staff's Complaint does not attempt to mount a collateral attack on the Commission's Order in Case No. GM-2001-342. The Stipulation and Agreement underlying the Commission's Order in that case indicates the Company will comply with the Commission's Rules. Similarly, Laclede's tariffs verify the Company will comply with the "Commission's affiliate transactions rules" for off-system sales. Contrary to Laclede's assertion, there is no collateral attack on either.

WHEREFORE Staff prays that the Commission will dismiss Laclede's Affirmative Defenses as insufficiently pled and treat them as requests for equitable relief, which the Commission cannot grant, and Staff further requests the Commission grant such other and further relief as the Commission finds just in the premises.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 28th day of January 2011.

/s/ Lera L. Shemwell