

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

Case No. GC-2011-0006

**STAFF’S SUGGESTIONS IN OPPOSITION TO
LACLEDE’S MOTION FOR SUMMARY
DETERMINATION**

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), by and through counsel, and for its Suggestions in Opposition to Laclede’s Motion for Summary Determination pursuant to Commission Rule 4 CSR 240-2.117(1), states as follows:

Introduction

Staff filed its *Complaint* on July 7, 2010, asserting that Respondent Laclede Gas Company (“Laclede”) has violated an order of the Commission by violating provisions of a Commission-approved Stipulation and Agreement. For relief, Staff prays that the Commission will (1) find that Laclede has violated the Commission’s order as charged by Staff and (2) authorize the Commission’s General Counsel to seek penalties in Circuit Court. Thereafter, on December 22, 2010, Laclede filed its Cross-motion for summary determination, and the Commission ordered that Staff’s response be filed no later than January 21, 2011.

Argument

Summary Determination:

Commission Rule 4 CSR 240-2.117(1)(E) authorizes summary determination “if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest.” Staff has filed its *Response* to Laclede’s motion together with these *Suggestions*, which are the “separate legal memorandum” that may be “attached” to a response to a motion for summary determination, pursuant to Rule 4 CSR 240-2.117(1)(C), explaining “why summary determination should not be granted.” Staff suggests that Laclede’s motion and memorandum fail to demonstrate that Laclede is entitled to relief as a matter of law or that the public interest demands that Laclede’s motion be sustained. Staff further suggests that its own motion, affidavit and suggestions previously filed herein demonstrate that there is no dispute of material fact, that Staff is entitled to relief as a matter of law and that the public interest demands that Staff’s complaint be sustained.

Summary determination should be favored, not disfavored. In a proper case, summary determination conserves scarce resources, both fiscal and human, for the Commission and for all the parties. Why hold an expensive and time-consuming evidentiary hearing in a case like this one, where the material facts are not in dispute? The Commission would gain nothing from A hearing that it cannot get from holding an oral argument on these cross-motions for summary determination.

What is Laclede's theory and why must it fail?

Laclede's theory is set out plainly enough in the first sentence of its memorandum: "Staff's complaint in this case constitutes an impermissible collateral attack on the Commission's November 4, 2009 Order, as well as on the Commission's January 21, 2009 Order, and the Circuit Court's June 25, 2010 Judgment." Laclede continues:¹

In the November 4 Order, the Commission agreed with Staff and specifically found that the Staff's discovery requests were not made pursuant to the 2001 S&A (or the Rules), both of which were red herrings. Instead, the Commission decreed that the discovery requests are covered by the discovery rules of civil procedure. Having carried the day on this point, the Staff cannot now attack the Commission's order on that same issue in this complaint case.²

It is true that Commission orders are not subject to collateral attack, see § 386.550, RSMo ("In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive").³ But this complaint case is in no way an attack on any Commission order, but instead is focused on Laclede's behavior. It is simply not true that Staff's complaint constitutes an impermissible collateral attack on a Commission order or on a judgment of the Circuit Court.

In the very order on which Laclede relies, the Commission stated:⁴

¹ *Laclede Gas Company's Legal Memorandum in Support of its Motion for Summary Determination*, ¶ 1.

² The "2001 S&A" referred to by Laclede is, more properly, *In the Matter of the Application of Laclede Gas Company for an Order Authorizing Its Plan to Restructure Itself Into a Holding Company, Regulated Utility Company, and Unregulated Subsidiaries*, Case No. GM-2001-342 (*Unanimous Stipulation and Agreement*), filed July 9, 2001. Staff will continue to refer to this document as the 2001 S&A.

³ And certainly Staff cannot attack a judgment issued by a circuit court in an administrative proceeding such as this.

⁴ *In the Matter of Laclede Gas Company's Purchased Gas Adjustment (PGA) to be Audited in its 2004-2005 and 2005-2006 Actual Cost Adjustment*, Case Nos. GR-2005-0203 & GR-2006-0288 (*Order Directing Laclede to Produce Information*, issued Nov. 4, 2009) at pp. 2-3 (footnotes omitted).

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. These issues have but served as red herrings in what is a discovery request governed by the rules of civil procedure. Mirroring what was set out in the Commission's initial order granting Staff's motion to compel, Commission rule 4 CSR 240-2.090(1) states that discovery may be obtained by the same means and under the same conditions as in civil actions. Under the rules of civil procedure, "it is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

The present case, unlike Case Nos. GR-2005-0203 and GR-2006-0288,⁵ most definitely **is** "a complaint through which Staff . . . seeks enforcement of the agreement reached in Case No. GM-2001-342."

The red herring here is Laclede's theory of impermissible collateral attack. There is no impermissible collateral attack; there are merely different and distinct cases involving different and distinct causes of action. In the ACA Cases, the Commission granted Staff's *Motion to Compel* because the discovery sought was entirely proper under the civil rules, without regard to the 2001 S&A. Here, Staff seeks penalties against Laclede for its breach of the promise it made in the 2001 S&A, which occurred in the course of the ACA Cases.

A reading of Laclede's pleadings also suggests that Laclede may believe that the promise it made in the 2001 S&A is somehow inapplicable to the ACA Cases because Staff's purpose in those cases is to review the prudence of Laclede's conduct. The 2001 S&A, Laclede repeatedly insists, applies only to discovery undertaken to verify compliance with its CAM.⁶ Perhaps this misconception arises from Laclede's habit of

⁵ Referred to hereafter as "the ACA Cases."

⁶ "CAM" is Cost Allocation Manual.

never quoting in full the promise that it made in the 2001 S&A or Staff's statements concerning the purpose of its discovery in the ACA Cases. The promise that the Laclede entities made in the 2001 S&A applies not only to verifying their compliance with Laclede's CAM but also to verifying their compliance with "the conditions set forth in this Stipulation and Agreement[.]"⁷ Those conditions, in turn, are the "agreements, understandings and requirements set forth in Sections III, IV, V, VI and VII" of the 2001 S&A.⁸ Among those conditions is this one:⁹

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.

The Laclede entities' promise in the 2001 S&A also applies, by its explicit terms, to "any other such information . . . relevant to the Commission's ratemaking, financing, safety, quality of service and other regulatory authority over Laclede Gas Company."¹⁰ It cannot be rationally denied that an inquiry into the prudence of Laclede's transactions with its affiliate LER – also a member of The Laclede Group – is necessarily also an inquiry into whether or not "a detrimental effect" has been imposed on Laclede's utility customers. And Staff explicitly stated in the course of the ACA Cases that Staff would

⁷ 2001 S&A, § IV.2, 1st sentence.

⁸ *Id.*, at § II.2.

⁹ *Id.*, at § III.1.

¹⁰ *Id.*, at § IV.2, 3rd sentence.

review Laclede's compliance with its CAM and with the Affiliate Transaction Rules as part of its prudence review in those cases.¹¹

There is absolutely nothing in this complaint case that is antithetical to the Commission's orders of January 21, 2009, and November 4, 2009, in the ACA Cases, and so Laclede's theory must fail. There is no impermissible collateral attack and Laclede's repeated claims that it does not possess the information sought by Staff in the ACA Cases are blatant violations of the promises that the Laclede entities made in Case No. GM-2001-342.

The Commission Must Deny Laclede's Motion for Summary Determination:

The Commission must deny Laclede's *Motion for Summary Determination* because Laclede has not shown that it is entitled to relief as a matter of law. The facts that it asserts, although mostly true, prove nothing and entitle it to nothing. The fact that the Commission granted Staff's discovery motions in the ACA Cases on a basis other than the promises contained in the 2001 S&A does not somehow relieve Laclede from the consequences of its repeated violation of those promises.

What Does the Public Interest Require?

The deciding consideration in this matter is the public interest: "The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and **the commission determines that it is in the public interest.**"¹² The public

¹¹ Case Nos. GR-2005-0203 and GR-2006-0288, Oral Argument on March 26, 2009, Transcript vol. 2, p. 23, line 19, to p. 24, line 15.

¹² Rule 4 CSR 240-2.117(1)(E), emphasis added.

interest here emphatically requires that Laclede be called to account for selling the Commission a pig in a poke back in 2001.

In Case No. GM-2001-342, Staff opposed Laclede's reorganization plan largely because Staff feared that Laclede would use the new organization as a means to impede Staff's access to necessary information. Surely no member of this Commission needs to be told that the great danger inherent in allowing regulated utilities to operate as part of a corporate group including unregulated entities in the same or similar lines of business is that costs and expenses will be shifted to the captive ratepayers while earnings are shifted to the shareholders. Staff fears that this sort of cross-subsidization is exactly what the members of The Laclede Group have been doing. Yet the Commission allowed Laclede to reorganize in 2001, with Staff's blessing, on the strength of the promises set out in the 2001 S&A.

Staff's battle to obtain access to necessary information in the ACA Cases is still not over, some three years after it began. The result is that Staff – and this Commission – cannot assure Laclede's customers with any degree of confidence that they are not being shamelessly milked by the shifting of costs to the regulated consumer through rigged affiliate transactions.

Conclusion

In conclusion, Staff urges the Commission to deny Laclede's *Motion for Summary Judgment* because it fails to show that Laclede is entitled to relief as a matter of law and because it is contrary to the public interest. Under Commission Rule 4 CSR 240-2.117(1)(E), the Commission cannot sustain a motion for summary determination under those conditions. Additionally, Staff urges the Commission to grant Staff's *Motion*

for Summary Determination and authorize its General Counsel to seek penalties against Laclede in Circuit Court.

WHEREFORE, Staff prays that the Commission will deny Laclede's *Motion for Summary Determination* and instead grant summary determination to Staff on its *Complaint* filed herein and enter its order (1) finding that Laclede has repeatedly and continuously violated §IV.2 of the Stipulation and Agreement approved by the Commission in Case No. GM-2001-342; (2) authorizing the General Counsel to pursue penalties against Laclede in the Circuit Court; and granting such other and further relief as the Commission deems just.

Respectfully Submitted,

/s/ Kevin A. Thompson

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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 **12th 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