

**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-2011-0006

**STAFF’S CORRECTED MOTION TO STRIKE
INSUFFICIENT AFFIRMATIVE DEFENSE**

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), by and through counsel, pursuant to Section 386.390, RSMo 2000,¹ and hereby files its *Corrected Motion to Strike*² Laclede Gas Company’s insufficient affirmative defense at Paragraph 5 of the Affirmative Defenses section of its *Answer*, states as follows:

Motion to Strike Insufficient Defense:

A motion to strike an insufficient defense is equivalent to a motion to dismiss for failure to state a claim.³ It is a demurrer that tests the legal sufficiency of a defense.⁴ Consequently, the same standard should be applied in determining such a motion as is applied in the case of a motion to dismiss for failure to state a claim.

A motion to dismiss for failure to state a claim tests only the legal sufficiency of

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

² The original version, filed earlier this day, mistakenly referred to MGE in the prayer.

³ J.R. Devine, *Missouri Civil Pleading and Practice*, § 20-4 (1986).

⁴ *Id.*

the complaint.⁵ All well-pleaded factual allegations in the complaint must be accepted as true and the facts must be liberally construed to support the complaint.⁶ The complainant enjoys the benefit of all reasonable inferences.⁷ The complaint should not be dismissed unless it shows no set of facts entitling it to relief.⁸ These same standards should be applied in determining a motion to strike an insufficient defense.

Respondent Has Insufficiently Pleaded Estoppel:

In the Affirmative Defenses section of its *Answer*, at Paragraph 5, Laclede Gas Company (“Laclede”) pleads the following as an “affirmative defense”:

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

One purpose of an answer is to assert any affirmative defenses.⁹ “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.”¹⁰ Professor Devine points out, “[i]n alleging an affirmative defense, care must be exercised to allege all elements of the defense.”¹¹

Respondent has not sufficiently pleaded the affirmative defense of the doctrine of unclean hands because Respondent has not pleaded any facts showing that Complainant has unclean hands. It is not sufficient to simply state the word in a conclusory pleading; Respondent must allege *facts* sufficient to show that every

⁵ *Id.*, at § 20-3.

⁶ ***Nazeri v. Missouri Valley College***, 860 S.W.2d 303, 306 (Mo. banc 1993).

⁷ *Id.*

⁸ *Id.*

⁹ Devine, *supra*, § 15-1.

¹⁰ *Id.*, at § 15-2 (emphasis added).

¹¹ *Id.*

element of the doctrine exists. In this case, Respondent has alleged no facts whatsoever, consequently, the asserted defense of unclean hands is insufficient on its face and Staff's motion to strike must be granted.

The Clean Hands Doctrine, also called the Unclean-Hands Doctrine, is an equitable principle, based on the saying that to seek equity, one must do equity. Our Supreme Court recently described the doctrine:¹²

A litigant with unclean hands generally is not entitled to equitable relief such as an injunction or declaratory judgment. ***City of St. Joseph v. Lake Contrary Sewer Dist.***, 251 S.W.3d 362, 369 (Mo. App. 2008). This rule reflects that the law strives to prevent opportunistic behavior. See *id.* "A party who participates in inequitable activity regarding the very issue for which it seeks relief will be barred by its own misconduct from receiving relief." *Id.* (internal quotation omitted).

In the present case, Laclede has not effectively invoked the doctrine because it has not alleged any inequitable behavior by Staff.

Additionally, the Commission is an administrative tribunal and not a court and cannot grant equitable relief.¹³ The Commission is therefore without authority to apply the Clean Hands Doctrine even in a proper case.

WHEREFORE, Staff prays that the Commission will strike Paragraph 5 from the Affirmative Defenses section of Laclede's *Answer* in that it insufficiently asserts the defense of unclean hands; and grant such other and further relief as the Commission deems just in the premises.

¹² ***Purcell v. Cape Girardeau County Com'n***, 322 S.W.3d 522, 524 (Mo. banc 2010).

¹³ See ***Soars v. Soars-Lovelace, Inc.***, 142 S.W.2d 866, 871 (Mo. 1940).

Respectfully Submitted,

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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