

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

Office of the Public Counsel,)	
)	
Complainant,)	
)	
vs.)	Case No. GC-2016-0297
)	
Laclede Gas Company, Missouri Gas)	
Energy,)	
)	
Respondent.)	

REPLY TO MOTION TO DISMISS and MOTION TO STRIKE

COMES NOW the Office of the Public Counsel (“OPC”) and for its Reply to Laclede Gas Company’s (“Laclede” or “Company” refers to both Laclede Gas and Missouri Gas Energy) May 31, 2016 Motion to Dismiss (“Motion”) OPC’s Complaint, and for its Motion to Strike, urges the Public Service Commission (“Commission”) to deny Laclede’s motion and further states:

1. On May 31, 2016, Laclede filed its Motion to Dismiss OPC’s Complaint alleging said Complaint failed to state a claim upon which relief may be granted. Laclede’s motion should be denied because it misinterprets the law regarding motions to dismiss. OPC’s Complaint complies with all Commission rules and Missouri statutes and states a claim upon which relief may be granted because the Commission clearly has the authority to investigate Laclede’s earnings and reset Laclede’s rates should the Commission find Laclede is earning a 10.45% return on equity (“ROE”).
2. “In reviewing the granting of a motion to dismiss for failure to state a claim upon which relief may be granted, the appellate court determines if the facts pleaded and the inferences reasonably drawn therefrom state any ground for relief.

Sullivan v. Carlisle, 851 S.W.2d 510, 512 (Mo. banc 1993). **All of a plaintiff's averments are assumed to be true.** *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993). **No attempt is made to weigh any facts alleged as to whether they are credible or persuasive;** instead, the petition is reviewed to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. *Id.*” *Velting v. City of Kansas City*, 901 S.W.2d 119, 121 (Mo. Ct. App. 1995). Throughout its motion, Laclede weighs alleged facts as to their credibility or persuasiveness contrary to the legal standards for considering a motion to dismiss. *Id.* OPC urges the Commission to apply the appropriate standard as outlined by the Missouri courts and recognize the facts alleged by OPC “meet the elements of a recognized cause of action” under Sections 386.250(1), 386.390, 393.130, and 393.140 RSMo providing the Commission with the authority to adjust Laclede’s rates should the Commission find Laclede is earning a 10.45% ROE.

A. OPC Complied with All Commission Rules for Complaints

3. OPC filed its Complaint on April 26, 2016 asserting Laclede’s rates are no longer just and reasonable. The Complaint explains in Laclede’s fiscal year 2015 Annual Report filed with the Securities and Exchange Commission Laclede’s financial results reflect an ROE of 10.45% for its Laclede and MGE operating divisions, whereas the average ROE for gas utilities in 2015 was 9.6%. OPC’s Complaint states it is “in the rate-paying public’s best interest for the Commission to evaluate the company’s cost of service and revenue requirement to determine just and reasonable rates going forward.”

4. Complaints before the Commission are governed by Sections 386.390.1 and 386.710.1(3) RSMo authorizing OPC to file complaints as well as Commission rule 4

CSR 240-2.070(4) requiring certain contents within a complaint. Formal complaints filed with the Commission must identify the Complainant, Respondent, and “[t]he nature of the complaint and the complainant’s interest in the complaint, in a clear and concise manner” and “[t]he relief requested.” OPC’s Complaint satisfied all requirements. It is of further note Laclede’s motion does not cite to any statute or rule Laclede claims OPC’s Complaint allegedly violates.

5. Laclede’s motion ignores the standard employed by the Commission when considering a complaint. “Complaints or other pleas before the commission are not tested by the rules applicable to pleadings in general, if a complaint or petition ‘fairly presents for determination some matter which falls within the jurisdiction of the Commission’, it is sufficient.” *State ex rel. Chicago, B. & Q. R. Co. v. Public Service Com.*, 334 S.W.2d 54 (Mo. 1960). *See also State ex rel. Crown Coach Co. v. Public Service Com.*, 238 Mo. App. 287 (Mo. App. 1944). **“Complaints filed with the Commission are to be liberally construed and the technical rules of pleading are inapplicable.”** *State ex rel. Friendship Village v. Public Serv. Com.*, 907 S.W.2d 339 (Mo. App. 1995). OPC’s Complaint goes beyond these minimal standards required by the law to assert facts and conclusions sufficient to enable Laclede and the Commission to understand the basis of OPC’s Complaint.

B. Commission Has Authority to Reduce Laclede’s Rates

6. The crux of Laclede’s motion is its argument OPC failed “to allege facts sufficient to support its contention Respondent’s rates are unjust or unreasonable in violation of Section 393.130.1 RSMo.” Laclede makes five separate points to support this argument. Each is responded to below. Relevant to many of these points, OPC notes

all of Laclede's points are factual in nature. Facts are not adjudicated in a Motion to Dismiss. This is a reason the Legislature granted the public with the right to file a Complaint with the Commission – so the Commission could investigate those facts. “Whether those facts are true, they cannot be considered on a motion to dismiss because they are outside the petition.” *Estate of Saling*, 924 S.W.2d 312 (Mo.App. 1996)

7. Laclede first argues “*The Commission should disregard the alleged ROE of 10.45% because it is a calculated figure that is unsupported by underlying facts; as such, it is a conclusion that is not entitled to be treated as true for purposes of a motion to dismiss.*”¹ Laclede essentially argues the result of an ROE calculation is a conclusion and not an alleged fact. Laclede's argument must fail because it confuses the difference between a fact and a conclusion. OPC's Complaint asserts as a matter of *fact* that Laclede is earning an ROE of approximately 10.45% while average ROEs for gas utilities in 2015 was 9.6%. The fact Laclede earned a 10.45% ROE in its last fiscal year lead OPC to the *conclusion* that Laclede's rates are unjust and unreasonable. Had OPC merely stated its conclusion that Laclede's rates are unjust and unreasonable without asserting any facts to support that conclusion, Laclede's motion may have merit. However, the Complaint explained the facts that formed the basis for OPC's Complaint and ultimate conclusion that Laclede's rates are not just and reasonable.

8. Laclede's interpretation of what constitutes a fact versus what constitutes a conclusion changes depending upon which party is performing the calculations. According to Laclede, the numbers calculated and included in the Annual Report are

¹ Motion to Dismiss, p. 6.

“underlying facts” while OPC’s calculations “form a conclusion.”² This nonsensical argument should be rejected. Both Laclede’s Annual Report calculations and OPC’s calculated ROE are facts because they are “something that actually exists; an aspect of reality.”³ Laclede’s 10.45% ROE is a fact because it is observable and can be demonstrated through a simple calculation.

9. To support its erroneous understanding of what constitutes an assertion of fact, Laclede cites to *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993) to make the point that OPC’s Complaint does not properly plead facts. However, the Supreme Court’s decision in *Nazeri* supports the sufficiency of OPC’s Complaint:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff’s petition. It assumes that all of plaintiff’s averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. *Sullivan v. Carlisle*, 851 S.W.2d 510, 512 (Mo. banc 1993). No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

Nazeri, 860 S.W.2d at 306. All averments in OPC’s complaint are assumed to be true, and there should be no attempt to weigh any alleged fact. *Id.* Instead, the Commission is to determine whether “the facts alleged meet the elements of a recognized cause of action.” The Commission is to assume OPC’s allegations that Laclede earned an ROE of 10.45% is true and the Commission is also to assume as fact that this return “significantly exceeds what state commission awarded in 2015 for natural gas companies.” The question to ask is if the Commission assumes these facts are correct as claimed, whether this creates a recognized cause of action. There is no question the law recognizes a cause

² Motion to Dismiss, pp. 2-3.

of action to reduce excessive rates under Sections 386.390 and 393.130 RSMo and there should be no question that OPC's Complaint is properly pled.

10. Laclede's second argument is "*OPC's Complaint should be dismissed because it offers no evidence supporting its allegation of overearnings, thereby failing to provide Laclede with adequate notice of the claims being asserted against it in violation of the Company's due process rights.*"⁴

Due process is provided by affording parties the opportunity to be heard in a meaningful manner. The parties must have knowledge of the claims of his or her opponent, [and] have a full opportunity to be heard, and to defend, enforce and protect his or her rights.

Weinbaum v. Chick, 223 S.W.3d 911, 913 (Mo. App. S.D. 2007). Laclede feigns ignorance of OPC's calculation, yet in its Answer to Complaint Laclede acknowledges "Complainant attempted to arrive at the ROE by dividing net income by shareholder's equity."⁵ Laclede provides a lengthy argument as to why it disagrees with OPC's method of calculating ROE but this disagreement is a matter of disputed fact to be determined by the Commission following a review of the evidence - the weighing of evidence is not appropriate for a motion to dismiss a complaint. *Nazeri*, 860 S.W.2d at 306. In addition, the due process clause prohibits *state actions* from depriving a person of life, liberty or property and OPC's Complaint alone cannot possibly violate Laclede's right to due process. *Shapiro v. Columbia Union Nat'l Bank & Trust Co.*, 576 S.W.2d 310, 318 (Mo. 1978). OPC anticipates the procedure ordered by the Commission for this Complaint will

³ *Black's Law Dictionary*, Seventh Edition, p. 610.

⁴ Motion to Dismiss, p. 6.

⁵ Answer to Complaint and Response to Motion for Expedited Treatment, p. 3.

allow OPC to present its case-in-chief to the Commission through testimony evidence, to which Laclede will have an ample opportunity to respond and be heard.

11. Laclede's third point argues "*OPC's Complaint should be dismissed because the ROE it claims Laclede is earning falls within the 1% "zone of reasonableness" based on OPC's own alleged data.*"⁶ Laclede is again attempting to convince the Commission to weigh the evidence regarding an appropriate ROE, which is not allowed for considering motions to dismiss. *Nazeri*, 860 S.W.2d at 306. Whether or not the Commission chooses to apply a zone of reasonableness to Laclede's ROE is a fact-based decision that can only be determined by the Commission following a consideration of the evidence before it. *Id.* Laclede is also misapplying the concept of zone of reasonableness which applies to *appellate court* reviews of Commission decisions to determine whether the Commission's decision on ROE is reasonable. *State ex rel. Noranda Aluminum, Inc. v PSC*, 356 S.W.3d 293 (Mo. Ct. App. 2011). Laclede provides no authority for the premise that the zone of reasonableness can be used to dismiss a complaint. Laclede is essentially arguing the Commission is prohibited from resetting a company's rates if those rates fall within a certain range, but there is simply no authority for this premise. The relief requested by OPC – a rate review - can be granted by the Commission regardless of any zone of reasonableness and therefore this point fails to establish the Commission cannot order the relief requested.

12. Laclede's fourth point argues "*OPC's Complaint should be dismissed because the ROE it claims Laclede is earning is based on a past period that ended within eight months ago and there is nothing in OPC's Complaint to indicate that what Laclede*

⁶ Motion to Dismiss, p. 9.

is earning today or is likely to earn in the future is excessive.”⁷ Again, Laclede is attempting to bait the Commission into weighing the evidence when considering Laclede’s motion, which, as explained above, is unlawful for motions to dismiss. *Nazeri*, 860 S.W.2d at 306. The proper test period for calculating Laclede’s earnings is a fact-based decision to be decided by the Commission in the same way test periods are decided by the Commission in standard rate cases filed by utility companies. By arguing OPC’s use of Laclede’s financial data ending September 2015 results in a failure to state a claim upon which relief may be granted, Laclede is asserting the Commission lacks the jurisdiction to choose test periods. Laclede cites to no authority to support this claim which is inconsistent with common Commission practice of using past test years to set future rates.

13. Laclede’s fifth point argues the Complaint should be dismissed for good cause because setting new rates will require them to do extra work. If this were a proper reason for granting a motion to dismiss, it should apply equally to rate cases filed by utilities as all rate cases require energy and effort. This is not a lawful or reasonable justification for dismissing a rate review initiated by either Laclede or OPC. Commission decisions are to promote the public interest, which is to take precedence over all other interests, including the busy workloads of the utility and those of the Commission’s Staff.⁸ “[T]he dominant thought and purpose of the [public utility] policy is the protection of the public while the protection given the utility is merely incidental

⁷ Motion to Dismiss, p. 11.

State ex rel. Crown Coach Co. v. Public Service Com., 238 Mo. App. 287, 296 (Mo. Ct. App. 1944). OPC has the fewest resources between the parties in this matter and, if the current workload of Commission cases is manageable by OPC (which bears the burden of proof in this case), it should be manageable by Laclede as well. On this point, Laclede accuses OPC of expecting the Staff to make OPC's case for it. To the contrary, OPC intends to fully present its own case to the Commission that will justify a rate reduction for Laclede's two Missouri operating units. OPC is indifferent to the Staff's participation in this case and only requested a Staff investigation since that is the procedure typically followed by the Commission in complaint cases.

14. Lastly, OPC is compelled to correct Laclede's inflammatory and incorrect accusation the Complaint "was politically motivated." OPC initiated its investigation and retained an outside consultant in this matter in 2015 before the start of the 2016 legislative session. OPC intended to file the Complaint earlier but was delayed for a number of reasons including:

- (a) The resignation of the prior acting Public Counsel and the appointment of the current acting Public Counsel;
- (b) OPC counsel's involvement in the Missouri-American Water Company ("MAWC") rate case; and
- (c) Laclede's request following discussions between OPC and Laclede to delay the filing to allow further attempts to resolve the issue and to allow Laclede to provide OPC with additional information they believed would explain the earnings calculated – primarily involving the sale of their "Forrest Park" location to IKEA.

⁸ The Staff previously indicated in its Staff Response to Complaint that it does not wish to participate in this case because "Staff has an extremely busy caseload in the coming months."

Unfortunately, the parties were unable to resolve their differences and the information Laclede provided to OPC only raised further questions and concerns. OPC filed the Complaint two business days following the filing of reply briefs in the MAWC case and one day after its last meeting with Laclede regarding the Complaint. OPC made it very clear during discussions with Laclede that the timing of OPC's Complaint had nothing to do with any proposed legislation. Laclede's claims to the contrary are baseless. If Laclede wishes to make its failed legislation attempt a point of discussion in this case, Laclede should be prepared to explain why it has been desperately trying for the past two legislative sessions to avoid a 2017 rate review.⁹ Laclede should also explain why a major "talking point" with the Legislature in promoting its proposed legislation was its claim that extending the date for a mandated rate case filing does not prevent OPC or another party from filing a complaint case against Laclede, yet when OPC made such a filing, Laclede moved to dismiss and made incorrect allegations towards this office.

A number of Legislators contacted OPC to inquire whether OPC believed Laclede was over-earning. OPC then disclosed to these lawmakers it was, in fact, close to filing a complaint. Laclede's disingenuous and groundless arguments are nothing more than a desperate attempt to prevent any review of its earnings. There are also a number of lawmakers and policy makers who have addressed concerns as to Laclede's business practice, an example being how Laclede uses funds from its synergies as a result of acquisitions across the country, among other things. The fact these concerns are parallel to the concerns of the OPC are irrelevant. OPC believes Laclede has introduced these issues into these proceedings as means of distracting and prejudicing the matter and OPC

⁹ See SB 403 (2015); SB 849 (2016); and HB 1471 (2016).

further seeks for these allegations, which Laclede admits have not been “confirmed,” to be struck from Laclede’s motion.

WHEREFORE, the Office of the Public Counsel respectfully submits this reply and urges the Commission to deny Laclede’s motion to dismiss and strike Laclede’s baseless accusations from its Motion.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 14th day of June 2016.

/s/ Marc Poston
