

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

The Staff of the Missouri Public Service Commission,)	
)	
v.)	Case No. GC-2011-0098
)	
Laclede Gas Company,)	
Respondent.)	

**LACLEDE GAS COMPANY’S RESPONSE TO STAFF’S RENEWED MOTION
TO DISMISS LACLEDE’S COUNTERCLAIM AND LACLEDE’S REQUEST
FOR LEAVE TO FILE MOTION FOR SUMMARY DETERMINATION**

COMES NOW Laclede Gas Company (“Laclede” or “Company”), and files this Response to Staff’s Renewed Motion to Dismiss Laclede’s Counterclaim and Request for Leave to File Motion for Summary Determination, and in support thereof, states as follows:

INTRODUCTION

1. Staff’s April 18, 2011 Motion to Dismiss is based entirely on the theory espoused by the Commission in its order in Case No. GC-2011-0006, in which the Commission found that neither the Company’s Cost Allocation Manual (CAM) nor the Commission’s Affiliate Transaction Rules (Rules) impose any obligation on Staff, and therefore Staff cannot be found to violate those rules. However, Laclede’s position in its counterclaim in this case is that Staff has violated Commission Rule 4 CSR 240-2.080(7) by presenting claims, defenses or other legal contentions in its pleadings that are not warranted by existing law or by a nonfrivolous argument for a change in the law.

2. Staff has wholly failed to address Laclede’s counterclaim, either in its motion to dismiss or in two rounds of testimony. As a result, not only is Staff not entitled

to dismissal of the counterclaim, but Laclede is entitled to summary determination of the counterclaim in its favor.

BACKGROUND

3. On September 22, 2010, in Case No. GC-2011-0006, Laclede filed a counterclaim against the Staff alleging that Staff had violated the CAM and the Rules by refusing to apply the pricing standards contained in these controlling documents to Laclede's affiliate transactions. Staff has openly divulged that it is applying a different standard. For example, rather than reviewing a sale of gas by LER to Laclede based on the fair market price of that sale, as required by the Rules and the CAM, Staff asserts that the proper price should be LER's acquisition cost.

4. On November 3, 2010, the Commission issued an order dismissing Laclede's counterclaim for failing to state a claim upon which relief could be granted. In the November 3 Order, the Commission recognized that "...Staff as well as the Commission itself, is bound by the requirements of the affiliate transaction rules." (Order, p. 4) The Commission nevertheless found that the CAM and the Rules impose no obligations on Staff that could be the subject of a violation.

5. On November 12, 2010, Laclede sought reconsideration of the November 3 Order. Among other arguments, Laclede emphasized that, pursuant to Commission Rule 2.080(7), the Staff does not have free reign to advocate positions that are clearly contrary to Commission rules.

6. On December 1, 2010, the Commission issued an order denying Laclede's application for rehearing and reconsideration. In the order, the Commission stated:

"Laclede argues Staff's argument is so clearly contrary to the language of the rules and the cost allocation manual that Staff cannot be making the argument in good faith. Laclede contends this places Staff in violation of

Commission Rule 4 CSR 240-2.080(7)(B), which states that a party that presents or maintains a claim, defense, request, demand, objection, contention, or argument before the Commission has certified that its claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

*Laclede's contention that Staff has violated Commission Rule 4 CSR 240-2.080(7) by advocating a frivolous position may state a claim that the Commission can address in an appropriate circumstance. However, that contention was not raised in the counterclaim that the Commission dismissed, and it is not properly raised for the first time in Laclede's motion for reconsideration and application for rehearing.*¹ (Emphasis supplied).

7. Based on the language quoted above, Laclede filed a counterclaim in this complaint case on December 10, 2010. This counterclaim alleged that Staff's admissions that it was disregarding the affiliate pricing standards in the CAM and the Rules were violations of Rule 2.080(7). Staff offered no response to this counterclaim, so on January 13, 2011, Laclede asked the Commission for an order of default.

8. On January 18, 2011, Staff filed its Motion to Late File and Reply to Laclede Gas Company's Counterclaim, which the Commission granted. In this pleading, Staff answered Laclede's counterclaim. Staff also opined in very conclusory fashion that the counterclaim should be dismissed because it "lacks merit" and is "unfounded".²

RESPONSE TO MOTION TO DISMISS

9. Staff's April 18 Motion to Dismiss states that Laclede's counterclaim fails to state a claim upon which relief may be granted. Staff raises no arguments in support of its motion except for the aforementioned argument that parroted Case No. GC-2011-

¹ Laclede contends that the matter was not raised for the first time in the motion for reconsideration, but that contention is not germane to its argument here.

² Although Staff's April 18 pleading claims to renew its January 18 motion to dismiss, Staff never actually made a motion to dismiss that presented grounds for dismissal. As explained in more detail herein, whether a claim lacks merit or is unfounded are matters of fact to be determined at hearing, not grounds for summary dismissal.

0006. As Laclede has indicated in its counterclaim and herein, its counterclaim in this case pertains to Staff's violation of a pleading rule, not to a violation of the Rules or the CAM. Staff wholly fails to address this distinction, even though the Commission addressed it directly in the December 1, 2010 Order quoted above.

10. A motion to dismiss for failure to state a claim is solely a test of the adequacy of a petition, or in this case, of a counterclaim. The Commission must accept all properly pleaded facts as true, give them a liberal construction, draw all reasonable inferences therefrom, and then determine based on that analysis if the counterclaim states any grounds for relief. *Wheeler v. Sweezer*, 65 S.W. 3d 565, 568 (Mo App. W. D. 2002). If principles of substantive law are invoked, the counterclaim is sufficient and cannot be dismissed for failing to state a claim. *Id.* In this case, Laclede has pled facts that properly allege that Staff's pleadings are contrary to the Rules and the CAM and are not warranted by law or by a nonfrivolous argument for a change in the law. Assuming such facts to be true, Laclede has clearly stated a claim that Staff has violated Commission Rule 2.080(7). As set forth below, Staff has offered no arguments that even address the sufficiency of Laclede's counterclaim. Staff's Motion to Dismiss must therefore fail.

11. In support of its Motion to Dismiss, Staff states that Laclede has accused Staff of violating Rule 2.080(7) in an attempt to shift blame for Laclede's flaunting of the Commission's rules. (Staff Motion to Dismiss, par. 4) Such an allegation, which Laclede denies as baseless, does not address the sufficiency of Laclede's claim and cannot form the basis of a motion to dismiss.

12. In paragraph 5 of its motion, Staff claims that it has presented its complaint against Laclede in good faith and not for an improper purpose. A mere statement that Staff's complaint was filed in good faith and not for an improper purpose,

even if relevant, is a matter to be proven at hearing and does not support dismissal of Laclede's counterclaim anymore than a mere statement by Laclede that it and its CAM comply fully with the Commission's Affiliate Transactions Rules would warrant the dismissal of a complaint that asserted otherwise. Staff's allegation is nothing more than an attack on the merits of the counterclaim. However, in a motion to dismiss, the facts pled by the counterclaimant are reviewed only to determine whether they state a claim for relief, not to determine who may ultimately prevail on the relief requested. *Id.* at 568-69.

13. In paragraph 6 of its motion, Staff claims that it has the authority to file a complaint and did so after meeting with Laclede. Again, this assertion does not address, much less demonstrate, whether Laclede failed to plead facts in the counterclaim that state a claim upon which relief could be granted.

14. In paragraph 7 of its motion, Staff claims that Laclede is making unfounded attacks on Staff and asserting wrongdoing where there is none. Staff's claim is a matter for Staff to prove at the hearing on the merits and cannot be the basis of dismissal of Laclede's counterclaim. *Id.* As a brief rebuttal, Laclede would point to Staff's October 25, 2010 Answer to Laclede's Counterclaim in Case No. GC-2011-0006, in which Staff admitted that its position is that Laclede should buy gas from LER at LER's acquisition price, and that any profit realized on sales of gas by LER that utilize capacity or gas purchased from Laclede should inure to the benefit of Laclede's ratepayers. This position is in direct conflict with the plain language of the Rules and the CAM, and is a pleading that is simply not warranted by law or by a nonfrivolous argument for a change to that law. The allegations of facts such as these by Laclede are sufficient to state a claim upon which relief may be granted.

15. In conclusion, Staff has raised no arguments that would justify dismissal of Laclede's counterclaim alleging that Staff has violated Commission Rule 2.080(7).

REQUEST FOR LEAVE TO MOVE FOR SUMMARY DETERMINATION

16. Commission Rule 2.117(1)(A) states that a motion for summary determination shall not be filed less than 60 days prior to the hearing except by leave of the Commission. The hearing in this case is set for June 9, 2011, which is less than 60 days from now.

17. Laclede had not previously filed a motion for summary determination pending the filing of testimony in this case. Direct testimony was filed by Staff and Laclede on March 22, 2011. Laclede filed direct testimony supporting its counterclaim. Staff's direct testimony not only failed to address the allegations in Laclede's counterclaim, it did not even mention the counterclaim.

18. Rebuttal testimony was filed on April 19, 2011, less than 10 days ago, and also less than 60 days before the hearing. In rebuttal, Mr. Hyneman finally mentioned Laclede's counterclaim, but only so far as to make a conclusory statement that if Staff's position "is contrary to the Rules, the Commission will address those issues in the appropriate ACA case." (Hyneman Rebuttal, p. 28).

19. Mr. Hyneman's decision to remain silent on the issues raised by Laclede's counterclaim ignores the fact that the Commission has not even ruled upon, let alone granted, Staff's Motion to Dismiss the counterclaim. Indeed, that is presumably why the Staff renewed its motion, prompting this response. In light of this fact, it is fundamentally inappropriate for Mr. Hyneman and the Staff to conduct their evidentiary filings as if Staff's Motion had been granted. The disposition of that Motion is a matter

for the Regulatory Law Judge and the Commission to decide, not Staff. Unfortunately, this is just the latest in a series of unilateral actions by a Staff that does what it wants, when it wants, without regard to its obligations under the Commission's rules. Whether pursuing affiliate pricing standards that are contrary to the Commission's Rules, filing amended complaints without asking leave of the Commission, ignoring affirmative defenses and counterclaims, or conducting its evidentiary presentation as if it, rather than the Commission, was in charge of deciding what issues may be properly raised in a proceeding, the Staff has repeatedly acted as if it is above the laws that apply to everyone else. Laclede respectfully submits that at some point the Staff should and must be held accountable for this pattern of conduct and that a wholly appropriate place to start would be with a Commission determination that Mr. Hyneman's dismissive and unilateral testimony deferring this matter to another case is not an adequate or acceptable defense to the Company's counterclaim.

20. In summary, Staff is clearly not taking seriously the accusation that it has violated the Commission's rule on bad faith pleadings. Staff didn't even bother to respond to Laclede's December 10, 2010 counterclaim in this case until Laclede asked for an order of default. Now, Staff has had two rounds of testimony to present evidence that its contentions do not violate Rule 2.080(7) and has failed to even attempt to do so.

21. Only after the filing of rebuttal testimony did Laclede become fully aware that Staff would fail or refuse to file testimony disputing Laclede's counterclaim. Therefore, Laclede requests the Commission grant Laclede leave to file a motion for summary determination less than 60 days prior to the hearing.

WHEREFORE, Laclede respectfully requests that the Commission deny Staff's April 18 Motion to Dismiss Laclede's counterclaim, and that the Commission instead grant Laclede leave to file a motion for summary determination as to its counterclaim in this case.

Respectfully submitted,

/s/Michael C. Pendergast

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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing pleading was served on the Staff and on the Office of Public Counsel on this 28th day of April, 2011 by United States mail, hand-delivery, email, or facsimile.

/s/ Gerry Lynch