

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

In the Matter of Laclede Gas Company's	)	
Tariff Revision Designed to Clarify its	)	Case No. GT-2009-0056
Liability for Damages Occurring on	)	Tariff No. JG-2009-0145
Customer Piping and Equipment.	)	

**BRIEF OF THE OFFICE  
OF THE PUBLIC COUNSEL**

Laclede Gas Company (“Laclede”) seeks to significantly modify its tariff to provide limitations on Laclede’s liability towards its customers when Laclede’s negligence causes injuries or damages. (Tr. 66-67). Laclede seeks Commission approval of these liability limitations for liabilities that arise under both the regulated and unregulated services provided by Laclede. (Tr. 91). The issue to be decided by the Commission is whether the tariff change proposed by Laclede that would grant Laclede immunity from lawsuit regardless of the circumstances is unlawful and unreasonable. The Office of the Public Counsel (“OPC”) opposes Laclede’s revised tariff language because it is unlawful and unreasonable as further explained below.

**1. Background: The Regulated and Unregulated Services Provided by Laclede**

To better understand the problems with Laclede’s proposed tariff revision, it is helpful to first understand the regulated and unregulated services provided by Laclede. The regulated services are those services that fall under the Commission’s jurisdiction as granted by the Legislature in § 386.250(1), which states:

386.250. The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

(1) To the manufacture, sale or distribution of gas, natural and artificial, and electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to gas and electric plants, and to persons or corporations owning, leasing, operating or controlling the same;

Laclede provides these *regulated* services pursuant to Laclede's Commission-approved tariff. § 393.140(11) and § 393.150. Laclede also provides *unregulated* HVAC services, which are defined as "the warranty, sale, lease, rental, installation, construction, modernization, retrofit, maintenance or repair of heating, ventilating and air conditioning equipment." § 386.754. The services Laclede provides that are unregulated include: gas appliance sales, gas appliance delivery and installation, connecting gas appliances, residential appliance service, appliance and fuel running inspections, parts warranties, commercial and industrial appliance service, and residential gas leak repair. (Ex. 8, Sch.1-3).

Laclede is authorized to provide these unregulated services under § 386.756, which prohibits utilities from providing HVAC services unless the utility provided those services for five years prior to August 28, 1998. In Commission Case Number GE-2000-610, the Commission's Staff reviewed the services provided by Laclede and concluded that Laclede was in fact performing HVAC services prior to August 28, 1998. The Commission determined that Laclede had met the requirements for the exception to the prohibition against a utility providing HVAC services.<sup>1</sup> While Laclede is authorized to provide HVAC services, Laclede has not been given a waiver from complying with the important protections of § 386.756(4):

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<sup>1</sup> *In the Matter of Laclede Gas Company's Filing Pursuant to 4 CSR 240-40.017(8)*. Order Granting Exemption, July 6, 2000.

A utility may not engage in or assist any affiliate or utility contractor in engaging in HVAC services in a manner which subsidizes the activities of such utility, affiliate or utility contractor to the extent of changing the rates or charges for the utility's regulated services above or below the rates or charges that would be in effect if the utility were not engaged in or assisting any affiliate or utility contractor in engaging in such activities. [emphasis added].

This prohibits Laclede from engaging in HVAC services in a manner which subsidizes the activities of Laclede to the extent it changes the rates of Laclede's regulated services.

**2. Burden of Proof: Laclede Has Not Proven That a Liability Problem Exists**

OPC does not believe Laclede has met its burden of proof to demonstrate that the current liability language is insufficient. The first reason claimed by Laclede for the proposed change to liability language is "the unnecessary costs and expenses that the Company incurs and that its customers ultimately pay as a result of having to defend and sometimes pay for frivolous legal actions." (Ex.1, p.2). To support these claims, Laclede's witness Mr. Abernathy identified four "examples of the kinds of unwarranted claims that the Company has had to defend." *Id.* On cross-examination, Mr. Abernathy acknowledged that no lawsuit was filed in the first example, and Laclede chose to settle and pay settlements in the other three. (Tr. 35-44). In other words, Laclede acknowledged it was negligent and chose to accept liability in the only three examples where a lawsuit was filed.

Mr. Abernathy also argues that juries and judges should not establish the safety requirements Laclede must follow. (Ex.2, p.2). On cross-examination, Mr. Abernathy could not identify a single example where a case was brought to a jury for determination that found Laclede liable for damages and which altered Laclede's safety practices. (Tr. 56-57). Instead, Laclede has simply chosen to settle each claim and then recover the

costs of such settlement from ratepayers. (Tr. 68-69). Laclede has therefore been rewarded for settling lawsuits that stemmed from Laclede's negligence by being allowed to recover these increased expenses through the cost of service in rates. (Tr. 51).

It gets worse. Laclede has also been allowed to recover in rates the liabilities caused by Laclede's *unregulated* services through rates for regulated services. (Ex. 9, pp.3-4). This recovery even includes the hiring of outside legal counsel to defend claims for unregulated services and payments on claims for "injuries and damages." (Ex. 9, p.4; Tr. 129). Customers of Laclede's regulated services have been unlawfully subsidizing the liabilities of Laclede's unregulated services. § 386.756(4).<sup>2</sup> This subsidization is relevant to this case because Laclede's proposed tariff changes would support the subsidization of unregulated services by applying liability provisions for those unregulated services.

**3. Laclede's Attempt to Restrict Access to Courts is a Violation of Article 1 § 14 of the Missouri Constitution**

During the evidentiary hearing, Commissioner Jarrett raised an important issue that had not been specifically addressed by the parties. Commissioner Jarrett questioned the tariff's lawfulness in light of Article 1 § 14, the "open courts" provision of the Missouri Constitution, which states:

**§ 14. Open courts—certain remedies—justice without sale, denial or delay**

That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.

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<sup>2</sup> OPC believes this issue should be fully examined in Laclede's next rate case to ensure subsidization does not occur when new rates are set. OPC understands that Laclede is preparing a rate increase request to be filed soon.

Laclede's proposed tariff revisions would be a direct violation of Article 1 § 14 of the Missouri Constitution because it would close the courts of justice to remedies by a consumer that has suffered injury to person or property due to Laclede's negligence. The policy of Missouri is to bar none of its citizens from its courts where there is proper venue and jurisdiction of the parties and subject matter. *State ex rel. Southern Ry. Co. v. Mayfield*, 240 S.W.2d 106 (Mo. 1951).

The open courts provision does not create rights, but is meant to protect the enforcement of rights already acknowledged by law. *State ex rel. Tri-County Electric Co-op. Ass'n v. Dial*, 192 S.W.3d 708 (Mo. 2006). The Missouri Revised Statutes currently recognizes a Laclede consumer's right to file an action in court, and the open courts provision of the Missouri Constitution protects that right. § 536.120.

In *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W. 2d 822, 832 (Mo. 1992), the Missouri Supreme Court stated that "the major issue in almost every consideration of the open courts provision is to determine exactly where the courts draw the line between the right of the legislature to modify the substantive law to eliminate or restrict some cause of action and the right of an individual litigant to have open access to the courts to obtain some remedy available under the applicable substantive law." Here the Supreme Court recognizes the *Legislature's* authority to limit or restrict causes of action, which is an authority not granted to the Commission. Any such limits on an individual litigant's rights to file suit in a court of law would have to come from the Missouri Legislature.

In *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638 (Mo. 2006), the Missouri Supreme Court outlined the requirements for a showing that an open courts violation has occurred. An open court violation is established upon the showing that: 1) a party has a

recognized cause of action; 2) that the cause of action is being restricted; and 3) the restriction is arbitrary or unreasonable. *Id.* at 640. Laclede's customers have a recognized cause of action against Laclede under Chapters 516 and 537 to file claims against Laclede for injuries and damages to property and person. The proposed tariff would restrict the consumer's ability to file such actions. This restriction is arbitrary and unreasonable for the reasons explained in the following section. Accordingly, Laclede's tariff proposal is in violation of Article 1 § 14 of the Missouri Constitution.

**4. Analysis of the Specific Sections of Laclede's Proposed Tariff that are Unjust and Unreasonable**

OPC does not oppose the idea of changing Laclede's tariff to clarify reasonable and lawful limitations to Laclede's liability. In fact, OPC's evidence includes a liability tariff revision proposal that would address these issues. (Ex.12, BAM SUR-3). Unfortunately, Laclede's proposal to modify its tariff is extremely anti-consumer and would unjustly expand the Commission's authority. Following is a paragraph by paragraph analysis of the specific portions of Laclede's tariff proposal that should be rejected.

**a. The Tariff Would Give Laclede a Complete Defense Against Liability so Long as the Minimum Safety Regulations are Followed**

The first proposed paragraph opposed by OPC is in the fourth paragraph of Laclede's Revised Tariff Proposal. (Ex. 2, Sch. DPA-1):

Paragraph 4

The Company shall be responsible for the safe transmission and distribution of gas, free of constituents (water or debris) that materially interfere with or adversely affect the safe and proper operation of Customer Equipment, until such gas passes the Point of Delivery to the Customer in a manner that complies with the pressure, quality and other requirements set forth in the Safety Standards of the Pipeline Safety Regulations of the State of Missouri, 4 CSR 240-40 .030, and the Pipeline Safety Regulations issued by the U.S.

Department of Transportation, 49 CFR Part 192. Such compliance shall constitute the safe transmission and distribution of gas by the Company and shall constitute full compliance with the Company's duties and obligations in the transmission and distribution of gas. Compliance with the above shall constitute a complete defense for the Company in any lawsuit against the Company by the Customer or any other person or entity for loss, damage or injury to persons or property, or death, arising in whole or in part from the transmission and distribution of gas by the Company. [emphasis added].

OPC interprets Laclede's proposed tariff language to prevent consumers from filing legitimate negligence claims so long as Laclede complies with the minimum safety standards. The Staff and Laclede apparently interpret the provision differently. However, the Staff's support for the tariff proposal is predicated on their legal interpretation that the proposal would not bar a consumer from filing a damages claim for negligence. (Tr. 132-133). If the language of the proposal can be interpreted to limit Laclede's negligence liability, as OPC believes it can, apparently the Staff would join OPC in opposing Laclede's proposed changes. *Id.* The Staff's legal analysis is flawed and the tariff would allow Laclede to avoid legitimate legal claims against it.

The highlighted language states that so long as Laclede follows the *minimum* Missouri and Federal safety standards, standards that are specifically labeled *minimum safety standards*, that Laclede would have a complete defense against liability in any lawsuit. This includes lawsuits that result from Laclede's negligence. The Commission should not be in the practice of releasing a utility from liability so long as it follows minimum standards. This will only act to weaken safety regulations because it is impossible to predict with accuracy the circumstances that could arise that would require Laclede to employ safety practices that go beyond the minimum standards. (Ex.11, p.6). If given a "Get out of Liability Free" card, the Commission can be assured that Laclede

would have a decreased incentive to employ safety measures that go beyond the minimum standards if the circumstances warrant such additional precautions.

OPC asserts that the proposed tariff revisions would alter the scope of *minimum* federal and state safety regulations by essentially concluding that compliance with minimum standards should be automatically deemed to be the *maximum* standard by which Laclede must operate. The “purpose” provisions of 4 CSR 240-40.030 and 49 CFR Part 192.1 Subparts A through M (thirteen total subparts) each clearly indicate that such rules are meant to be the minimum standards, implying that Laclede’s obligations towards consumer safety go beyond these minimum standards. (Ex. 10). The rules establishing the minimum safety standards impose an inherent obligation upon Laclede to go beyond these standards if necessary to ensure the safe distribution of gas. The tariff proposed by Laclede would consider compliance with these minimum standards to end Laclede’s obligations towards safety. Not only is this change in conflict with these regulations, but it could lessen Laclede’s attentiveness towards ensuring consumer safety.

OPC also opposes Laclede’s attempts to limit its liability because it is unreasonable to predetermine that Laclede is not liable when Laclede’s negligent actions caused the injuries or damages in question. Courts of law are better able to assess the specific facts in question to determine negligence. Determining whether Laclede was negligent depends on the surrounding circumstances as well as the particular conduct involved since actions or omissions which would be clearly negligent in some circumstances might not be negligent in other circumstances. *Zuber v. Clarkson Const. Co.*, 251 S.W.2d 52 (Mo. 1952). Negligence claims involve many considerations which go to determine whether due care has been exercised in the particular instance in which



the question arises. *Schiermeier v. Kroger Grocery & Baking Co.*, 167 S.W.2d 967 (Mo. App. 1943). These important fact specific decisions regarding liability should be left to the Missouri judicial system.

**b. The Tariff Would Give Laclede an Unreasonable 48-Hour Presumption of Safe Testing and Inspection**

The next proposed tariff language that OPC opposes is in the fifth paragraph of Laclede's Revised Tariff Proposal. (Ex. 2, Sch. DPA-1):

Paragraph 5

The Company does not own Customer Equipment, nor is it responsible for the design, installation, inspection, operation, repair, condition or maintenance of Customer Equipment, except for the testing and inspection requirements of 4 CSR 240-40 .030(10)(7) and (12)(S), or unless the Company expressly agrees in writing to assume such obligations. The 10(7) and 12(S) requirements are intended only to ensure the safe introduction of gas into Customer Equipment. As with any equipment, Customer Equipment can be defective, fail, malfunction or fall into disrepair at any time, and Customer shall be deemed to be aware of this fact. It shall be presumed that such testing and inspections were performed in a safe and appropriate manner if such Customer Equipment operates as designed for 48 hours after gas service is initiated. [emphasis added].

This language is against the public interest because Laclede has not proven any basis for determining that damages caused by testing or inspection will be revealed within 48-hours following a test or inspection. A consumer may not even use a gas appliance for days or even weeks following an inspection or test. This paragraph seeks to create a presumption in Laclede's favor to the detriment of consumers. Laclede has not proven any reasonable basis for creating this presumption, which would only act to give Laclede an unreasonable advantage whenever Laclede's negligent actions cause harm to property or person.

**c. The Tariff Would Require Individual Customers to Pay Laclede's Liabilities and Legal Fees Resulting from Laclede's Negligence**

The next proposed tariff language that OPC opposes is in the sixth paragraph of Laclede's Revised Tariff Proposal. (Ex. 2, Sch. DPA-1):

Paragraph 6

Subject to the Company's responsibility for the safe transmission and distribution of gas as provided above, and except as otherwise provided for herein, upon expiration of the Non-Incident Operational Period, as defined below, Company shall in no event be liable to Customer or anyone else, and Customer shall indemnify, hold harmless and defend the Company from and against any and all liability, claims, proceedings, suits, cost or expense, for any loss, damage or injury to persons or property, or death, in any manner directly or indirectly connected with or arising out of, in whole or in part (i) the release or leakage of gas on the Customer's side of the Point of Delivery; (ii) a leak and ignition of gas from Customer Equipment; (iii) any failure of, or defective, improper or unsafe condition of, any Customer Equipment; or (iv) a release of carbon monoxide from Customer Equipment. [emphasis added].

This language is both unreasonable and unlawful. It is unreasonable because it would release Laclede from any liability related to customer equipment, even when Laclede's negligent actions "directly or indirectly" caused the harm. The paragraph does not distinguish between liability that was caused by Laclede or caused by the customer. If Laclede's negligence causes the leak or other unsafe condition, the customer would be required to pay for Laclede's liability, including Laclede's legal fees. (Tr. 58). For example, if the actions of a Laclede employee cause customer equipment to explode and injure a third party, the customer would be responsible for all of Laclede's damages and legal fees. It is wholly inappropriate to force consumers to be responsible for damages that a court of law determines are Laclede's responsibility. Furthermore, this provision

could lessen Laclede's incentive to ensure testing and inspection is performed safely and adequately.

**d. The Proposed Tariff Would Unlawfully Apply to Unregulated Services and Limit the Statute of Limitations**

The next proposed tariff language that OPC opposes is in the eighth paragraph of Laclede's Revised Tariff Proposal. (Ex. 2, Sch. DPA-1):

Paragraph 8

The Non-Incident Operational Period shall begin on the date that Company representatives were last inside the customer's place of business or premises to perform testing, inspection or other work for which the costs and revenues are normally considered in the ratemaking process. For instances where the Customer Equipment at issue is a natural gas fueled appliance used for space heating, such as a furnace or boiler, the Non-Incident Operational Period shall end once 60 winter days has elapsed following the premises visit or the date on which any party other than Company subsequently tests, inspects, adjusts, repairs, or replaces such Customer Equipment, whichever occurs earlier. For instances where the Customer Equipment at issue is a natural gas fueled appliance not used for space heating, such as a water heater or stove, the Non-Incident Operational Period shall end once 90 days has elapsed following the premises visit, or the date on which any party other than Company subsequently tests, inspects, adjusts, repairs, or replaces such Customer Equipment, whichever occurs earlier. It is intended that the running of this time period be a complete defense and absolute bar to such claims and lawsuits. This provision shall not be construed as affecting the Company's liability for claims arising from any defects in Customer Equipment sold by the Company as part of its Merchandise Sales business, for other activities in which the associated costs and revenues are not considered in the ratemaking process; or in circumstances where the Non-Incident Operational Period has elapsed solely as a result of Company's unexcused failure to enter the customer's place of business or premises to perform an inspection required by the Commission's Safety Standards. [emphasis added].

OPC urges the Commission to reject the language proposed in Paragraph 8 because: 1) The Commission does not have the authority to provide consumer liability provisions for unregulated services; 2) The Commission does not have the authority to deny access to the courts; 3) The Commission does not have the authority to implement a

statute of limitations that differs from that provided by Chapter 516 RSMo; and 4) Laclede wrongly claims the 60 day and 90 day window on filing claims is similar to the liability limitations for unregulated service.

**i. No Authority Over Unregulated Services**

Laclede acknowledged that one of its goals in this proposed tariff change is to have the liability tariff apply to unregulated services. (Tr. 61). The Staff also admitted that revenues and expenses associated with non-regulated services “have been traditionally treated above-the-line for financial reporting and ratemaking purposes.” (Ex.9, p.3). The Staff explains that the reason these unregulated services are recorded above the line is because of Laclede’s practice of not recording the unregulated and regulated expenses and revenues separately. *Id.* While these services do not appear in Laclede’s tariff, they do appear in Laclede’s rates. (Tr. 129-130). The liability tariff would clearly apply to unregulated services because such services are currently considered in the “rate case process.” (Tr. 142).

The underlined sections of Paragraph 8 would apply to unregulated services because currently the costs and revenues for HVAC services “are normally considered in the ratemaking process.” (Ex.9. p.3). Therefore, HVAC services would fall under the terms of the rule. The only HVAC services that would not be covered under the liability provision are claims for defects of equipment sold by Laclede. By not also excluding the long list of other HVAC services provided by Laclede (*See* Ex. 8, Sch.1-3), the tariff would unlawfully apply to unregulated services.

Laclede has identified no law that would authorize the Commission to limit Laclede’s liability stemming from unregulated services. The Commission’s authority

over Laclede's unregulated HVAC services is limited under § 386.762 to ensuring compliance with the prohibitions against subsidization found in the HVAC rules. §§ 386.754 to 386.764. HVAC services do not require Commission consent and authorization when establishing rates and conditions of service, and are therefore unregulated. § 393.140(12).

It is also unreasonable to impose liability limitations for unregulated services when Laclede's unregulated competitors are not afforded the same legal protections. (Ex.3-HC). Laclede's unregulated competitors do not have the privilege of having a tariff approved by a state commission that limits damage claims.

**ii. No Authority to Limit Liability as Proposed**

Laclede's proposed 60 day and 90 day limitation on filing claims is an attempt to change the current statute of limitations in Chapter 516 of the Missouri Revised Statutes. Imposing a 60 day or 90 day limitation on the filing of liability claims is prohibited by § 536.120(1) which states that all actions upon contracts, obligations or liabilities can be filed within five years. The only exceptions allowed by the statute for a different limitation period are those "herein limited" by Chapter 516. § 536.120(1). Other statutes of limitations could also be unlawfully restricted by Laclede's proposal such as actions for wrongful death under § 537.080.

OPC also asserts that approving this tariff language is beyond the Commission's jurisdiction because the authority granted to the Commission by the Missouri Legislature does not include the authority to limit Laclede's liability in a court of law. The Commission "is an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto." State ex rel. AG

Processing, et al. v. P.S.C., 100 S.W.3d 915 (Mo. App. 2003). It is well established that the Commission “has no power to determine damages, award pecuniary relief, declare or enforce any principle of law or equity.” State of Missouri, ex rel. Fee Fee Trunk Sewer, Inc., v. Litz, 596 S.W.2d 466 (Mo. App. E.D. 1980). Approving the proposed tariffs and limiting a consumer’s ability to make legal and equitable claims in a court of law would be an unlawful declaration of a principle of law and equity. As explained previously, it would also be an unlawful violation of Article 1 § 14 of the Missouri Constitution to deny a consumer’s access to the courts.

**iii. Laclede’s Proposal Goes Well Beyond the Examples Provided for Competitive Companies**

Laclede claims the 60 day and 90 day time limitation on a customer’s ability to file a liability claim against Laclede is common in service contracts for unregulated companies. (Ex. 1, p.7). However, the service contracts reviewed by Mr. Abernathy in making his claim reveal no such limitation on liability for injuries and damages. Exhibit 3-HC is a complete list of the service contracts reviewed by Mr. Abernathy, and as admitted to by Mr. Abernathy during cross-examination, they make no reference to liability for injuries and damages. (Tr. 54-56). The time-frames referenced in the service contracts are nothing more than warranties on labor and parts. (Ex. 3-HC). Laclede has provided absolutely no evidence that competitive industries have liability protections that would absolve liability to the same extent proposed by Laclede. In fact, approving the tariff would place Laclede in a competitive advantage over its competition for unregulated services. (Ex.12, p.5).

**e. The Proposed Tariff Would Limit Laclede's Duty to Warn to No More Than the Minimum Safety Standards**

The next proposed tariff language that OPC opposes is in the ninth paragraph of Laclede's Revised Tariff Proposal. (Ex. 2, Sch. DPA-1):

Paragraph 9

Absent actual, specific knowledge of a dangerous condition on a Customer's premises, gained through notice to the Company by the Customer, or by the Company's discovery during the Non-Incident Operational Period described above, the Company's obligation to provide warnings or safety information of any kind to the Customer shall be limited to the obligations that are imposed by Sections (1)(K), (1)(L), (10)(J) and (12)(S) 2 of the Safety Standards of the Pipeline Safety Regulations of the State of Missouri, 4 CSR 240-40.030(1)(K)-(L), (10)(J), (12)(S) 2; and Section 192.16 of the Pipeline Safety Regulations of the U.S. Department of Transportation, 49 CFR 192.16. Compliance with the aforesaid obligations to notify shall constitute a complete defense and bar to any claims or lawsuits by the Customer or anyone else against the Company for loss, damage or injury to persons or property, or death, alleging the breach of any duty to warn or provide safety information. Delivery of warnings and information by the Company to the Customer may be made by means of electronic message to customers that receive bills electronically or by a brochure or similar document that is included in the mailing envelope for a billing statement addressed to the Customer. No special language or legend is required on the envelope in which such notices are delivered. Such delivery in the United States mail, postage prepaid, or electronically shall constitute compliance with the aforesaid regulations.

The same argument against modifying the minimum safety standards would also apply to this attempt to limit liability under a tariff for Laclede's duty to provide consumers with safety warnings. Turning minimum standards into maximum standards does not take into consideration all situations that could arise where Laclede may be negligent if it did not provide additional warnings to a customer or customers. This paragraph also attempts to bar the filing of any claims, which violates Article 1 § 14 of the Missouri Constitution, as previously explained, because Laclede's customers have a constitutional right to an open court.

**f. The Proposed Tariff Attempts to Trump Court Orders**

The next proposed tariff language that OPC opposes is in the tenth paragraph of Laclede’s Revised Tariff Proposal. (Ex. 2, Sch. DPA-1):

Paragraph 10

Company will use reasonable diligence to furnish to Customer continuous natural gas service, but does not guarantee the supply of gas service against irregularities or interruptions. Company shall not be considered in default of its service agreement with customer and shall not otherwise be liable for any damage or loss occasioned by interruption, failure to commence delivery, or failure of service or delay in commencing service due to accident to plant, lines, or equipment, strike, riot, act of God, order of any court or judge granted in any bonafide adverse legal proceedings or action or any order of any commission or tribunal having jurisdiction; or, without limitation by the preceding enumeration, any other act or things due to causes beyond Company's control. Any liability of the Company under this paragraph due to the Company's negligence shall be limited to the charge for service rendered during the period of interruption or failure to render service, which shall be the sole and exclusive remedy, and shall in no event include any indirect, incidental, or consequential damages.

This section is similar to tariffs for other Missouri utilities that provide a limited guarantee on the availability of the natural gas commodity being sold. However, it also states that the Company would not be liable for irregularities or interruptions even where an “order of any court or judge granted in any bonafide adverse legal proceedings or action” concluded that Laclede was responsible for damages due to Laclede’s negligence. Laclede and the Staff have not identified any statute that grants the Commission the authority to negate the decision of a court of law.

**5. Conclusion**

OPC urges the Commission to reject Laclede’s tariff and avoid authorizing an unlawful, unreasonable, and lopsided tariff that seeks to do more than just attempt to avoid frivolous lawsuits. Laclede’s proposal could act to avoid legitimate claims against



Laclede that result from Laclede's negligence. A consumer with a legitimate action for negligence against Laclede could be deterred from filing that claim and receiving just compensation due to the appearance of Laclede's tariff that all claims of negligence are prohibited by the tariff. (Tr. 72-73).

The current tariff provisions are working as they should. Laclede's witness Mr. Abernathy testified regarding a claim that Laclede did not properly odorize its gas. Mr. Abernathy testified that Laclede responded to the claim and provided evidence that the odorizing was within the required standards. (Tr. 77). As a result of Laclede's demonstration, "the issue kind of fell by the way-side." *Id.* This is an example of Laclede's ability to address these legal challenges without the proposed tariff changes.

OPC asks the Commission to keep in mind that Laclede is a monopoly provider of a necessary service. Consumers in Laclede's service area have only one choice in their natural gas provider. From this lone provider they receive the natural gas energy that is essential for heating their homes. In a competitive industry, a consumer could choose between service providers and attempt to avoid those that imposed lopsided terms in their service agreements. Laclede's customers do not have that choice, and they rely upon the Commission to ensure that the terms of Laclede's service offerings are lawful and reasonable. OPC asks that the Commission reject the tariff proposal and recognize that the Commission's primary purpose is to protect consumers. *State ex rel. Capital City Water Co. v. P.S.C.*, 850 SW2d 903 (Mo. App. W.D. 1993). The protection given the utility "is merely incidental." *State ex rel. Electric Co. of Missouri v. Atkinson*, 204 SW 897 (Mo. 1918). For these reasons, OPC urges the Commission to reject the proposed liability tariff.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 13<sup>th</sup> day of November 2009:

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