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

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

---

## STAFF BRIEF

---


Robert S. Berlin
Senior Counsel
Missouri Bar No. 51709

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 526-7779 (Telephone)
(573) 751-9285 (Fax)
email: bob.berlin@psc.mo.gov


November 13, 2009

**TABLE OF CONTENTS**

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

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

# STAFF BRIEF

**COMES NOW** the Staff of the Missouri Public Service Commission (Commission) and for its Brief provides the following:

I. Purpose of Proposed Liability Tariff

On October 8, 2009, the Commission held an evidentiary hearing on Laclede Gas Company's (Laclede or Company) revised proposed liability tariff (hereinafter the "Tariff"). (See attached Exh. 3, "Sched. DPA-1" of Laclede witness David Abernathy's Surrebuttal testimony. For ease of reference, Tariff paragraphs have been labeled "Paragraphs A – M" and they are summarized and explained below).

The purpose of the Tariff is to clarify the Company – Customer relationship by setting reasonable time periods and parameters in certain liability limiting provisions that address situations when the Company does its Commission-mandated inspections and testing or performs other Commission-authorized service work on customer equipment.

The Tariff achieves its purpose because it sets parameters and time periods that are sensible. In doing so, the Tariff strikes a fair and reasonable balance of the interests of the individual customer and the Company and it does so in a way that serves the greater interest of the entire body of Laclede's ratepayers.

In support of the proposed Tariff, four Staff witnesses filed testimony and appeared before the Commission for cross examination at the evidentiary hearing held on October 8, 2009:

Ms. Natelle Dietrich, Director of the Commission's Utility Operations Division, filed Surrebuttal testimony on policy matters implicated in this case. (Exh. 4)

Mr. Robert Leonberger, Gas Safety/Engineering Supervisor, filed Rebuttal and Surrebuttal testimony on how the Tariff interacts with and reinforces Missouri and Federal Gas Pipeline Safety Regulations. (Exh.'s 5 and 6)

Mr. Tom Imhoff, the Energy Department Rate & Tariff Examination Supervisor, filed Rebuttal and Surrebuttal testimony regarding the Tariff at issue. (Exh's 7and 8).

Ms. Kim Bolin, Utility Regulatory Auditor, filed Surrebuttal testimony addressing how the Staff accounts for Laclede's merchandising and HVAC services revenues and costs in the ratemaking process. (Exh. 9)

II. Summary and Explanation of Tariff Provisions (Exh 3, Sched. DPA-1)

- Para. (A) defines "Customer Equipment" (p. 1, lns 5-7)

- Para. (B) defines "Point of Delivery" (p. 1, lns 9-12)

- Para. (C) defines "Winter days" to include the months of November through April (p.1 ln 14).

  This is consistent with Laclede's PSC MO No. 5, Tariff Sheet No. 2. and it provides an additional month (April) to the heating season.[1]

- Para. (D) re-affirms the Company responsibility to provide safe transmission and distribution of gas, free of constituents (water or debris) until gas passes the Point of Delivery in accordance with the Missouri Pipeline Safety Regulations (4 CSR 240-40.030) and the Pipeline Safety Regulations of the U.S. Department of Transportation, 49 CFR Part 192. (p. 1, lns 16-27)

  This paragraph creates a defense for the Company only upon its full compliance with the duties and obligations imposed upon the Company by the Commission and Department of Transportation in the safe transmission and distribution of gas.

[1] The Commission's Cold Weather Rule, 4 CSR 240-13.055(2), defines the winter heating season from November 1 through March 31.

- Para. (E) re-affirms Company responsibility for performing limited inspection and testing requirements on Customer Equipment in so far as the Company is required under 4 CSR 240.030(10)(J) and (12)(S). (Referred to as the "(10)(J)" and the "(12)(S)" rules and attached herein). (p. 1, lns 29-37)

  This paragraph creates a rebuttable presumption that the Company safely performed its Commission mandated testing and inspections if the Customer Equipment operates as designed for 48 hours after gas service is turned-on.

  Also, the Company disclaims responsibility for Customer Equipment but for the (10)(J) and (12)(S) rules and any Company writing that agrees to assume an obligation for Customer Equipment.

- Para. (F) defines Customer responsibility for ensuring the safety and suitability of Customer Equipment according to applicable codes. (p.1, lns 39-46).

  This paragraph also requires the Customer to give no one, except the Company's authorized employees or agents, access to Company property located on the Customer's premises.

- Para. (G), subject to the Company having met all its regulatory obligations and duties and only after the expiration of the "Non-Incident Operational Period" defined below, exculpates the Company from claims, loss, damages, or injuries resulting from any failure, defect, leakage, release, or unsafe condition on the Customer's side of the Point of Delivery. (p.2, lns 5-14)

  This paragraph also contains language common in commercial contracts that the Customer "hold harmless and defend" the Company for any loss or damage arising from Customer equipment upon expiration of the Non-Incident Operational Period.

- Para. (H) defines the Non-Incident Operational Period (NIOP) as the period of time that begins on the date Company representatives were last inside the Customer's premises to perform testing, inspection, or other work for which the costs and revenues go to ratemaking purposes. (p.2, lns 16-24)

  The NIOP for space heating equipment (i.e. furnace or boiler) ends after <u>60 winter days</u> have elapsed, or when an outside contractor works on the equipment, whichever is earlier.

The NIOP for all other gas appliances ends after 90 days have elapsed, or when an outside contractor works on the equipment, whichever is earlier.

This paragraph does not affect Company liability for claims arising from its Merchandise Sales business, from other activities where the costs and revenues are not included in ratemaking, or for the Company's unexcused failure to perform a Commission required inspection.

As for claims made by Customers against the Company on Customer Equipment, this provision "…is intended that the running of this time period [NIOP] be a complete defense and absolute bar to such claims and lawsuits." (p. 2 lns 27-28)

The language expressing the *intent* of the Tariff to be used as a defense is precatory. Therefore, the application of the facts pled go to the *intent* of the Tariff and whether the Tariff applies to any particular claim is subject to a judicial determination.

- Para. (I) re-affirms and limits the Company's requirement to provide notice to Customers to the obligations enumerated in the Pipeline Safety Regulations of Missouri and the U.S. Department of Transportation. (p. 2 ln 36 to p. 3 ln 6)

  Company compliance with its mandated obligations to notify shall constitute a complete defense and bar to any claims or lawsuits by Customer alleging a breach of any duty to warn or provide safety information.

  The purpose of this paragraph is to avoid having juries fashion their own standards and inserting its own ideas on what standards should be applied to the Company when a jury decides a case.

  The point here is the regulated public utility should be able to rely on the standards in the Pipeline Safety Regulations and not be made subject to some jury-made standard.

- Para. (J) requires the Company to use reasonable diligence to furnish continuous natural gas service to the Customer. If there is a service interruption, the Company is not considered in default of its service agreement, and any liability of the Company as a result of service interruption due to the Company's negligence is limited to the charge for service during the period of interruption, and does not include indirect, incidental, or consequential damages. (p.3 lns 9-22)

This paragraph mimics similar provisions in electric utility tariffs (discussed later in this Brief).

- Para. (K) limits the Company's obligation to odorize gas to the requirements placed on the Company by the Pipeline Safety Regulations. (p. 3 lns 24-32)

- Para. (L) lets the Tariff remain in effect at least to the end of the second general rate case following the Tariff's effective date. This paragraph provides parties the chance to make changes to the Tariff during the rate case or in any complaint case. (p. 3 lns 34-39)

- Para. (M) sets forth annual Company reporting requirements to Staff and OPC regarding the merits and impacts of this Tariff. (p. 3 ln 41 to p. 4 ln 6)

> The Tariff will be the subject of Staff review and possible revision in the Company's second general rate increase case. Because of ISRS filings by the Company and imminent filing of a rate case by year end 2009, this allows a period of four years to collect sufficient information to audit financial and legal impacts of the Tariff. At that time, Staff will propose revisions if appropriate.

## III. The Tariff Complies With and Reinforces Commission and Department of Transportation Pipeline Safety Regulations

At hearing, Public Counsel seized on the word "minimum" and used it to mischaracterize the Tariff as somehow taking away from, or watering down the Commission's more stringent Pipeline Safety Regulations. That assertion is simply not true. A plain reading of the Tariff paragraphs that directly reference Pipeline Safety Regulations (paragraphs D, E, I, and K) reveals a clear and unambiguous commitment of both Company and the Commission to the enforcement of Missouri and DOT Pipeline Safety Regulations.

Moreover, the Federal government, in its enabling legislation, has explicitly defined the purpose of its minimum pipeline safety standards as those necessary to provide adequate protections to life and property:

> "(1) Purpose. –The purpose of this chapter is to provide adequate protections against risks to life and property posed by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation."[2] (emphasis added).

Also, Sect. 60104 U.S.C.A. provides that any state agency may adopt additional or more stringent safety standards for intrastate pipeline transportation if such standards are compatible with the Federal minimum standards. Missouri has not only exceeded the Federal minimum safety standards with its Pipeline Safety Regulations, the proposed Tariff provides clear language reinforcing those standards.

Mr. Robert Leonberger manages the Commission's Pipeline Safety Program and supervises the Gas Safety/Engineering Staff. He has served on the Gas Safety/Engineering Staff of the Commission since 1982 and he has supervised gas safety and engineering programs since 1990. Mr. Leonberger is responsible for monitoring all phases of natural gas utility plant design, installation, operation, and maintenance. In the course of his duties he conducts on-site plant inspections, reviews and analyzes utility records, and he investigates customer gas safety complaints and natural gas related incidents. He also assists the evaluation and development of the Commission's pipeline safety rules and he makes recommendations to utility management and the Commission. (Exh 5, Leonberger Reb p 1 ln 27 to p 2 ln 15). From the onset of this case, Mr. Leonberger has been actively involved in reviewing the proposed Tariff. He provides the following assessment of the Tariff:

> "The tariff language proposed by Laclede does not change the safety requirements that Laclede must meet pursuant to state and federal regulations. Under 4 CSR 240-40.030(10)(J) and (12)(S) Laclede is required to test the customer-owned fuel line for leakage and conduct a visual inspection of exposed, accessible customer-owned gas piping and all connected equipment when natural gas service is turned on to customers to determine that the requirements of any applicable industry codes, standards or procedures adopted by the Company to assure safe service are met. These safety rules are not part of the Federal Pipeline Safety Regulations and are additional, more stringent safety

[2] See 49 U.S.C.A. Sect. 60102(a)(1).

> requirements placed on the gas utility by the [Commission]. Missouri is one of the few states that require the additional safety inspections.
>
> In addition, under rule 4 DSR 240-40.030(12)(S)(3)., Laclede is required to 'discontinue service to any customer whose fuel lines or gas utilization equipment are determined to be unsafe.' This would apply to all inspections or work conducted by Laclede – even the non-regulated service work whose revenues go toward ratemaking. Laclede's customers and all citizens in the state of Missouri are safer because of these more stringent regulations." (Exh 6, Leonberger Surr. p. 2 lns 8 – 23). (See "(10)(J)" and "(12)(S)" attached as Appendices) (emphasis added).

Mr. Leonberger provided extensive testimony that Missouri's Pipeline Safety Regulations (4 CSR 240-40.030) are "…very detailed and are very specific on requirements of initiating service and discontinuing service to any customer when fuel lines or gas utilization equipment are determined to be unsafe." In addition, the Pipeline Safety Regulations "…contain numerous other specific safety requirements specifically related to customer safety, none of which are changed by the proposed tariff…Even though 4 CSR 240-40.030 prescribes the minimum safety standards regarding the design, fabrication, installation, construction, metering, corrosion control, operation, maintenance, leak detection, repair and replacement of pipelines used for the transportation of natural and other gas, these [Commission] regulations are much more stringent than the minimum safety standards contained in the Code of Federal Regulations[49 CFR, Part 192]." (Exh 6, p.6 lns 4-20)

## IV. The Commission has Imposed a Duty on Laclede to do Turn-on Inspections and has Granted Laclede an Exemption to sell Heating and Ventilating / Air Conditioning (HVAC) services under Section 386.757.7.

Unlike other public utilities, such as water and electric utilities, Missouri Pipeline Safety Regulations place an affirmative duty on gas distribution companies to conduct a visual, on-site inspection of customer service lines and equipment before turning on gas service. This limited

inspection of service lines and equipment is spelled out in the "(10)(J)" and "(12)(S)" rules discussed above.

"The inspections required by ["(10)(J)" and "(12)(S)"] are only visual inspections to determine if it is safe, at that time, to introduce gas into the customer-owned system. This means the Company makes a "yes" or "no" determination to turn on the gas and may also identify unsafe conditions. At the time the regulations were written, there was no thought given to a "time-limit warranty" for this inspection. The intent was simply to determine whether it was safe at that time to turn on the gas. The regulations do not envision an exhaustive search or inspection of the premises." ( Exh 5, p. 4 lns 16-23).

Thus, the proposed Tariff sets a reasonable limit on the Company's duties under Commission rules. Paragraph E of the Tariff creates a presumption that such testing and inspections were performed in a safe and appropriate manner <u>if</u> customer equipment operates as designed for 48 hours after gas service is initiated. (Refer to Paragraphs in attached Tariff, Exh. 3, "Sched. DPA-1") Should an incident occur outside the 48 hour period after the limited inspection, the Tariff still allows a customer to bring a claim under the 60 winter day and 90 day NIOP. (Paragraphs G and H). For all that, these limiting provisions are conditioned on the Company fulfilling its responsibilities for the safe transmission and distribution of gas pursuant to all Pipeline Safety Regulations. (Para G lns 5-6). In other words, the Company must do things right to avail itself of the protections offered in the Tariff.

Laclede is unique among Missouri gas utilities because it is the only gas utility that has been granted an exemption to sell HVAC services under the Laclede Gas Company name. In Case No. GE-2000-610, pursuant to the HVAC statute, the Commission granted Laclede an

exemption from Sect. 386.757.7 and 4 CSR 240-40.017(8).[3] Staff witness Imhoff includes in Sched. 1 of his Surrebuttal a copy of the Commission's Order and the list of HVAC services the Commission has authorized Laclede Gas Company to perform as a public utility. Mr. Imhoff states:

> Revenues from these services have been and continue to be booked on Laclede's regulated books with the exception of the revenues from the Company's merchandising operations. With the exception of merchandising revenues, the revenues collected for its HVAC-related services and home inspections go toward lowering customers' cost of gas service. Even though the charges for services offered by Laclede are not set by the Commission, it is Staff's opinion that Laclede's proposed tariff should apply to the services for which the Commission has authorized Laclede an exemption and for the home inspection activities which are included in Laclede's revenue for ratemaking purposes." (Exh 8, p. 3 lns 1-8).

Even though the Commission does not set the rates or charges for HVAC services, when Laclede performs its Commission authorized HVAC services, Laclede still operates as a public utility under Missouri and DOT Pipeline Safety Regulations. As discussed above, Mr. Leonberger points out that when Laclede provides HVAC services the Company must operate under the "(12)(S)" rule requiring it to '…discontinue service to any customer whose fuel lines or gas utilization equipment are determined to be unsafe.' Pipeline Safety Regulations apply to all inspections and work done by Laclede – even non-regulated service work covered by this Tariff and whose revenues go to ratemaking. All Laclede HVAC customers are safer because of the added Commission oversight of Laclede that results from following these Regulations. (Exh 6, p. 2, lns 18-23).

Commission-mandated inspections and Commission-authorized HVAC services combine to create unique policy concerns and stress the need to define the Company – Customer relationship by drawing reasonable boundaries of the Company's duties after it has fulfilled its obligations under Missouri and DOT Pipeline Safety Regulations.

[3] Exh 8, Imhoff Surreb., pp. 2-3 and Order Granting Exemption in GE-2000-610 in Sched. 1-1 to 1-3.

V. Liability Tariff as a Litigation Tool

As pointed out by Laclede witness Abernathy "The idea being we're rather unique because we have so many – because of our requirements, so many, I guess I'll call them, touches of the customer. We're there a lot…so a lot of duty [is] being assumed." (Tr. Vol. 2, p 67 lns 2-5). Because of the exposure Laclede has to its customers, there is a need to set sensible and reasonable boundaries of the Company's duties owed to its customers. "Our intent is the tariff would protect us" when the Company has followed all the rules and standards. (Tr. Vol. 2, p. 66 lns 19-23).

In a line of questions from Commissioner Kenney aimed at discerning the Tariff's ultimate effect in a litigation context, Mr. Abernathy assessed its impact as follows:

> Q…..Is this just a matter of eliminating the amount of discovery Laclede has to take? Or how is it going to work as a practical matter? At what point in the litigation will this tariff help?
> A. Well, obviously, somebody would have a claim or at least an alleged claim and then, of course, file their suit.... You'd [Laclede] have to answer it. You then have some time maybe for, obviously, some discovery to see exactly what the cause was, if you could figure out what caused the incident. And if you can decide and identify in some respects what it was, obviously, you can try to apply the tariff to it. It would vary case to case. I really can't say. You know, it might be a month or two. It might be four or five months. It would just depend.
> Q. But at the end of the day, it's still going to have – you're still going to have to go through summary judgment? You're still going to go through the expe[n]se of having to draft a summary judgment motion?
> A. The tariff is not designed [t]o say you can't file a lawsuit against me. The tariff is designed to give the Courts a look at something to say, look, what if – this is what we think happened. This tariff said that at this point the company's not liable here. Dismiss this case. And the Court can always do that, or they can ignore the tariff, too.
> Q. And isn't the Court already free to grant your summary judgment motion based upon the state of the law already?
> A. They are. But in all these cases here, we went to court for summary judgment, and the plaintiff lawyer – you know how summary judgment works. If there's any material dispute or fact at all, summary judgment doesn't occur.
> And so in all the cases, the plaintiffs invented, that's my term, invented, but came up with theories that allowed the Court to say, Well, I've got something at issue here. I've got to go ahead and let this case proceed.

Q. So this tariff will be an additional tool in the litigation tool box to aid the Court in – well, in Laclede's opinion or in Laclede's hope of granting summary judgment?
A. Exactly.
(Tr. Vol. 3 HC, p. 47 ln 6 to p. 48 ln 24. This portion of HC transcript has been authorized for public release by Laclede)

Example of MGE's Transportation Customer Liability Tariff as a Litigation Tool in Summary Judgment

The Commission has approved MGE tariff sheets[4] that more aggressively limit liability than do the proposed Laclede Tariff provisions because MGE's transportation tariff disclaim all liability for customer equipment on the customer side of point of delivery. Although MGE's liability limiting provisions for its transportation customers are similar to those in Laclede's Tariff, the Laclede Tariff goes an extra step and requires the Company supply gas "…free of constituents (water or debris) that materially interfere with or adversely affect…" the safe operation of Customer equipment. (Para. D lns16-18).

MGE transportation customers are governed by these liability disclaimers:

MGE PSC MO No. 1 Second Revised SHEET No. 59, para. A.(2)(b) states:

> Company shall not be responsible in any way for damages or claims relating to the customer's gas or the facilities of the customer or others containing such gas prior to receipt into Company's facilities or after delivery to the customer,… (effective November 1, 2003)(emphasis added)

MGE PSC MO No. 1, SHEET No. 90, para. 2. states:

> The Company shall not be responsible in any way as to any damages or claims relating to the customer's gas or the facilities of the customer or others containing such gas prior to delivery into the facilities of the Company or after redelivery to the customer. (effective February 1, 1994)(emphasis added)

[4] These MGE tariff sheets pertain to transportation customers and are not the sheets at issue in pending complaint case GC-2009-0036.

In Triumph Foods v. MGE,[5] Triumph brought suit for damages against MGE and other parties as the result of an explosion that occurred inside the plant after natural gas had escaped from gas piping in the kitchen. Triumph owned all the gas lines and valves downstream of the meter set by MGE, including the valve from which the gas that ignited escaped in the kitchen.

MGE unsuccessfully asserted its liability tariff as an affirmative defense when it sought summary judgment from the court. MGE argued that its tariff, which has the full force and effect of a statute, barred Triumph's claim as a matter of law. MGE pled in its Motion for Summary Judgment,[6] among other things, that its tariff provides that Triumph is responsible for all claims relating to natural gas after MGE delivers the gas to Triumph. The court was not persuaded and the case has gone to trial.

Though this case is still pending and a final decision has yet to issue, so far this case exemplifies a public utility asserting its rights under its Commission-approved liability tariff, in effect using its tariff as a "litigation tool" to win summary judgment, and being denied by the court. How the court ultimately applies the facts of the case to the liability tariff to reach its decision remains to be seen.

## VI. Proposed Tariff is Just and its Approval is a Legal Exercise of the Commission's Authority

Laclede is a "gas corporation" as that term is defined under Sect. 386.020 RSMo[7] and falls under the jurisdiction of the Commission under Sect. 386.250. Under the powers granted the Commission by the Legislature in Sect. 393.140, the Commission may approve this Tariff.

[5] Currently pending before the Western United States District Court of Missouri, St. Joseph Division , No. 06-6093-CV-SJ-HFS (2007 WL 3323779).
[6] See MGE's Memorandum in Support of Defendant's Motion for Summary Judgment, No. 06-6093-CV-SJ-HFS, (2007 WL 3323779) (W.D.Mo.).
[7] All statute references to the Revised Statues of Missouri will be to RSMo 2000 and 2008 Supplement unless otherwise noted.

Tariffs with liability limiting provisions are not new to this Commission. (for example see above Section V). In 1921, the U.S. Supreme Court in Western Union Telegraph Co. v. Esteve Bros.[8] reasoned liability limitations are reasonable and needed because without them, utilities would be exposed to an incredible amount of liability claims that would significantly raise the rates charged to customers.

In an effort to provide affordable rates, the Commission has approved liability limiting provisions in utility tariffs that apply to situations involving simple negligence, customer equipment, and interruption of service.

For example, on service interruptions, the Commission has approved language similar to language proposed in Laclede's Tariff. The Empire District Electric Company tariff states "The Company shall have no liability to the Customer or to any other person, firm, association, trust, governmental unit, or corporation, of any kind, for any loss, damage or injury by reason of any interruption or curtailment of the Customer's load[9]…"

Kansas City Power & Light Company's tariff provides:

> The Company will use reasonable diligence to supply continuous electric service to the Customer but does not guarantee the supply of electric service against irregularities and interruptions. Except where due to the Company's willful misconduct or gross negligence, the Company shall not be considered in default of its service agreement and shall not be liable in negligence or otherwise for any claims for loss, expense or damage (including indirect, economic, special or consequential damage) regardless of cause.[10]

Both the KCPL tariff above and the proposed Laclede Tariff include "reasonable diligence" standards on preventing service interruptions and both tariffs have similar liability disclaimers. (Para. J, p. 3 lns 9-22)

---

[8] Western Union Telegraph Co. v. Esteve Bros., 256 U.S. 566 (1921).
[9] Exh. 4, Surrebuttal of Staff witness Natelle Dietrich pp. 3-4 *quoting* Tariff Tracking Number JE-2003-0707, The Empire District Electric Company PSC Mo No. 5, Sec. 4, 4th Revised Sheet No. 4c (revised effective February 19, 2009).

In National Food Stores v. Union Electric Company[11], National brought a claim against Union Electric for loss of perishable food when the utility cut off electric service because of a power shortage during a summer heat wave. The Court of Appeals held that the utility had an obligation to provide its customers with adequate and continuous service and in so doing, to exercise reasonable care. The Court reasoned even though the utility had a right under its tariff to interrupt service, the utility had a duty to protect its customers from foreseeable damage from such a significant interruption by providing its customers with notice.

As to the matter of a tariff disclaiming liability for negligence, the Missouri Western District Court of Appeals addressed this issue in Danisco Ingredients USA, Inc, v. Kansas City Power & Light Company.[12] The Court, using responses of the Kansas Supreme Court to its certified questions of law, held that a utility's disclaimers of liability in its tariff "… are valid and enforceable insofar as they disclaim liability for simple negligence, but [we find them] to be void and unenforceable, as against public policy, insofar as they purport to limit KCP & L's liability for its own willful and wanton misconduct." Id. at 333.

Quoting the Kansas Supreme Court on tariffs with liability limitations, the Danisco Court proffers "…The theory underlying the enforcement of liability limitations is that because a public utility is strictly regulated its liability should be defined and limited so that it may be able to provide service at reasonable rates..." Danisco at 332.

While Danisco is instructive as to the enforceability of tariff provisions that disclaim liability for negligence, the Laclede Tariff has no such provisions or language excluding the

[10] Exh. 4, Dietrich Surr. p.4 *quoting* KCP&L PSC MO No. 2, Fifth Revised Sheet No. 1.11 General Rules and Regulations Applying to Electric Service 3.09 CONTINUTITY OF SERVICE.
[11] National Food Stores, Inc. v. Union Electric Company, 494 S.W.2d 379 (Mo Ct of App, St. Louis Dist., 1973)
[12] 999 S.W. 2nd 326, 333 (Mo WD, 1999).

Company from its own negligence. Instead, the Tariff sets forth sensible time periods that circumscribe the Company's duties.

If an incident occurs within the 60 winter day and 90 day time periods (NIOP), a customer may bring a negligence claim against Laclede for any work done by the Company on customer equipment. Staff witness Imhoff and Laclede witness Abernathy have testified that the 60 winter day and 90 day Non Incident Operational Periods are reasonably based on similar time period provisions found in the warranty clauses of HVAC service contracts for similar work performed by Laclede.[13] (See Exh 3 HC "Service Contracts" for examples of HVAC contractor warranty periods).

In event an incident to customer equipment occurs outside the NIOP, the Tariff states "It is intended that the running of this time period [NIOP] be a complete defense and absolute bar to such claims and lawsuits." (emphasis added)(p. 2 lns 27-28). That said, the Tariff merely limits Company responsibility after it has performed its duties and expresses the intent that the running of the NIOP be an affirmative defense and bar to claims for incidents occurring outside the NIOP.

Even though Missouri courts have held that a tariff has the force and effect of law,[14] judicial inquiry does not end when a tariff is used as an affirmative defense to a lawsuit. Ultimately, the court determines the validity of a tariff's liability limitation provisions in negligence actions. "The Public Service Commission had and has the authority to determine the reasonableness of the ….limitations promulgated as a part thereof. Its determination in that regard may only be reviewed in the method provided by statute. The courts have jurisdiction of

[13] Imhoff Surr. p. 3 lns 14-21. Tr. Vol 2 p 135 lns 21-25; Abernathy Dir. p. 6 ln 19 to p. 8 ln 6.
[14] Bauer v Southwestern Bell Telephone Company, 958 S.W.2d 568 (Mo. App. E.D. 1998)

a suit for damages based on negligence in which a determination of the legal validity and the applicability of such provisions to a given state of facts is required."[15]

Tariff as Contract

In A.C. Jacobs And Company, Inc. v. Union Electric Company[16] the Western District Court of Appeals, in affirming Union Electric's tariff in a billing dispute held "The business relationship between a utility and its customers is rooted in contract" (citing *National Food Stores, Inc. v. Union Electric Company*, 494 S.W.2d 379, 381 (Mo.App. 1973)). The Court further held that the tariff "…was part of the regulatory contract governing the relationship…" of the parties. Id. at 585. By likening a tariff to a contract, the Court confirms the need of the public utility through its tariffs to define the relationship of the utility to its customers. Because Laclede "touches" the customer in so many ways, sensible parameters are needed, much as they are in commercial contracts, on the bringing of claims by customers against the Company.

Public Utilities are not Liable for Customer Equipment

Under well established Missouri case law, public utilities are not insurers or guarantors of the safety of persons or of their property.[17] Liability disclaimers are often used in tariffs to reflect this long held doctrine.

For example, on disclaiming liability for customer equipment on the customer side of the service connection, the Commission-approved Missouri American Water Company (MAWC) tariff states:

> The Company shall in no event be liable for any damage or inconvenience caused by reason of any break, leak or defect in the Customer's service or fixtures or in the

[15] Warner v. Southwestern Bell Telephone Company, 428 S.W.2d 596, 602 (Mo Supreme Ct, 1968)
[16] 17 S.W. 3d 579, 585 (Mo WD, 2000).
[17] National Food Stores at 383 (*citing* Henneke v. Gasconade Power Co., 236 Mo.App. 100, 152 S.W.2d 667 (1941); Hamilton v. Laclede Electric Co-op, 294 S.W.2d 11 (Mo.1956); and Donovan v. Union Electric Co., 454 S.W.2d 623 (Mo.App.1970)).

physical connection between the Customer's service and the Company owned service connection.[18]

Staff's policy witness Dietrich also points out examples of liability provisions of two out-of-state gas utility tariffs that, in much the same way as the Laclede Tariff, define the Company-Customer relationship in terms that exclude company liability on the customer side of the point of delivery:

One example is the Xcel Energy Minnesota tariff:

4.2 CUSTOMER'S PIPING AND EQUIPMENT

"…Any inspection of a customer's piping and equipment by the Company is for the purpose of avoiding unnecessary interruption of service to its customers or damage to its property and for no other purpose, and will not be construed to impose any liability upon the Company to a customer or any other person by reason thereof. In additions, the Company will not be liable or responsible for any loss, injury, or damage that may result from the use of or defects in a customer's piping or equipment…" (Exh. 3, p. 6 lns 5-18)

The liability provisions of Ameren IP (Illinois Gas) in Illinois are another example:

C. Liability

"…nor shall the Company be liable for damages that may be incurred by the use of gas appliances or the presence of the Company's property on the Customer's Premises. Company is not responsible for or liable for damage to Customer's equipment or property caused by conditions not due to negligence of Company…. The Company shall not be responsible nor liable for gas from and after the point at which it first passes to the pipes or other equipment owned or controlled by the Customer, and Customer shall protect and save harmless Company from all claims for injury or damage to Persons or property occurring beyond said point, except where injury or damage shall be shown to have been occasioned solely by the negligence of the Company…". (Exh. 3, p.6 lns 20-34)

[18] Exh. 3,Dietrich Surr. p. 5 *quoting* MAWC PSC MO No. 2, Sheet No. 9, effective June 22, 1974, Rule 3 LIABILITY OF THE COMPANY (a).

VII. Proposed Tariff is Reasonable and in the Greater Interest of the Entire Body of Laclede's Ratepayers

"The mission of the Commission is to ensure Missouri consumers have access to safe and reliable utility service at just, reasonable and affordable rates…consistent with the Commission's mission, the tariff proposes to address the larger policy issues of balancing the company/customer relationship of a select, small subset of customers with the costs that are recoverable from all customers while ensuring all safety needs are met." (Exh 4, Dietrich Surreb p 2 lns 18 to p 3 ln 9).

In support of the Tariff, Staff witness Dietrich underscores the need for the Commission to protect the greater interests of the entire body of Laclede ratepayers:

"After reviewing several data request responses, it is evident that Laclede has been subject to defending and settling claims where Laclede has not been on or near the customer's property for several months or even several years. Ultimately, the costs associated with those claims will be included in the ratemaking process and passed to the ratepayer…it is possible that some or all of the costs incurred in defending and settling those claims may not have been incurred if Laclede's tariff had reasonable limitations on liability; thus, potentially resulting in a different rate structure for customers." (Exh 4, p 7 ln 17 to p 8 ln 2).

Staff witness Imhoff, whose duties are to analyze tariffs and their applications, has also analyzed information contained in Laclede's responses to Staff's Data Requests. Responses relied on by Mr. Imhoff include:

- Unregulated HVAC warranty periods for services provided that are similar to those services provided by Laclede;
- Company checklists for real estate inspections and reconnecting gas service; and,

- Summary information from claims and cases for damages that include name of claimant, date of injury or damage, nature of claim, and a description of the resolution of the case by settlement or verdict/judgment including amounts paid to the claimant from 2000 to present. (Exh 7, Imhoff Reb p 1 ln 27 p 2 ln 5; p 3 lns 3-21).

Based on his analysis of information provided by Laclede, Mr. Imhoff states:

> "Laclede's proposed periods of a 60 winter day non incident operational period for…appliances used for space heating and a 90 day non incident period for all non-heating equipment are in line with the warranty time periods that are offered by HVAC contractors. The non-incident operational periods provide customers with a reasonable time period upon which customers may bring a claim against Laclede." (Exh 8, Imhoff Surreb p 3 lns 17-21)

Staff witness Leonberger agrees: "The 60-day and 90-day time periods seem to be appropriate and reasonable and to be consistent with HVAC contractor practices when repairs are made." (Exh 5, Leonberger Reb p 6 lns 9-11).

Mr. Imhoff points out "HVAC service and repairs authorized by the Commission are often performed by Laclede in conjunction with a required inspection. These costs and revenues are booked above the line and included in Laclede's rates." (Exh 8, p. 4 lns 6-8; Exh 9, Sched 1-1 to 1-3, *Order Granting Exemption* in Case No. GE-2000-610).

Staff witness Bolin, Staff Utility Regulatory Auditor, explains how costs and revenues from HVAC services are booked:

- Revenues and expenses associated with the sales of natural gas appliances are separately tracked by the Company and recorded below-the-line as merchandising activities on the Company's books and are not included in Laclede's cost of service or in the ratemaking process. (Exh 9, Bolin Surreb p 2 ln 22 to p 3 ln 5)

- HVAC maintenance and repairs and home sale inspections that are performed by Laclede Gas personnel are non-regulated in that the Commission does not establish prices charged for these services. Staff includes revenues and expenses for these unregulated services in the cost of service because Company personnel perform these services. (Exh 9 p 3 lns 8-14).

Explaining how Laclede's customers pay for the cost of claims and settlements, Staff witness Bolin explained:

- "Liability insurance premiums are an expense item included in Laclede's cost of service. Insurance coverage is believed to be a prudent and ongoing activity that should be included in the Company's cost of service. Staff normally includes an annualized level of insurance expense into a Company's cost of service during the ratemaking process. By including the insurance premiums in to the cost of service, the liability insurance is paid for by the ratepayers through the rates charged…" (Exh 9, p 2 lns12-17).

- "The cost of hiring outside legal counsel and the cost of paying settlements related to claims for 'injuries and damages' are already included in the cost of service, thus costs are shifted to the ratepayers and those costs are being paid by the ratepayers." (Exh 9, p 4 lns 20-23).

In answering why this liability Tariff should be approved by the Commission in the context of this tariff case, Mr. Imhoff reasoned Laclede's Tariff "…is unlikely to have an immediate impact on rates and can, therefore be addressed in a tariff filing." (Exh 8, p. 4 lns 17-20). Ms. Bolin proffers that the Tariff "…may help to decrease the amount of injuries and damages expense and the outside service expense. However, the impact of the proposed language cannot be quantified at this time and it may not be easily identifiable in future years." (Exh 9, p. 4 lns 1-3).

VIII. The Tariff does Not Conflict with Article I, Section 14, of the Missouri Constitution on Open Courts

The proposed Tariff includes language intended to limit or eliminate Laclede's liability for damages or injurious resulting from a failure of equipment on the customer side of the "Point of Delivery," and provides, in pertinent part (Para. D, p. 1, lns 24-27):

> Compliance with the above [i.e., safe delivery of natural gas free of debris] 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.

and (Para. G, p. 2, lns. 7-14):

> 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.

and (Para. I, p. 2, l. 43-p. 3, l. 1):

> Compliance with the aforesaid obligations to notify [i.e., those imposed by state and federal regulations] 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.

A question has been raised as to whether the above-cited provisions violate Article I, Section 14, of the Missouri Constitution, which provides:

> 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.

Article I, section 14, "prohibits any law that *arbitrarily or unreasonably* bars individuals or classes of individuals from accessing [Missouri] courts in order to enforce *recognized* causes

of action for personal injury." Mo. Alliance for Retired Americans v. Dept. of Labor & Industrial Relations, 277 S.W.3d 670, 675 (Mo. banc 2009); Kilmer v. Mun, 17 S.W.3d 545, 549 (Mo. banc 2000), *quoting* *Wheeler v. Briggs*, 941 S.W.2d 512, 515 (Mo. banc 1997). "The open courts provision does not itself grant substantive rights but, rather, is a procedural safeguard that ensures a person has access to the courts when that person has a legitimate claim recognized by law." Mo. Alliance, *supra.* In Kilmer, *supra,* for example, Article I, Section 14 was applied to invalidate a statutory provision that limited civil liability under the "dram shop" statute to those instances in which the licensee had first been convicted of supplying intoxicants to an obviously intoxicated person. The analysis under Article I, Section 14, is the same as that used for procedural due process claims because the "Open Courts" provision is "a second due process clause to the state constitution." Mo. Alliance, *supra;* Goodrum v. Asplundh Tree Expert Co., 824 S.W.2d 6, 10 (Mo. banc 1992). "Often the question turns on whether a statute imposes a procedural bar to access the courts or whether the statute substantively changes or limits the right to recovery." Etling v. Westport Heating & Cooling Services, Inc., 92 S.W.3d 771, 773 (Mo. banc 2003). "An open courts violation is established upon a 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." Snodgras v. Martin & Bayley, Inc., 204 S.W.3d 638, 640 (Mo. banc 2006).

The proposed tariff does not violate Article I, Section 14.[19] The provisions at issue are substantially identical to those appearing in many contracts under which commercial enterprises

[19] For purposes of this analysis, tariffs are considered to be statutes, as though enacted by the legislature.

do business, both with other commercial entities and with the public. If those contracts are valid, then this tariff is valid.

Laclede is a private corporation that enjoys a state-created monopoly with respect to the distribution of natural gas within its assigned service territory. In exchange for this commercial advantage, Laclede must submit to state regulation of the charges, terms and conditions under which it distributes natural gas. The proposed tariff at issue here is such a term or condition. As proposed, the tariff language purports to create a "complete defense" to any action against Laclede for injuries or damage arising from the failure of equipment on the customer's side of the "Point of Delivery," defined as "that point where the Company delivers metered gas . . . to the Customer's installation[.]" (Para. B, p. 1, lns. 9-10) or for any failure to notify the customer or others of the dangerous nature of natural gas ( Para. I, p. 2, l. 43-p. 3, l. 1). Additionally, the language imposes a duty on the customer to "indemnify, hold harmless and defend" Laclede in any such action. The tariff does not purport to create any sort of procedural obstacle for the plaintiff, but rather creates (1) an affirmative defense and (2) an obligation to "indemnify, hold harmless and defend."

Many affirmative defenses are known to the law and none of them have been invalidated for offending against Article I, Section 14. Under the proposed tariff, it will be incumbent upon Laclede to plead and prove the defense. Laclede may or may not meet that burden in any given case, but the courthouse door cannot be said to be locked against the plaintiffs. Likewise, the duty to "indemnify, hold harmless and defend" Laclede is a common one in commercial contracts. Again, it will be Laclede's burden to assert these rights in any particular case.

IX. Proposed Tariff Operates Independently of the Statute of Limitations

The statute of limitations governing negligence actions in Missouri is Section 516.120 RSMo, "which allots five years from the accrual of the cause of action." Kansas City v. W.R. Grace & Co[20]. Under this statute, "a cause of action for negligence accrues . . . when the damage resulting therefrom is sustained and capable of ascertainment."

According to Para. H of Laclede's proposed tariff, "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." (Exh. 3) For natural gas appliances used for space heating, the non-incident operational period ends once 60 winter days have elapsed following the premises visit or replacement or work on the customer equipment. For natural gas appliances not used for space heating, the non-incident operational period ends once 90 days have elapsed following the premises visit or replacement or work on the customer equipment.

After the Non-Incident Operational Period runs, Para. G of Laclede's tariff states that the Company "shall in no event be liable to the Customer and that the Customer shall further indemnify, hold harmless and defend the Company from and against any and all liability . . . 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."

[20] 778 S.W. 2d 264, 268 (Mo. App. W.D. 1989).

The tariff and the statute of limitations operate independently of one another. However, Laclede's proposed tariff could serve as a defense to Section 516.120 RSMo. For example, if alleged negligence against Laclede occurred to customer owned equipment outside of the 60 or 90 days prescribed by the Non-Operation Incident Period, the customer would not be barred by the five year statute of limitations.

However, the customer, depending on the facts pleaded, may be barred from bringing a claim because of the tariff. In the event that the customer brought a claim against Laclede after the statute of limitations had run, Laclede could raise both the defense that its tariff limits its liability because the NIOP had run and the affirmative defense that the five year statute of limitations had run.

X. Public Counsel's Argument that the Tariff is Not Legal Mischaracterizes the Law

Public Counsel seems to have two arguments against the proposed Tariff.

First, OPC's argument that the Tariff sets new minimum standards, or somehow lowers the bar, fails to recognize the true purpose of Pipeline Safety Regulations, which is "…to provide adequate protections against risks to life and property…"(49 U.S.C.A. Sect. 60102(a)(1)). As discussed earlier, Missouri has made its Pipeline Safety Regulations more stringent than the Department of Transportation safety regulations by requiring a visual, onsite inspection of Customer gas lines and equipment when service is turned on. Missouri's more stringent regulations are allowed by law. Logically, it follows that Pipeline Safety Regulations do not set maximum safety limits, otherwise Missouri could not have more stringent safety regulations than the minimum required. Safety regulations can only provide minimum standards that may or may not be exceeded for the "adequate protection against risk to life and property." Missouri exceeds DOT Pipeline Safety Regulations.

Because the Tariff references all applicable Pipeline Safety Regulations and because the Company must meet its duties under those regulations before the defenses of the Tariff apply, both Customers and the Court are properly guided by the Tariff's reinforcement of Missouri and DOT regulations.

For OPC to suggest that a court or sympathetic jury should fashion its own standards on which to hold Laclede liable creates an indefensible position for Laclede and burdens the great body of ratepayers that pay the cost of jury awards and settlements in their rates. Laclede's request to be held to the duties and standards of the Pipeline Safety Regulations is reasonable, even necessary, because it provides the certainty of one set of standards to Customers and juries alike.

Second, OPC's argument that the Tariff, which has the force and effect of statute, will bar Customers from bringing suit for damages to Customer equipment where an incident alleging Company negligence occurs outside the 60 or 90 day NIOP is only partially true, depending on the facts pleaded to the court and how the court applies the language of the Tariff. Language of the Tariff is precatory because it expresses the "intent" or desire to be used as a bar or defense to Customer lawsuits in situations where an incident occurs outside the appropriate time period. The affirmative defenses created by the Tariff must be pled by the Company and their applicability is subject to judicial determination. (See discussion of Triumph Foods in Sect. V above).

The whole point of the Tariff, just as in commercial contracts, is that there must be a boundary on the Company's duties after the Company has fulfilled its obligations. Under AC Jacobs, a tariff is rooted in contract and is part of the regulatory contract governing the relationship of the parties.

## XI. Conclusion

For the reasons explained in this Brief and summarized below, the Staff recommends the Commission approve Laclede's proposed liability Tariff.

Laclede is a state-granted monopoly gas service provider, but Laclede is not similarly situated to other Missouri utilities. The Commission has placed a duty on Laclede to perform on-site inspections of Customer equipment and service lines to determine whether it is safe, at that time, to turn on the gas. The Commission has also granted Laclede a statutorily permitted exemption to sell HVAC services under the Laclede Gas Company name. Though the charges are not set by the Commission, the costs and revenues associated with doing HVAC service work and county home sale inspections flow to the ratepayers and are reflected in their rates. When Laclede performs HVAC service work or county home sale inspections, Laclede does not don the clothing of an independent HVAC contractor. Laclede remains a public utility held to Missouri and DOT Pipeline Safety Regulations and answerable to the Commission for safety violations. When Laclede performs HVAC service work, the Customer sees only Laclede Gas Company, the regulated public utility.

Because Laclede touches the customer in so many ways and because the Company accepts a lot of duty in doing its Commission mandated inspections and Commission authorized service work, there grows a need to define the Company – Customer relationship in its Tariff. That concern creates the larger policy need to set reasonable boundaries and sensible time limits in such a way as to strike a balance of the interests of the individual Customer with the greater interests of the entire body of Laclede ratepayers.

Laclede and its ratepayers should not be held to open-ended liability for claims made by customers when the Company has fulfilled all its safety duties. The fact that Laclede was at a

property at some remote point in time doing an inspection or service work should not, by itself, be used to capture large settlements or jury awards from juries that fashion their own theories and standards and ignore the Pipeline Safety Regulations that Laclede is duty bound to follow.

Provisions in the proposed Tariff do not exempt Laclede from its own negligence. The Tariff reinforces Missouri and DOT Pipeline Safety Regulations. Laclede must fulfill its obligations before availing itself of the Tariff's protections. The Tariff sets sensible time periods for Customers to make claims against the Company for any alleged incident involving Customer equipment. As for service interruptions, Laclede's Tariff is modeled from existing electric utility tariffs approved by the Commission. This Tariff strikes a fair balance of the interests of all ratepayers.

The Danisco Court accurately summed up the rationale behind Laclede's Tariff and the reason why the Commission should approve it. "…The theory underlying the enforcement of liability limitations is that because a public utility is strictly regulated its liability should be defined and limited so that it may be able to provide service at reasonable rates..." Id. at 332.

WHEREFORE, the Staff submits its Brief as directed by the Commission.

Respectfully submitted,

**/s/ Robert S. Berlin**
Robert S. Berlin
Senior Counsel
Missouri Bar No. 51709

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 526-7779 (Telephone)
(573) 751-9285 (Fax)
email: bob.berlin@psc.mo.gov

## Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 13th day of November 2009.

**/s/ Robert S. Berlin**

**Schedule DPA-1**

## Revised Tariff Proposal Language

Customer Equipment shall mean all appliances, piping, vents, connectors, valves, fittings or any other gas utilization or distribution equipment at or on the Customer's side of the Point of Delivery. **Para. A**

Point of Delivery shall be that point where the Company delivers metered gas (outlet of Company gas meter) to the Customer's installation unless otherwise specified in the service agreement. The gas supplied by Company becomes the property of Customer at the Point of Delivery. **Para. B**

Winter days shall be those days occurring during the months of November through April. **Para. C**

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. **Para. D**

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)(J) and (12)(S), or unless the Company expressly agrees in writing to assume such obligations. The 10(J) 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. **Para. E**

The Customer shall ensure that all Customer Equipment is suitable for the use of natural gas and shall be designed, installed, inspected, repaired and maintained by the Customer and at the Customer's expense in a manner approved by the public authorities having jurisdiction over the same, and in good and safe condition in accordance with all applicable codes. The owner/customer shall ~~be responsible at all times for the safekeeping of all Company property installed on the premises being served, and to that end shall~~ give no one, except the Company's authorized employees, contractors or agents, access to Company ~~such~~ property on owner/customer's premises. ~~The owner/customer of the premises being served shall be liable for~~ **Para. F**

~~and shall indemnify, hold harmless and defend the Company for the cost of repairs for damage done to Company's property due to negligence or misuse of it by the owner/customer or persons on the premises affected thereby.~~

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. **Para. G**

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. **Para. H**

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 ~~[This clause is only about the duty to provide warnings or safety information]~~ 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 **Para. I**

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.

Company will use reasonable diligence to furnish to Customer continuous natural -gas service ~~with natural gas that does not contain constituents (water or debris) that would materially adversely affect the proper and safe operation of Customer Equipment~~, 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. **Para. J**

The Company's obligation to odorize gas supplied to the Customer shall be limited to compliance with 40 CSR 240-40.030(12)(P). The Company shall not have any duty to warn or advise Customer regarding the limitations of any odorant used by Company in compliance with 40 CSR 240-40.030(12)(P), and shall not have any liability to Customer or anyone else for failure to provide such warnings or advice. The Company shall not have any duty to warn or advise Customer regarding the availability of any supplemental warning devices or equipment, including, but not limited to, electronic gas detectors, that might be used to provide a warning of leaking gas, and shall not have any liability to Customer or anyone else for failure to provide such warnings or advice. **Para. K**

These Rule 12-a tariff sheets shall continue in effect at least until the conclusion of the second general rate case proceeding following the initial effective date of these tariff sheets. It is expressly understood that any party shall be free in such rate case proceeding or any complaint proceeding to propose prospective changes to these tariff sheets without any burden of proof or presumption applying to the determination of whether these tariff sheets, or alternative tariffs sheets, should be approved by the Commission. **Para. L**

To assist in the evaluation of the merits and impact of these tariff sheets on the Company and its customers, the Company shall submit an annual report to Staff and OPC each November 1, beginning November 1, 2010, for the twelve months ended October 1st, specifying: **Para. M**

(a) Each case in which the provisions of the tariff sheets have been cited or relied upon as a basis for limiting, reducing or otherwise modifying the Company's legal or financial

liability, together with a full account of the factual circumstances and legal issues involved in such cases; and

(b) An estimate, to the extent feasible, of any costs avoided as a result of the Company's reliance on such tariff provisions, including avoided litigation expenses; any favorable impacts on premiums paid for liability insurance, and potential reductions in litigation damages.

pressure of at least one (1) psi (6.9 kPa) gauge but not more than forty (40) psi (276 kPa) gauge must be given a leak test at a pressure of not less than fifty (50) psi (345 kPa) gauge.

3. Each segment of a service line (other than plastic) intended to be operated at pressures of more than forty (40) psi (276 kPa) gauge through ninety (90) psi (621 kPa) gauge must be tested to at least ninety (90) psi (621 kPa) gauge; if the service line is to be operated between ninety (90) psi (621 kPa) gauge and one hundred (100) psi (689 kPa) gauge, it must be tested to at least one hundred (100) psi (689 kPa) gauge; and if the service line may be operated at one hundred (100) psi (689 kPa) gauge; or more, it must, at a minimum, be tested using the appropriate factor in subparagraph (12)(M)1.B. of this rule, except that each segment of the steel service line stressed to twenty percent (20%) or more of SMYS must be tested in accordance with subsection (10)(D).

(G) Test Requirements for Plastic Pipelines. (192.513)

1. Each segment of a plastic pipeline must be tested in accordance with this subsection.

2. The test procedure must ensure discovery of all potentially hazardous leaks in the segment being tested.

3. The test pressure must be at least one hundred fifty percent (150%) of the maximum allowable operating pressure or fifty (50) psi (345 kPa) gauge, whichever is greater. However, the maximum test pressure may not be more than three (3) times the pressure determined under subsection (3)(I), at a temperature not less than the pipe temperature during the test.

4. During the test, the temperature of thermoplastic material may not be more than 100°F (38°C), or the temperature at which the material's long-term hydrostatic strength has been determined under the listed specification, whichever is greater.

(H) Environmental Protection and Safety Requirements. (192.515)

1. In conducting tests under this section, each operator shall ensure that every reasonable precaution is taken to protect its employees and the general public during the testing. Whenever the hoop stress of the segment of the pipeline being tested will exceed fifty percent (50%) of SMYS, the operator shall take all practicable steps to keep persons not working on the testing operation outside of the testing area until the pressure is reduced to or below the proposed maximum allowable operating pressure.

2. The operator shall ensure that the test medium is disposed of in a manner that will minimize damage to the environment.

(I) Records. (192.517)

1. For mains, each operator shall make and retain for the useful life of the pipeline, a record of each test performed under subsections (10)(C)–(E) and (G). (192.505, 192.507, 192.509 and 192.513) Where applicable to the test performed, the record must contain at least the following information, except as noted in subparagraph (10)(I)1.B.

A. The operator's name, the name of the operator's employee responsible for making the test and the name of any test company used;

B. Test medium used, except for tests performed pursuant to subsections (10)(E) and (G);

C. Test pressure;

D. Test duration;

E. Pressure recording charts or other record of pressure readings;

F. Elevation variations, whenever significant for the particular test;

G. Leaks and failures noted and their disposition;

H. Test date; and

I. Description of facilities being tested.

2. For service lines, each operator shall make and retain for the useful life of the pipeline, a record of each test performed under subsections (10)(F) and (G) (192.511 and 192.513) Where applicable to the test performed, the record must contain the test pressure, leaks and failures noted and their disposition and the date.

(J) Test Requirements for Customer-Owned Fuel Lines.

1. At the initial time an operator physically turns on the flow of gas to new fuel line installations—

A. Each segment of fuel line must be tested for leakage to at least the delivery pressure;

B. A visual inspection of the exposed, accessible customer gas piping, interior and exterior, and all connected equipment shall be conducted to determine that the requirements of any applicable industry codes, standards or procedures adopted by the operator to assure safe service are met; and

C. The requirements of any applicable local (city, county, etc.) codes must be met.

2. The temperature of thermoplastic material must not be more than one hundred degrees Fahrenheit (100°F) during the test.

3. A record of the test and inspection performed in accordance with this subsection shall be maintained by the operator for a period of not less than two (2) years.

(11) Uprating.

(A) Scope. (192.551) This section prescribes minimum requirements for increasing maximum allowable operating pressures (uprating) for pipelines.

(B) General Requirements. (192.553)

1. Pressure increases. Whenever the requirements of this section require that an increase in operating pressure be made in increments, the pressure must be increased gradually, at a rate that can be controlled and in accordance with the following:

A. At the end of each incremental increase, the pressure must be held constant while the entire segment of the pipeline that is affected is checked for leaks. When a combustible gas is being used for uprating, all buried piping must be checked with a leak detection instrument after each incremental increase; and

B. Each leak detected must be repaired before a further pressure increase is made, except that a leak determined not to be potentially hazardous need not be repaired, if it is monitored during the pressure increase and it does not become potentially hazardous.

2. Records. Each operator who uprates a segment of pipeline shall retain for the life of the segment a record of each investigation required by this section, of all work performed, and of each pressure test conducted, in connection with the uprating.

3. Written plan. Each operator who uprates a segment of pipeline shall establish a written procedure that will ensure compliance with each applicable requirement of this section.

4. Limitation on increase in maximum allowable operating pressure. Except as provided in (11)(C)3., a new maximum allowable operating pressure established under this section may not exceed the maximum that would be allowed under (12)(M) and (12)(N) for a new segment of pipeline constructed of the same materials in the same location. However, when uprating a steel pipeline, if any variable necessary to determine the design pressure under the design formula in subsection (3)(C) is unknown, the MAOP may be increased as provided in subparagraph (12)(M)1.A.

5. Establishment of a new maximum allowable operating pressure. Subsections (12)(M) and (N) (192.619 and 192.621) must be reviewed when establishing a new MAOP. The pressure to which the pipeline is raised during the uprating procedure is the test pressure that must be divided by the appropriate factors in subparagraph (12)(M)1.B.

2. When a pipeline is being purged of gas by use of air, the air must be released into one (1) end of the line in a moderately rapid and continuous flow. If air cannot be supplied in sufficient quantity to prevent the formation of a hazardous mixture of gas and air, a slug of inert gas must be released into the line before the air.

(S) Providing Service to Customers.

1. At the time an operator physically turns on the flow of gas to a customer (see requirements in subsection (10)(J) for new fuel line installations)—

A. Each segment of fuel line must be tested for leakage to at least the delivery pressure; and

B. A visual inspection of the exposed, accessible customer gas piping, interior and exterior, and all connected equipment shall be conducted to determine that the requirements of any applicable industry codes, standards or procedures adopted by the operator to assure safe service are met. This visual inspection need not be met for emergency outages or curtailments. In the event a large commercial or industrial customer denies an operator access to the customer's premises, the operator does not need to comply with the above requirement if the operator obtains a signed statement from the customer stating that the customer will be responsible for inspecting its exposed, accessible gas piping and all connected equipment, to determine that the piping and equipment meets any applicable codes, standards, or procedures adopted by the operator to assure safe service. In the event the customer denies an operator access to its premises and refuses to sign a statement as described above, the operator may file with the commission an application for waiver of compliance with this provision.

2. When providing gas service to a new customer or a customer relocated from a different operating district, the operator must provide the customer with the following as soon as possible, but within seven (7) calendar days, unless the operator can demonstrate that the information would be the same:

A. Information on how to contact the operator in the event of an emergency or to report a gas odor;

B. Information on how and when to contact the operator when excavation work is to be performed; and

C. Information concerning the customer's responsibility for maintaining his/her gas piping and utilization equipment. In addition, the operator should determine if a customer notification is required by subsection (1)(K).

3. The operator shall discontinue service to any customer whose fuel lines or gas utilization equipment are determined to be unsafe. The operator, however, may continue providing service to the customer if the unsafe conditions are removed or effectively eliminated.

4. A record of the test and inspection performed in accordance with this subsection shall be maintained by the operator for a period of not less than two (2) years.

(13) Maintenance.

(A) Scope. (192.701) This section prescribes minimum requirements for maintenance of pipeline facilities.

(B) General. (192.703)

1. No person may operate a segment of pipeline unless it is maintained in accordance with this section.

2. Each segment of pipeline that becomes unsafe must be replaced, repaired or removed from service.

3. Leaks must be investigated, classified and repaired in accordance with section (14).

(C) Transmission Lines—Patrolling. (192.705)

1. Each operator shall have a patrol program to observe surface conditions on and adjacent to the transmission line right-of-way for indications of leaks, construction activity and other factors affecting safety and operation.

2. The frequency of patrols is determined by the size of the line, the operating pressures, the class location, terrain, weather and other relevant factors, but intervals between patrols may not be longer than prescribed in the following table:

**Maximum Interval Between Patrols**

| Class Location of Line | At Highway and Railroad Crossing Locations | At All Other Locations |
|---|---|---|
| 1, 2 | 7 1/2 months; but at least twice each calendar year | 15 months; but at least once each calendar year |
| 3 | 4 1/2 months; but at least four times each calendar year | 7 1/2 months; but at least twice each calendar year |
| 4 | 4 1/2 months; but at least four times each calendar year | 4 1/2 months; but at least four times each calendar year |

3. Methods of patrolling include walking, driving, flying or other appropriate means of traversing the right-of-way.

(D) Transmission Lines—Leakage Surveys. (192.706)

1. Instrument leak detection surveys of a transmission line must be conducted—

A. In Class 3 locations, at intervals not exceeding seven and one-half (7 1/2) months but at least twice each calendar year;

B. In Class 4 locations, at intervals not exceeding four and one-half (4 1/2) months but at least four (4) times each calendar year; and

C. In all other locations, at intervals not exceeding fifteen (15) months but at least once each calendar year.

2. Distribution lines, yard lines and buried fuel lines connected to a transmission line must be leak surveyed in accordance with subsection (13)(M).

(E) Line Markers for Mains and Transmission Lines. (192.707)

1. Buried pipelines. Except as provided in paragraph (13)(E)2., a line marker must be placed and maintained as close as practical over each buried main and transmission line—

A. At each crossing of a public road or railroad. Some crossings may require markers to be placed on both sides due to visibility limitations or crossing widths; and

B. Wherever necessary to identify the location of the transmission line or main to reduce the possibility of damage or interference.

2. Exceptions for buried pipelines. Line markers are not required for the following buried pipelines—

A. Mains and transmission lines located at crossings of or under waterways and other bodies of water;

B. Feeder lines and transmission lines located in Class 3 or Class 4 locations where placement of a marker is impractical; or

C. Mains other than feeder lines in Class 3 or Class 4 locations where a damage prevention program is in effect under (12)(I).

3. Pipelines aboveground. Line markers must be placed and maintained along each section of a main and transmission line that is located aboveground.

4. Marker warning. The following must be written legibly on a background of sharply contrasting color on each line marker:

A. The word "Warning," "Caution" or "Danger," followed by the words "Gas (or name of gas transported) Pipeline" all of which, except for markers in heavily developed urban areas, must be in letters at least one inch (1") (25 millimeters) high with one-quarter inch (1/4") (6.4 millimeters) stroke; and

B. The name of the operator and telephone number (including area code) where the operator can be reached at all times.

(F) Record Keeping. (192.709)

1. For transmission lines each operator shall keep records covering each leak