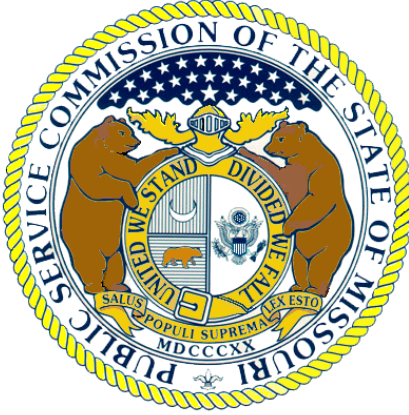


BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI



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

REPORT AND ORDER

Issue Date: **January 13, 2010**

Effective Date: **January 23, 2010**

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Designed to Clarify Its Liability for Damages Occurring)
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Appearances

Rick Zucker, Assistant General Counsel, and **Michael C. Pendergast**, Vice President and Associate General Counsel, Laclede Gas Company, 720 Olive Street, Room 1520, St. Louis, Missouri 63101, for Laclede Gas Company.

Marc D. Poston, Senior Public Counsel, Office of the Public Counsel, 200 Madison Street, P.O. Box 2230, Jefferson City, Missouri 65102, for the Office of Public Counsel and the public.

Robert S. Berlin, Senior Counsel, and **Lera Shemwell**, Deputy General Counsel, Missouri Public Service Commission, Governor Office Building, 200 Madison Street, Suite 800, Post Office Box 360, Jefferson City, Missouri 65102-0360, for the Staff of the Missouri Public Service Commission.

Regulatory Law Judge: Nancy Dippell, Deputy Chief.

REPORT AND ORDER

Syllabus: This order rejects the tariff changes filed by Laclede Gas Company.

Procedural History

On August 22, 2008, Laclede filed tariff sheets setting parameters for its liability in certain instances. Following the tariff filing, Laclede proceeded to meet and negotiate with the Staff of the Missouri Public Service Commission and the Office of Public Counsel over a number of months in an effort to produce reasonably acceptable positions on

liability. During this period, Laclede and the Staff reached a basic agreement on the terms of the tariff. Public Counsel did not join in the agreement.

The tariff was suspended and the matter was set for hearing. Written direct, rebuttal, and surrebuttal testimony was filed. A hearing was held on October 7, 2009.

During the months prior to the hearing, additional negotiations among the parties resulted in numerous revisions to the tariff sheets proposed by Laclede. The final version, referred to as the "Amended Tariff," was attached as Schedule DPA-1 to the surrebuttal testimony of Laclede witness David Abernathy filed on September 29, 2009. Public Counsel also submitted proposed tariff language attached as Schedule 3 to the surrebuttal testimony of Barbara Meisenheimer.¹

The Commission further suspended the tariff on December 9, 2009, until January 18, 2010, and on January 6, 2010, until February 17, 2010. The issue for Commission determination, as presented by the parties,² is whether the Amended Tariff is just and reasonable.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact:

1. Laclede is a natural gas local distribution company (LDC) under the jurisdiction of the Commission.
2. Laclede is a regulated monopoly provider of natural gas service in its distribution area.

¹ Exhibit 12, p. 3.

² *Issues List, Order Of Witnesses And Order Of Cross-Examination*, (filed October 10, 2009).

3. Laclede provides its regulated services pursuant to a Commission-approved tariff.

4. Laclede also provides unregulated services such as 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.³

5. Because Laclede is a regulated entity the Commission imposes certain requirements through regulations regarding testing and inspections to ensure that gas service is provided in a safe manner.⁴

6. The Commission's gas safety regulation covers, among other things, metering, corrosion control, operation, maintenance, leak detection, and repair and replacement of gas pipelines.

7. The gas safety regulation is similar to the Minimum Federal Safety Standards contained in 49 CFR Part 192 ("federal regulation"). However, the Missouri regulation is, in certain circumstances, stricter than the federal rule. With respect to inspections, the federal safety rule requires an operator to inspect only its own facilities when physically turning on the flow of gas. Under the Missouri regulation, however, Laclede is required to perform a gas safe inspection of both its equipment (which generally ends at the meter) and the customer's equipment, at the time a Laclede representative physically turns on the flow of gas to a customer.⁵

³ Ex. 8, Sch. 1-3.

⁴ 4 CSR 240-20-030 ("gas safety regulation").

⁵ Ex. 1, pp. 8-9.

8. Because Laclede is regulated by the Commission with regard to safety, it must follow the Commission's safety regulation in instances when it is performing an unregulated service.⁶

9. Gas utilities in most other states do not have an obligation to perform inspections of customer-owned equipment and piping at service initiation.⁷

10. To support its proposed change to the liability language Laclede presented the testimony of witness David P. Abernathy. Mr. Abernathy has been Vice President and Associate General Counsel for Laclede since 2004. He has experience at Laclede in supervising the Claims Department as well as litigation activities.⁸

11. Mr. Abernathy identified four examples of claims that Laclede believes demonstrate that Laclede has had to defend frivolous lawsuits.⁹ No lawsuit had been filed in the first claim and Laclede settled the other three before they went to trial.¹⁰

12. No jury has found Laclede liable for damages that resulted in Laclede altering its safety practices.¹¹

13. One claim alleging that Laclede did not properly odorize gas was resolved under the current tariff language when Laclede responded to the claim and provided evidence that the odorizing was within the required standards.¹²

⁶ Ex. 6, pp. 8-9.

⁷ Ex. 1, pp. 8-9.

⁸ Ex. 1, p. 1.

⁹ Ex.1, p.2.

¹⁰ Tr. 35-44.

¹¹ Tr. 56-57.

¹² Tr. 77.

14. Laclede's litigation expenses regarding gas safety claims, including the settlement amounts, are traditionally recovered from the ratepayers through the cost of service.¹³

15. Laclede also recovers the costs of the liabilities caused by Laclede's unregulated services through rates for regulated services.¹⁴ This recovery includes the hiring of outside legal counsel to defend claims for unregulated services and payments on claims for "injuries and damages."¹⁵

16. The revenues and expenses from the unregulated services, with the exception of merchandising revenues and expenses, are also included in rates.¹⁶

17. These revenues and expenses for unregulated services are included in the cost of service because Laclede does not separately track the regulated functions from the unregulated functions of a specific call.¹⁷

18. The ratepayers have been getting both the benefits (revenues) and the detriments (expenses) of the unregulated services included in rates.¹⁸

19. The liability limitation in Paragraph 8 of the Amended Tariff specifically applies to any activity of Laclede that is "considered in the ratemaking process."

¹³ Tr. 51, 68-69, and 165.

¹⁴ Ex. 9, pp. 3-4.

¹⁵ Ex. 9, p. 4; Tr. 129.

¹⁶ Ex. 9, p. 3; Tr. 129 – 130.

¹⁷ Ex. 9, p. 3.

¹⁸ Ex. 3, p. 9.

20. The unregulated activities listed in Schedule 1-3 of the Surrebuttal Testimony of Tom Imhoff are “considered in the ratemaking process” in that the revenues and expenses are included in the cost of service.¹⁹

21. This Amended Tariff language is intended to apply to both regulated and unregulated services provided by Laclede.²⁰

22. It is possible that a customer may not use a gas appliance immediately after an inspection, test, or service initiation; or that customers will have used their gas appliances within 60 or 90 days.²¹

23. Damage caused by testing or inspection or other negligence on the part of Laclede may not be revealed within 48 hours following a test or inspection.²²

24. Pointing to the service contracts of unregulated firms performing HVAC services, 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.²³

25. Exhibit 3-HC is a complete list of the service contracts reviewed by Mr. Abernathy.

26. The service contracts in Exhibit 3-HC make no reference to liability for injuries and damages.²⁴

¹⁹ Tr. 129-130 and 142; Ex. 3, p. 3; and Ex. 8, p.3.

²⁰ Tr. 61.

²¹ Ex. 1, pp. 6-7.

²² Ex. 1, pp. 6-7.

²³ Ex. 1, p. 7.

²⁴ Tr. 54-56; and Exhibit 3-HC.

27. The timeframes referenced in the service contracts Laclede presented are warranties on labor and parts.²⁵

28. Laclede's unregulated competitors do not have similar liability limitations for damage claims.²⁶

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

1. Laclede is a natural gas local distribution company (LDC) under the jurisdiction of the Commission.

2. The Commission's jurisdiction to regulate the services of Laclede extends to the "manufacture, sale or distribution of gas, natural and artificial . . . 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."²⁷

3. Section 393.130, RSMo, requires that all charges made or services rendered by a gas corporation be "just and reasonable."

4. According to the Missouri Supreme Court the Commission has the authority to approve or reject tariffs limiting liability. The Missouri Supreme Court confirmed this concept in a case concerning telegraph tariffs. In ***State ex rel. Western Union Telegraph v. Public Service Commission***,²⁸ Western Union's tariffs limited its liability for mistakes,

²⁵ Ex. 3-HC.

²⁶ Ex.3-HC.

²⁷ Section 386.250(1), RSMo.

²⁸ 264 S.W. 669 (Mo. 1924).

delays and even non-delivery of messages. The Court found that the limitation of liability was one of the terms of telegraph service, along with the rate charged for the service. Since the rates were deemed lawful, the limitations of liability included with the rates were lawful too. The Court stated that “the power to pass on the reasonableness and lawfulness of rates necessarily includes the power to determine the reasonableness and lawfulness of such limitations of liability as are integral parts of the rates.”²⁹

5. In ***Warner v. Southwestern Bell Telephone Co.***,³⁰ the Missouri Supreme Court upheld a liability tariff provision that was not directly connected to the rate itself. Southwestern Bell mistakenly failed to list a business customer in the correct directory two years in a row. The company’s tariff limited its liability to the amount paid for service during the term of the directory. Nevertheless, the customer sued and won a large verdict, including punitive damages. The Court overturned the verdict, instead agreeing with the great weight of authority in this area, both in Missouri and elsewhere that, since the utility is regulated in its rights and privileges, it should likewise be regulated to some extent in its liabilities.³¹

6. HVAC services are defined as “the warranty, sale, lease, rental, installation, construction, modernization, retrofit, maintenance or repair of heating, ventilating and air conditioning equipment[.]”³²

²⁹ *Id.* at 672.

³⁰ 428 S.W.2d 596 (Mo. 1968).

³¹ *Id.* at 601-02.

³² Section 386.754(2), RSMo.

7. Laclede provides unregulated HVAC services as authorized by the Commission and allowed under Section 386.756, RSMo.³³

8. Subsection 386.756.4, RSMo, states that:

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.

9. The Commission's authority over Laclede's unregulated HVAC services is limited under Section 386.762 to ensuring compliance with the prohibitions against subsidization found in the HVAC rules.³⁴

10. HVAC services do not require Commission consent and authorization when establishing rates and conditions of service, and are therefore unregulated.³⁵

11. Laclede's unregulated competitors do not have the privilege of having a tariff approved by a state commission that limits damage claims. This could put Laclede at a competitive advantage with regard to Laclede's unregulated services. The Commission concludes it is unreasonable to impose liability limitations for unregulated services where Laclede's unregulated competitors are not afforded the same legal protections.

Decision

The positions and arguments of all of the parties were considered by the Commission in making this decision. Failure to specifically address a piece of evidence,

³³ *In the Matter of Laclede Gas Company's Filing Pursuant to 4 CSR 240-40.017(8)*, Case No. GE-2000-0610, *Order Granting Exemption* (July 6, 2000).

³⁴ Sections 386.754 to 386.764, RSMo.

³⁵ Subsection 393.140(12), RSMo.

position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decision.

The Commission has the authority to prescribe certain limits on the liabilities of its regulated entities when those liabilities affect just and reasonable rates. Laclede, however, has not shown that these limits would be just and reasonable or that the public interest would be served by their approval.

To show there is a need for such liability limitations, Laclede cites to several examples of what it considers frivolous lawsuits filed against it. However, Laclede provided no evidence other than these cases and could not quantify savings to it or the ratepayers that would result from the Amended Tariff. Further, in at least one example where an allegation of improper odorization was made, Laclede was able to resolve that issue without going to trial. Thus, Laclede's current tariff language is sufficient to avoid litigation in some instances.

Laclede and Staff also argued that Paragraph 10 of the proposed tariff language is similar to tariffs for other Missouri utilities that provide a limited guarantee on the availability of the natural gas commodity being sold. However, Paragraph 10 of the Amended Tariff goes further than the limitations found in those other utility tariffs because it states that Laclede would not be liable for "any damage or loss" resulting from an "order of any court or judge granted in any bonafide adverse legal proceedings or action." A customer with a legitimate claim for damages may not file such a claim after reading the

Amended Tariff language, or after consulting an attorney who has read the Amended Tariff language.³⁶ Thus, Laclede's Amended Tariff may act to deter legitimate claims against it.³⁷

In addition, this particular case is different from the other types of limitations that have been placed in utility tariffs. Laclede is unique in that it has been authorized to conduct unregulated activities and many of those expenses and revenues have traditionally been combined in rate base because of the difficulty in determining which part of the activity can be attributed specifically to the regulated activity. Laclede's litigation expenses involving these types of claims have not been separated into regulated and unregulated categories either. And, the evidence showed that, at least in recent history, Laclede has not fully litigated any of these cases. Rather, it has settled each one and included or expects to include the settlement amounts in rate base. It seems that Laclede has no incentive to proceed to trial in any case where the settlement costs will be fully recovered from the ratepayers instead of the shareholders. The Commission has concerns about this method of attributing expenses, and a closer examination and understanding of this policy may be necessary in Laclede's next rate case.

The Commission also has concerns about the co-mingling of regulated and unregulated activities. There is insufficient information in this case, however, to determine whether the method of ratemaking which includes the revenues and expenses from unregulated HVAC services is lawful. That concern is also more appropriately addressed in the context of a rate case where all factors affecting rates can be examined.

³⁶ Tr. 72-79.

³⁷ Tr. 72-79.

The Commission does have sufficient information to determine that it is unreasonable to impose liability limitations for unregulated services when Laclede's unregulated competitors are not afforded the same or substantially similar legal protections.³⁸ Laclede's evidence on this point consisted of service contracts of its competitors, but did not show that those competitors enjoyed liability limitation on anything more than their parts and labor. The Commission concludes that limitation of liability for unregulated activities as set out in the Amended Tariff is not appropriate.

Further, Laclede provided no sound basis for determining that damages caused by testing or inspection will be revealed within 48 hours. As Laclede stated in its testimony, a consumer may not even use a gas appliance for days or weeks following an inspection or test. This paragraph seeks to create a presumption in Laclede's favor to the detriment of its customers which could deter a customer from filing a legitimate claim. Laclede has not proven any reasonable basis for creating this presumption.

With regard to determining liability for negligent acts, Laclede did not persuade the Commission that the court system is not better able to assess the specific facts in determining negligence. A negligence claim involves many considerations which go to determine whether due care was exercised in the particular instance in which the question arises.³⁹ Determining whether Laclede was negligent in a particular situation depends on the surrounding circumstances. Actions or omissions which would be clearly negligent in some circumstances might not be negligent in other circumstances.⁴⁰ These important fact

³⁸ Ex.3-HC.

³⁹ *Schiermeier v. Kroger Grocery & Baking Co.*, 167 S.W.2d 967 (Mo. App. 1943).

⁴⁰ *Zuber v. Clarkson Const. Co.*, 251 S.W.2d 52 (Mo. 1952).

specific decisions regarding liability, especially with regard to unregulated services, should be left to the judicial system.

Ultimately, even though the Commission has the legal authority to add some liability limits in tariffs, it is choosing not to do so in this case because the limitations in the Amended Tariff are not just and reasonable. The court system is qualified to determine whether negligence has occurred even in matters involving regulated utilities. The state legislature is also an appropriate place to set liability limits on negligence claims or to give more specific authority to the Commission in this area. Laclede has produced no convincing evidence that it would be in the public interest for the Commission to limit liability in the manner it proposes. The Commission, therefore, concludes it is unreasonable to include liability limiting language in Laclede's tariffs as proposed in the Amended Tariff and rejects the tariffs.

THE COMMISSION ORDERS THAT:

1. The tariff sheets filed by Laclede Gas Company as Tariff File No. JG-2009-0145, are rejected. The specific tariff sheets are:

P.S.C. MO. No. 5 Consolidated

Original Sheet No. R-11-a, CANCELLING All Previous Schedules

Original Sheet No. R-11-b, CANCELLING All Previous Schedules

Original Sheet No. R-11-c, CANCELLING All Previous Schedules

Original Sheet No. R-11-d, CANCELLING All Previous Schedules

2. This Report and Order shall become effective on January 23, 2010.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Clayton, Chm., Gunn and Kenney, CC., concur;
Jarrett, C., concurs; separate concurring opinion may follow;
Davis, C., dissents; separate dissenting opinion may follow;
and certify compliance with the provisions of
Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 13th day of January, 2010.