BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

POST-HEARING BRIEF

OF

LACLEDE GAS COMPANY

NOVEMBER 13, 2009

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LACLEDE GAS COMPANY'S POST-HEARING BRIEF

COMES NOW Laclede Gas Company ("Laclede" or "Company"), and files this Post-Hearing Brief, and in support thereof, states as follows:

INTRODUCTION

The Missouri Public Service Commission (the "Commission") was created primarily to ensure that utility service is provided to the public in a safe and adequate manner, and at just and reasonable rates. The Commission has the staff, the expertise and the experience to determine the requirements for safe and adequate service, and to balance that goal against the inevitable costs necessary to achieve it.

Those attributes cannot be duplicated in the court system, where a judge and 12 jurors' entire knowledge of gas engineering and operations often consists of only a one or two week trial, and where dueling experts paint diametrically opposing views of what safety measures are really necessary and appropriate. Moreover, a judge and jurors have before them only a sympathetic plaintiff that they may want to compensate. They are not charged with considering the consequences of their actions or the systemic costs of meeting an ad hoc safety requirement they might create. (Exh. 1, pp. 4-5)

Laclede's experience is that utilities are often treated by judges and juries as a deep-pocket, no-fault insurer for damage claims allegedly related to natural gas. (Exh.1, p. 2-4) In reaching their decisions, courts have freely ignored gas safety standards set by

the Commission and by the Federal Department of Transportation. Through their rulings, courts create safety standards of their own to support a desired outcome in a particular case. (Exh. 2, pp. 2, 7-8)

The Company's goal in making this tariff filing was to achieve a fair balance between the ratepaying public and the party who has suffered a damage or loss. The goal is neither to permit Laclede to avoid paying for damages for which it might reasonably be at fault, nor to cause Laclede to be an unwilling, no-fault insurer for any adverse event involving natural gas.

Laclede believes that, under the circumstances covered in the tariff sheets attached hereto as Attachment 1 (the "Amended Tariff"), the Commission, and not judges or juries, should set reasonable parameters on the Company's obligations by determining the standards that the Company should meet to ensure that safe and adequate service is being provided and by clearly specifying that the Company's legal liability will depend on whether those standards have been satisfied. The Amended Tariff permits the Commission and its Staff to apply their expertise in placing such parameters on the Company under these circumstances. The Amended Tariff does not interfere with an individual's access to the court system but, as is the case with many tariffs, it applies structure in establishing the bounds of the Company's obligations. In doing so, both the Company and the Staff believe that the Amended Tariff supports the goal of safe and adequate service, while representing a fair balance between the interests of the ratepaying public and that of an individual who has suffered a damage or loss allegedly related to natural gas. Laclede urges the Commission to approve the Amended Tariff. (Exh. 6, pp. 3-4)

BACKGROUND

On August 22, 2008, Laclede filed tariff sheets setting parameters for the Company's liability in certain instances. Following the tariff filing, the Company proceeded to meet and negotiate with Staff and the Office of Public Counsel ("OPC") over a number of months in an effort to produce reasonably acceptable positions on liability that achieved this balance. During this period, the Company and the Staff reached a basic agreement on the terms of the tariff. However, OPC did not agree, and so a procedural schedule was ordered. (Exh. 1, p. 4; Exh. 4, p. 8)

Pursuant to that schedule, Laclede filed direct testimony on July 17, 2009. Staff and OPC filed rebuttal testimony on August 19, 2009, and all parties filed surrebuttal testimony on September 29, 2009. The hearing in this matter 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, the Amended Tariff, was attached as Schedule DPA-1 to the surrebuttal testimony of Laclede witness David Abernathy filed on September 29, 2009. As previously noted, the Amended Tariff, as corrected during the evidentiary hearing, is set forth in Attachment 1, hereto.

THE AMENDED TARIFF

It is important to understand what the Amended Tariff covers and what it does not cover. It does not absolve the Company of liability for its own negligence. It does not place extreme restrictions on virtually every activity affecting gas service. Nor does it relieve the Company from liability for negligence arising out of activities unrelated to the provision of regulated services. These are all misleading and inaccurate claims made in

testimony filed by OPC, which should be rejected by the Commission. (Rebuttal Testimony of Barbara A. Meisenheimer, Exh. 11, pp. 3, 5-6)

The Amended Tariff does cover a limited number of circumstances in a fair and reasonable manner. For the Commission's convenience, the Amended Tariff has been summarized on a single page chart set forth in Attachment 2 to this Brief.

OPC has criticized the Amended Tariff for not specifically disclaiming liability protection for negligence or willful or wanton conduct, as other liability tariffs do. OPC misses the point. Where other tariffs completely relieve the utility from liability except for negligence or even worse conduct, the Amended Tariff sets specific standards for Laclede's conduct, above which Laclede has acted acceptably and should not be held liable, and below which Laclede has failed to act acceptably and is exposed to liability and possibly penalties. As Staff witness Natelle Dietrich recognized, the Amended Tariff approaches liability from a direction different than other liability tariffs by specifically describing the standard of care that must be met to avoid liability, rather than providing a generalized exception to complete liability protection. (Tr. 102-03)

In three circumstances, the Amended Tariff ties the Company's duties to its compliance with both Federal safety standards and the more stringent safety standards promulgated by the Commission. Specific Federal and State gas safety rules apply to all three of these areas. These three areas involve: (i) the safe transmission and distribution of gas (i.e. the quality and pressure of gas Laclede delivers to its customers); (ii) the proper odorization of gas; and (iii) the obligation to provide warnings or safety information. Compliance with these safety rules relieves the Company of liability for losses allegedly caused by a failure in these specific areas, except that the Amended

Tariff does not offer liability protection where the Company had actual knowledge of a dangerous condition on the customer's premises and did not provide a warning to the customer.

The Amended Tariff also addresses in a normal, reasonable and clear manner the Company's obligation to provide continuous service. The Company is required to be reasonably diligent in providing gas service without interruption. However, consistent with standard utility provisions, the Company will not be liable for interruptions caused by factors outside of its control (i.e. force majeure), and any liability that does apply is limited to the Company's charge for rendering service.

Finally, the Amended Tariff sets reasonable boundaries with respect to the Company's responsibility for customer equipment and the damages that may arise therefrom. The Amended Tariff recites that the Company is responsible for the operation of customer equipment only arising from the testing and inspection requirements of the Federal and State safety rules, or where the Company has expressly agreed to be responsible for it. The Commission's safety rules require the Company to perform an inspection when it initiates the flow of gas at a property. The purpose of this requirement is to ensure that gas can safely be turned on. The Amended Tariff provides a presumption that the Company met this requirement to safely initiate gas service if the customer equipment operates without incident for 48 hours. (Exh. 1, pp. 5-6; Exh. 5, pp. 4-5;)

In this and other circumstances in which the Company has entered the customer's premises to perform any work for which the costs and revenues are normally considered in the ratemaking process, the Amended Tariff sets a limit on the Company's

responsibility in a manner that is not only reasonable, but is at least as long as private contractors warrant their services. For non-space heating appliances, this limit is set at 90 days, and for space heating appliances (e.g. furnaces), this period is set at 60 winter days. These limitations do not apply to claims related to merchandise sold by Laclede, nor situations where the time periods have elapsed because Laclede failed to perform a required inspection. (*Id*.)

In summary, the Amended Tariff is fair to all constituents, and places the establishment of the Company's responsibility and liability for meeting reasonable gas safety standards in the hands of the Commission, where it belongs. The Amended Tariff should be approved as just and reasonable.

ISSUES:

The main issue presented in this case is a policy issue, namely whether the Amended Tariff is just and reasonable. However, OPC, Commissioner Jarrett and Judge Dippell have all raised legal issues for briefing, including the following: :

1. Can the Commission approve a tariff that sets limits on the Company's liability? (OPC)

2. Can the Commission approve a tariff that relieves a utility of liability for its own negligence? (Commissioner Jarrett)

3. There was discussion in the testimony of the intent of the Amended Tariff. What will be the effect if a court does not agree with the parties' intent? (Judge Dippell)

4. Does the Amended Tariff violate Article 1, Section 14 of the Missouri Constitution, the Open Courts provision? (Commissioner Jarrett)

5. What is the statute of limitations on negligence claims? (Judge Dippell)

Laclede will address the policy issues first and then address the legal issues.

ARGUMENT

POLICY ISSUE: Is the Amended Tariff just and reasonable?

The Amended Tariff is just and reasonable. This case boils down to who should set the terms for the Company's duties and liabilities with respect to gas safety, and whether the Company should serve as a no-fault insurer for any incidents behind its meter that can be alleged to relate to natural gas. The Company and Staff have testified that the Commission should exert some control over Laclede's responsibilities in providing safe service, and the Company's liability for failing to do so. (Exh.1-2; Exh. 4) OPC believes that judges and jurors should be free to set their own safety standards, and corresponding liability for any failure to meet such standards, based solely on the limited facts and contrasting opinions offered in the case before them. (Exh. 11, p. 3; Exh. 12, p. 7; Tr. 157-166) Laclede and Staff believe that the Company and its customers should not serve as deep-pocket insurers for any alleged gas-related incident on the customer's side of the meter. (Exh. 1, pp. 2-4; Exh. 4, pp. 7-8) OPC believes that Laclede's rates should include the costs of paying for these incidents. (Exh. 11, p. 3; Tr. 165-67)

The Amended Tariff is supported by both the experts testifying on behalf of Staff (Exhibits 4-9), and by Laclede Witness David Abernathy, who has first hand knowledge of the unnecessary costs and expenses that both the Company and its customers incur as a result of having to defend and sometimes pay for frivolous legal actions that should never have been filed or pursued through the civil court system. (Exh. 1, p. 2) Many of these suits are over incidents that occurred inside the customer's premises and "downstream" of Laclede's meter. All too often, Laclede had no role in creating the incident and no

duty, or even the ability, to prevent it. In many instances, Laclede's only connection to the incident was that it provided natural gas to the premises where the incident occurred or, at some distant point in the past, performed a mandated inspection of the customer-owned equipment located at the premises. Nevertheless, the Company finds itself having to defend itself in litigation simply because it is viable, accessible and financially solvent. (*Id.* at 2-3)

Mr. Abernathy provided multiple examples of such claims. In one case, Laclede had been sued when a third party attempted to steal gas from the Company in an apartment complex by breaking the locks on several meters and, unfortunately turned on gas to the wrong apartment, causing an explosion. Laclede has been sued for allegedly failing to notice a squirrel's nest in a flue despite the fact that the incident occurred several months after the Company had made a mandated inspection of the customer-owned equipment located on the premises. The Company was also sued for allegedly failing to properly inspect a customer-owned furnace during a mandated turn-on inspection performed *sixteen* months before a carbon monoxide incident occurred, even though an intervening third party had serviced the furnace multiple times prior to the incident, and even though the plaintiff had no evidence that the furnace was even the source of the carbon monoxide. Currently, Laclede faces the prospect of another potential suit where an explosion occurred after someone, without contacting the Company, illegally turned on gas at a locked meter, allowed the gas to escape from an open stove valve, and before the gas could dissipate, lit a cigarette despite a warning from a cohort that there was gas in the house. (Exh. 1, p. 3)

By effectively seeking to make the Company and its customers "insurers of last resort" for anything bad that happens behind the Company's meter, these and other frivolous actions expose our ratepayers to significant and unnecessary costs in matters that are not the Company's responsibility. It is these kinds of inappropriate claims and costs that the Amended Tariff is designed to mitigate. (*Id.* at 3-4)

Most, if not all, of the concepts addressed in the Amended Tariff are already codified in some form or another in Laclede's existing tariff. However, the Amended Tariff has more specific language, because it has become apparent in recent years that courts are more likely to enforce specific, rather than general tariff language. (*Id.* at 5) For example, in situations where the customer uses natural gas as a source for space heating, 60 winter days must expire since the customer's premises was last visited by a Company employee before the Company will be relieved of liability. In situations where gas is used for non-space heating purposes, the period is 90 calendar days. These periods of time were selected because it is possible that once gas service is initiated, the customer may not immediately use their gas-fueled appliances or equipment. (Exh. 1, p. 6). Where work was done during the summer, for example, the customer may not turn on the furnace or boiler that heats the customer's home, thereby frustrating the objective of determining whether the appliance was working in a safe manner. It is also possible that a customer may go on an extended vacation during which appliances in the home would be shut off. During any 60 day period during the winter months of November through March, however, it is almost certain that customers will have used their heating equipment at some point, thereby affording the opportunity to determine if that equipment was working appropriately; hence, the 60 day period for situations where gas

is used for space heating. Similarly, where natural gas is consumed by those non-space heating applications that tend to operate throughout the year (i.e. stoves, water heaters, etc), a 90 calendar day period should likewise provide sufficient time to ensure that such customer-owned equipment has had a chance to demonstrate that it is functioning in a safe manner. (*Id*. at 6-7)

Moreover, a review of the service contracts of a wide variety of unregulated firms that inspect, test and do work on customer-owned gas appliances and piping revealed that they all place explicit limits on how long they will be liable for any defect or malfunction that may arise in connection with the equipment they inspected or otherwise worked on. In most instances, these warranties or guarantees extended for only 30 days after the work was performed, although a few went as long as 60 or 90 days. In other words, the competitive marketplace recognizes that once work has been performed on a piece of equipment, there should be only a limited amount of time during which the servicer of the equipment should be expected to guarantee continued operation of the equipment. Similarly, there should be limits on how long a utility like Laclede should be held financially responsible for claims arising from defects or malfunctions of customer-owned equipment that it may have inspected or worked on at some point in the past. Clearly the limits that Laclede has proposed in this regard fall well within the competitive norm. (Exh. 1, pp. 7-8; Exh. 3HC; Exh. 5, p. 6; Exh. 7, p. 3; Exh. 8, p. 3)

Finally, liability limits regarding customer facilities are appropriate because much of the inspection and testing work done by the Company on customer facilities is mandated by the Commission and provided without any direct charge to the customer. In fact, the Missouri Commission has adopted one of the most aggressive programs in the

country to ensure that gas service is provided in a safe manner. Specifically, Commission Rule 40.030 (4 CSR 240-40.030) prescribes the safety standards that must be followed by operators who transport natural gas in Missouri (the "Missouri Safety Rule"). The Missouri Safety Rule standards apply to each Missouri municipal and investor-owned gas utility, including Laclede. The Missouri Safety Rule was originally adopted in 1968, and has since been amended 23 times. The Rule is 37 full pages of single-spaced, triple column print, and covers, among other things, metering, corrosion control, operation, maintenance, leak detection, and repair and replacement of gas pipelines. The Missouri Safety Rule is similar to the Minimum Federal Safety Standards contained in 49 CFR part 192 (the "Federal Safety Rule"). However, the Missouri Safety Rule is, in certain circumstances, stricter than the Federal Safety Rule. With respect to inspections, the Federal Safety Rule requires an operator to inspect only its <u>own</u> facilities when physically turning on the flow of gas. Under Section 12(S) of the Missouri Safety Rule, however, Laclede is required to perform a gas safe inspection of <u>both</u> its <u>own</u> equipment (which generally ends at the meter) *and* the <u>customer's</u> equipment, at the time a Laclede representative physically **<u>turns on</u>** the flow of gas to a customer. (Exh. 1, pp. 8-9)

Gas utilities in most other states have no obligation to perform any inspections of customer-owned equipment and piping at the time service is initiated and therefore incur no liability for events that occur behind their meters. (*Id.)* There is no reason that the enhanced level of public safety opted for by the Commission should be allowed to be used as a pretext for exposing Missouri utilities and their customers to additional and unnecessary litigation costs. (*Id*. at p. 9) In effect, the Amended Tariff simply serves as a reasonable, partial limit of liability that other gas utilities are able to escape entirely.

Regarding plaintiff's rights to redress in the courts, customers and non-customers alike will continue to have the opportunity to pursue their claims in civil court regarding alleged acts of negligence by the Company. The Amended Tariff simply provides direction in specific instances regarding whether the Company has met the standard of care established by the Commission. It is fitting and proper for the Commission to set these standards; it would be very poor public policy indeed for the Commission to surrender to judges and jurors, who have no particular technical expertise in how natural gas systems and facilities operate, the authority to determine when a utility has or has not met its obligations to provide natural gas service in a safe manner. Such an ad hoc approach to setting safety standards – through the imposition of civil liability for particular acts and omissions rather than the approval and enforcement of informed regulation – is nowhere contemplated by Missouri law or sound public policy. To the contrary, the Missouri legislature has long recognized that the power to determine how utilities should go about the task of rendering utility service in a safe and reliable way resides with the Commission rather than the courts. (Exh. 1, p. 10).

For it is the Commission, and not the courts, that has the resources and obligation to assess the financial costs associated with providing various levels and types of service and to determine whether a particular measure makes enough of a contribution to public safety to justify its costs and recovery from ratepayers. It is also the Commission, and not the courts, that have an expert safety Staff, with decades of experience in assessing the operational, engineering, and financial implications of various safety measures. Given these attributes, the Commission not only has the right but the affirmative duty to establish the standards that utilities should follow to ensure that gas service is provided in

an efficient and safe manner. Indeed, the Commission itself has recognized as much by opposing prior efforts by attorneys and others to use the courts to alter the terms of safety programs and other measures that have been approved by the Commission to protect public safety in a rational and prudent manner. The very same considerations warrant approval of the Company's proposal in this case. (*Id*. at 10-11)

OPC has raised the issue that compliance with federal and state gas safety rules is insufficient because these rules are "minimum" rules, and not meant to be used as safety standards. Exh. 12, pp. 6-7. OPC reads the word "minimum" as meaning minimal or marginal. This interpretation presupposes that the federal government intended to create safety rules that were not adequate but instead provided only a minimal level of safety.

OPC has misread the meaning of the word "minimum" standards. The term "minimum" actually refers to Congress' instruction that the federal government set adequate interstate pipeline safety standards, which the states are required to meet, at a <u>minimum</u>, and may exceed if they so choose. In other words, states may exceed the federal safety standards, but may not go below them. Contrary to OPC's view, the federal rules are so stringent that they affirmatively prohibit a state from adopting less strict requirement in *any* area, even if the state has adopted stricter requirements in some areas. (49 U.S.C. §60104(c)) Further, for states to even be entitled to enforce their own safety standards, they must certify annually with the federal government and meet a laundry list of requirements to obtain such certification. (49 U.S.C. §60105) Quoted below is the purpose of the minimum federal pipeline safety standards, which clearly indicates that such standards are designed to provide utility customers and the public with

sufficient protection against risks associated with the transportation of natural gas through pipeline facilities. (49 U.S.C. § 60102(a)(1))

§ 60102. Purpose and general authority

(a) Purpose and minimum safety standards.--

(1) Purpose.--The purpose of this chapter is to provide *adequate* protection 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…
(*emphasis supplied*).

In short, there is a strong public policy rationale for the Commission to establish the kind of reasonable parameters proposed in this case for determining when the Company should and should not be exposed to liability for actions undertaken in providing natural gas and related services. It is the Commission that has the expertise, the resources, and the broad grant of authority to determine not only what is required to provide safe and adequate service but also what level of costs should reasonably be incurred and imposed on utility ratepayers to meet that objective.

In contrast, it was evident from the cross-examination of OPC witness Meisenheimer, that OPC's approach to this issue, if approved, would lead to a morass of inconsistent and potentially unjustified "safety" standards – standards that would expose utility customers to needless costs and the Company to conflicting and irreconcilable requirements on how it should conduct its business. (Tr. 157-66) Specifically, Ms. Meisenheimer acknowledged that should a jury determine that Laclede should have done something more or different than what the Commission's safety standards require (and award a significant amount of damages), the Company might have no choice but to implement whatever practices were necessary to satisfy this ad hoc safety standard in the future so as to avoid further liability. (Tr. 163-64) Ms. Meisenheimer also

acknowledged that the costs of implementing such practices would, in all likelihood, be eventually included in the rates charged to utility customers. (Tr. 165) What Ms. Meisenheimer was not able to articulate, however, was any reasonable policy rationale for its effort to make the Commission a mere bystander in the critical process of establishing utility safety standards; with real control residing instead in whatever notion of public safety a judge or jury might concoct based on their narrow and inexperienced view of a single case. (Tr. 158, line 24 – 160, line 16)

It was for this very reason, that the Missouri General Assembly gave the Commission both the authority and the resources to balance what is truly necessary to provide safe and adequate service with the inevitable costs that ratepayers must bear for any measures aimed at accomplishing that objective. The Amended Tariff proposed by Laclede in this case furthers this legislative grant of authority in a reasonable and appropriate way, while OPC's position would eviscerate it.

OPC also objected to the Amended Tariff on the alleged grounds that it provides protection for unregulated services. The language of the Amended Tariff itself refutes this argument, stating:

> 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*.

(emphasis supplied). The Amended Tariff covers no work wherein the revenues are not imputed in Laclede's rates. Further, the Amended tariff does not apply where the Company has agreed to assume an obligation relating to customer equipment. Nor does it apply to merchandise sold by Laclede. (*See* Amended Tariff, p. 2; Exh. 2, p. 5)

It is fair and appropriate for the Commission to set liability parameters for services that generate revenues used to reduce rates customers pay for utility services. (Exh. 6, p. 8; Exh. 8, pp. 2-3) This is especially true because the Commission's safety rules continue to apply when Laclede is providing such services, affording customers additional safety protection. (Exh. 6, pp. 8–9) If the Commission finds that it can impute the revenues from these related services, but cannot provide a boundary for liability, the Company must certainly reconsider whether it should be participating in these ancillary activities.

LEGAL ISSUES:

1. **Can the Commission approve a tariff that sets limits on the Company's liability?**

   Answer: **Yes.**

As previously noted, the Commission's authority to approve tariffs limiting liability is a matter of longstanding law. Back in 1924, the Missouri Supreme Court confirmed this concept in a case concerning telegraph tariffs. In ***State ex rel. Western Union Telegraph v. Public Service Comm'n***, 264 S.W. 669 (Mo. 1924), Western Union's tariffs limited its liability for mistakes, 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." ***Id***. at 672.

In ***Warner v. Southwestern Bell Telephone Co.***, 428 S.W.2d 596 (Mo. 1968), the 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. Setting parameters on the utility's liabilities assists in the goal of having service provided at reasonable rates. A broadened liability exposure must inevitably raise the cost and the rates of utility service. ***Id***. at 601-02; ***Danisco Ingredients USA, Inc. v. Kansas City Power & Light Co.***, 986 P. 2d 377, 383-84 (Ks. 1999).

More recently, the Western District Court of Appeal upheld the validity of a tariff limiting liability in ***A.C. Jacobs and Co., Inc. v. Union Electric Co.***, 17 S.W.3d 579 (Mo. App. W.D. 2000). In this case, Union Electric overcharged a retirement home over a period of seven years. The company's tariff limited refunds in such instances to 60 prior billing periods (five years). The Court found that the Commission had approved the tariff and by doing so had determined that the limit on refunds was just and reasonable. The limitation of liability was upheld.[1] ***Id***. at 582-83.

In addition to the case law cited above, the Commission has routinely approved tariffs that provide reasonable limitations on liability for utilities. Similar to the Amended Tariff, this includes limitation on liability for interruption of gas service and for

[1] It should be noted that Laclede also has a similar tariff regarding limitations on refunds for overcharges.

damages that arise out of the use of gas on the customer's side of the point of delivery. ***See*** Aquila Networks – MPS and L&P; P.S.C.MO. No. 1, Sheet No. R-21 (May 1, 2004). The Commission has also approved tariffs limiting liability for damage to trees and other property (Union Electric Company Gas Service, P.S.C.Mo. No. 2; 1st Revised Sheet No. 50, February 18, 1998), and for interruption of telephone service (Southwestern Bell Telephone Company; P.S.C. Mo.-No. 35; General Exchange Tariff, Section 17, 2nd Revised Sheet 20, April 30, 1997).

In summary, there is a long history of cases, both in Missouri and other states, as cited in the ***Warner*** case, that support the proposition that the Commission may approve tariffs that set limits on utility's liability. In addition, the Commission has regularly approved tariffs providing just and reasonable limitations of liability for utilities, including tariffs similar to the Amended Tariffs in this case.

2. **Can the Commission approve a tariff that relieves a utility of liability for its own negligence?**

Answer: **The Amended Tariff is not intended to, nor does it, relieve Laclede of liability for its own negligence. However, the law in this area is clear that tariffs can limit liability for ordinary negligence, but not for willful or wanton misconduct.**

The Amended Tariff sets the boundaries of the Company's obligations in certain areas. For example, the Amended Tariff provides that compliance with the Federal and State gas safety rules on odorization of gas constitutes compliance with the Company's obligations in this area. This provision establishes the duties owed by the Company to the public with respect to odorization. Failure to meet this standard would constitute a

failure by the Company to comply with its obligations and expose the Company to potential damages and penalties.

Contrary to the position taken by OPC, this provision establishes the terms of liability; it does not relieve the Company from liability. In effect, the Amended Tariff stands for the proposition that there will be one set of standards for the Company to follow in performing a gas safety procedure such as odorization. And those standards will be set by the federal government's pipeline safety rules and the Commission gas safety rules, and not by the whim of a judge or twelve jurors who may be trying to find a deep pocket insurer for an injured party.

Even if the Amended Tariff did limit the Company's liability for its own negligence, the law would clearly support it. In ***Warner v. Southwestern Bell,*** *supra*, the Missouri Supreme Court cited legal authority for the principle that, while limitations of liability provisions are valid and enforceable, they do not exempt a utility when its conduct has been wanton or willful. The Court stated that it agreed with this legal authority, and concluded that liability limitation provisions are effective where the utility is merely negligent, but does not exempt the utility for willful and wanton conduct. ***Warner*** at 603.

Eleven years later, the Western District Court of Appeals followed this holding, while finding that a liability limitation provision did not bar a suit that stated a claim of willful or wanton misconduct. In ***Engman v. Southwestern Bell Co.***, 591 S.W. 2d 78 (Mo. App. W.D. 1979), a telephone company representative entered a home without announcing himself or knocking on the door, and proceeded to disconnect service. The

Court found that the facts alleged by the plaintiff supported a claim of intentional invasion of privacy that could be considered wanton or willful misconduct. ***Id.*** at 81.

The principle stated in the ***Warner*** case was more recently confirmed in a case involving KCP&L. In ***Danisco Ingredients v. KCP&L***, *supra*, the Kansas Supreme Court responded to questions posed by the Missouri Western District Court of Appeals regarding Kansas law on limitation of liability provisions. KCP&L's tariff relieved it of liability for any damages occasioned by any irregularity or interruption of electric service. The Court cited a long list of cases, including ***Warner***, that stand for the proposition that tariffs absolving utilities from liability for simple negligence are reasonable and will be upheld. The Court went on to find that KCP&L's tariff appeared to be too broad, and should be enforced as protection for KCP&L's ordinary negligence, but not for its willful or wanton misconduct. ***Danisco*** at 383-86.

It should be noted that the Amended Tariff also involves a liability limitation in connection with interruption of service. However, these limitations apply under certain stated conditions, none of which involve Laclede's willful or wanton conduct, or even its negligence.

In summary, the law is clear that tariffs can limit liability for ordinary negligence, but not for willful or wanton misconduct. Commissioner Jarrett likely anticipated this concept when he asked Laclede witness David Abernathy whether the Amended Tariff exculpates Laclede from all responsibility, or "does it only protect it from negligent acts and not willful or wanton conduct?" Mr. Abernathy agreed that a court would certainly not apply the Amended Tariff where Laclede's conduct exceeded ordinary negligence. However, Mr. Abernathy added that the Amended Tariff was not drafted to protect

Laclede even from its own ordinary negligence, but to address a situation where courts were creating standards so as to make Laclede and its customers unwilling insurers. As Mr. Abernathy stated with regard to the Amended Tariff, "its intent is to not protect us from our negligence, but to protect us when we're not negligent." (Tr. 64, line 1 – 65, line 5)

3. **There was discussion in testimony of the intent of the Amended Tariff. What will be the effect if a court does not agree with the parties' intent?**

Answer: **Laclede believes the Amended Tariff is clear and therefore not subject to interpretation. However, as with any statute or tariff, the parties will have to accept a court's judgment interpreting the Amended Tariff, subject to appeal, or seek tariff changes to address the court's interpretation.**

The Amended Tariff sets parameters on the Company's obligations, and states that the Company will not be subject to liability when it meets those obligations. The discussion of intent in the testimony primarily surrounded whether the obligations in the Amended Tariff were established so as to relieve the Company of responsibility for its own negligence or simply to define the boundaries where the Company would not be negligent in the cases covered by the Amended Tariff. As discussed in the paragraph above, it is Laclede's position that the Amended Tariff defines boundaries, outside of which the Company is neither negligent nor responsible for damages.

Laclede believes that the language of the Amended Tariff itself is clear. Where such language is clear and unambiguous, courts do not resort to construction or interpretation. ***City of Harrisonville v. Public Water Supply Dist.***, 49 S.W. 3d 225, 230 (Mo. App. W.D. 2001). Assuming the Amended Tariff is legally valid as discussed

above, the court's duty is to determine the "applicability of such provisions to a given state of facts…" ***Warner v. Southwestern Bell***, *supra*, 428 S. W. 2d at 602. In other words, a court will assess whether the Amended Tariff applies to the case before it.

If the court finds the Amended Tariff to be ambiguous, it will then apply rules of construction, which may include determining the parties' intent. The court would then issue its ruling based on its interpretation of the meaning of the Amended Tariff. (***See A.C. Jacobs***, *supra*, 17 S.W. 3d at 584-85. If Laclede disagrees with the court's interpretation, it may (i) accept the court's interpretation for that case; (ii) appeal the court's decision; or (iii) file revised tariffs for the Commission's consideration that address the issue raised by the court. As Laclede witness Abernathy testified in response to a question from Commissioner Kenney, Laclede hopes the Amended Tariff would provide appropriate protections in frivolous cases, but "obviously, a judge may rule otherwise." (Tr. 66-67)

4. **Does the Amended Tariff violate Article 1, Section 14 of the Missouri Constitution, the Open Courts provision?**

Answer: **The Amended Tariff does not violate the Open Courts provision as it does not prevent any person from obtaining access to or redress from the courts.**

Article 1, §14 of the Missouri Constitution states 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." The Amended Tariff does not violate this provision because in no way does it bar

access to the courts. In the large mass of law governing liability tariffs, none have been held to run afoul of Missouri's Open Courts provision.

In fact, courts are open for the challenge of any act by the Commission, and the courts have long since found that laws creating a regulatory structure are not intended to preclude individuals from bringing private actions. ***Corbett v. Lincoln Savings & Loan Assn.***, 17 S.W. 2d 275, 278 (Mo. App. E. D. 1929). Further, it has long been held that even statutes of limitations do not violate this provision. ***Cooper v. Minor***, 16 S.W. 3d 578 (Mo. 2000).

The courts emphatically have jurisdiction over a suit for damages based on negligence in which a determination of the legal validity and applicability of tariff provisions to a given state of facts is required. ***Warner v. Southwestern Bell***, *supra*, 428 S. W. 2d at 602. Thus, the Amended Tariff can be challenged in the courts as to its validity and lawfulness. Plaintiffs may argue that the Amended tariff does not apply to their particular set of facts. As the Missouri Supreme court stated, "If this were not true, we would not find as we do such a large number of cases in which the courts throughout the country have assumed jurisdiction." ***Id***. at 602-03.

However, while the Open Courts provision guarantees access to the courts, it does not guarantee that plaintiffs will prevail on any claim they dream up. The Amended Tariff applies the wisdom and experience of the Commission in establishing gas safety rules, and sets the parameters of liability based in part on those rules. Plaintiffs cannot be heard to claim that the reasonable standards set forth in the Amended Tariff deny them open access to the courts.

5. **What is the statute of limitations on negligence claims?**

Answer: **The statute of limitations on negligence claims is five years. However, limitations statutes pertain to the amount of time between when an incident giving rise to damage occurred and when the suit is filed. As a result, it is not affected by the time frames in the Amended Tariff.**

The statute of limitations in Missouri on torts caused by negligence is five years. ***§516.120*** (R.S. Mo. 2009). The limitation period applies to when civil actions can be commenced after the cause of action has accrued. The cause of action is not deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment. ***§516.100*** (R.S.Mo. 2009).

In other words, limitation statutes dictate when a plaintiff must sue after the plaintiff knows or should have known that damage occurred. This is completely different from the purpose of the time frames stated in the Amended Tariff, which provide when Laclede may or may not be at fault.

For example, assume the Amended Tariff is approved, and on October 10, 2010, a customer reports a problem with the gas service. A Company service worker visits the customer's house and identifies that the furnace is not operating properly. The Company shuts off the gas and repairs the furnace, after which the gas is turned on, and an inspection is performed to ensure that gas can be turned on safely. The furnace repair revenue is included in the Company's rate case so as to reduce its base rates. On December 20, 2010, the furnace completely malfunctions, and the customer must buy a new furnace to replace it. On December 30, 2015, the customer sues Laclede alleging that the Company failed to properly repair the furnace. Under the Amended Tariff, the

customer could maintain this suit, because 60 winter days had not yet elapsed since Laclede had repaired the furnace, meaning the Non-Incident Operational Period had not expired, and Laclede was not entitled to a limitation of liability. However, because more than five years had passed since the customer was or should have been aware that a wrong had occurred, the customer's suit is time barred by the statute of limitations.

In summary, the time frames in the Amended Tariff apply to when the Company may be negligent, whereas the time frames in the limitation statutes apply to when the plaintiff must sue over damages allegedly resulting from that negligence.

CONCLUSION

For all of these reasons, Laclede respectfully requests that the Commission approve the Amended Tariff set forth in Attachment 1. The Amended Tariff safeguards the Commission's authority over the provision of safe and adequate gas service by establishing reasonable parameters for the Company's responsibility and liability relating to its provision of that service. It protects all utility customers from unnecessary costs associated with frivolous litigation, while still affording potential plaintiffs the opportunity to seek redress when the Company has not met its responsibilities. The Amended Tarff is just and reasonable and should accordingly be approved.

WHEREFORE, Laclede Gas Company respectfully requests that the Commission accept the Company's Brief, and approve the Amended Tariff.

Respectfully submitted,

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ATTORNEYS FOR
LACLEDE GAS COMPANY

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing pleading was served on the General Counsel of the Staff of the Missouri Public Service Commission, and the Office of the Public Counsel, on this 13th day of November, 2009 by hand-delivery, fax, electronic mail or by regular mail, postage prepaid.

/s/Gerry Lynch

AMENDED TARIFF

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.

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.

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

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.

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.

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 give no one, except the Company's authorized employees, contractors or agents, access to Company property on owner/customer's premises. The owner/customer of the premises being served shall not

be considered a bailee with respect to Company equipment, but shall be liable for 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.

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.

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 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, 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.

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.

ATTACHMENT 2

SUMMARY OF AMENDED TARIFF

ISSUE	STANDARD	RESULT
Safe Transmission and Distribution of Gas	Compliance with Federal and Missouri Pipeline Safety Rules	No Liability for loss from transmission and distribution
Company is responsible for customer equipment only so far as the testing and inspection requirements of Safety Rules, or where the Company agrees to be responsible.	For inspections arising from initiating the flow of gas: Gas appliances function normally for 48 hours	Presumption that testing or inspection was performed properly.
Problems with customer equipment • Gas leaks • Leak and ignition • Failure • C. O.	<u>Elapse of time</u> 60 winter days for space heating equipment; 90 regular days for non-space heating equipment; or Intervening HVAC company	Utility is not liable for losses.
Obligation to provide warnings or safety information to customer	Federal and Missouri Pipeline Safety Rules; Plus no actual knowledge	Utility not responsible for losses.
Interruptions of Service or Irregularities	Reasonable diligence to furnish continuous, quality gas.	No liability for events outside of Laclede's control; Liability limited to charge for service;. No special damages.
Odorizing Gas	Compliance with Federal and Missouri Pipelinesafety rules.	No liability for failure to warn regarding gas odorization.
Information on Effect of Tariff	Company shall submit Annual Report to Staff and OPC	