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

LACLEDE GAS COMPANY'S
APPLICATION FOR REHEARING
AND ALTERNATIVE REQUEST FOR CLARIFICATION

COMES NOW Laclede Gas Company ("Laclede" or "Company") and, pursuant to Section 386.500 (RSMo 2000) and 4 CSR 240-2.160 of the Commission's Rules of Practice and Procedure, submits its Application for Rehearing and Alternative Request for Clarification of the Commission's January 13, 2010 Report and Order in the above-referenced case. In support thereof, Laclede states as follows:

1. On January 13, 2010, the Commission issued its Report and Order in the above captioned case in which it rejected the tariffs that had been filed by Laclede to establish new parameters governing the Company's liability in certain areas. To that end, the proposed tariffs addressed three general areas. First, they proposed to limit the amount of time during which the Company would remain liable for incidents involving customer owned equipment and piping. Such limitations would have applied primarily in those situations where the Company has performed a mandated inspection of customer-own equipment and piping or performed service work that, while not regulated as to price or terms by the Commission, is nevertheless taken into account when establishing rates for utility service. Second, the tariffs proposed to tie the Company's potential liability for events relating to the transmission, distribution and odorization of gas (and any related warnings) to whether the Company had or had not complied with the federal and more strict state safety standards applicable in these areas. Finally, the tariffs proposed to

clarify the scope of the Company's liability in instances where its provision of service was interrupted due to force majeure or other events.

2. In its January 13, 2010 Report and Order, the Commission rejected each and every one of these liability provisions. Laclede believes that the Commission's rejection of these provisions is contrary to some very basic legal and policy principles regarding which governmental branch is best suited to determine what specific practices public utilities should follow to ensure utility service is being rendered in a safe and adequate manner and at a reasonable cost. It is also based on a faulty reading of the meaning and effect of the tariff sheets that Laclede filed as well as a misconstruction of the competent and substantial evidence on the record. Finally, the Report and Order fails to contain adequate findings of fact that would show how controlling issues were decided. For all of these reasons, the Commission should grant rehearing in this case. Alternatively, Laclede requests that the Commission clarify its Report and Order to be consistent with the requests set forth below.

Determination for Situations Involving Inspections of, and Service Work on, Customer-Owned Equipment and Piping

3. At pages 11 and 12 of its Report and Order, the Commission rejected Laclede's proposal to establish a clear limitation of the period of time that Laclede would remain subject to liability for mandated inspections and service work performed on customer-owned equipment and piping. The two main reasons cited by the Commission were: (a) its concern over the propriety of providing liability protection for work done on customer equipment that is not mandated or regulated by the Commission (including whether such protection would provide Laclede with a competitive advantage) and (b) the

reasonableness of the 48 hour window during which the equipment must operate without incident before Laclede would receive any liability protection.

"Unregulated" Service Work

4. With respect to the Commission's first concern regarding the propriety of establishing liability limitations for "unregulated service work," Laclede would note that its own tariff proposal only sought to obtain such protection to the extent the revenues associated with such work were taken into account when establishing utility rates. (*See* Amended Tariff, p. 2; Exh. 2, p. 5). Because such revenues, as well as costs, have, in fact, been considered in the past when setting utility rates, Laclede believed that such service work had a sufficient nexus to its regulated service to justify the kind of liability protection it was proposing.

5. Indeed, over the many decades it has performed service work, Laclede believes such service work benefitted utility customers in several ways. First, it has allowed Laclede to maintain a higher level of experienced, in-house union workers throughout the year than would otherwise be the case by providing them with another form of compensated work in which they could engage when the peak demands imposed by reconnection, disconnection and other mandated work were at an ebb. This work has, in turn, generated revenues that have been used to offset the cost of utility service (Report and Order, p. 5, Exh. 3, p. 9). Second, such service work has contributed to public safety since, as the Commission recognized in its Report and Order, Laclede's employees are required to comply with any applicable Commission-approved gas safety standards (including wearing leak detection equipment) whenever they perform home sale inspections or other service work on a customer's premises. (Report and Order, p. Exh. 6, pp. 8-9). Third, it has enhanced customer convenience by allowing Laclede, on

occasion, to make minor repairs and get a customer's HVAC system up and running again in a short period of time, something that is particularly appreciated by customers during a cold snap. Finally, the fact that the revenues and costs of this work are included in rates precludes Laclede from obtaining any significant earnings; rather its customers effectively reap the benefits of these compensated activities. Thus, Laclede has no incentive to gain a competitive advantage over other HVAC contractors other than to maximize benefits for its customers.[1] For all of these reasons, Laclede has consistently viewed its service work more as a customer convenience and as a way of holding down utility rates, than as a mechanism for making money. Laclede submits that the Commission should reach the same conclusion and grant rehearing on this issue.

6. The Commission also erred in finding that the 60-day and 90-day limitation periods that apply in certain circumstances are unreasonable. The comparison of Laclede's liability period to HVAC parts and labor warranty periods is apt for several reasons. First, the 60-day period is not just 60 days, as in HVAC contracts, but 60 winter days, which could be as long as eight months. Second, because the incidents subject to these time limits are so difficult to prove (see Tr. 67), the warranty period is effectively the same as a liability limitation period. Third, HVAC warranty periods are effectively equivalent to a Laclede liability limitation period because Laclede has deep pockets compared to many HVAC contractors; hence, Laclede is much more likely than HVAC contractors to be held accountable for incidents. Finally, while the Commission states that HVAC contractors do not have the privilege of having a Commission-approved liability tariff (Order, p.9), the Commission should also recognize that neither do these

[1] The Commission reached this same conclusion in 1983, stating that "Since the revenues are included in overall requirement Laclede appears to have no incentive for understating its costs for service work. No

contractors bear the burden of having to adhere to the Commission-approved gas safety rules.

7. Alternatively, if the Commission is still disinclined to provide any liability protection for such service work, it should clarify the portion of its Order that suggests a need to examine how the costs and revenues, including litigation expenses, associated with such work should be treated in Laclede's next rate case. It is not clear what end result the Commission may expect as a result of this rate case evaluation. Certainly, the absence of liability protection makes it more difficult for Laclede to stay in the service work business. A result that would allocate the revenues and costs for such work in a way where the Company could only lose money on such work – while still incurring this liability risk – would make it even more problematic for the Company to stay in the business and maintain the current work force. Nevertheless, the rate case does provide a vehicle for sorting these matters out and making any ratemaking adjustments that may be necessary. Accordingly, if the Commission is not willing to grant rehearing on this issue, Laclede requests that the Commission clarify in its Report and Order that these matters shall be addressed in Laclede's existing rate case proceeding, Case No. GR-2010-0171, and direct the parties to file proposed procedural recommendations for doing so.

Regulated Testing and Inspections

8. Laclede also believes that the Commission should reconsider its decision as it relates to the time period over which Laclede would remain liable for mandated inspections of customer-owned equipment and piping at the time gas is turned on or where Laclede is otherwise required by the Commission's rules to be on the customer's premises. Because such inspections are mandated and performed under terms dictated

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benefit would accrue to the Company since the revenues are not maintained separately for the benefit of the

by the Commission, none of the concerns raised by the Commission regarding unregulated services apply. In addition, there is nothing in the evidentiary record to support the Commission's determination that the 48 hour time limit proposed by the Company is unreasonable. In reaching that contrary conclusion, the Commission erroneously found that 48 hours was not enough time to determine whether testing or inspection had damaged the customer equipment. There is not one scintilla of evidence on the record, however, to show that merely testing or inspecting such equipment can in some way damage it. Indeed, the whole purpose of the turn-on inspection is not to modify the customer's equipment or piping but to simply determine, through limited inspection and testing, whether there are any obvious problems with the equipment or piping (or perhaps open valves in the customer's home) that would make it unsafe to turn-on or restore gas service. It is not intended to be a detailed and thorough inspection upon which customers should expect to rely for years to come. Given this purpose and the fact that most gas utilities in the United States are not required to, and do not, perform such inspections (let alone subject themselves to potential liability based on someone's allegation that they failed to do so properly), it is eminently reasonable to establish a presumption that an inspection or test was performed properly if such equipment operated without incident for 48 hours after such work was performed.

9. The Commission's criticism that the 48 hour limitation is unreasonable because some customer equipment may not even be operated during that period is also misplaced because Laclede's proposed tariffs explicitly addressed this possibility. It is important to remember that the 48 hour limitation only serves to establish a presumption that can be rebutted. Even after that period has expired, Laclede is also subject to

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shareholders." ***Re: Laclede Gas Company***, 26 Mo. P.S.C. (N.S.) 411, 414 (1983)

potential liability claims until 60 winter heating days have expired (in the case of space heating equipment) or 90 calendar days have expired (in the case of other gas-fueled equipment). Both of these provisions, which the Commission failed to mention, were proposed for the express purpose of accommodating situations where customers might not run their equipment for some time after it is inspected or tested.

10. Finally, the Commission's determination that there was no evidence to support such a limitation simply belies the fact that the only witness to testify on the issue with any relevant engineering and gas-safety experience said just the opposite. Staff witness Robert Leonberger, who has years of experience examining a huge variety of natural gas incidents, as well an engineering degree through which to filter that experience and make appropriate recommendations that will promote public safety, testified clearly that the 48 hour limitation was reasonable for the purpose of establishing a safe turn-on inspection. (Rebuttal Testimony of Robert Leonberger, Exh. 5, pp. 4-5). With all due respect to the attorneys who presented and disposed of this case, Laclede submits that at least some deference should be given to the opinions of expert witnesses who have the training, education, experience and other qualifications typically required to render meaningful judgments on such issues. For all of these reasons, Laclede believes that the Commission should grant rehearing on this issue.[2]

11. In the alternative, Laclede requests that the Commission clarify its Order to direct that this issue also be taken up in Laclede's pending rate case so that the parties

[2]At page 11 of its Report and Order, the Commission erroneously concludes that Laclede has no incentive to litigate cases since all of its settlement costs are included in rate base and fully recovered from ratepayers. This statement is simply untrue. First, such costs are an operations and maintenance expense, not a rate base item. Moreover, to the extent Laclede incurs increases in such costs between rate cases, it must absorb such increases. Accordingly, there is no basis for concluding that the Company has no incentive to minimize such cost.

may offer additional evidence and recommendations on this issue in light of the concerns expressed by the Commission in its Report and Order.

Determination for Situations Involving the Transmission, Distribution and Odorization of Gas (and any Related Warnings) where the Company has Complied with all applicable Federal and State Safety Standards

12. The Commission also erred in rejecting Laclede's proposal to tie the Company's potential liability for incidents relating to the transmission, distribution and odorization of gas (and any related warnings) to whether the Company has or has not complied with the federal and more strict state safety standards applicable in these areas. In rejecting this proposal, the Commission found that Laclede had presented no evidence regarding the need for additional liability protections in these areas other than the various cases cited by Laclede in which patently frivolous claims had been made against the Company. (Report and Order, p. 10). Laclede's arguments were not purely theoretical. The fact that such frivolous suits have been filed – and in the process exposed the Company to needless litigation expense and unwarranted liability exposure – is a real and sufficient justification for the liability provisions that were proposed by Laclede. The Commission's summary dismissal of this evidence is akin to finding that a prosecutor failed to provide any evidence to support a shoplifting charge other than a videotape of the defendant stealing the item in question.

13. The Commission also expressed the view that courts were better suited than the Commission to determine the specific facts that might or might not establish negligence, and that it was therefore appropriate not to impose limitations that might affect the Company's liability, particularly in regard to unregulated activities. As previously discussed, however, Laclede is willing to pursue in its current rate case proceeding an approach that would remove unregulated activities from the mix.

Moreover, whatever advantages a court and a jury might have in determining negligence in a particular circumstance has to be counterbalanced with the fact that it is the Commission's legislatively-delegated duty, and its duty alone, to determine the practices and procedures that utilities, like Laclede, should follow to ensure safe and adequate service at just and reasonable rates. §393.130.1 (R.S.Mo 2000).[3]

14. As the undisputed evidence in this proceeding showed, it is the Commission 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

[3]As the Missouri Supreme Court summarized it in ***State ex rel. and to Use of CIRESE et al. v Ridge***, 345 Mo. 1096; 1099-1100; 138 S.W.2d 1012, 1014 (Mo. 1940) "It is exclusively within the legislative power to determine what the policy of the commonwealth shall be, or it may designate an agency of the government to determine that policy. Such policy may, in itself, become a matter for judicial determination as contravening a constitutional inhibition or for other cause within judicial cognizance. But the Legislature has the power to determine who shall promulgate and enforce its declared public policy, and, when an agency of the government is selected or created for that purpose, no other body, judicial, executive, or municipal, can step in, and by decree, order, ordinance, or otherwise, actively enforce the policy, or do other acts in relation thereto, except possibly to sustain the legislatively created or designated body. By act of assembly, the Public Service Commission was the designated government agency to enforce its declared public policy, whether that policy originated by statute or was created by the commission. It is an arm of the state government, created for the benefit of the people as well as the utilities it in part controls. There has been placed under the regulation, supervision, and control of the commission generally all matters relating to rights, facilities, service, and other correlated matters of a public service company. By this act a complete system in itself is presented to enforce such powers."

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. (Exh. 1 at 10-11).

15. By summarily concluding that judges and jurors are better suited to determining negligence, the Commission's Report and Order completely fails to deal with the issue of how such an ad hoc approach to setting safety standards – i.e. through the imposition of civil liability for particular acts and omissions rather than the approval and enforcement of informed regulation – would conflict with its own duties. This omission is particularly significant given the degree to which OPC's own witness demonstrated how such complete deference to the judicial system could 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)

16. 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 neither Ms. Meisenheimer, nor the Commission in its Report and Order, has been able to articulate, however, was any reasonable policy rationale for an approach that would 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). By failing to address this consideration at all in its Report and Order, the Commission has failed to meet its legal obligation to provide findings sufficient to explain how controlling issues were decided. ***State ex rel. Coffman v. Public Service Comm'n,*** 121 S.W.3d 534 (Mo.App. W.D. 2003); ***State ex rel. Laclede Gas Company v. Public Service Comm'n,*** 103 S.W.3d 813, 817 (Mo. App. W.D. 2003). The Commission should accordingly grant rehearing on this issue.

17. In the alternative, Laclede requests that the Commission clarify its Report and Order to provide that this issue also been taken up in Laclede's pending rate case proceeding. As previously discussed, the Commission indicated in its Report and Order that it believed providing liability protection was particularly inappropriate for unregulated service work. Consistent with the Commission's Report and Order, the rate case would provide an opportunity to address how those unregulated activities should be treated as well as consider liability limitations that apply exclusive to regulated services.

Determination for Situations Involving an Interruption of Service

18. Nowhere in its Report and Order does the Commission specifically address why it rejected Laclede's tariff proposal to clarify the Company's liability in situations where there is an interruption of service. Consistent with the general approach followed for other utilities, Laclede's language would have made it clear that while the Company is required to use reasonable diligence in maintaining service, its liability for an interruption of service is limited to the charges that would have otherwise applied during the period of interruption. Again, given the fact that it is the Commission, and not the courts, which has been empowered to determine and enforce what it means to provide

safe and adequate service, such a limitation is entirely consistent with the statutory scheme that has been established by the Missouri General Assembly. Accordingly, Laclede requests that the Commission either grant rehearing on this issue or, alternatively, clarify that this issue should be taken up in Laclede's rate case.

WHEREFORE, for the foregoing reasons, Laclede Gas Company respectfully requests that the Commission grant rehearing or, in the alternative, clarify its January 13, 2010 Report and Order consistent with the recommendations set forth herein.

Respectfully submitted,

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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 22nd day of January, 2010 by hand-delivery, fax, electronic mail or by regular mail, postage prepaid.

/s/Gerry Lynch