

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE APPLICATION OF)	BRIEF ON LIMITS OF
MIDAMERICAN ENERGY COMPANY FOR)	LIABILITY
AUTHORITY TO INCREASE RATES FOR)	
NATURAL GAS SERVICE)	NG98-011

A tariff which attempts to limit liability of a utility is invalid and unenforceable.

South Dakota law provides at SDCL 20-9-1:

Every person is responsible for injury to the person, property, or rights of another caused by his willful acts or caused by his want of ordinary care or skill, subject in the latter cases to the defense of contributory negligence.

Further, the South Dakota Constitution at Article VI, § 20 provides:

All courts shall be open, and every man for an injury done him in his property, person or reputation shall have a remedy by due course of law, and right and justice, administered without denial or delay.

In similar cases where legislation has attempted to place a cap on damages an injured party may claim, the South Dakota Supreme Court in striking it down has stated:

The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy.

A jury determination of the amount of damages is the essence of the right to trial by jury. See, In Re Certification of Questions of Law from the U S Court of Appeals, 1996 S.D. 10, 544 N.W.2d 183 (S.D. 1996).

With regard to SDCL 20-9-1, the South Dakota Supreme Court has held

This statute simply recognizes the right of injured persons to recover from wrongdoers who fail to exercise ordinary care. It does not define the circumstances under which the law imposes a duty on an alleged tort-feasor such as Basin Electric.

Poelstra v. Basin Electric Coop, 1996 S.D. 36 ¶ 12, 545 N.W.2d 823 (S.D. 1996).

It is submitted that an injured party cannot be restrained in his or her efforts to be

made whole. MidAmerican's Gas Sales Tariff at Section V, Original Issue Sheet No. 26, paragraph 12.02 attempts to limit an injured customer's right to recover damages for inspection work that MidAmerican performs on customer premises. It flies in the face of the constitutional right of every South Dakotan to have his or her day in court.

If the claim is one in contract, SDCL 21-2-1 states:

For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and their origin.

Finally, under SDCL 49-34A-3, a public utility may not, in its rates or service, grant an unreasonable preference or advantage to any person or subject any person to an unreasonable prejudice or disadvantage. If as a gas customer of MidAmerican I can recover for MidAmerican's negligent acts up to the meter on my house or business but cannot recover for those same acts on my side of the meter, I have been unreasonably prejudiced. There is no rhyme or reason for this distinction. It is arbitrary and it is discriminatory.

MidAmerican's tariff which attempts to limit its liability should not be approved and should be stricken as part of this rate proceeding.