

Exhibit No.:

Issue:

Tariff Revision
Designed to Clarify
Liability for Damages
Occurring on
Customer Piping and
Equipment

Witness:

Type of Exhibit:

Sponsoring Party:

David P. Abernathy
Surrebuttal Testimony
Laclede Gas
Company

Date Testimony

Prepared:

September 29, 2009

LACLEDE GAS COMPANY

GT-2009-0056

SURREBUTTAL TESTIMONY

OF

DAVID P. ABERNATHY

SEPTEMBER 2009

FILED²

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**Missouri Public
Service Commission**

Laclede Exhibit No. 2
Case No(s). GT-2009-0056
Date 10/8/09 Rptr NM

SURREBUTTAL TESTIMONY OF DAVID P. ABERNATHY

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4 Q. Please state your name and business address.

5 A. My name is David P. Abernathy. My business address is 720 Olive St., St. Louis,
6 Missouri 63101.

7 Q. Are you the same David P. Abernathy that filed Direct Testimony on behalf of Laclede
8 Gas Company in this case on July 17, 2009?

9 A. Yes.

10 Q. What is the purpose of your surrebuttal testimony in this case?

11 A. The purpose of my surrebuttal testimony is to respond to the rebuttal testimony filed by
12 Barbara A. Meisenheimer on behalf of the Office of the Public Counsel ("OPC") on
13 August 19, 2009. Pursuant to Commission Order, on September 23, Laclede submitted
14 revised tariff language with changes that were designed to address certain concerns that
15 had been expressed by Ms. Meisenheimer in her testimony as well as a concern raised by
16 the Commission Staff in its discussions with the Company. For the Commission's
17 convenience, this tariff language is attached hereto as Schedule DPA-1. In this
18 testimony, I will explain how the changes address the respective concerns. I will also
19 respond to the proposed tariff language filed by OPC on September 23, 2009.

20 Q. Please summarize the matters in Ms. Meisenheimer's testimony to which you wish to
21 respond.

22 A. I will respond to both Ms. Meisenheimer's general policy concerns and her specific
23 concerns.

24 Q. What are her general policy concerns?

1 A. Her concerns are that the tariff will (i) weaken the Company's incentive to provide safe
2 and adequate service; (ii) excuse the Company from its own negligence; and (iii) cause
3 the Company to cease to serve as an insurer for the benefit of individual customers.

4 Q. How do you respond to these general concerns?

5 A. First, the proposed tariff does not weaken the Company's incentive to provide safe and
6 adequate service. To the contrary, the tariff repeatedly maintains that the Company must
7 adhere to the Commission's safety standards in order to be assured that it has fulfilled its
8 duties to the public to provide such service. The tariff strengthens the connection
9 between the Commission's safety rules and the Company's liability for safety failures.
10 Conversely, the tariff weakens the ability of lay judges and juries to invent their own
11 safety standards and, in the process, undermine the policies of the Commission and its
12 Staff, entities that have far more expertise and experience in determining how resources
13 should be spent to ensure public safety with due regard for the cost of utility service.
14 Second, nowhere in the tariff is there language excusing the company from its own
15 negligence. The tariff establishes in certain areas the boundaries of the Company's
16 duties, so that the Company may know what is expected of it, rather than have those
17 standards set after the fact in accordance with the whims of a judge or jury. The tariff
18 will result in consequences for the Company's failure to meet requirements. By claiming
19 that the tariff relieves the Company of liability for its own negligence, Public Counsel is
20 really complaining that the tariff will shift the arbiters of such negligence from 12
21 randomly selected individuals to the experts who have been designated to make such
22 decisions.

1 Third, Public Counsel's policy statement that the Company should act as an insurer
2 against gas-related damage or loss reveals the real policy motivation behind Public
3 Counsel's position, rather than the flawed claims regarding safe and adequate service and
4 insulation from negligence. There is nothing in the theory or operation of public utility
5 regulation to suggest that the Commission can or should require utilities to serve as an
6 insurer for events and circumstances that involve customer equipment and that are
7 unrelated to whether the utility has complied with its recognized obligations for rendering
8 safe utility service. To the contrary, electric utilities are not expected to insure against
9 electrocution or fires caused by consumer equipment, and water utilities are not charged
10 with insuring against damage caused by water leaking from customers' facilities. Nor do
11 firms operating in a completely unregulated environment typically take on the role of
12 insurer. Moreover, while the proposed tariff provides standards of care for both the
13 Company and customers, Public Counsel's policy would remove the responsibility placed
14 on each customer to maintain his or her own equipment, and place that burden on the
15 Company and all of its customers.

16 Q. Ms. Meisenheimer describes six specific concerns on pages 4-5 of her rebuttal testimony.
17 Her first concern is that the tariff is overbroad by considering compliance with
18 Commission safety rules to constitute "full compliance with all duties and obligations of
19 providing utility service." (OPC Rebuttal, p. 5) She also claims the tariff imposes
20 extreme liability limitations on virtually every activity affecting gas service at the
21 customer's premise (*Id.*, p. 6). How do you respond to her first set of specific concerns?

22 A. These concerns are not valid because they do not represent a fair reading of the tariff.
23 The tariff language cited on page 5 of Ms. Meisenheimer's rebuttal testimony addresses

1 only the “safe transmission and distribution of gas.” This would apply to claims in which
2 the Company is accused of causing damage by delivering poor or inferior quality gas, or
3 by some other fault in the gas delivery process. The tariff merely provides that Laclede’s
4 compliance with Commission safety rules would represent compliance with the narrow
5 subject of transmission and distribution. The tariff is not so broad as to apply to “all
6 duties and obligations of providing utility service.”

7 The same flaw applies to the second part of this concern. The tariff language cited on
8 page 6 of Ms. Meisenheimer’s rebuttal testimony only addresses delivery of the gas itself,
9 and does not cover “virtually every activity affecting gas service at the customer
10 premise.” Further, the provision does not even disclaim liability, but instead limits it to
11 the “charge for service rendered during the period of interruption...” This provision is
12 similar to other longstanding utility provisions regarding liability for interruption of
13 service, including those of Southwestern Bell and Aquila Networks, dating back at least
14 to 1997 and 2004, respectively.

15 Q. On page 7 of her rebuttal testimony, Ms. Meisenheimer states that the Company should
16 leave open the possibility that it be liable for some reasonable indirect, incidental or
17 consequential damages arising from an interruption of service. Do you agree?

18 A. Absolutely not. Eliminating indirect, incidental, or consequential damages is standard
19 language in business contracts. In a situation where Laclede is required to serve
20 hundreds of thousands of customers, leaving the Company at the mercy of the court
21 system for such open-ended remedies is a recipe for disaster.

1 Q. The second and third specific concerns, on pages 8-11 of Ms. Meisenheimer's rebuttal
2 testimony, indicate that the proposed tariff is not clear that it would apply only to
3 regulated services. Is this true?

4 A. No. The tariff is clear that it applies only to regulated services. For example, the
5 complete disclaimer of liability for customer equipment does not apply where the
6 Company has agreed in writing to assume an obligation relating to customer equipment,
7 such as repair or maintenance. Further, the limitation regarding services rendered by the
8 Company at the customer's property only applies to those services for which the revenues
9 and costs are normally considered in the ratemaking process. Finally, in order to assure
10 OPC that the liability limitation does not apply to merchandise sold by Laclede, the
11 Company has added specific language to that effect, which is red-lined in Schedule DPA-
12 1.

13 Q. On page 11 of her rebuttal testimony, Ms. Meisenheimer refers to the Service initiation
14 Fee and Reconnection Fee charged by the Company as direct charges that recover the
15 cost of inspections performed by the Company. Do you agree?

16 A. Not at all. The \$36 fee in 2001 was not even designed to cover the entire cost of service
17 initiation at that time. Today, the \$25 fee currently charged merely defrays the
18 administrative cost of registering the customer for service. The same applies for the
19 disconnection/reconnection fee. The \$62 charge for that service only partially covers the
20 Company's cost to first disconnect service, and then restore it and provide a service
21 initiation inspection. Certainly, the charge would be much higher to provide that service
22 plus the insurance benefit sought by Public Counsel. In addition, some of the visits

1 made by the Company to a customer location, such as for a high-bill inspection, do not
2 involve the initiation of service, and are not subject to a direct charge at all.

3 Q. OPC's fourth specific concern is that an ambiguity exists with respect to the Company's
4 obligation to provide gas free of constituents. What is the Company's obligation on this
5 issue?

6 A. The Company's obligation is as stated on the first page of the proposed tariff: that the
7 Company shall deliver gas free of constituents that materially interfere with or adversely
8 affect the safe and proper operation of Customer Equipment. The Company's later
9 reference to this obligation was intended to refer only to the Company's obligation to use
10 reasonable diligence to furnish continuous gas service. The gas quality obligation was
11 referenced precisely so a party would not think the Company was modifying its
12 responsibility on gas quality. In order to clarify this for Public Counsel, Laclede has
13 removed the reference, as shown on Schedule DPA-1, so there will be no question that
14 the gas quality obligation on the first page of the tariff controls that issue.

15 Q. OPC's fifth concern is that the Company will avoid liability by not having recently been
16 at the customer's property, and such absence was due to the Company's failure to
17 conduct a required inspection. Is this a legitimate concern?

18 A. No. Had Laclede not performed a required inspection, it would certainly be in violation
19 of Commission rules. The proposed tariff does not limit the Company's liability in such
20 instances. Nevertheless, in order to again assuage OPC's concerns, the Company has
21 added language as indicated on Schedule DPA-1 specifically providing that the tariff
22 does not excuse the Company's failure to perform an inspection required by Commission
23 rules.

1 Q. OPC's sixth and final specific concern is that the proposed tariff may impact the
2 Company's revenue requirement and should be addressed in a rate case. Do you agree?

3 A. I do not. There is no way to determine what effect the tariff change will have on the
4 Company's expenses. Moreover, the effect on litigation costs, insurance premiums and
5 other related costs will not happen overnight. Therefore, both the Company and its
6 customers are better off implementing these terms now so that the tariff's effects can be
7 studied and the benefits passed on to customers more quickly, possibly by the rate case
8 following the Company's next rate case. Moreover, it was for these very reasons that the
9 parties, including OPC, agreed as part of the Stipulation and Agreement in Laclede's last
10 rate case proceeding (Case No. GR-2007-0208), that the Company would, in fact, be free
11 to propose changes to its liability tariffs (and have such changes considered by the
12 Commission) *outside* of the context of a general rate case proceeding. OPC's proposal to
13 defer this tariff filing to the Company's next rate case is certainly not consistent with that
14 agreement.

15 In response to Staff's questions on a related issue, however, Laclede has modified the
16 proposed tariff to add provisions requiring the Company to track the impact of the tariff
17 so that the tariff can be evaluated in a future rate case. The language in Schedule DPA-1
18 permits any party to argue for the continuation, modification or termination of the tariff at
19 that time.

20 Q. As stated above, on September 23, 2009, OPC filed its version of a proposed tariff
21 regarding Company liability. What is your opinion of this tariff language?

22 A. The tariff language proposed by OPC would do little or nothing to address the problem
23 that prompted Laclede's filing. In fact, it might make it worse than doing nothing at all.

1 The original purpose of the tariff filed by Laclede was to draw some bright lines where
2 Laclede and its customers, along with judges and juries, could not only know the extent
3 of the Company's duties, but also know where those duties end. The goal was to keep
4 the determination of what constitutes the safe provision of natural gas service within the
5 ambit of Commission personnel who have the experience and expertise to make those
6 determinations, while leaving it to judges and juries to assess liability in the event the
7 Company did not comply with its obligations. Public Counsel's language fails to
8 accomplish this goal, however, by making it clear that the Company's compliance with
9 its safety obligation is only one thing to be considered by a judge and jury – language
10 which implies that judges and juries are free to consider other safety related duties and
11 standards of their own invention in assessing whether or not the Company should be held
12 liable. Unfortunately, such unrestrained discretion will do nothing but permit judges and
13 juries to indeed make Laclede and its customers the unwilling insurers for customers or
14 third parties who experience some kind of damage for events or circumstances that the
15 Company had no duty or even ability to prevent. While OPC may believe that is a
16 preferable outcome, I strongly disagree that such outcome is in the best interests of the
17 vast majority of our customers.

18 Q. Does this complete your Surrebuttal Testimony?

19 A. Yes, it does.

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

STATE OF MISSOURI)
) SS.
CITY OF ST. LOUIS)

1. My name is David P. Abernathy. My business address is 720 Olive Street, St. Louis, Missouri 63101; and I am Vice President & Associate General Counsel, Industrial Relations and Claims Management of Laclede Gas Company.

3. I hereby swear and affirm that my answers contained in the attached testimony to the questions therein propounded are true and correct to the best of my knowledge and belief.

David P. Abernathy
David P. Abernathy

Sandra R. Furbine
Notary Public



Revised Tariff Proposal Language

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

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 be responsible at all times for the safekeeping of all Company property installed on the premises being served, and to that end shall give no one, except the Company's authorized employees, contractors or agents, access to Company such property on owner/customer's premises. ~~The owner/customer of the premises being served shall be liable for~~

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

4 |
5 | Subject to the Company's responsibility for the safe transmission and distribution of gas as
6 | provided above, and except as otherwise provided for herein, upon expiration of the Non-
7 | Incident Operational Period, as defined below, Company shall in no event be liable to Customer
8 | or anyone else, and Customer shall indemnify, hold harmless and defend the Company from and
9 | against any and all liability, claims, proceedings, suits, cost or expense, for any loss, damage or
10 | injury to persons or property, or death, in any manner directly or indirectly connected with or
11 | arising out of, in whole or in part (i) the release or leakage of gas on the Customer's side of the
12 | Point of Delivery; (ii) a leak and ignition of gas from Customer Equipment; (iii) any failure of, or
13 | defective, improper or unsafe condition of, any Customer Equipment; or (iv) a release of carbon
14 | monoxide from Customer Equipment.

15 |
16 | The Non-Incident Operational Period shall begin on the date that Company representatives
17 | were last inside the customer's place of business or premises to perform testing, inspection or
18 | other work for which the costs and revenues are normally considered in the ratemaking process.
19 | For instances where the Customer Equipment at issue is a natural gas fueled appliance used for
20 | space heating, such as a furnace or boiler, the Non-Incident Operational Period shall end once 60
21 | winter days has elapsed following the premises visit or the date on which any party other than
22 | Company subsequently tests, inspects, adjusts, repairs, or replaces such Customer Equipment,
23 | whichever occurs earlier. For instances where the Customer Equipment at issue is a natural gas
24 | fueled appliance not used for space heating, such as a water heater or stove, the Non-Incident
25 | Operational Period shall end once 90 days has elapsed following the premises visit, or the date
26 | on which any party other than Company subsequently tests, inspects, adjusts, repairs, or replaces
27 | such Customer Equipment, whichever occurs earlier. It is intended that the running of this time
28 | period be a complete defense and absolute bar to such claims and lawsuits. This provision shall
29 | not be construed as affecting the Company's liability for claims arising from any defects in
30 | Customer Equipment sold by the Company as part of its Merchandise Sales business, for other
31 | activities in which the associated costs and revenues are not considered in the ratemaking
32 | process; or in circumstances where the Non-Incident Operational Period has elapsed solely as a
33 | result of Company's unexcused failure to enter the customer's place of business or premises to
34 | perform an inspection required by the Commission's Safety Standards.

35 |
36 | Absent actual, specific knowledge of a dangerous condition on a Customer's premises,
37 | gained through notice to the Company by the Customer, or by the Company's discovery during
38 | the Non-Incident Operational Period described above, the Company's obligation to provide
39 | warnings or safety information of any kind to the Customer shall be limited to the obligations
40 | that are imposed by Sections (1)(K), (1)(L), (10)(J) and (12)(S) 2 of the Safety Standards of the
41 | Pipeline Safety Regulations of the State of Missouri, 4 CSR 240-40.030(1)(K)-(L), (10)(J)
42 | (12)(S) 2; and Section 192.16 of the Pipeline Safety Regulations of the U.S. Department of
43 | Transportation, 49 CFR 192.16. Compliance with the aforesaid obligations to notify [This clause
44 | is only about the duty to provide warnings or safety information] shall constitute a complete
45 | defense and bar to any claims or lawsuits by the Customer or anyone else against the Company
46 | for loss, damage or injury to persons or property, or death, alleging the breach of any duty to

1 warn or provide safety information. Delivery of warnings and information by the Company to
2 the Customer may be made by means of electronic message to customers that receive bills
3 electronically or by a brochure or similar document that is included in the mailing envelope for a
4 billing statement addressed to the Customer. No special language or legend is required on the
5 envelope in which such notices are delivered. Such delivery in the United States mail, postage
6 prepaid, or electronically shall constitute compliance with the aforesaid regulations.

7
8
9 Company will use reasonable diligence to furnish to Customer continuous natural gas
10 ~~service with natural gas that does not contain constituents (water or debris) that would materially~~
11 ~~adversely affect the proper and safe operation of Customer Equipment, but does not guarantee~~
12 the supply of gas service against irregularities or interruptions. Company shall not be considered
13 in default of its service agreement with customer and shall not otherwise be liable for any
14 damage or loss occasioned by interruption, failure to commence delivery, or failure of service or
15 delay in commencing service due to accident to plant, lines, or equipment, strike, riot, act of
16 God, order of any court or judge granted in any bonafide adverse legal proceedings or action or
17 any order of any commission or tribunal having jurisdiction; or, without limitation by the
18 preceding enumeration, any other act or things due to causes beyond Company's control. Any
19 liability of the Company under this paragraph due to the Company's negligence shall be limited
20 to the charge for service rendered during the period of interruption or failure to render service,
21 which shall be the sole and exclusive remedy, and shall in no event include any indirect,
22 incidental, or consequential damages.

23
24 The Company's obligation to odorize gas supplied to the Customer shall be limited to
25 compliance with 40 CSR 240-40.030(12)(P). The Company shall not have any duty to warn or
26 advise Customer regarding the limitations of any odorant used by Company in compliance with
27 40 CSR 240-40.030(12)(P), and shall not have any liability to Customer or anyone else for
28 failure to provide such warnings or advice. The Company shall not have any duty to warn or
29 advise Customer regarding the availability of any supplemental warning devices or equipment,
30 including, but not limited to, electronic gas detectors, that might be used to provide a warning of
31 leaking gas, and shall not have any liability to Customer or anyone else for failure to provide
32 such warnings or advice.

33
34 These Rule 12-a tariff sheets shall continue in effect at least until the conclusion of the
35 second general rate case proceeding following the initial effective date of these tariff sheets. It is
36 expressly understood that any party shall be free in such rate case proceeding or any complaint
37 proceeding to propose prospective changes to these tariff sheets without any burden of proof or
38 presumption applying to the determination of whether these tariff sheets, or alternative tariffs
39 sheets, should be approved by the Commission.

40
41 To assist in the evaluation of the merits and impact of these tariff sheets on the Company
42 and its customers, the Company shall submit an annual report to Staff and OPC each November
43 1, beginning November 1, 2010, for the twelve months ended October 1st, specifying:

44
45 (a) Each case in which the provisions of the tariff sheets have been cited or relied
46 upon as a basis for limiting, reducing or otherwise modifying the Company's legal or financial

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

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