

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 17th day of February, 2022.

Symmetry Energy Solutions, LLC,)	
)	
Complainant,)	
)	
v.)	<u>File No. GC-2021-0316</u>
)	
Spire Missouri, Inc. d/b/a Spire)	
)	
Respondent.)	

ORDER REGARDING SYMMETRY’S MOTION TO COMPEL FURTHER DEPOSITION TESTIMONY FROM SPIRE’S CORPORATE REPRESENTATIVE

Issue Date: February 17, 2022

Effective Date: February 17, 2022

On February 4, 2022, Symmetry Energy Solutions, LLC (Symmetry) filed a motion to compel Spire Missouri, Inc. d/b/a Spire (Spire) to produce its corporate representative, George Godat, to be further deposed. Spire responded to Symmetry’s motion to compel further deposition testimony on February 11, 2022.

Symmetry’s complaint is one of three complaints arising from the extreme cold weather event that struck the central United States in February 2021.¹ That event is sometimes referred to as Winter Storm Uri. As the effects of the storm developed, Spire issued an Operational Flow Order (OFO) on its Spire West operating system. That OFO required shippers of gas through Spire’s system to balance their shipments of gas daily,

¹ The other complaints are by Constellation NewEnergy – Gas Division, LLC (GC-2021-0315) and Clearwater Enterprises, LLC. (GC-2021-0353).

meaning they had to deliver sufficient supplies of gas into Spire's system each day to meet the gas demand of their customers on the system. Under normal conditions, such shipments are balanced monthly. During the storm, the market for natural gas supplies became extremely unstable and spot prices for natural gas reached stratospheric heights.

The three complainants - Constellation NewEnergy - Gas Division (CNEG), Clearwater Enterprises, LLC (Clearwater), and Symmetry - are natural gas marketing companies that during Winter Storm Uri failed to deliver enough gas into Spire's system to fully meet the needs of their customers. Spire billed the gas marketers for natural gas used by the marketers' customers during the storm. The bills included the cost of gas Spire said it procured to replace the gas that was not delivered to the system by the marketers, as well as substantial OFO penalties established under Spire's tariffs for the failure to balance natural gas supplies and deliveries during the OFO. Spire's February 2021 bill to the complainants was approximately \$35 million to CNEG, \$150 million to Symmetry, and \$7 million to Clearwater

CNEG, Symmetry, and Clearwater filed separate complaints against Spire, alleging that the OFO issued by Spire in February 2021 did not comply with the requirements of Spire tariff in that the OFO was put in place without sufficient justification, and kept in place beyond the time Spire knew, or should have known, it was no longer necessary. The complainants further allege that Spire has overstated the cost of obtaining natural gas to make-up for the shortage of gas supplied by the marketers.

The three complaints were filed separately and have not been consolidated. However, they have been consolidated for purposes of a joint hearing, which is currently

scheduled to take place on April 18-22, 2022. In addition, counsel for all complainants have cooperated in their attempts to obtain discovery from Spire.

Discovery at the Commission is governed by Commission Rule 20 CSR 4240-2.090(1), which states that discovery “may be obtained by the same means and under the same conditions as in civil actions in the circuit court.” The applicable Missouri civil procedure rule regarding discovery is Missouri Rules of Civil Procedure Rule 56.01. That rule provides in general that parties may obtain discovery regarding any relevant matter that is not privileged. In deciding whether discovery is to be had, the tribunal is to consider whether the discovery is:

proportional to the needs of the case considering the totality of the circumstances, including but not limited to, the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expenses of the proposed discovery outweighs its likely benefit.

The party seeking discovery has the burden of establishing relevance.²

Symmetry, and the other complainants, previously deposed Spire’s Vice-President of Gas Supply, George Godat, on December 13, 2021. Godat was deposed as Spire’s corporate representative pursuant to Missouri Rules of Civil Procedure 57.03(b)(4). That rule states:

A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which the person will testify.... The person so designated shall testify as to matters known or reasonably available to the organization....

² Missouri Rules of Civil Procedure 56.01(b)(1).

In analyzing this rule, the Missouri Supreme Court said in *State ex rel. Reif v. Jamison*,³ that the purpose of the rule is to “permit a party to depose an opposing corporation’s representative under circumstances in which the statements made by the witness on identified topics will be admissible against and binding on the corporate party.”⁴

Reif v. Jamison was a personal injury case in which the plaintiff subpoenaed a corporate representative for a deposition under Missouri Rules of Civil Procedure 56.03(b)(4). At his deposition the corporate representative testified that he had no personal knowledge about several topics identified by the plaintiffs. He also testified that he had not consulted with the defendant corporation to establish the defendant’s position with respect to those issues. The plaintiffs thereupon sought an order from the trial court allowing them to depose a different corporate representative. The trial court denied that motion, but the Supreme Court granted the plaintiff’s writ of mandamus, finding that the trial court had abused its discretion by overruling the motion to compel production of a substitute corporate representative prepared to testify regarding the defendant’s organizational knowledge of the identified deposition topics.⁵ In explaining its decision, the Court said that the deposition of a corporate representative under the rule is “not the deposition of that individual for his or her personal recollections or knowledge but is instead ‘the deposition of the corporate defendant.’” [Internal citation omitted].⁶ The Court further explained “[i]f the representative can state simply that he has no personal

³ 271 S.W.3d 549 (Mo. banc 2008).

⁴ *Reif v. Jamison*, at 551.

⁵ *Reif v. Jamison*, at 551.

⁶ *Reif v. Jamison*, at 551.

knowledge of the matter, then a party engaged in litigation against a corporation would be placed at a significant disadvantage, subject to deposition by the corporate defendant but left with little access to what knowledge could be imputed to the corporation.”⁷

Symmetry subpoenaed a corporate witness to be deposed about ten topics related to the events occasioned by Winter Storm Uri and the OFO issued by Spire. Mr. Godat was designated by Spire to be that witness. Symmetry asks the Commission to order further depositions regarding the following topics:

1. Spire’s collection and production of documents in this matter, including the basis for stating that “Spire has no additional responsive documents to produce at this time” in Spire’s September 17, 2021 letter.

Symmetry complains that Mr. Godat was unable to answer basic questions about what steps Spire took to preserve and produce relevant documents. Spire responds that it objected to Symmetry’s questions on this topic at the deposition and argues Symmetry’s concerns about production of documents should be handled between counsel and within the pending motion to compel and is not a proper topic for the deposition of a corporate witness.

The Commission finds that Spire is correct on this particular point. This is a matter that is tied to the decisions of Spire’s legal counsel as to which documents to produce during the course of discovery and is better addressed in the motions to compel production of documents that are currently before the Commission.

⁷ *Reif v. Jamison*, at 551.

2. The full factual bases, including details and the supporting documentation, for each of the following statements in Spire's September 17, 2021 letter:

2b. Spire reacted by initiating an OFO to all marketers for the projected start of the storm and short market.

Symmetry complains that Mr. Godat was unable to answer several questions about this topic and instead attempted to defer to other Spire employees who would have more personal knowledge. Spire responded that this is a rather vague topic that Mr. Godat made an honest attempt to answer. That he was not able to provide detailed responses to all questions on the topic does not require that Mr. Godat be re-deposed.

The Commission agrees with Spire. The answers offered by Mr. Godat that are cited by Symmetry are reasonable responses to questions about the details of events. Even the best prepared corporate witness will not be able to precisely describe every action taken by every employee of the corporation during a multi-day period.

2f. As a result, Symmetry customers largely did not conserve natural gas during this period.

Symmetry complains that Mr. Godat was unable to explain whether Spire has the means to determine whether individual customers are conserving natural gas. Spire responded by pointing out that later in his deposition, Mr. Godat testified that Spire was able to identify which of the marketer's customers used more natural gas than their daily nominations.

The Commission agrees with Spire. Mr. Godat provided informed testimony on this rather vague topic.

2k. Spire was faced with the choice of either shutting off natural gas to all of Symmetry’s customers or buying additional gas to maintain their gas service.

Symmetry complains that Mr. Godat was unable to answer a question on this topic and instead deferred to another Spire employee, Justin Powers. Spire counters that Mr. Godat did testify at length latter in the deposition about the related topic of curtailment and Spire’s cover purchases.

The Commission agrees with Symmetry that Mr. Godat was unprepared to offer testimony on this topic.

2l. Spire elected to do the right thing for the community by purchasing and delivering enough natural gas to cover for Symmetry’s failure.

Symmetry complains that Mr. Godat was again unable to answer a question on this topic and instead deferred to Justin Powers. Spire contends Mr. Godat did answer other questions on this topic and that a single deferral to the knowledge of another employee does not justify the re-deposition of Mr. Godat.

The Commission agrees with Spire.

2m. Symmetry is charging its customers for gas Spire bought for them during the OFO period.

Symmetry complains that Mr. Godat was unable to explain the factual basis for this statement and instead indicates he is not aware of what Spire’s counsel, Mr. Aplington, was considering when he made that statement in his September 17, 2021 letter. Spire replies that questions about Mr. Aplington’s basis for the statement would intrude on attorney work product and mental impressions and would therefore be improper.

The Commission does not agree with Spire's objection. The topic proposed by Symmetry is asking for the factual basis of a statement of fact alleged by Spire's counsel in a letter to Symmetry. It is not asking for attorney work product or the attorney's mental impressions. Mr. Godat should have been prepared to testify as to the factual basis for Spire's statement.

3. Any analysis Spire engaged in concerning the issuance of the Operational Flow Order Spire issued on February 10, 2021, including why it was necessary, when it should be issued, and any internal discussions or communications with third parties about this topic.

Symmetry contends Mr. Godat on several occasions testified that he could not recall various details about the issuance of the OFO and instead deferred to other Spire employees. Spire replies that aside from the few particular questions described by Symmetry, Mr. Godat provides substantial testimony about the topic.

The Commission agrees with Spire. Mr. Godat was properly prepared to testify about this topic.

4. Any analysis Spire engaged in concerning the lifting of the ODO, including why it was lifted on February 20, 2021, why it was not lifted earlier, and any internal discussions or communications with third parties about this topic.

Symmetry contends Mr. Godat was unable to answer some questions about this topic and deferred to other Spire employees to provide details. Spire replies that aside from the few particular questions described by Symmetry, Mr. Godat provided substantial testimony about the topic.

The Commission agrees with Spire. Mr. Godat was properly prepared to testify about this topic.

6. The availability and use of storage gas by Spire in February 2021, including any decisions to draw from storage or to sell gas to third parties.

Symmetry contends Mr. Godat was unable to answer some questions about this topic and deferred to other Spire employees to provide details. Spire replies that aside from the few particular questions described by Symmetry, Mr. Godat provided substantial testimony about the topic.

The Commission agrees with Spire. Mr. Godat was properly prepared to testify about this topic.

7. Spire's sale of gas to Atmos Energy Corporation in February 2021, including any discussions, communications, or analysis concerning this topic.

Symmetry contends Mr. Godat was unable to answer questions about this topic and deferred to other Spire employees to provide details he should have known about. Spire replies that Mr. Godat did offer substantial testimony about this topic and that if Symmetry wants detailed facts about the negotiations with Atmos it should ask the Spire employee who was involved in the negotiations when he is deposed next week.

The Commission agrees with Symmetry on this point. Mr. Godat should have been better prepared to testify on this topic.

8. The process by which Spire engages in month-end balancing with Symmetry regarding monthly invoicing, including but not limited to the process as applied since November 2020.

Symmetry listed this issue as a topic for further questioning of Mr. Godat, but it does not cite to any specific questions to show that his initial deposition testimony was deficient. Spire notes Symmetry's failure to support the need for further questioning on this topic and contends that Mr. Godat provided knowledgeable testimony on this topic.

The Commission agrees with Spire regarding this topic.

9. Spire's document retention policies.

Symmetry describes this issue as the core of its concerns. Symmetry is concerned that it has not received the number of documents concerning communications among Spire employees and between Spire employees and gas marketers and other entities that it would expect to exist. It is concerned that such communications may have been deleted, destroyed, or improperly withheld from discovery. Spire replies that Mr. Godat did provide substantial testimony about Spire's document retention policies and that Symmetry's discovery concerns should be resolved through the pending motions to compel rather than through further depositions of Mr. Godat.

The Commission agrees with Symmetry's concerns. Mr. Godat testified about what Spire's document retention policy is in the abstract, but he was unable to testify about the details of how that policy was implemented in this circumstance. As indicated by the Court in *Reif v. Jamison*, Symmetry is entitled to the testimony of a corporate witness on that topic that can be imputed to the corporate defendant.

The Commission has found that Symmetry should be allowed to further depose Mr. Godat concerning topics 2k, 2m, 7, and 9. Symmetry's motion will be granted as to those topics.

THE COMMISSION ORDERS THAT:

1. Symmetry Energy Solutions, LLC's Motion to Compel Further Deposition Testimony from Spire Missouri, Inc.'s Corporate Representative is granted as to topic 2k, 2m, 7, and 9.
2. This order shall be effective when issued.



BY THE COMMISSION

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Silvey, Chm., Coleman, Holsman, and
Kolkmeier CC., concur.
Rupp, C., absent.

Woodruff, Chief Regulatory Law Judge

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 17th day of February, 2022.




Morris L. Woodruff
Secretary

MISSOURI PUBLIC SERVICE COMMISSION

February 17, 2022

File/Case No. GC-2021-0316

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Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,

A handwritten signature in black ink that reads "Morris L. Woodruff". The signature is written in a cursive style with a large, prominent "M" and "W".

Morris L. Woodruff
Secretary

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.