

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Constellation NewEnergy – Gas Division, LLC,)	
Complainant,)	
)	
v.)	File No. GC-2021-0315
)	
Spire Missouri, Inc. d/b/a Spire,)	
Respondent,)	
)	
Symmetry Energy Solutions, LLC,)	
Complainant,)	
)	
v.)	File No. GC-2021-0316
)	
Spire Missouri, Inc. and its operating unit)	
Spire Missouri West,)	
Respondent,)	
)	
Clearwater Enterprises, L.L.C.,)	
Complainant,)	
)	
v.)	File No. GC-2021-0353
)	
Spire Missouri, Inc. d/b/a Spire and its)	
Operating Unit Spire Missouri West,)	
Respondent,)	

**RESPONDENT SPIRE MISSOURI INC’S MOTION FOR
PROTECTIVE ORDER AND MEMORANDUM IN SUPPORT**

COMES NOW Spire Missouri Inc. (“Spire”), and by and through its attorneys seeks a protective order seeking to prohibit the depositions of Spire Missouri President, Scott Carter, and Manager of Records Retention, Bob McKee.

BACKGROUND

In early February 2021, extreme cold weather was forecast to occur in the Central United States, threatening to disrupt natural gas supply. In response to these forecasts, Spire issued an Operational Flow Order (“OFO”) to protect the integrity of its natural gas distribution system and

to ensure compliance with upstream pipelines who had similarly issued OFOs. Complainants Constellation NewEnergy – Gas Division, LLC; Symmetry Energy Solutions, LLC; and Clearwater Enterprises, L.L.C. (collectively, the “Complainants”) are natural gas marketers who, during the February OFO, failed to deliver sufficient natural gas to Spire to cover their customers’ needs. In accordance with the parties’ service agreements and Spire’s Tariff, Spire charged Complainants for the substantial cost of gas that Spire purchased to cover Complainants’ under-deliveries, as well as for the OFO penalties that attached to their under-deliveries.

Complainants have since refused to pay their February 2021 invoices or, even, reimburse Spire for the significant costs it incurred buying cover gas on behalf of Complainants. Complainants have, instead, filed three substantively similar cases in front of the PSC alleging that Spire violated provisions of its Tariff during the OFO period and that these alleged violations should absolve Complainants from paying Spire its damages. Spire denies it violated its Tariff and seeks to be paid what it is owed from all three Complainants.

Discovery is underway, and Complainants have so far taken one deposition, which was an eleven-hour corporate representative deposition of Spire’s Vice President of Gas Supply, George Godat (“Godat”). Complainants have noticed depositions for seven other Spire employees. Spire has agreed to produce five of those employees for depositions. Those five employees are: Managing Director of Regulatory and Legislative Affairs, Scott Weitzel; Director of Gas Supply, Justin Powers; Manager of Gas Supply, Ashley Dixon; Manager of Gas Control, Alex Grewich; and Administrator Theresa Payne.

In addition, Symmetry and Constellation have also noticed the depositions of Spire’s President, Scott Carter (“Carter”), and its Manager of Records Retention, Bob McKee (“McKee”). Neither Mr. Carter nor Mr. McKee should be subject to a deposition under Missouri law because

these depositions are outside the scope of allowable discovery and would impose an undue burden on Spire. Under Ford Motor Co. v. Messina, 239 S.W.3d 583 (Mo. banc 2007), Mr. Carter's deposition should be prohibited because: (1) Complainants have failed to first depose lower-level employees who undoubtedly have better information than Mr. Carter; (2) Mr. Carter has no unique personal knowledge about the relevant facts or events underlying the Complaints; and (3) given the importance of Mr. Carter's role and his lack of personal knowledge, requiring him to sit for a day of deposition would inflict substantial annoyance and burden on him and Spire. Complainants unsuccessfully attempted to inject Mr. Carter into the OFO decision-making process during the deposition of Mr. Godat. Mr. Godat, however, repeatedly explained that he and Mr. Powers were the decisionmakers regarding the OFO and that Mr. Godat only spoke with Mr. Carter to keep him up-to-date. George Godat Transcript (attached as Exhibit 1) 202:21 – 203:19.

Similarly, the deposition of Mr. McKee should be prohibited. Mr. McKee has no personal knowledge regarding the factual allegations in Complainants' Complaints. Spire produced its Record Retention Policy both at the deposition of Mr. Godat and in its response to Symmetry's Third Set of Data Requests. Spire has confirmed, both during the deposition of its corporate representative and in those data requests, that it has complied with its document retention policy and that it has no knowledge of any lost or destroyed documents. Godat Tr. 127:17-25; Spire's Response to Symmetry's Data Requests (attached as Exhibit 2). Complainants have not alleged that Spire violated its Tariff as a result of a failure to retain documents, and there is no evidence in the record even suggesting a spoliation issue. The PSC should not allow Complainants to go on a fishing expedition in search of issues that are outside of the allegations set forth in Complainants' Complaints, and it should not force Mr. McKee to sit for a deposition that will ultimately be cumulative, duplicative, and unduly burdensome.

Spire met and conferred with Complainants during a call on January 25, 2022 and participated in a call with Judge Woodruff in an effort to reach a compromise on these issues, but Complainants are persisting in seeking these unduly burdensome depositions. As a result, Spire is forced to seek a protective order.

STANDARD UNDER RULE 56.01

This matter arises in a different context than the Commission generally is presented with. The requesting parties, the Complainants, are not Staff nor OPC. Complainants have no statutory right to discovery access to Spire Missouri's books and records. Commission Rule 2 CSR 4240-2.090(1) states in part that "[d]iscovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court." Thus, standard limits on the scope of discovery are very much in play.

Under Missouri law, courts are granted broad discretion in the control and management of discovery. City of Wentzville v. Dodson, 133 S.W.3d 543, 548 (Mo. App. 2004). This broad discretion is warranted, because "[t]he discovery process was not designed to be a scorched earth battlefield upon which the rights of the litigants and the efficiency of the justice system should be sacrificed to mindless overzealous representation of plaintiffs and defendants." Ford Motor Co. v. Messina, 71 S.W.3d 602, 606 (Mo. banc 2002). Instead, "the discovery process is primarily designed to facilitate an orderly and efficient resolution of individual lawsuits," and "discovery should be conducted in the most practical and cost efficient way possible." Ford Motor Co. v. Manners, 239 S.W.3d 583, 588-89 (Mo. banc 2007).

"Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . . provided the discovery is proportional to the needs of the case considering the totality of circumstances." Mo. R. Civ. P. 56.01(b). However,

the PSC “must limit the frequency or extent of discover if it determines that . . . [t]he discovery sought is cumulative, duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” Mo. R. Civ. P. 56.01(b)(2)(A). Where good cause exists to limit discovery, Rule 56.01(c) provides the PSC with the ability to “make any order which justice requires” to protect a party from “annoyance, embarrassment, oppression, or undue burden or expense.” Mo. R. Civ. P. 56.01(c). Specifically, subsection (c)(1) allows the PSC to deny discovery, and subsection (c)(3) allows the PSC to place limits on parties’ methods of discovery.

ARGUMENT

Complainants’ notices to take the depositions of Messrs. Carter and McKee would: disrupt Spire’s business operations; result in duplicative, burdensome, and costly discovery; and permit a fishing expedition regarding non-existent spoliation issues. Complainants seek to impose this burden on Spire, even though permitting these depositions to go forward would do nothing to further Complainants’ efforts to meet their burden of proving the false allegations upon which their Complaints are based.

I. The PSC Should Prohibit the Deposition of Spire President, Scott Carter.

Complainants attempt to depose Spire President Scott Carter should be prohibited because a deposition of Mr. Carter would serve no purpose other than to cause disruption to Spire’s business operations and annoyance to Mr. Carter. “A top-level employee—like anyone else—should not be deposed unless the information sought is relevant, or reasonably calculated to lead to the discovery of admissible information.” Messina, 71 S.W.3d at 607 (citing Rule 56.01(b)(1); Wilfong v. Schaeperkoetter, 933 S.W.2d 407, 410 (Mo. banc 1996)). However, even if a top-level employee has discoverable information, the court should still issue a protective order prohibiting

his or her deposition if annoyance, oppression, and undue burden and expense outweigh the need for the employee's deposition. Id. In considering whether good cause exists to prohibit the deposition of a top-level employee, "the court should consider: whether other methods of discovery have been pursued; the proponent's need for discovery by top-level deposition; and the burden, expense, annoyance, and oppression to the organization and the proposed deponent." Id. (citing Anheuser v. Nolan, 692 S.W.2d 325, 328 (Mo. Ct. App. 1985)). Applied here, all the Messina factors support a finding that the deposition of Carter should be prohibited.

A. Complainants have not pursued other less burdensome methods of discovery.

First, the PSC should determine whether Complainants have pursued the discovery they seek from Mr. Carter through less burdensome methods. As recognized in Messina, top-level depositions can be unnecessary where "[p]ersons lower in the organization may have the same or better information." Messina, 71 S.W.3d at 606. As such, litigants are required to pursue other less burdensome methods of discovery before deposing a company's executive. Id. Here, Complainants have only conducted a single deposition. During his approximately eleven-hour deposition, Mr. Godat testified that he was the decisionmaker regarding the issuance, continuance, and cessation of the OFO and that he made those decisions in consultation with the Director of Gas Supply, Justin Powers. Mr. Godat further identified other Spire employees who worked in the gas supply and gas control divisions during the OFO who may have knowledge relevant to Complainants' claims. Thus far, none of the Complainants have deposed Mr. Powers, nor any of the other Spire employees that Mr. Godat identified as potentially having relevant knowledge regarding the gas supply and gas control division's response to the February 2021 polar vortex.

Mr. Carter has no unique knowledge regarding the allegations in Complainants' Complaints and was not part of the decision-making process. See, e.g., Godat Tr. 268:13 – 271:3.

As shown by Mr. Godat's deposition, lower-level gas supply and gas control employees who were involved in the day-to-day decision making regarding the OFO, will have "better information" than a top-level employee like Mr. Carter. Messina, 71 S.W.3d at 606; Godat Tr. 75:9 – 76:7; 112:6-8; 138:14 – 139:1; 157:21 – 158:16; 202:21 – 203:19; 268:13 – 271:3. Deposing the lower-level employees that Spire has agreed to make available would be a far less intrusive means of conducting discovery, rather than escalating to a deposition of Spire's President. Under Missouri law, Complainants should first depose these lower-level employees before noticing a top-level deposition. Id. at 608. As such, this Messina factor weighs in favor of a protective order.

B. Mr. Carter's deposition is unnecessary.

The PSC should next evaluate the need that Complainants have to depose Mr. Carter. Messina, 71 S.W.3d at 608. It is hard to discern what information Complainants believe Mr. Carter has that would be relevant to the factual allegations in this case. Mr. Carter had only tangential involvement in the events underlying Complainants' claims. He did not make the decision to issue the OFO, continue it, or lift it. Godat Tr. 268:13 – 271:3. He did not communicate with Spire Marketing regarding the purchasing or sale of gas, nor decide whether to utilize Spire's natural gas storage. Godat Tr. 75:9 – 76:7; 112:6-8. He was not involved in providing notice to Complainants regarding the OFO, nor in computing the cover damages or OFO penalties. Godat Tr. 138:14 – 139:1; 157:21 – 158:16. As Mr. Godat testified during his deposition, he at no point sought Mr. Carter's input regarding decisions related to the OFO. Rather, because Mr. Carter is Mr. Godat's direct supervisor, he kept Mr. Carter up-to-date about the situation. Godat. Tr. 202:21 – 203:19. Complainants' attempts to inject Mr. Carter into the decision-making process relevant to the issues in this case failed:

QUESTION: [D]id Spire Draw from Storage and sell gas to any third parties during February 2021?

ANSWER: [W]e had a storage transaction where we sold some inventory to another party.

....

QUESTION: And who was involved in that decision?

ANSWER: Justin Powers and I.

QUESTION: Anyone else?

ANSWER: I had a conversation with my boss Scott Carter to make sure he was aware of it.

Godat Tr. 75:17 – 76:7.

QUESTION: So at the end of the day, I'm just trying to figure out from you, Mr. Godat, as Spire's corporate representative could you describe the role, if any, that Scott Carter had during the winter storm?

ANSWER: I kept him – on the OFO perspective, since that's who I report to, I kept him informed of what was going on and that we were – we were in a position where we thought we had to issue an OFO. I – I was the one that ultimately made the decision working with Justin Powers.

So it wasn't that I went to Scott for permission. It was – it was more of an information to keep him up-to-date. Scott Carter through – throughout the process, he did a lot of radio interviews, just more from the media side kind of keeping customers and stuff-up-to-date on things that were going on.

Godat. Tr. 202:21 – 203:19.

As such, Mr. Carter's knowledge of the relevant facts in these matters is limited to what lower-level employees, such as Mr. Godat, reported to him. Accordingly, Mr. Carter has no unique knowledge that necessitates his deposition which further weighs in favor of granting Spire's request for a protective order.

C. Forcing Mr. Carter to give a deposition would impose significant annoyance and burden upon Spire and Mr. Carter.

Complainants have noticed Mr. Carter for a seven-hour deposition. Forcing Carter to sit for a deposition would impose a significant annoyance and burden upon Spire. As the President of a public utility that serves over a million Missourians, Mr. Carter has supervisory authority over

1,576 employees and has ultimate responsibility for ensuring safe and adequate service to customers every day. As a result, removing Carter from his responsibilities for even one day would cause significant disruption to Spire's business operations.

The only knowledge Mr. Carter has regarding the OFO were reported to him by other employees. Mr. Carter has no unique personal knowledge regarding the allegations underlying the Complaints. And, given the importance of Mr. Carter's role and his lack of personal knowledge, requiring him to sit for a day of deposition would inflict substantial annoyance and burden on him and Spire. Messina, 71 S.W.3d at 606 (litigants "may not use the threat of a burdensome deposition as a bargaining chip or annoying tactic."). Requiring Mr. Carter to sit for an unnecessary deposition regarding issues that he has no unique knowledge of is precisely the type of deposition that should be prohibited under the Messina standard.

II. The PSC Should Prohibit the Deposition of Manager of Records Retention, Bob McKee.

Complainants have noticed a deposition for Spire's Manager of Records Retention, Bob McKee. Mr. McKee had no involvement in the factual events relevant to this matter. As made clear in the Commission's orders denying Spire's Motions to Dismiss, the PSC has taken jurisdiction over a very limited set of Complainants' allegations:

The Commission finds that the complaint is sufficient to state a cause of action that can be addressed by the Commission. Specifically, the complaint alleges that Spire violated its tariff regarding the justification for issuance of operational flow orders, the notice provided to shippers about those operational flow orders, and the duration of the operational flow orders.

Order Denying Motion to Dismiss, at 3-4. Mr. McKee's only connection to this litigation is that, by nature of his role, he is responsible for implementing Spire's Record Retention Policy. Complainants have not alleged that Spire violated its Tariff as a result of a failure to properly retain

documents associated with the February OFO or that Spire's document retention policies were (or are) in anyway deficient. The PSC should not allow Complainants to go on a fishing expedition in search of issues that are outside of the allegations set forth in Complainants' Complaints. Mo. R. Civ. P. 56.01(b) (discovery should be had only if it is "relevant to the subject matter involved in the pending action").

Based on the deposition and written discovery that Complainants have conducted to date, it is clear that permitting a fishing expedition regarding non-existent spoliation issues would do nothing to further Complainant's efforts to meet their burden of proving the false allegations upon which their Complaints rely. During Mr. Godat's corporate representative deposition, Spire produced a copy of its Record Retention Policy to Complainants. Mr. Godat testified that he spoke with Mr. McKee and that Mr. McKee confirmed that the Retention Policy was in place and followed during Winter Storm Uri. Godat Tr. 127:17-25.

In addition, in response to data requests from Symmetry, Spire has: (1) confirmed and identified the Spire employees that received a legal hold memorandum; (2) confirmed that, to its knowledge, all recipient employees complied with the legal hold; and (3) confirmed that no documents were lost or destroyed. Ex. 2. As such, deposing Mr. McKee would result in no new discovery of information that Complainants could not obtain from simply reading Spire's Record Retention Policy and its responses to Spire's Responses to Symmetry's Third set of Data Requests. Complainants' effort to depose Mr. McKee regarding issues that have already been covered in corporate representative testimony and exhaustive written discover is costly, cumulative, duplicative, and unduly burdensome. Rule 56.01(b)(2) (discovery should be limited if "the discovery sought is cumulative, duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive").

The PSC should require that Complainants tailor their discovery to issues that were raised in the Complaints that they filed. There is nothing at all in the record to suggest that deposing Spire's records custodian would serve to provide any testimony that would support the allegations that form the basis of Complainants' Complaints. The record is clear that permitting this fishing expedition is an effort to create a smoke screen that would distract the PSC and Spire from focusing on Complainants' false allegations and will inflict undue burden on Spire.

CONCLUSION

For the foregoing reasons, the PSC should grant Spire's motion for protective order and prohibit the depositions of Spire Missouri President, Scott Carter, and Manager of Records Retention, Bob McKee.

Dated: February 2, 2022

Respectfully submitted,

By: /s/ Gabriel Gore

Gabriel E. Gore #45416
Rebecca McLaughlin #71969
DOWD BENNETT LLP
7733 Forsyth Blvd., Suite 1900
St. Louis, MO 63105
Telephone: (314) 889-7300
Facsimile: (314)863-2111
ggore@dowdbennett.com
rmclaughlin@dowdbennett.com

Dean L. Cooper #36592
BRYDON, SWEARENGEN & ENGLAND
P.C.
312 E. Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
(573) 635-7166
dcooper@brydonlaw.com

Matthew Aplington MoBar #58565
General Counsel

Spire Missouri Inc.
700 Market Street, 6th Floor
St. Louis, MO 63101
(314) 342-0785 (Office)
matt.aplington@spireenergy.com

Goldie T. Bockstruck MoBar #58759
Director, Associate General Counsel
Spire Missouri Inc.
700 Market Street, 6th Floor
St. Louis, MO 63101
314-342-0533 Office
314-421-1979 Fax
Goldie.Bockstruck@spireenergy.com

Rachel Lewis Niemeier MoBar #56073
Regulatory Counsel
Spire Missouri Inc.
700 Market Street, 6th Floor
St. Louis, MO 63101
314-390-2623 Office
rachel.niemeier@spireenergy.com

**ATTORNEYS FOR SPIRE MISSOURI
INC.**

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent by electronic mail this 2nd day of February 2022 to the parties.

By: /s/ Gabriel Gore _____