

**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.

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

**ORDER DENYING SPIRE MISSOURI'S MOTION
FOR PROTECTIVE ORDER**

Issue Date: February 17, 2022

Effective Date: February 17, 2022

Background

The Respondent, Spire Missouri, Inc. (Spire), filed a motion for protective order on February 2, 2022, asking the Commission to prohibit the Complainants – Constellation NewEnergy – Gas Division, LLC (CNEG), Symmetry Energy Solutions, LLC (Symmetry), and Clearwater Enterprises, L.L.C. (Clearwater) – from deposing Spire Missouri President, Scott Carter, and Spire’s Manager of Records Retention, Bob McKee. The Commission ordered that any responses to that motion be filed by February 8, 2022. CNEG and Symmetry filed timely responses to Spire’s motion.

These three complaints arise from the extreme cold weather event that struck the central United States in February 2021. 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, 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 – CNEG, Symmetry, and Clearwater – 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.

Among other discovery efforts, the Complainants have sought to depose Spire Missouri President, Scott Carter, and Spire's Manager of Records Retention, Bob McKee. Spire's Motion for Protective Order seeks to block both depositions.

Deposition of Spire President Scott Carter

Spire's Motion for Protective Order contends the proposed deposition of Scott Carter should be prohibited because (1) Complainants have failed to first depose lower-level employees who would have better information than Mr. Carter; (2) Mr. Carter has no unique knowledge about the relevant facts or events underlying the complaints; and (3) given the importance of Mr. Carter's role as president 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.

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 Mo. Sup. Ct. 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.¹ That rule also requires that discovery must be limited if the tribunal determines that:

- (A) The discovery sought is cumulative, duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (B) The party seeking discovery as had ample opportunity to obtain the information by discovery in the action; or
- (C) The proposed discovery is outside the scope permitted by this Rule 56.01(b)(1).

Missouri does not have any special discovery rule relating to the deposition of a high-level executive of a corporation. In a 2002 case, *Ford Motor Company v. Messina*,²

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

² 71 S.W.3d 602 (Mo banc 2002).

the Missouri Supreme Court specifically declined to adopt such an “apex” rule, instead holding that a deposition of “top-level decision-makers” should proceed in accordance with the general discovery rules.³ Nevertheless, the court recognized that such top-level depositions may be annoying, burdensome, expensive, and oppressive,⁴ and that the organization or the top-level employee may seek a protective order.⁵ The Court stated:

[a] protective order should be issued if annoyance, oppression and undue burden and expense outweigh the need for discovery. For top level employee depositions 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. [Internal citations omitted].⁶

The party or person opposing discovery has the burden of showing good cause to limit discovery.

In *Ford Motor Company v. Messina*, the Court found that Ford had established good cause to prevent the deposition of two top-level Ford employees. That case concerned an alleged product defect regarding the tires of a 1987 Bronco II and Ford’s failure to issue a recall of that product. The plaintiff sought to depose the top-level employees about a similar problem with the tires on the Ford Explorer and a recall that was implemented in 2001. In finding that the depositions should not proceed, the Court found (1) that the plaintiff had not first attempted less intrusive means of discovery, as the proposed depositions of the top-level employees was the first attempt by the plaintiff to obtain discovery about this matter; (2) that the plaintiff’s need for the discovery was slight in that the recall of the Ford Explorer was not directly related to the failure to recall the

³ *Ford v. Messina*, at 607.

⁴ *Ford v. Messina*, at 606.

⁵ *Ford v. Messina*, at 607.

⁶ *Ford v. Messina*, at 607.

Ford Bronco II; and (3) that Ford is a huge organization with more than 300,000 employees and is involved in extensive litigation. Consequently, unnecessarily deposing Ford's top level executives would be annoying, unduly burdensome and expensive, and oppressive.⁷

Ford Motor Company v. Messina is not the Missouri Supreme Court's last word on the deposition of top-level employees. The Court revisited the issue in a 2015 case involving the Kansas City Chiefs. In *Cox v. Kansas City Chiefs Football Club, Inc.*,⁸ an employee of the football club alleged that Clark Hunt, the owner of the Chiefs, had instructed the club's general manager to "go in a more youthful direction" and he did so by firing many older employees. Cox was one of those fired and he responded with a suit alleging age discrimination. Cox sought to depose Clark Hunt and the trial court granted a protective order that did not allow for Hunt to be deposed.

In finding that the trial court abused its discretion in not permitting Hunt to be deposed, the Court found that Cox's theory of the case was that the club's policy to discriminate against older employees originated at the top. When the Chiefs denied that any such policy existed, there were questions that only Hunt could answer and the court should have allowed him to be deposed.⁹

Consideration of the facts in this case as they apply to the standard described in Rule 56.01 and *Ford Motor Company v. Messina* is instructive. As to the first standard, the deposition of Mr. Carter is not the Complainants' first attempt to discover information about the events surrounding the OFO and Winter Storm Uri. In December 2021, the

⁷ *Ford v. Messina*, at 608.

⁸ 473 S.W.3d 107 (Mo. banc 2015)

⁹ *Cox*, at 127.

Complainants deposed Spire's Vice-President for Gas Supply, George Godat, as a corporate representative designated by Spire pursuant to Mo. Sup. Ct. R. 57.03(b)(4). Godat testified that he reports directly to Mr. Carter and that he kept Mr. Carter informed about the decision to issue the OFO and to sell storage gas while the OFO was in effect. The Complainants want to be able to ask Mr. Carter why he permitted the OFO to be issued, why he did not end the OFO sooner, and any other discussions he may have had, or decisions he may have made about the sale of storage gas.

As to the second standard, the Complainants have described a significant need for the information that Mr. Carter may be able to provide. Spire is demanding that the three Complainants pay a total of nearly \$200 million in gas costs and OFO penalties. Spire's actions in imposing the OFO and the facts purporting to justify the issuance of an OFO are central to the Complainants' theory about why they should not have to pay that large sum of money. This is not a tangential theory about the recall of an unrelated product as described in *Ford Motor Company v. Messina*. Rather, it is the heart of the Complainant's case, akin to the central theory of Cox's discrimination claim against the Chiefs.

Finally, applying the third standard, while Mr. Carter is no doubt a busy executive and his time should not be burdened unnecessarily, this matter is as significant to Spire as it is to the Complainants. This is not just one of dozens of product liability actions going on around the country as described in *Ford Motor Company v. Messina*. Instead, its resolution will have a significant impact on the company that Mr. Carter leads. Under the circumstances, requiring Mr. Carter to sit for a deposition will not be annoying, unduly burdensome and expensive, or oppressive.

Applying the standards described in *Ford Motor Company v. Messina*, in light of the findings in *Cox*, the Commission finds that Spire's request for a protective order precluding the deposition of Mr. Carter should be denied.

Deposition of Spire's Manager of Records Retention, Bob McKee

Spire contends the proposed deposition of Spire's Manager of Records Retention, Bob McKee, should be prohibited because it has already produced its written records retention policy and Mr. McKee has no personal knowledge regarding the factual allegations in the complaints. Spire asserts that Mr. McKee has no knowledge of any lost or destroyed documents. Further, Spire argues that the filed complaints do not allege that Spire violated its tariff by failing to retain documents and there is no evidence in the record to suggest a spoliation issue.

The Complainants counter that the deposition of Spire's manager of records retention is necessary because of the difficulties it has faced in obtaining e-mails and chat messages from Spire regarding events during and leading up to issuance of the OFO. They want to be able to ask Mr. McKee about application of the records retention policy and whether any documents that should have been retained under that policy have either been lost or destroyed.

The Commission finds that the information the Complainants seek to obtain through the deposition of Mr. McKee is within the proper scope of discovery as established in Mo. Sup. Ct. R. 56.01(b). The Complainants are not required to rely on the representations of Spire's counsel that all relevant documents have been disclosed in discovery and are entitled to question Mr. McKee about those issues. The Commission

finds that Spire's request for a protective order precluding the deposition of Mr. McKee should be denied.

THE COMMISSION ORDERS THAT:

1. Spire's Motion for Protective Order is denied.
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-2021-0315, GC-2021-0316 and GC-2021-0353

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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, flowing style.

**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.