

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Clearwater Enterprises, L.L.C.,)	
)	
Complainant,)	
)	
v.)	Case No. GC-2021-0353
)	
Spire Missouri, Inc. and its operating unit)	
Spire Missouri West,)	
)	
Respondents.)	

**CLEARWATER ENTERPRISES, L.L.C.’S RESPONSE IN
OPPOSITION TO SPIRE’S MOTION TO DISMISS**

Complainant, Clearwater Enterprises, L.L.C. (“Clearwater”), files this Response in Opposition to Spire’s Motion to Dismiss, as directed by the Commission’s May 19, 2021 Order. In response to the arguments of Spire Missouri, Inc. and its operating unit, Spire Missouri West (collectively, “Spire”), Clearwater offers as follows:

RELEVANT PROCEDURAL FACTS

1. Clearwater filed its Complaint on April 15, 2021, and Spire filed its Motion to Dismiss and, in the Alternative, Answer (“Motion to Dismiss”) on May 17, 2021. In an Order issued on May 19, 2021, the Commission ordered that responses to the Motion to Dismiss be filed by June 8, 2021.
2. On May 26, 2021, the Commission addressed and denied nearly identical motions to dismiss in Case Nos. GC-2021-0315 and GC-2021-0316. Those cases involve complaints against Spire brought by Constellation NewEnergy-Gas Division, LLC (“Constellation”) and Symmetry Energy Solutions, LLC (“Symmetry”), respectively. Such complaints are grounded in the same underlying circumstances that give rise to Clearwater’s Complaint. In its May 26, 2021 Orders denying Spire’s motions to dismiss the Constellation and Symmetry complaints, the Commission stated:

Spire’s motion is a motion to dismiss the complaint for failure to state a cause of action. In ruling on that motion, the Commission merely considers the adequacy of the complaint. It must assume that all averments in the complaint are true and must liberally grant to the complainant all reasonable inferences from those averments. The Commission does not weigh any facts alleged in the complaint to determine whether they are credible or persuasive. Further, “[c]omplaints or other pleas before the Commission are not tested by the rules applicable to pleadings in general, if a complaint or petition ‘fairly presents for determination some matter that falls within the jurisdiction of the Commission, it is sufficient.’” Section 386.390(1), RSMo (Supp. 2020), gives the Commission jurisdiction to hear complaints about:

any act or thing done or omitted to be done by any corporation, person or public utility in violation, or claimed to be in violation, of any provision of law subject to the commission’s authority, of any rule promulgated by the commission, of any utility tariff, or of any order or decision of the commission;

...

After examining Symmetry’s complaint in light of the guiding legal standard, 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, the duration of the operational flow orders, and calculation of the penalties it seeks to impose. The Commission cannot make any findings or reach any conclusions about the truth of those allegations at this time, but the allegations are sufficient to properly place this complaint within the Commission’s jurisdiction.¹

3. In its Answer, Spire generally admits that the allegations contained in paragraphs 8-10 of Clearwater’s Complaint are true. These allegations lead to the allegation in paragraph 16 that: “The February 2021 [Operational Flow Order or “OFO”] was put in place without sufficient justification and kept in place beyond the time Spire knew or should have known that it was no longer necessary.”²

4. Like the complaints in Case Nos. GC-2021-0315 and GC-2021-0316, the instant Complaint alleges that Spire violated its tariff regarding the justification for issuance of a standard Operational Flow Order (“OFO”) for the Spire West territory, the notices provided to shippers about

¹ Order Denying Motion to Dismiss, Case No. GC-2021-0316, issued May 26, 2021; citations omitted. The Order Denying Motion to Dismiss in Case No. GC-2021-0315, also issued on May 26, is almost identical.

² See Complaint at 4-5, ¶ 16.

the OFO, the duration of the OFO, and the calculation of the OFO penalties Spire seeks to impose. The Commission should therefore reach the same result with respect to the instant Complaint: Spire's Motion must be denied.

LEGAL STANDARD

A motion to dismiss for failure to state a cause of action is solely a test of the petition.³ “It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive.”⁴ “Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that *might be adopted* in that case.”⁵ “A petition will not be dismissed for failure to state a claim if it asserts facts which would entitle plaintiff to relief, if proven.”⁶

Applicable to the instant Complaint, Missouri law governing the regulation of utilities and carriers specifies that a complaint may be made by “any corporation or person . . . by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility in violation, or claimed to be in violation, of any provision of law subject to the commission's authority, of any rule promulgated by the commission, of an utility tariff, or of any order or decision of the commission[.]”⁷ The Missouri Code of State Regulations, in further defining and supplementing the Missouri Revised Statutes, explains that “[a]ny person or public utility who feels aggrieved by an alleged violation of any tariff, statute, rule, order, or decision within the commission's jurisdiction may file a complaint.”⁸

³ *Foremost Ins. Co. v. Pub. Serv. Comm'n of Mo.*, 985 S.W.2d 793, 796 (Mo. App. W.D. 1998).

⁴ *Id.*

⁵ *Nazeri v. Mo. Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993) (emphasis added).

⁶ *Kennedy v. Mo. Atty. Gen.*, 920 S.W.2d 619, 621 (Mo. App. W.D.1996).

⁷ § 386.390, RSMo (2018).

⁸ 20 CSR 4240-2.070.

ARGUMENT AND AUTHORITIES

I. Clearwater Pleaded Tariff Violations against Spire.

Despite Spire's contentions that Clearwater's Complaint fails to allege a tariff violation, the Commission should deny Spire's Motion to Dismiss. On its face, Clearwater's Complaint offers no less than four tariff obligations that Spire violated. The Commission should disregard Spire's attempt to misdirect the Commission's decision-making power and jurisdiction by ignoring Clearwater's plain factual allegations.

Spire's Motion to Dismiss makes clear that Spire cherry-picked portions of Clearwater's Complaint and disregarded the rest in support of its contention that Clearwater's allegations fall outside of Commission jurisdiction. Specifically, Spire discusses an introductory paragraph of the Complaint and Clearwater's request for relief. Spire's Motion does not mention the body of the Complaint, much less touch on Clearwater's actual allegations against it. Nowhere in its Motion does Spire acknowledge the allegations in Paragraphs 16 through 19 of the Complaint. Such allegations are sufficient to bring Clearwater's Complaint within this Commission's jurisdiction.

In its Complaint, Clearwater alleges not only that the Commission is the body assigned to determine reasonable rates⁹, but, also, that the Commission's exclusive jurisdiction is invoked given that 1) neither the OFO nor the penalties comply with Spire's tariff requirements, given that the OFO was put in place without proper justification and was left in effect beyond the point when Spire knew or should have known that it was not necessary¹⁰; 2) Spire's OFO notices did not provide the requisite specificity as required by the tariff¹¹; 3) Spire failed to attempt to identify the specific customers

⁹ See Clearwater's Complaint at 2, ¶¶ 6-7.

¹⁰ *Id.* at 4-5, ¶ 16.

¹¹ *Id.* at 5, ¶ 17.

causing the conditions to give rise to the need for the OFO¹²; and 4) the OFO penalties Spire imposed against Clearwater and Clearwater’s customers/end-users were not reasonable or properly limited but instead impose an unreasonable burden on Clearwater and those of Spire’s customers represented by Clearwater and create an unjustified windfall to Spire and certain of its other customers.¹³

Rather than address the four corners of Clearwater’s Complaint, Spire attempts to justify its OFO and penalty imposition. Spire then baldly asserts that “[Clearwater’s] Complaint in this case fails to allege any violation of tariff . . . or to request a remedy that may be granted by the Commission.”¹⁴ A plain reading of Clearwater’s Complaint indicates that it is, in fact, alleging that Spire violated its own tariffs.

II. Spire Misunderstands Clearwater’s Position as to the Reasonableness of the OFO Penalties.

A. Spire Acted unreasonably in Imposing and Seeking to Enforce OFO Penalties.

Spire’s Motion in this case does raise an additional point which the Commission did not address directly in its orders denying the motions to dismiss in GC-2021-0315 or GC-2021-316. Here, Spire asserts that Clearwater alleges that the penalties Spire seeks to impose are unreasonable, which claim Spire asserts can only be brought by an entity enumerated in the second part of Mo. Rev. Stat. Section 386.390.1. Spire wrongly attempts to recast Clearwater’s complaint about Spire’s actions as a complaint as to the reasonableness of rates, a misdirection that cannot withstand scrutiny. While it is true that Clearwater recites that the Commission is required to determine the propriety of charges and set reasonable rates¹⁵, and the Missouri statutes exclusively “vest in the Public Service Commission extensive control over public utilities . . . [s]pecifically, . . . [to] determine the

¹² *Id.* at 5, ¶18.

¹³ *Id.* at 5-6, ¶ 19.

¹⁴ *See* Spire’s Motion to Dismiss and, in the Alternative, Answer at 6, ¶ 20.

¹⁵ *See* Clearwater’s Complaint at 2, ¶¶ 6-7.

reasonableness of rates to be charged . . .”¹⁶, such reference to the Commission’s jurisdiction over charges and rates is made for the point of parallel. If the Commission is vested with the exclusive jurisdiction to preside over rate disputes and determine the reasonableness thereof, then the substance of Clearwater’s Complaint falls within the Commission’s jurisdiction.

Specifically, Clearwater’s Complaint includes allegations that “Spire’s imposition of penalties under the circumstances is not reasonable or properly limited as required by Spire’s tariff”, allegations tied directly to the language in Spire’s tariff. Tariff Sheet No. 16.8(B) requires that “[a]ny OFO, along with associated conditions and penalties, shall be limited, as practicable to address only the problem(s) giving rise to the need for the OFO.”¹⁷ Spire’s Tariff also requires that Spire’s “actions with respect to its OFO’s shall be reasonable, objective, non-discriminatory and consistent with the General Terms and Conditions for Gas Service, R-16 Priority Service and R-17.”¹⁸.

There is a distinction between a complaint about the reasonableness of a penalty, and a complaint about the reasonableness of Spire’s actions with respect to its imposition of an OFO, its conditions and penalties under its tariff. Clearly Mo. Rev. Stat. Section 386.390.1 puts no limitations on who may assert the latter. While the second part of Section 386.390.1 (following the semicolon) states that complaints as to the reasonableness of any rates or charges may only be brought by the Commission itself, certain entities, or a group of at least 25 customers¹⁹, Clearwater’s allegation that Spire acted unreasonably in its imposition of OFO, its conditions and penalties is an allegation that Spire acted in violation of its tariff, a claim that may be brought before the Commission by almost any entity.

¹⁶ *State ex rel. Taylor v. Nangle*, 227 S.W.2d 655, 657 (Mo. banc 1950).

¹⁷ Spire’s Tariff TRPR B-2.

¹⁸ *Id.*

¹⁹ Clearwater notes that it serves as a “Customer’s Agent” under the provisions of Spire’s TRPR tariffs (P.S.C. MO. No. 8 Original SHEET No. 1, et seq.) for more than 25 customers.

B. Clearwater Properly Seeks a Waiver or Variance as a Direct Result of Spire's Unreasonableness.

Spire argues that the Commission cannot grant a waiver or variance and Clearwater's request for such a remedy is demonstrative of the fact that a tariff violation is not at issue. Spire's argument is incorrect. First and foremost, Missouri courts have held that the Commission has jurisdiction to determine whether tariff penalties should be collected or waived in a complaint case.²⁰ Spire offers no authority to the contrary and offers absolutely nothing to support its argument on this point.

Second, Clearwater has knowledge of at least three pipelines akin to Spire which requested to waive OFO penalties.²¹ Interestingly, Spire Marketing, one of Spire's natural gas-related businesses, filed a late-filed protest in the Panhandle Eastern Pipe Line Company, LP Federal Energy Regulatory Commission ("FERC") case seeking a full waiver of the OFO penalties.²² Spire is aware that administrative agencies, like the Commission and FERC, are the proper bodies to determine whether OFO penalties amount to tariff violations and should result in waiver.

Additionally, the reasonableness of Spire's actions goes to the heart of the issue which this Commission set forth in its Staff Report regarding the February 2021 Cold Weather Event. There, the Staff Report noted that the winter storm, Winter Storm Uri, had an unprecedented impact on natural gas prices such that daily market gas price which rarely exceeds \$10.00/MMBtu suddenly

²⁰ *Mo. Pub. Serv. Comm'n v. Office of Pub. Counsel (In re Emerald Point Util. Co.)*, 438 S.W.3d 482 (Mo. App. W.D. 2014) ("the Commission ha[s] the authority to determine whether [the utility/carrier] violated the tariff by collecting the . . . charge").

²¹ *See Panhandle Eastern Pipeline Company, LP*, Order on Waiver of Penalties, RP21-616-000, 174 FERC P 61237, 2021 WL 1148702 (Mar. 25, 2021); *Southern Star Central Gas Pipeline, Inc.*, Order Granting Waiver Request, RP21-618-000, 175 FERC P 61015, 2021 WL 1337574 (Apr. 9, 2021); *Gulf South Pipeline Company, LLC*, RP21-630-000, 175 FERC P 61055, 2021 WL 1545534 (Apr. 19, 2021).

²² *Panhandle Eastern Pipeline Company, LP*, Order on Waiver of Penalties, RP21-616-000, 174 FERC P 61237, 2021 WL 1148702 (Mar. 25, 2021).

escalated to upwards of \$622/MMBtu at the peak of the event.²³ Where the gas daily index price is at unparalleled values, penalties calculated using such values would be equally unprecedented. As such, other pipelines and companies akin to Spire waived or sought penalty waivers. In stark contrast, Spire's position with regard to the OFO penalties is such a departure from the industry that Clearwater maintains Spire cannot justify that position and waiver is warranted, particularly in light of Spire's violations of its own tariff in implementing the OFO.

III. Denying Spire's Motion to Dismiss Is Crucial for Consistency and Uniformity.

As a final matter, in the interest of consistency, Clearwater urges the Commission to apply its rationale and reasoning set forth in Case Nos. GC-2021-0315 and GC-2021-0316 and deny Spire's Motion to Dismiss the instant Complaint. To determine otherwise would be to issue inconsistent rulings on nearly identical issues. Uniformity and consistency are such fundamental principles in Commission matters that courts will defer to the Commission on matters involving technical and specialized concepts within the Commission's purview so as to ensure such principles are upheld.²⁴ Consequently, the Commission should deny Spire's Motion to Dismiss to maintain uniformity and safeguard the very function of the Commission and its guiding laws and regulations.

CONCLUSION

WHEREFORE, Clearwater respectfully requests that Spire's request for dismissal in its Motion to Dismiss and, in the Alternative, Answer, be denied.

²³ MPSC April 30, 2021 Staff Report In the Matter of the Cause of the February 2021 Cold Weather Event and its Impact on Investor Owned Utilities, File No. AO-2021-0264 at 63.

²⁴ *Penny v. SW Bell Tel. Co.*, 906 F.2d 183, 187 (5th Cir. 1990); *Lamar v. Ford Motor Co.*, 409 S.W.2d 100, 106 (Mo. 1966) (reasoning that failure to defer to the Commission's statutory powers to regulate rates and charges would make uniformity impossible and undermine the very purpose of the Commission).

Respectfully submitted,

ELLINGER & ASSOCIATES, LLC_

By: /s/ Stephanie S. Bell
Stephanie S. Bell #61855
308 East High Street, Suite 300
Jefferson City, MO 65101
Telephone: 573-750-4100
Facsimile: 314-334-0450
Email: sbell@ellingerlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all of the parties of record or their counsel, pursuant to the Service List maintained by the Data Center of the Missouri Public Service Commission, on this June 8, 2021.

 /s/ Stephanie S. Bell