

Exhibit No.: \_\_\_\_\_  
Issue: Spire OFO and Curtailment Notices,  
System Integrity, Spire Operations  
During Cold Weather Event, Other Issues  
Witness: Raymond L. Gifford  
Type of Exhibit: Direct  
Sponsoring Party: Constellation NewEnergy-Gas Division  
Case No.: GC-2021-0315  
Date Testimony Prepared: December 20, 2021

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

**FILE NO. GC-2021-0315**

**DIRECT TESTIMONY AND SCHEDULES OF**

**RAYMOND L. GIFFORD**

**ON BEHALF OF**

**CONSTELLATION NEWENERGY-GAS DIVISION**

**December 20, 2021**

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1 Missouri Public Service Commission

2 Testimony of Raymond L. Gifford

3

4 Q. Please state your name and title.

5 A. I am Raymond L. Gifford, Denver Office Managing Partner of Wilkinson Barker Knauer, LLP.

6

7 Q. Please describe your professional experience.

8 A. I began my career in regulatory law in 1996 as First Assistant Attorney General in the  
9 Regulatory Law unit of the Colorado Attorney General's Office. In 2000, I was appointed to the  
10 Colorado Public Utilities Commission, where I served as Chairman from 2000-2004. From there,  
11 I went on to become President of The Progress & Freedom Foundation, a Washington, D.C.-based  
12 think tank, that focused its work on regulatory policy relating to network industries. While there,  
13 I co-founded the Institute for Regulatory Law & Economics, an annual seminar for state regulators  
14 and staff that teaches the legal and economic principles underlying regulation. For the last twelve  
15 years, I have practiced regulatory law in Denver, Colorado, focusing my practice on energy  
16 regulation at both the state and federal level. A copy of my C.V. is attached as Schedule A.

17

18 Q. What is the purpose of your testimony?

19 A. My testimony will provide a framework for the Commission to consider in analyzing the  
20 complaint before it. My testimony is comprised of two main parts. The first portion includes my  
21 observations about the Spire tariff itself, considering the facts of this case. The second part of my  
22 testimony addresses public policy considerations that should guide the Commission's decision  
23 making. Taken together, I believe that the facts of the case, buttressed by an overwhelming public

1 policy imperative, argues strongly for the Commission granting the relief requested by  
2 Constellation NewEnergy-Gas Division, LLC (CNEG). The tariff itself, buttressed by the policy  
3 equities, leads to the conclusion that CNEG’s position should be vindicated here.

4

5 Q. Have you reviewed the Spire Missouri West tariff provisions at question in this complaint,  
6 specifically, Sheets 16.1 – 16.14?

7 A. I have.

8

9 Q. Could you please walk-through relevant portions of the tariff as it relates to operational flow  
10 orders, and their issuance by Spire?

11 A. While it is my understanding that CNEG witness Jim Cantwell will provide a more detailed  
12 explanation of the interworking of the tariff and the operational details of what transpired during  
13 the February 2021 cold weather event, I will provide my own observations, both as a practicing  
14 regulatory attorney, and as a former Chairman of a state utility commission.

15 As for a former regulator, I tried to step back and ask, “what is a particular provision trying to  
16 accomplish?”

17 Here, the relevant sections of the tariff are related to protecting the operational integrity of the  
18 pipeline system from failure due to over- or under-delivery of gas. All provisions related to  
19 operational flow orders (OFO) and penalties assessed under the tariff relate to that matter. For  
20 Spire to seek penalties against customers, it must meet specific criteria that all relate to this central  
21 principle.

22 As such, the tariff requires Spire meet certain obligations to trigger an OFO, among other things:

1 1. Notice of an OFO shall specify the nature of the problem sought to be addressed, the  
2 anticipated duration of the required compliance and the parameters of such compliance.

3 16.8 (B)(1)

4 2. As necessary to protect the integrity of its system or any portion thereof and/or to insure  
5 compliance with the requirements of upstream pipeline companies. 16.8 (B)(2)

6 3. The Company will specify in the OFO whether customers or agents are required to avoid  
7 Under-Deliveries, Over-Deliveries, or both. 16.8 (B)(2)

8 4. Any OFO, along with associated conditions and penalties, shall be limited, as practicable  
9 to address only the problem(s) giving rise to the need for the OFO. 16.8 (B)(2)

10 5. Before issuing an OFO, Spire West will attempt to identify specific customers causing the  
11 conditions that give rise to the need for the OFO, and attempt to remedy those problems  
12 through requests for voluntary action; provided, however, exigent circumstances may  
13 exist which require immediate issuance of an OFO. 16.8 (B)(2)(emphases added)

14 In this matter, it will be critical for the Commission to ensure Spire is held to an exacting standard.  
15 Before seeking to impose such crippling penalties on Missouri natural gas consumers, Spire must  
16 prove it has precisely followed – both in letter and in spirit – the obligations it has under the tariff.

17  
18 Q. Why do you say that?

19 A. Because the penalties Spire is seeking to levy against Missouri consumers are exorbitant. The  
20 penalty provisions Spire seeks to impose were not written in contemplation of gas prices spiking  
21 to heretofore unimaginable levels – peaking at \$622 per MMBtu, and yielding \$1,555 per MMBtu  
22 penalties during the period in question. Such a penalty serves no public purpose, and in fact leads

1 to *over-deterrence* of the behavior the penalty is meant to discourage. It is an outcome that is  
2 absurd and inequitable, on its face.

3 Such penalties do not assist in ensuring system integrity. To the contrary, they would be purely  
4 punitive. Affirmation of such penalties would act to impose exceptional financial strain on certain  
5 Missouri customers, while cross-subsidizing other customers who are entitled to no windfall. The  
6 Commission should have every interest in finding a reasonable outcome in this matter. This sort  
7 of reasonable outcome has been sought by utilities elsewhere, and has been approved by other  
8 regulatory commissions, as I will note later in my testimony. Ironically, as we will see, even  
9 Spire's own marketing affiliate has made that very case before the Federal Energy Regulatory  
10 Commission (FERC).

11

12 Q. If the Commission finds Spire did not strictly adhere to its obligations that precede the issuance  
13 of an OFO, what does that mean?

14 A. In that instance, the matter ends there. Spire failed its obligation to execute a proper OFO  
15 notice under the tariff and no penalties should be assessed. The broader public interest in achieving  
16 a reasonable outcome will have been met, but due to Spire's own lack of precision in carrying out  
17 its obligations.

18

19 Q. What if there is ambiguity in the tariff?

20 A. Any ambiguities in the tariff itself should be read in such a way as to align the interpretation  
21 of the tariff -- and the facts of this case -- with the public's interest in a reasonable public policy  
22 outcome. This is why it is important to understand the broader public policy context in which  
23 OFO penalty provisions occur.

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Q. Did Spire precisely follow the provisions in its tariff in executing the OFO?

A. It did not. The tens of millions of dollars in penalties Spire seeks to assess Missouri customers hangs by a thin, weak thread.

The penalty is contingent on a notice which states, in its entirety:

*“Due to predicted extreme cold weather beginning 09:00 am Friday, February 12, 2021, until further notice, Spire Missouri West is issuing a standard operation flow order (Standard OFO). In order to maintain and protect the integrity of our distribution system, Spire Missouri is requesting that all end users control their usage to avoid any Under-Deliveries. Please see our tariff for the charges with non-compliance with this Standard OFO.”*

Now compare that rather sparse statement to what is required of Spire to properly execute an OFO:

- Spire must specify not only the duration of the OFO, but also detail the parameters of its compliance. Simply alerting customers of a start time, with no indication of an anticipated end date and no description of compliance parameters, fails to fulfil this obligation. In the words of Spire, the OFO is to last “until further notice.” Is that two days? Four days? Four weeks? Until the end of winter? Who knows, because Spire failed to make even an estimate of its duration – which is required by the tariff.
- Spire must only issue an OFO to protect the integrity of the system. As explained by CNEG witness Jim Cantwell, system integrity was not at risk.
- Spire must inform customers whether they are required to avoid over-deliveries, under-deliveries or both. The alert sent by Spire only “requested” action – it did not require it, as provided in the tariff. This failure to properly execute its OFO was so glaring that even

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4 so far as to say it proves dispositive in determining that Spire did not comply with the  
5 requirements of the tariff.

- 6 • The OFO shall be limited, and only address those problems giving rise to it. As further  
7 described by CNEG witness Jim Cantwell, the overly broad, vague alert in no way reflected  
8 the more granular information that Spire should have imparted to customers. This is  
9 information to which only Spire would have had access, and which only Spire could have  
10 imparted to customers.

- 11 • Finally, Spire is required to attempt to identify specific customers causing the conditions  
12 that give rise to the circumstance, and request voluntary action even prior to the issuance  
13 of an OFO. Again, Mr. Cantwell's review of the event shows no indication this was ever  
14 appropriately completed.

15 When reading the tariff in its entirety, the overwhelming theme is that OFOs are to be of a limited,  
16 articulated, anticipated duration, for specific reasons related to system integrity. Spire is to  
17 communicate a substantial amount of clear, actionable information to be provided to customers so  
18 they can avoid paying penalties. Spire's obligation to ensure all these requirements are met is true  
19 when the penalty is as little as \$5 per MMBtu. When the stakes for Missouri consumers rise to a  
20 penalty of greater than \$1500 per MMBtu, the consequences are so profound that the Commission  
21 should expect Spire's actions to be exceptionally clear and in full compliance with the tariff. In  
22 this case, Spire simply failed to meet its obligations under the tariff. Missouri natural gas  
23 customers should not be required to face the devastating penalties Spire now seeks to assess if



1 even one of its tariff obligations was unfulfilled, let alone the multiple failures identified here.  
2 Spire's failure to meet its tariff obligations is, in and of itself, enough for the Commission to  
3 approve the complaint and relieve Missouri natural gas customers of the penalties Spire seeks to  
4 assess.

5  
6 Q. Do any other factors enter into your conclusion that the OFO tariff penalties do not apply?

7 A. Spire's own actions during the OFO period belie its invocation of the penalty provision. That  
8 Spire saw fit to \*\*Confidential Information Removed\*\* during the OFO period illustrates

9 that Spire itself did not think the operating conditions required invocation of the OFO penalties.

10 The purpose of the OFO is to mitigate the common pool problems inherent in a gas delivery

11 system. Where the party invoking the OFO by its own actions demonstrates that those common

12 pool and under-delivery problems do not exist, then it is unwarranted to assess penalties based on

13 conditions that are not present. If the system conditions warranted application of the OFO

14 penalties, then Spire would have been expected to behave in a way that demonstrated that need.

15 To the contrary, Spire's own witness, Mr. Godat, describes \*\*Confidential Information Removed\*\*

16 \*\*Confidential Information Removed\*\*. Whether it was rank opportunism

17 or a simple mistake, the problems the OFO were meant to address did not exist and therefore

18 invocation of the penalties would serve no valid regulatory purpose.

19

20 Q. Would a waiver of these penalties, as sought in this complaint, comport with a broader public

21 policy interest in this matter?

22

1 A. Yes, it would. Other regulatory commissions throughout the United States have had similar  
2 proceedings before them and recognized that the public interest is served by waiving OFO  
3 penalties arising from the February 2021 winter storm.

4 Perhaps most instructive is FERC's approval<sup>1</sup> of a waiver of OFO penalties for the Southern Star  
5 Central Gas Pipeline, which serves Spire Missouri West itself. Though Southern Star is an  
6 interstate gas pipeline, and Spire is serving retail gas customer demand, the facts and policy issues  
7 raised by the Southern Star waiver are remarkably similar to the facts here.

8 In the FERC proceeding, even though Southern Star did not have specific tariff authority to  
9 unilaterally waive OFO penalties for all classes of customers, a 5-0 unanimous FERC nonetheless  
10 approved the penalty waiver based upon a rationale that applies equally well to the facts before the  
11 Missouri Commission. FERC's order approving the penalty waiver is a useful roadmap for other  
12 Commissions attempting to equitably mitigate potentially harmful consumer outcomes arising  
13 from the unprecedented winter gas price spike of February 2021.

14 To analyze the application for waiver of OFO penalties, FERC applied a four-part test that assessed  
15 whether:

16 *(1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver*  
17 *addresses a concrete problem; and (4) the waiver does not have undesirable consequences,*  
18 *such as harming third parties*

19 FERC found the criteria were satisfied in the case of Southern Star.

20 As to each point:

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<sup>1</sup> 175 FERC ¶ 61,015, United States of America, Federal Energy Regulatory Commission, Southern Star Central Gas Pipeline, Inc. Docket No. RP21-618-000, Order Granting Waiver Request (Issued April 9, 2021).

- 1 1. Just as with the pooled transportation customers in the case before this Commission, FERC  
2 found that the collective actions of shippers and delivery point operators assisted in  
3 maintaining the integrity of the system during the February event.
- 4 2. Just as in the case before this Commission, FERC found that the waiver sought was limited  
5 in so far as it only was only requested for the days affected by the February event.
- 6 3. Just as in the case before this Commission, FERC found that a waiver remedied a concrete  
7 problem, specifically, the “extreme penalties” that would be faced by delivery point  
8 operators. FERC’s justification is particularly appropriate to the facts of this case:  
9 *“Moreover, these extreme penalties do not accomplish the purpose of penalties, which is*  
10 *to deter behavior that could impair system reliability. The extreme weather event presented*  
11 *circumstances outside the control of the delivery point operators. Southern Star found no*  
12 *evidence of gamesmanship by any entity incurring penalties during this critical time.”*<sup>2</sup>
- 13 4. Finally, just as in the case before this Commission, FERC found: *“no shipper...has a right*  
14 *to a windfall as the result of administration of penalties on other entities. The Commission*  
15 *requires pipelines to credit penalties to shippers so they will not be a source of revenue to*  
16 *the pipeline. Similarly, penalties are not intended to provide a windfall for other shippers,*  
17 *and these penalties do not reimburse shippers for any cost or relate to any service received*  
18 *by those shippers.”*<sup>3</sup> In this proceeding before the Missouri Commission, an application  
19 of the tariff that requires extreme administrative penalties on one set of customers, would,  
20 just as in the case before FERC, result in an unjustified windfall for another set of  
21 consumers via crediting mechanisms in the purchased gas adjustment. Such a result would  
22 create an extreme cross-subsidization of customer classes with no logical basis. FERC

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<sup>2</sup> Pg. 8

<sup>3</sup> Pg. 8-9

1           avoided an irrational outcome by approving penalty waivers, and I would recommend the  
2           Missouri Commission do the same.

3  
4   Q. Does FERC's approval of the Southern Star penalty waiver have any other specific implications  
5   for the case here in Missouri?

6   A. I believe it does. As I noted, one of the reasons FERC gave for approving the Southern Star  
7   waiver request is because the customers on Southern Star's interstate gas pipeline system  
8   collectively acted in such a way as to maintain system integrity. But it is important to remember  
9   that in this case, Spire is a customer of Southern Star. And if the Spire system collectively assisted  
10   in maintaining Southern Star's integrity, then Spire's own transportation customers – the ones  
11   Spire seeks to levy extraordinary penalties against – were part of that collective successful effort.  
12   Jim Cantwell's testimony regarding the system's integrity during the cold weather event further  
13   reinforces this point. In order to assess these penalties in Missouri, Spire would have to hold two  
14   irreconcilable positions at once: 1.) that its own system and customers were part of the collective  
15   action that merited Southern Star receiving a penalty waiver from FERC; and also 2.) its customers  
16   ignored Spire's own requests for response to the event to such an extent that tens of millions of  
17   dollars in penalties are merited.

18  
19   Q. Is this the only such waiver of OFO penalties FERC approved?

20   A. No. FERC also approved penalty waivers in Gulf South Pipeline Co.<sup>4</sup> and a limited waiver in  
21   Panhandle Eastern Pipe Line Company.<sup>5</sup> The Panhandle pleadings were particularly interesting

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<sup>4</sup> *Gulf South Pipeline Co.* 175 FERC ¶ 61,055 (2021)

<sup>5</sup> *Panhandle Eastern Pipeline Company, LP* 177 FERC ¶ 61,027

1 because they include reply comments filed by Spire Marketing, Inc.,<sup>6</sup> that, once again, read as an  
2 endorsement of the positions that I have taken in my own testimony, and in opposition to the  
3 position taken by Spire. The Spire Marketing comments were made during a proceeding where  
4 Spire Marketing was itself asking FERC to waive OFO penalties that were being assessed against  
5 it.

6 For example, Spire Marketing highlights the importance of pipelines being clear and unambiguous  
7 when communicating that an OFO is in effect. Spire Marketing declares, *“Panhandle failed to  
8 communicate clearly and consistently with its Tariff and earlier operational notices, and failed to  
9 provide clear direction regarding actions its customers must take to comply with its operational  
10 notices and OFO Notice. Shippers should not be left to guess, in the midst of an unprecedented  
11 weather event, what Panhandle meant...”*<sup>7</sup>

12 Furthermore, Spire Marketing emphasized, *“Pipelines are required to narrowly design and apply  
13 penalties to deter conduct that is actually harmful to the system or to prevent arbitrage during  
14 critical periods.”*<sup>8</sup> More recently, the Commission confirmed that *“penalties are not intended to  
15 provide a windfall for other shippers, and these penalties do not reimburse shippers for any cost  
16 or relate to any service received by those shippers.”*<sup>9</sup>

17 Unfortunately for Spire Marketing, FERC declined to waive all of Panhandle’s OFO penalties  
18 assessed during the winter storm. FERC found both that Panhandle’s OFO notice did provide  
19 enough actionable information to affected shippers, and that Spire Marketing failed to take

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<sup>6</sup> Motion for Leave to Reply and Reply of Spire Marketing Inc, Docket No. RP21-813-000 (filed June 9, 2021)

<sup>7</sup> At p. 2

<sup>8</sup> Referring to: *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, 90 FERC ¶ 61,109 at 159 (2000) (“[T]o the extent that a pipeline assesses penalties, they must be limited to only those transportation situations that are necessary and appropriate to protect against system reliability problems. . . . By requiring that all penalties be necessary to prevent the impairment of reliable service, the Commission is requiring pipelines to narrowly design penalties to deter only conduct that is actually harmful to the system.”).

<sup>9</sup> At p. 3

1 appropriate action in response to the OFO notice. These facts differ materially from the case before  
2 this Commission, where, as other CNEG witnesses will testify, Spire Missouri West's conduct  
3 (and the response of transportation customers) more closely reflects the fact patterns established  
4 in the Southern Star and Gulf South OFO penalty waiver proceedings.

5  
6 Q. Have any other state commissions addressed similar penalty waiver requests arising from the  
7 February 2021 cold weather event?

8 A. Yes. It is my understanding other utilities have waived penalty provisions for their customers,  
9 though these instances may not have required any regulatory action, so there would be no  
10 government docket to which to cite. Also, at least one state commission is currently considering  
11 a penalty waiver request.

12  
13 Q. Are there any differences in the cases before other Commissions that you referenced?

14 A. There is one. In these other cases, it was the pipeline company itself that sought the waiver of  
15 penalties. In each of these cases, the pipeline understood the absurdity and public harm of applying  
16 OFO penalties in this circumstance. Utility regulatory law is not a suicide pact. In my experience,  
17 state and federal law, rules and procedures contain "safety valves" to ensure that devastating  
18 customer impacts do not arise from unique and completely unforeseen events. In my opinion, it  
19 would have been better for Spire to follow the example of these other utilities and voluntarily ask  
20 for a waiver, but that not being the case, approving this complaint to waive penalties is the next  
21 best solution.

22

1 Q. Do you have any other observations about the tariff, this matter and public policy  
2 considerations?

3 A. Yes. As I mentioned at the beginning of my testimony, I have found that it sometimes makes  
4 sense to step back and consider the broader context of a particular case. In this matter, should  
5 penalties of this magnitude be levied, it would be a particularly perverse public policy outcome.  
6 Should the Commission find that Spire properly followed its own tariff – which, I emphasize, I do  
7 not believe it did, and if the Commission then finds that the penalties should not be waived, it will  
8 mean that those with the least amount of information during the February event would be required  
9 to pay the greatest penalty. End-use customers – especially those that are simply part of a pooling  
10 arrangement – are unlikely to know with any precision exactly how much natural gas they have  
11 used on any given day, whether there has been an over- or under-delivery, or what the spot price  
12 of gas is that would be used for penalty assessment. Spire, however, is the one party that may have  
13 this information. Such information asymmetry combined with an extreme penalty structure would  
14 result in a public policy outcome that the Commission should seek to avoid.

15

16 Q. Does this conclude your testimony?

17 A. Yes, it does.

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

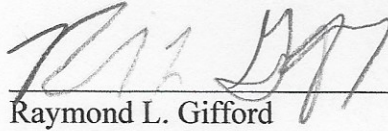
Constellation NewEnergy-Gas )  
Division, LLC, )  
Complainant, )  
v. )  
Spire Missouri, Inc. and its operating unit )  
Spire Missouri West, )  
Respondents. )

Case No. GC-2021-0315

**DECLARATION OF RAYMOND L. GIFFORD**

My name is Raymond L. Gifford. I am over the age of eighteen, and I am competent and authorized to make this declaration. I prepared the foregoing *Direct Testimony of Raymond L. Gifford*. I declare under penalty of perjury that the same is true and correct to the best of my knowledge and belief.

Signed on this December 20, 2021.

  
\_\_\_\_\_  
Raymond L. Gifford