

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

Symmetry Energy Solutions, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. GC-2022-0062
	)	
The Empire District Gas Company	)	
d/b/a Liberty,	)	
	)	
Respondent.	)	

**MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY DETERMINATION**

Pursuant to Missouri Public Service Commission (the “Commission”) Rule 20 CSR 4240-2.117(1)(B), Respondent The Empire District Gas Company d/b/a Liberty (“Empire”), by and through its undersigned counsel, hereby submits this Memorandum in Support of its Motion for Summary Determination filed contemporaneously herewith. Empire respectfully requests that the Commission find that there are no material facts in dispute, that Empire’s Tariff on file with the Commission is unambiguous and governs Complainant Symmetry Energy Solutions, LLC’s (“Symmetry”) Operational Flow Order (“OFO”) violations, that Empire is entitled to payment for Symmetry’s OFO violations as calculated in its Tariff, and that Symmetry’s Complaint should be dismissed.

**I. INTRODUCTION**

Empire’s Tariff allows for non-residential customers to contract with natural gas marketers (like Symmetry) for the purchase of natural gas and have that gas delivered over Empire’s local gas distribution system.<sup>1</sup> Marketers are required to keep their accounts balanced by nominating as

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<sup>1</sup> Tariff, Sheet No. 23.

much gas as their customers use.<sup>2</sup> Because it is essential that during extreme events—like Winter Storm Uri—that gas distribution systems balance be maintained, Empire’s Tariff allows it to issue an OFO that “will require actions by the Customer to alleviate conditions that, in the sole judgment of [Empire], jeopardize the operational integrity of [Empire’s] system required to maintain system reliability.”<sup>3</sup>

The question at the heart of this proceeding is simply whether Empire followed the terms of its Tariff when it imposed OFO penalties on Symmetry for Symmetry’s failure to comply with the OFO in effect during Winter Storm Uri. In its Complaint, Symmetry concedes that the Tariff applies.<sup>4</sup> Symmetry concedes that Empire had the right to issue an OFO and, in fact, issued an OFO.<sup>5</sup> Symmetry also concedes that there are penalties associated with not complying with an OFO.<sup>6</sup> And it is undisputed that Symmetry failed to comply with the OFOs issued by Empire during Winter Storm Uri.<sup>7</sup>

Based on the plain text of the Tariff and these undisputed facts, the Commission should find that Empire is entitled to impose OFO penalties on Symmetry and that Symmetry’s Complaint should be dismissed. To find otherwise, would mean that Empire’s retail customers will be forced to cover the increased gas costs associated with the purchases made by Empire to meet the needs of Symmetry’s customers, which are substantial given the extremely high gas prices during Winter Storm Uri and the fact that Symmetry nominated little gas for many of the days that Empire’s OFO

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<sup>2</sup> Tariff, Sheet Nos. 24, 25, 29.

<sup>3</sup> Tariff, Sheet No. 43.

<sup>4</sup> See, e.g., Complaint ¶¶ 1, 3, 4, 7, 16, 17, 18, 19, 23, 34, 35, 37.

<sup>5</sup> Complaint ¶¶ 17, 23. The Commission should note that while Symmetry pasted part of the OFO notice into its Complaint, it omitted Empire’s statement to “Please adjust your nominations to ensure you are NOT SHORT. OFO Penalties will apply to unauthorized deliveries.” The OFO notice also included the OFO provision contained in Empire’s Tariff. The full notice was, however, included as Exh. D to the Complaint.

<sup>6</sup> Complaint ¶ 19.

<sup>7</sup> Affidavit of Tatiana Earhart in Support of Motion for Summary Determination, Exh. A-1 (“Aff.”) at ¶¶ 11, 12, 18, 19, Exh. A-3, Exh. A-7.

call was in effect.<sup>8</sup> The Federal Energy Regulatory Commission’s (“FERC”) decision to grant a waiver of OFO penalties to an interstate gas pipeline for its separately issued OFO has no bearing on this proceeding.<sup>9</sup>

## II. STANDARD OF REVIEW

Commission Rule 20 CSR 4240-2.117(1)(E) provides that the Commission may grant a motion for summary determination if “the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest.” The Commission has explained that a party moving for summary determination is entitled to relief “when the facts determinative of a claim or defense (‘material facts’) are established without genuine dispute.”<sup>10</sup> Where there is no genuine issue as to material facts “the public interest clearly favors the quick and efficient resolution ... by summary determination without an evidentiary hearing...”<sup>11</sup>

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<sup>8</sup> Aff. at ¶ 11, 18, Exh. A-3, Exh. A-7.

<sup>9</sup> “The FERC has no jurisdiction over LDCs which come under the authority of their respective state regulatory commissions.” *Mo. Pub. Service Co.*, Opinion, File No. GR-89-104, 30 Mo. P.S.C. (N.S.) 39, 1989 Mo. PSC LEXIS 19, at 5 (Oct. 19, 1989).

<sup>10</sup> Order Regarding Motion for Summary Determination, *Shepherd v. KCP&L Greater Missouri Operations Co.*, File No. EC-2011-0373, at 4 (Dec. 23, 2011).

<sup>11</sup> *Missouri Coalition for Fair Competition v. Laclede Gas Co.*, Order Granting Summary Determination, File No. GC-2007-0169, at 5 (April 19, 2007) (“Moreover, the public interest clearly favors the quick and efficient resolution of this matter by summary determination without an evidentiary hearing in as much as ‘[t]he time and cost to hold hearings on [a] matter when there is no genuine issue as to any material fact would be contrary to the public interest.’”) (quoting Determination on the Pleadings, *In the Matter of the Application of Aquila Inc. for an Accounting Authority Order Concerning Fuel Purchases*, Case No. EU-2005-0041 (Oct. 7, 2004)), *See also* *Northeast Missouri rural Telephone Co. v. AT&T Corp.*, Order Granting Partial Summary Determination regarding Affirmative Defense of Accord and Satisfaction, File No. IC-2008-0285, at 6 (Oct. 7, 2008) (“In general, the public interest is served by the granting of a motion for summary determination when doing so reduces the Commission’s expenditure of time and resources to hear an issue that can be appropriately resolved in a summary fashion.”)

### III. BACKGROUND

Empire’s Tariff was filed with the Commission on August 17, 2020 and became effective October 16, 2020.<sup>12</sup> As with “[a]ny validly adopted tariff [it] ‘has the same force and effect as a statute, and it becomes state law.’”<sup>13</sup> Thus, Empire’s “tariff is governing law in this case.”<sup>14</sup> And in this case, Empire’s Tariff unambiguously entitles it to impose OFO penalties on Symmetry for its blatant OFO violations.

The Tariff provides that the “Customer, Marketer or Aggregator has the obligation to nominate a quantity of gas at the Receipt Point that matches the quantity of gas Deliveries to the Customer(s), including [lost and unaccounted for gas] to avoid the creation of Imbalances on [Empire’s] distribution system.”<sup>15</sup> The Tariff defines “Imbalance” as the “difference at any time, whether positive or negative, between the volumes of gas received, including [lost and unaccounted for gas], at a Receipt Point on behalf of a Customer, Aggregator or Marketer and the volumes of gas delivered by [Empire] at the specified Delivery Point(s) of the Customer, Aggregator or Marketer.”<sup>16</sup> Under normal operating conditions if the marketer nominates too little gas they will be responsible for paying Empire for the “spot” market price of gas plus additional charges based upon the degree to which their account is out of balance.<sup>17</sup>

However, in situations where the “operational integrity” of Empire’s system is jeopardized—as it was with Winter Storm Uri—Empire’s Tariff authorizes it to, in its “sole judgement,” issue an OFO.<sup>18</sup> The Tariff defines OFO as:

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<sup>12</sup> File No. GN-2021-0039.

<sup>13</sup> *PSC v. Mo. Gas Energy*, 388 S.W.3d 221, 227 (Mo. Ct. App., 2012).

<sup>14</sup> Order Denying Motions for Summary Disposition and Directing Filing, *Brower v. Branson Cedars Resort Util. Co., LLC*, File No. WC-2017-0207, 3 (Aug. 30, 2017).

<sup>15</sup> Tariff, Sheet No. 26.

<sup>16</sup> Tariff, Sheet No. 25.

<sup>17</sup> Tariff, Sheet Nos. 41-42.

<sup>18</sup> Tariff, Sheet No. 43.

Any order from [Empire] or applicable Interstate Transportation pipeline(s) that requires Customer, Aggregator or Marketer to maintain the daily delivery of specified quantities of natural gas to the Receipt Point. Notification of [an Empire] issued OFO shall be made via [Empire's] website, facsimile or electronic mail. Any OFO declared by an applicable Interstate Pipeline is also an OFO on that part of [Empire's] system served by the Interstate Pipeline issuing the OFO. Notification of an Interstate Pipeline OFO shall come from the Interstate Transportation pipeline.<sup>19</sup>

The Tariff grants Empire broad authority to call an OFO in any of the following instances:

- [Empire] experiences failure of transmission, distribution or gas storage facilities;
- When transmission system pressures or other unusual conditions jeopardize the operation of [Empire's] system;
- When [Empire's] transportation, storage and supply resources are being used at or near their maximum rate deliverability;
- When any of [Empire's] transporters or suppliers call the equivalent of an OFO or Critical Day;
- When [Empire] is unable to fulfill its firm contractual obligations or otherwise when necessary to maintain the overall operational integrity of all or a portion of [Empire's] system.<sup>20</sup>

The Tariff does not require that Empire state the basis for the OFO in the OFO notice.

If an OFO is called, customers are “responsible for complying with the directives set forth in the OFO,” which will either be based on penalties for taking Unauthorized Deliveries or Unauthorized Receipts of gas from the system during the duration of the OFO.<sup>21</sup> For example, the OFO at issue in this case included a directive that “OFO Penalties will apply to unauthorized deliveries.”<sup>22</sup> When a marketer's account is more than 5% unbalanced as a result of unauthorized deliveries during and OFO—i.e. burning more gas than it has is nominated—the Tariff imposes “a

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<sup>19</sup> Tariff, Sheet No. 26.

<sup>20</sup> Tariff, Sheet No. 43.

<sup>21</sup> Tariff, Sheet No. 43.

<sup>22</sup> Complaint, Exh. D.

penalty of \$25.00 per Mcf, plus the Gas Daily Index price for the applicable Interstate Pipeline for such Unauthorized Overruns during the duration of the OFO.”<sup>23</sup>

The OFO Penalty has two components. The first component—which is not so much a penalty as it is a provision to ensure that Empire’s retail customers are shielded from high gas costs that Empire may be forced to incur for Marketers like Symmetry’s OFO noncompliance—requires that Empire be paid for Unauthorized Deliveries at the Gas Daily Index price. By compensating Empire at the Gas Daily Index price the Tariff helps ensure that Empire is made whole for the gas it has to purchase to supply marketers’ customers when marketers like Symmetry fail to nominate enough (or in Symmetry’s case, practically any) gas. The \$25.00 per Mcf penalty—which is the true penalty component of the OFO penalty—is designed to incentivize marketers not to simply rely on Empire to purchase gas for their customers. The Tariff is clear that those “who fail to deliver to [Empire] for the account of Customer(s) specified operation flow ordered quantities of gas shall be billed appropriate ‘Unauthorized Delivery’ charges.”<sup>24</sup>

#### **IV. ARGUMENT**

##### **A. The Tariff Unambiguously Entitles Empire to Impose OFO Penalties on Symmetry**

Tariffs are to be construed according to their plain language.<sup>25</sup> “Where the language of a tariff is unambiguous, evidence of intent or historical interpretation is not needed.”<sup>26</sup> Because Empire’s Tariff on file with the Commission is clear and unambiguous—a point on which the Complaint agrees<sup>27</sup>—“the clear language of the tariffs filed . . . controls the outcome of this case.”<sup>28</sup>

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<sup>23</sup> Tariff, Sheet No. 43.

<sup>24</sup> Tariff, Sheet No. 44.

<sup>25</sup> *D.F.M. Investment Co. v. Union Electric Co.*, Opinion, File No. EC-91-349, 1 Mo. P.S.C. 3d 420, 1992 Mo. PSC LEXIS 48, at 9 (Nov. 3, 1992).

<sup>26</sup> *Id.*

<sup>27</sup> See Complaint ¶ 10 (“pursuant to the clear terms of Empire’s Tariff”).

<sup>28</sup> *Lucks v. Terre Du Lac Utilities Corp.*, Opinion, File No. WC-94-83, 3 Mo. P.S.C. 3d 22, 1994 Mo. PSC LEXIS 37, at 6 (April 29, 1994).

That outcome must be that Empire is entitled to impose OFO penalties on Symmetry and has properly done so.

As a starting point, the Tariff grants Empire broad discretion to call an OFO<sup>29</sup> and on February 9, 2021 Empire exercised that discretion.<sup>30</sup> Empire called an OFO by emailing (as provided for in the Tariff)<sup>31</sup> Symmetry and notifying it that, just as Southern Star Central Gas Pipeline, Inc. (“Southern Star”) had issued an OFO, Empire would do the same.<sup>32</sup> Empire specifically instructed Symmetry to “Please adjust your nominations to ensure you are NOT SHORT. OFO Penalties will apply to unauthorized deliveries.”<sup>33</sup> Empire even included a copy of the OFO provision contained in its Tariff.<sup>34</sup> Empire subsequently called another OFO on February 11, 2021, which included the same instruction to Symmetry: Please adjust your nominations to ensure you are NOT SHORT. OFO Penalties will apply to unauthorized deliveries.<sup>35</sup>

Symmetry, however, did not comply with the OFO. It also did not comply with its Marketer/Aggregator Agreement.<sup>36</sup> Its customers burned gas at increasing rates and Symmetry nominated only nominal amounts of gas on many days.<sup>37</sup> Symmetry’s utter failure to comply with the OFO forced Empire to cover for it in order for Symmetry’s customers to maintain their operations and to keep Empire’s system stable.

Following the conclusion of the OFO on Gas Day February 19, 2021, Empire calculated the OFO penalties for each of Symmetry’s customers that took Unauthorized Deliveries greater

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<sup>29</sup> Tariff, Sheet No. 43.

<sup>30</sup> Complaint, Exh. D.

<sup>31</sup> Tariff, Sheet No. 26.

<sup>32</sup> Complaint, Exh. D.

<sup>33</sup> Complaint, Exh. D.

<sup>34</sup> Complaint, Exh. D.

<sup>35</sup> Aff. at ¶ 10, Exh. A-2.

<sup>36</sup> Complaint, Exh. B. The Marketer/Aggregator Agreement states that Symmetry “is subject to and shall comply with Company’s gas curtailment and Operational Flow Order policies when it provides gas to Customers and may be subject to the penalties and charges as set forth in the Company’s tariff sheets on file with the Commission.”

<sup>37</sup> Aff. at ¶¶ 11, 12, Exh. A-3, Exh. A-7.

than 5% of the daily tolerance.<sup>38</sup> The calculation had two components. First, Empire imposed the \$25.00 penalty per Mcf of unauthorized delivery.<sup>39</sup> Then it added the Gas Daily Index price on the day on which the unauthorized delivery occurred for each Mcf of unauthorized delivered gas.<sup>40</sup> These calculations were performed in accordance with the Tariff.<sup>41</sup>

Under the plain language of Empire’s Tariff, it was required to then impose the OFO penalty on Symmetry. Specifically the Tariff states that “Customer, Aggregator or Marketer *shall* be charged a penalty of \$25.00 per Mcf, plus the Gas Daily Index price for the applicable Interstate Pipeline for such Unauthorized Overruns during the duration of the OFO.”<sup>42</sup> The OFO penalty is not optional. Missouri law provides Empire no discretion to exempt Symmetry from OFO penalties by prohibiting “gas corporation[s] [from] directly or indirectly by any special rate, rebate, drawback or other device or method, charg[ing], demand[ing], collect[ing] or receiv[ing] from any person or corporation a greater or less compensation for gas ... than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service...”<sup>43</sup> Empire must impose the charges described in its Tariff. This Commission has also previously found that it lacked the authority to grant refund waivers to a certain subset of customers during “record cold temperatures and unprecedented high gas costs” like Winter Storm Uri, because it would result in preferential treatment for that subset of customers.<sup>44</sup> Given that it is

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<sup>38</sup> Aff. at ¶ 19. Southern Star issued a number of OFOs and extended a number that it issued initially. *See* Southern Star Informational Report dated February 12, 2021 (FERC Accession No. 20210212-5244); Southern Star Information Report dated February 19, 2021 (FERC Accession No. 20210219-5193).

<sup>39</sup> Tariff, Sheet No. 43.

<sup>40</sup> Tariff, Sheet No. 43.

<sup>41</sup> Tariff, Sheet No. 43.

<sup>42</sup> Tariff, Sheet No. 43 (emphasis added).

<sup>43</sup> RSMo § 393.130.2.

<sup>44</sup> *Missouri Gas Energy*, Opinion, File No. GE-2001-393, 10 Mo. P.S.C. 3d 100, 2001 Mo. PSC LEXIS 716, at 10-16 (Mar. 6, 2001) (“Section 393.130.2 forbids MGE from directly or indirectly rebating to customers any part of collected rates when such a rebate results in a lesser compensation by one person for the same service than is paid by another person for a like and contemporaneous service under the same or substantially similar circumstances.”). Granting Symmetry’s Complaint or providing it a waiver for not complying with the OFO penalties would similarly



undisputed that Symmetry incurred OFO violations, Empire must (under its Tariff, Missouri law, and the Commission's precedent) impose the accompanying OFO penalties.

Empire thus billed Symmetry for the OFO penalties pursuant to the Tariff's statement that "Aggregators and Marketers who fail to deliver to [Empire] for the account of Customer(s) specified operational flow ordered quantities of gas shall be billed appropriate 'Unauthorized Delivery' charges."<sup>45</sup> When Symmetry refused to pay the OFO penalties, Empire notified Symmetry's customers who had incurred OFO penalties but noted that it was "first billing this amount to your marketer or aggregator."<sup>46</sup> Empire's notification was consistent with the Tariff's statement that Customers are ultimately responsible for OFO penalties if the marketer fails to fulfill its obligations.<sup>47</sup> Finally, and again consistent with multiple Tariff provisions<sup>48</sup> and the Marketer/Aggregator Agreement,<sup>49</sup> Empire also informed Symmetry that if it did not pay the OFO penalties it would provide notice to terminate its right to utilize Empire's transportation service.<sup>50</sup>

In short, Empire has categorically followed the terms of its Tariff in imposing OFO penalties on Symmetry. As a validly filed Tariff, it "'has the same force and effect as a statute, and it becomes state law."<sup>51</sup> The only violation of that law in this proceeding is Symmetry's failure to

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"result in preferential treatment for [a] subset of customers," at the expense of others. Specifically, Symmetry's customers would not incur any costs associated with Symmetry's non-compliance while Empire's retail customers would be on the hook for over \$11 million gas costs that Empire was required to make up for on Symmetry's behalf.

<sup>45</sup> Tariff, Sheet No. 44.

<sup>46</sup> Complaint, Exh. E.

<sup>47</sup> Tariff, Sheet No. 43.

<sup>48</sup> Tariff, Sheet Nos. 31 ("If a Customer, Marketer or Aggregator fails to comply with or perform any of the obligations of its part, [Empire] shall have the right to give the Customer, Marketer or Aggregator written notice of [Empire's] intention to terminate the transportation service on account of such failure.") ("The Aggregator or Marketer Agreement may be terminated by [Empire] upon 30 days written notice if an Aggregator or Marketer fails to meet any condition of the Transportation rate schedule or Transportation Contract."); 44 ("Aggregators or Marketers who repeatedly fail to deliver to [Empire] specified operational flow order quantities of gas will not be permitted to continue transportation service.").

<sup>49</sup> Complaint, Exh. B, ¶¶ 8, 10.

<sup>50</sup> Aff. at Exh. A-7.

<sup>51</sup> *PSC v. Mo. Gas Energy*, 388 S.W.3d 221, 227 (Mo. Ct. App., 2012).

comply with Empire’s OFO and pay the associated penalties. The Commission should determine that, based on the express terms of the Tariff, Symmetry owes, and must pay the OFO penalties.

**B. Waiver Requests of Some Interstate Pipelines Have No Effect on Empire’s Tariff**

The Complaint relies heavily on a FERC order in which it waived the OFO penalties that could have been imposed by interstate gas pipeline Southern Star for a similar time period.<sup>52</sup> Symmetry argues that “[b]ecause FERC has waived the upstream pipeline’s OFO penalties the situation that purportedly justified Empire’s OFO—namely the threat of OFO penalties from an upstream supplier—no longer exists.”<sup>53</sup> But in making this argument Symmetry ignores the plain terms of the Tariff and ignores the effects that Winter Storm Uri had on interstate and intrastate gas pipelines.

The Southern Star OFO and Empire’s OFO are different OFOs that are not dependent on each other. In fact, when Southern Star issued its OFO—under the terms of Empire’s Tariff—it automatically triggered an OFO under Empire’s Tariff.<sup>54</sup> The Tariff’s definition of OFO provides that:

Any OFO declared by an applicable Interstate Pipeline *is also* an OFO on that part of [Empire’s] system served by the Interstate Pipeline issuing the OFO. Notification of an Interstate Pipeline OFO shall come from the Interstate Transportation pipeline.<sup>55</sup>

Thus, when Southern Star called its OFO at 12:48 pm on February 9, 2021 an OFO was automatically triggered for Empire without Empire needing to make another call related to

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<sup>52</sup> See, e.g., Complaint, ¶¶ 2-3; *Southern Star Central Gas Pipeline, Inc.*, 175 FERC ¶ 61,015 (2021).

<sup>53</sup> Complaint ¶ 3.

<sup>54</sup> Tariff, Sheet No. 26.

<sup>55</sup> Tariff, Sheet No. 26 (emphasis added).

Southern Star's OFO.<sup>56</sup> But Empire did issue its own OFO independent of Southern Star's on February 9 and 11.<sup>57</sup>

This is also not a situation where Empire seeks to pass on an OFO penalty of an upstream pipeline that, as the Complaint asserts, have been waived.<sup>58</sup> Empire issued its own distinct OFO pursuant to the terms and conditions of its Tariff on February 9<sup>59</sup> and again February 11.<sup>60</sup> Empire's OFO carries its own penalties that are distinct from any penalties that Southern Star could have imposed. Empire's Tariff even has separate provision that deals with upstream interstate pipeline OFO penalties:

**Interstate Pipeline Overrun Penalties:** [Empire] may charge the Customer, Aggregator or Marketer for any daily or monthly overrun penalties assessed to [Empire], which are applicable to Customer, Aggregator or Marketer by the applicable Interstate Pipeline.<sup>61</sup>

Empire is thus not attempting to pass along any interstate pipeline overrun penalties. It's attempting to collect its own OFO penalties for Symmetry's utter failure to comply with Empire's own OFO.

Even if Empire's OFO was somehow dependent on Southern Star's OFOs, it is not as if Southern Star's OFO "no longer exists," as the Complaint asserts.<sup>62</sup> To the contrary, Southern Star's OFOs remained in effect through Gas Day February 19, 2021, as Southern Star itself admitted, due to "the unprecedented severe and extreme cold and winter weather conditions experienced on Southern Star's system during that period."<sup>63</sup> These were the same conditions that Empire was attempting to manage with its OFO. Empire's OFO was thus "limited as practicable

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<sup>56</sup> Complaint, Exh. D.

<sup>57</sup> Aff. at ¶¶ 9, 10, Exh. A-2; Complaint, Exh. D.

<sup>58</sup> Complaint ¶ 3.

<sup>59</sup> Aff. at ¶ 9; Complaint, Exh. D.

<sup>60</sup> Aff. at ¶ 10, Exh. A-2.

<sup>61</sup> Tariff, Sheet No. 43.

<sup>62</sup> Complaint ¶ 3.

<sup>63</sup> Complaint, Exh. C.

to address only the problem(s) giving rise to the need for the OFO.”<sup>64</sup> And while FERC may have granted waivers to Southern Star, it did so based in part on “the cooperation of delivery point operators [who] helped maintain system integrity.”<sup>65</sup> Symmetry, however, did not cooperate with Empire during the Winter Storm Uri. In fact it simply did not respond to the many email communications sent during the period of the OFO.<sup>66</sup> And it nominated only nominal amounts of gas during Empire’s OFO, which can hardly be characterized as “cooperation” to help maintain system integrity.<sup>67</sup>

The Complaint also appears to conflate FERC’s jurisdiction over interstate pipelines such as Southern Star with this Commission’s jurisdiction over Missouri intrastate pipelines like Empire’s distribution system. It should be clear, however, that “FERC has no jurisdiction over LDCs which come under the authority of their respective state regulatory commissions.”<sup>68</sup> Outside of a requirement to pass along FERC jurisdictional rates,<sup>69</sup> this Commission is not bound by a FERC decision that applies different tariffs to different parties<sup>70</sup> and involves different issues.

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<sup>64</sup> Tariff, Sheet No. 43.

<sup>65</sup> *Southern Star Central Gas Pipeline, Inc.*, 175 FERC ¶ 61,015, P 25 (2021). It should also be noted that, according to Southern Star, its “OFO tariff provisions do not enable Southern Star to recognize such collaboration in the assessment of penalties. Accordingly, Southern Star believes that waiver of all OFO penalties would be appropriate under the circumstances.” Motion for Leave to Answer and Answer of Southern Star Central Gas Pipeline, Inc., FERC eLibrary No. 20210324-5217, at 2 (Mar. 24, 2021). In Symmetry’s case, however, there is no need for such distinction since it plainly did not “collaborate” to address system integrity issues.

<sup>66</sup> Aff. at ¶¶ 13, 14, 15, 16, 17.

<sup>67</sup> Aff. at ¶ 18.

<sup>68</sup> *Mo. Pub. Service Co.*, Opinion, File No. GR-89-104, 30 Mo. P.S.C. (N.S.) 39, 1989 Mo. PSC LEXIS 19, at 5 (Oct. 19, 1989).

<sup>69</sup> As noted above, Empire’s Tariff has a separate provision that addresses its ability to pass along interstate OFO penalties, but that provision is not applicable to this proceeding. Tariff, Sheet No. 43.

<sup>70</sup> The Complaint mistakenly equates The Empire District Electric Company’s interest in the Southern Star FERC proceeding with that of The Empire District Gas Company’s interest in this proceeding. *See, e.g.*, Complaint ¶ 6 (accusing The Empire District Gas Company of an “end run [around] its loss before FERC”). But The Empire District Electric Company’s interest in the Southern Star case—as stated in the pleadings filed at FERC—was on behalf of two combined cycle gas-fired generating facilities (and their associated customers) that complied with Southern Star’s OFO at great cost. *See* Motion to Intervene and Protest of The Empire District Electric Company, FERC eLibrary No. 20210318-5087 (Mar. 18, 2021). This proceeding is about The Empire District Gas Company’s application of its OFO penalties to Symmetry who failed to comply with Empire’s distinct OFO.

Finally, for a pipeline to even be able to request a waiver it must have a provision in its Tariff that allows for such waivers.<sup>71</sup> Empire’s Tariff does not have a provision in its Tariff that would permit OFO waivers like the one that exists in Southern Star’s Tariff.<sup>72</sup> But even if Empire’s Tariff did have an OFO penalty waiver provision, it would be left entirely up to Empire’s discretion to seek a waiver of OFO penalties. Indeed, there are numerous interstate pipelines that have *not* followed Southern Star’s course and sought a waiver of their OFO tariff provisions for penalties associated with Winter Storm Uri.<sup>73</sup>

### **C. To Not Apply the Tariff Would Incentivize Bad Behavior and Impose Inequitable Costs on Empire’s Retail Customers**

OFO penalties are necessary to incentivize parties to comply with OFOs.<sup>74</sup> Not applying the Tariff’s OFO provision to Symmetry in the face of the major natural gas and electric reliability event that many parties suffered through during Winter Storm Uri runs contrary to the purpose of the OFO penalties themselves. Moreover, if Empire were to excuse every OFO offender for every OFO violation during a period when its system was stressed, then under what circumstances would penalties be appropriate? OFO penalties were established for scenarios such as this one. To not apply OFO penalties under these circumstances completely undermines the purpose of penalties and may discourage cooperation in the future and even incentivize non-compliance the next time Empire’s system is threatened.

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<sup>71</sup> *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1231 (D.C. Cir. 2018) (noting that generator was not eligible for a waiver or variance of cost cap that applied to generators during a “Polar Vortex” because the Tariff had no provision warning that such cost cap could be varied).

<sup>72</sup> *Southern Star Central Gas Pipeline, Inc.*, 175 FERC ¶ 61,015, P 21 (2021) (“Under its tariff, Southern Star has the authority to waive penalties incurred by shippers as a result of an OFO violation.”).

<sup>73</sup> For example, Panhandle Eastern Pipe Line Company, LP (“Panhandle”), which also provides service to Empire’s system, only requested and FERC only granted a waiver for the first day of its OFO because it was issued shortly before that day’s nomination deadline. *Panhandle Eastern Pipe Line Company, LP*, 174 FERC ¶ 61,237, PP 7, 19 (2021). Panhandle still imposed its OFO penalties for the other days the OFO was in effect. *Id.* P 8. *See also, The cause of the February 2021 Cold Weather Event and Its Impact on Investor Owned Utilities*, Staff Report, File No. AO-2021-0264, at 23-24 (April 30, 2021).

<sup>74</sup> *See e.g. See Noram Gas Transmission Co.*, 79 FERC ¶ 61,126, 61,544 (1997), *order denying reh’g*, 80 FERC ¶ 61,100 (1997).

Setting aside the \$25.00 Mcf portion of the penalty, if the portion of the OFO penalty based on the Gas Daily Index price is not applied, it will be left to Empire's retail customers to cover that amount—which is substantial given the extremely high gas prices and the fact that Symmetry nominated little or no gas for many of the days that Empire's OFO call was in effect.<sup>75</sup> Thus, the OFO penalty is anything but the windfall that Symmetry attempts to portray it as and failing to enforce it would impose an inequitable burden on Empire's retail customers.

## V. CONCLUSION

In light of the foregoing, Empire respectfully requests that the Commission grant its Motion for Summary Determination in this proceeding and dismiss Symmetry's Complaint.

*/s/ Elizabeth W. Whittle*

Elizabeth W. Whittle (*Admitted Pro Hac Vice*)

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<sup>75</sup> Aff. at ¶ 18, 20, 21.

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I hereby certify that this document was filed in EFIS, with notice sent to all counsel of record, and also sent by email to Staff, OPC, and all other counsel of record.

Dated this 17th day of September 2021.

/s/ Diana Carter  
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