

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

Symmetry Energy Solutions, LLC,)	
)	
Complainant)	
v.)	Case No. GC-2021-0316
)	
Spire Missouri, Inc. d/b/a Spire)	
)	
Respondent)	

Symmetry Energy Solutions, LLC’s Reply in Support of Its Motion to Compel Production of Responsive Documents by Spire Missouri, Inc.

Symmetry submits this reply in support of its February 8, 2022 Motion to Compel Production of Responsive Documents (Dkt. 95, “Motion”).¹

I. INTRODUCTION

Symmetry’s Motion to Compel proved, with evidence, what seemed intuitively true: that Spire’s initial 45-document production² was very much incomplete and further, that Spire’s witnesses and attorneys had to have known this. As an example, Symmetry showed that Spire disclosed previously withheld documents when it suited its strategy (and months after promising to Symmetry that it had collected and produced all relevant documents). For another example, Symmetry showed that Spire failed to collect responsive documents from key witnesses until a year after the event and almost two months after testimony was submitted. And Spire still has not produced a privilege log, although its responses and testimony demonstrate that it is still withholding documents. If that decision to withhold is, as it must be, on the advice of counsel, Spire must produce a privilege log forthwith.

¹ Capitalized terms have the same meaning as in Symmetry’s Motion. Exhibits 1-12 are appended to Symmetry’s Motion. Exhibits 13-20 are appended to this Reply brief.

² Prior to the February 9, 2022 production, Spire also produced an additional 6 documents and a set of customer contracts in response to Symmetry’s second and third sets of data requests.

How does Spire respond to this evidence? Does Spire explain why it withheld documents until past Symmetry’s deadline to file its direct testimony on December 20, 2021? Does it offer an excuse for producing responsive documents to one party but not another? Does it try to justify the misleading and false statements that it offered through counsel and in testimony? Does it submit a sworn declaration by a representative attesting that Spire has (now) fully complied with the discovery requirements? No. Instead, Spire asserts, wrongly, that it “has responded to the documents requested for the settlement conference” and therefore Symmetry’s Motion “should be found to be moot.” Spire Missouri Inc.’s Response to Symmetry Energy Solutions, LLC’s Motion to Compel Production (“Opp.”) at 9. This makes no sense on its face. Even if Spire had produced all settlement-related documents (and it did not come close), why would that moot a motion seeking to compel the production of all responsive documents? Spire offers no explanation. Spire instead attempts to sidestep its noncompliance by arguing that Symmetry does not need evidence regarding Spire’s winter storm actions or that Symmetry should not have relied on Spire’s earlier false statements and should have challenged them more often and earlier.³

Spire’s lack of response to Symmetry’s motion is an admission that the motion should be granted entirely. Spire fails to address the points in Symmetry’s motion and, by its deeds, has admitted that its past production was incomplete and its representations to the contrary were

³ Spire also spends half a page of its nine page Opposition addressing a footnote in Symmetry’s Motion, in which Symmetry provides an example of a document clearly responsive to one of Symmetry’s Data Requests that was not produced: a letter to Spire from Spire Marketing. *See* Mot. at n.9; Opp. at 8-9. Spire implies that the letter in question was provided to Symmetry alongside Spire’s September 9, 2021 response to Symmetry’s First Set of Data Requests. It was not. That this letter was provided to Constellation, as Spire claims, is irrelevant since, until February 2, 2020, Spire had (inexplicably) shared with Symmetry only a subset of the documents that it had produced to Constellation, and in any event that subset of documents excluded this letter.

false. On this record, there is only one possible ruling: An order requiring Spire to produce—forthwith—all documents sought by Symmetry’s motion, a privilege log identifying anything being withheld on that assertion, and all allegedly privileged communications about the withholding and false representations.

Spire’s latest claim that “[t]here is nothing to be remedied in regard to the discovery process at this time,” Opp. at 4, is once again false and misleading, and the Commission should grant Symmetry’s Motion.

As a threshold matter, Spire has not responded to the specific, substantive points in Symmetry’s motion. As described above, this is a non-opposition and a reason to grant the motion completely. Moreover, the Motion should be granted for three further affirmative reasons.

First, Spire does not even suggest that it has responded to all of Symmetry’s document requests, and only refers to a still incomplete production of 68 documents that Spire made on February 9, 2022 (which more than doubled its total initial document production count)—two months after Spire’s corporate representative testified that its document production was complete, five months after its general counsel represented that Spire had no more documents to produce, and almost a year after Symmetry served its Data Requests. For instance, Spire has still failed to produce:

- contemporaneous transaction confirmations for Spire’s gas purchases and sales in February 2021, and documentation of Spire’s long-term deals;
- invoices from Spire’s gas transactions in February 2021 that Symmetry has previously identified to Spire as missing;
- many of Spire’s weather forecasts for February 2021;
- Spire’s supply forecast addressing Spire’s anticipated supply sources;

- records of Spire’s supply cuts for some of the most important days in February 2021;
- the force majeure notices that Spire received from upstream suppliers; and
- a full set of Spire emails, ICE chats and Teams chats on relevant topics (such as Spire’s gas transactions and the issuance, duration, and termination of the OFO).

Additionally, Spire’s Opposition indicates that Spire *still* continues to selectively produce, and to withhold unproduced, responsive documents. *See, e.g.*, Opp. at 8-9 (discussing a document Symmetry requested that was produced to Constellation, but not Symmetry); *id.* at 6 (“Spire Missouri has endeavored to provide information . . . and will continue to do so.”); *id.* at 9 (“Spire Missouri . . . has continued to search and provide documents” and “will continue to do so.”). Spire does not contest that the categories of documents listed above are relevant, or that they are responsive to Symmetry’s long-outstanding Data Requests. It just hasn’t produced them.

Second, Spire’s response does not adequately address the serious questions about Spire’s document collection and preservation practices that Symmetry raised in its Motion. *See generally*, Mot. Spire’s latest production only adds to those questions. For example, all of the emails that Spire produced last week reflect that they were forwarded from the custodian to Spire’s general counsel on February 8, 2022 for production the next day. There are similar problems with the transaction confirmations and cut report that Spire produced, which reflect dates of February 9, 2022 and February 7, 2022 respectively. These issues underscore two critical and troubling facts: (1) Spire did not bother to search for and collect basic responsive documents, such as emails, when Symmetry issued its Data Requests (or in the almost *eleven months* since then); and (2) in a \$200 million case, Spire did not collect documents using anything approaching standard e-discovery methods. Put differently: Spire has not taken a reasonable (let alone comprehensive) approach to document collection, ignoring its obligations,

and then—at the eleventh hour—engaging in a half-hearted effort to pull together a few documents on an ad hoc basis.

Spire’s Opposition also fails to explain what Spire did, if anything, to preserve relevant material. Instead, the company that filed three federal cases (against Symmetry and its fellow marketers) spends time arguing that its decision to delay issuing a litigation hold until a month after initiating those cases, and two months after it sought a \$150 million penalty from Symmetry, is excusable because it only violates the federal rules.⁴ That concession speaks volumes about Spire’s approach to discovery in every forum, including this one: the rules do not apply to Spire. Neither does Spire feel it necessary to explain the gaps in its production, almost certainly the result of its admitted failure to timely preserve responsive documents. And that Spire only recently collected the responsive material it produced last week raises further questions about what was destroyed in the eleven months since Symmetry’s Data Requests.

Third, and finally, Spire’s argument that its latest production moots Symmetry’s Motion belies all of Spire’s repeated representations to counsel and under oath that its production was complete. Those claims were made in September and December last year. Spire offers no explanation for why the Commission should now credit Spire’s latest assurance that its production is complete. And, Spire even hedges its mootness claim by asserting only that it “has responded to the documents requested *for the settlement conference*.” Opp. at 9 (emphasis added). Setting aside that Spire’s production is still incomplete for the purposes of the settlement conference, Spire does not assert that it has as collected and produced all documents responsive

⁴ Spire’s assertion is untrue given that Missouri courts also require litigants to take steps to avoid spoliation once they have a “duty or should have recognized a duty to preserve . . . evidence.” *Ball v. Allied Physicians Group, L.L.C.*, 548 S.W.3d 373, 386 (Mo. App. E.D. 2018).

to Symmetry's almost year-old data requests. As noted above, it's still working on that. *See* Opp. at 6, 9.

Symmetry is entitled to Spire's responsive documents, now. Not some of them. Not only those that escaped deletion. Not just those that Spire first decided to collect, manually and non-systematically, last week. Spire's obfuscations, misrepresentations, and almost year-long delay in producing a still-incomplete set of responsive material has prejudiced Symmetry's ability to put on its case or even to effectively analyze Spire's cover gas costs, a topic that is critical if meaningful settlement discussions are to occur. The Commission must intervene and order Spire to meet its discovery obligations.

II. SUPPLEMENTAL BACKGROUND

As discussed in greater detail in its Motion, Symmetry has been pressing Spire for documents for the better part of 2021, continuing into 2022. Mot. at 6-7, 9, 13-15. When the Commission scheduled this week's settlement hearing, Symmetry renewed its demand that Spire produce all responsive documents—and identified a priority subset that would allow Symmetry to meaningfully participate in the conference. *Id.* at 14-15. Symmetry reiterated its request, for example, that Spire produce trade confirmations and invoices for all Spire gas purchases and sales; its supply records related to the Spire Missouri West system; its supply, demand, storage, and weather forecasts; evidence of daily supply cuts Spire faced; force majeure notices Spire received; and daily throughput records—all for February 2021. *Id.* Spire promised it would respond by February 7. *Id.* at 15. When Spire did not respond, Symmetry moved to compel Spire to produce this basic information that Symmetry has been seeking throughout this action. *See generally* Mot.

The day after Symmetry filed its Motion, and nearly a year after Symmetry served its data requests, Spire produced an additional 68 documents that it had previously withheld from Symmetry, more than doubling the size of its initial production. The production consisted of:

- an incomplete compilation of transaction confirmations, stamped with the date “February 9, 2022,” *i.e.*, the day of the production;
- tradesheets for some dates in February: 12-13 and 16-19, 2021;
- Sendout Forecasts for the dates of February 1-20, 2021;
- two weather forecasts for the month of February for Kansas City, MO and Oklahoma City, OK;
- Southern Star ID3 cut reports for the dates of February 12-18, 2021;
- an invoice summary providing limited information relating to Spire’s gas supply for February 2021;
- a one-page summary of forecasted and actual temperature and STS for the dates of February 5-24, 2021;
- 13 ICE chats;
- 13 emails with Southern Star; and
- 3 miscellaneous emails relating to the OFO.

As discussed in Symmetry’s Motion, all of these documents are responsive to Symmetry’s year-old data requests and relevant to Symmetry’s case. *See Mot.* at 14-15. But Spire did not explain why it has withheld these documents. Nor did Spire explain why its counsel, Mr. Aplington, or its corporate deponent, George Godat, had represented that Spire’s document productions were complete as of last year—statements that the production on February 9 proves were false.

Further, Symmetry’s review of Spire’s belated production reveals that it remains incomplete with respect to every category of documents that Symmetry has moved to compel. Each such category, and Spire’s response, is discussed in the next section.

Given the imminent settlement hearing, Symmetry wrote to Spire this past weekend, requesting that Spire explain the continuing holes in Spire’s production. *See* Ex. 19. Symmetry requested a response by today, but as of the filing of this motion, Spire had not replied.

Incredibly, rather than responding to Symmetry’s letter, Spire produced today—during the deposition of Scott Weitzel, Spire’s Vice President of Regulatory and Governmental Affairs—yet more previously unproduced communications, in the form of four text messages exchanged during Winter Storm Uri between Mr. Weitzel and other senior Spire employees including Spire President, Scott Carter (whose testimony Spire is seeking to block)⁵ and Vice President of Gas Supply and General Manager, Missouri East, George Godat (who testified in December that there were no unproduced documents). *See* Ex. 20. The text messages discuss line pressure and other issues relating to system integrity and the OFO, and as such are directly responsive to Symmetry’s data requests. There was no explanation as to why these communications have been withheld, let alone why they were produced in the middle of Mr. Weitzel’s deposition. And they appear to be recently taken screenshots, demonstrating yet again that Spire has not engaged in a reasonable search or collection.

Moreover, Mr. Weitzel testified that, until yesterday, February 14, 2022, he had no recollection of being provided or shown copies of Symmetry’s data requests and had not been asked to collect communications relating to the February 2021 winter storm or Spire’s asserted OFO penalties against Symmetry. He also did not know if anyone else has searched his documents, but stated that his practice is to sometimes save documents to his local desktop rather than to the Spire network drive, which he had not been asked to provide. He also stated that he

⁵ Spire has filed a motion for a protective order seeking to preclude deposition of Mr. Carter, arguing that “Mr. Carter has no unique personal knowledge about the relevant facts underlying the Complaints.” *See* Motion for Protective Order at 3 (February 2, 2022), Dkt. 88.

used a Skype chat feature to communicate with his co-workers, and was unaware whether anyone had searched his Skype messages for information responsive to Symmetry's data requests. Spire has produced not one Skype chat.⁶

III. DISCUSSION

The Commission must intervene to ensure that Spire meets its discovery obligations and to preserve the integrity of this proceeding. As discussed in Symmetry's Motion, Spire withheld numerous relevant, responsive categories of documents, while representing under oath and counsel-to-counsel that its production was complete. Now, Spire has made an eleventh-hour production that proves Spire has withheld documents from Symmetry and then, in the same breath, claimed that it has acted in good faith and Symmetry's Motion "should be found to be moot." Opp. at 9. The Commission cannot allow this gambit to succeed and should grant Symmetry's Motion for three reasons: (a) Spire's belated production does not come close to addressing many of the categories of documents that Symmetry's Motion seeks to compel; (b) Spire's belated production—and its Opposition—raise numerous questions about Spire's document collection and preservation processes; and (c) there is no basis to credit Spire's representation that it has produced everything Symmetry needs, especially since Spire admits that it is still withholding documents.

⁶ Further Spire depositions are scheduled for this week and next. It is plain that many, if not all, will need to be held open given Spire's failure to instruct witnesses to collect responsive materials, its production of documents during and after depositions, and its own decision not to collect or search multiple categories of documents (including various types of chat applications). The revelations from today's deposition underscore that Spire's refusal to comply with its discovery obligations is tainting the entire discovery process, and that the prejudice to Symmetry increases by the day.

A. Spire’s Belated Production Is Still Incomplete.

Spire’s belated production does not address many of the categories of documents that Symmetry’s Motion seeks to compel, and it is incomplete as to several other of the other categories at issue. Those categories—which correspond to the numbering in Symmetry’s Proposed Order—are discussed below.

Category 2(a):⁷ Documentation regarding Spire’s available gas supply for each day in February, including baseload gas, callable gas, storage gas, and spot purchases: On February 9, Spire produced trade sheets for some days during the winter storm: February 12, 13, and 16-19. But these trade sheets do not identify whether the gas is baseload gas, callable gas or spot gas. Moreover, Symmetry has sought this information for all of February 2021, and the trade sheets for the days leading up to the OFO are particularly important in light of Symmetry’s claims regarding Spire’s initiation of its OFO on February 9, 2021.

Categories 2(b) / 3(a)(iv):⁸ Trade confirmations and invoices for all of Spire’s gas purchases and sales in February 2021: Although Spire produced a handful of transaction confirmations, many transaction confirmations that should have been produced are still missing, and those that have been produced are missing critical information. For example, Spire produced no transaction confirmations for multiple purchases listed on other documents produced,⁹ including certain of the purchases that Spire claims caused its “actual cover costs” and a

⁷ “Category 2” documents are documents that Symmetry requested be compelled for production by February 16, 2022 ahead of the settlement conference, and are responsive to response to Symmetry’s Data Requests Nos. 3, 7, 31, 33, 47, 58, 73 and 74.

⁸ “Category 3” documents are documents Symmetry requested be compelled for production by February 17, 2022. Those documents are also responsive to Symmetry’s Data Requests Nos. 3, 7, 31, 33, 47, 58, 64, 73 and 74.

⁹ This includes a spreadsheet produced titled “Confidential Actual Cover Costs Spire.xls” and another document produced titled “MOWEST FEB 2021 Portfolio HIGHLY CONFIDENTIAL.”

transaction with Mico on February 9, 2021 that is specifically referenced in the testimony of Spire’s Director of Gas Supply, Justin Powers.¹⁰

Further, instead of producing original transaction confirmations, Spire appears to have generated transaction confirmations based on data from its systems (which is why they all bear the same date of February 9, 2022). Because the transaction confirmations appear to have been generated retroactively, it is unclear whether the volumes indicated are the contracted volumes or the volumes delivered, and the documents lack much of the information that transaction confirmations would routinely be expected to contain. For example, because all of the transaction confirmations bear a date from last week, they do not contain the date upon which each transaction was entered into—this is basic information that is central to Symmetry’s case and to examining Spire’s actual cost of gas.

Spire also has not produced transaction confirmations for Spire’s “long-term” deals. Spire claims that it does not have confirmations for such deals. But Spire also has not produced *any* documents that reflect the terms of those transactions (*e.g.*, base contracts, etc.), which would themselves be responsive to Symmetry’s Data Requests. *See* Symmetry’s Data Request No. 74 (seeking correspondence and documents relating to “all gas purchase, sale, exchange, and other transactions made by Spire related to the SS System or the Spire MO West System[.]”).

Finally, rather than produce all relevant invoices, as Symmetry’s Data Requests requested, Spire has asked Symmetry to identify for Spire any invoices that are missing from the invoices previously produced. It is unclear how Spire expects Symmetry to do this in light of Spire’s refusal to produce a list of the transactions made in February 2021 (as requested in Symmetry’s Data Request No. 73). In any event, Symmetry identified two invoices missing

¹⁰ *See* Ex. 13 (Rebuttal Testimony of Justin Powers) at 3:16-19.

from Spire’s production in its opening Motion: the invoices reflecting Spire’s sales of gas to Tenaska and Atmos. *See* Mot. at 9-10, 12 n.8. Spire still has not produced those invoices. How much spot gas Spire purchased, the dates on which Spire entered into the transactions, and the dates of contracted-for and actual delivery, are all highly relevant to (1) assessing whether the OFO was necessary to ensure system integrity or to comply with the Southern Star OFOs and (2) evaluating Spire’s purported actual cover costs (an issue Spire itself has raised multiple times despite its continued refusal to produce complete documentation).¹¹

Category 2(c): A daily record of all sources of supply to the Spire Missouri West system in February 2021 including (among other information) whether the gas was baseload, callable, storage, or spot purchases, the date the gas was contracted to be purchased, and the date or date range for delivery: Spire produced an invoice summary spreadsheet, which does not provide the aforementioned information. The information omitted is necessary for Symmetry to evaluate Spire’s claim that it bought “incremental supply to cover the marketer shortfalls for the transportation customers.”¹²

Categories 2(d) / 3(a)(iii): All forecasts regarding supply, customer demand, storage, and weather in February 2021 (including the regression analyses about which Mr. Godat testified in his deposition): The production is missing several weather forecasts. For example, on September 9, 2021, Spire produced a document titled “DR KC Weather Forecast,” dated February 12, 2021. Spire should have similar forecasts for the other days in February, but it has

¹¹ Spire seemingly attempts in its Opposition to argue that these documents are irrelevant. *See* Opp. at 4-6. But Spire had the opportunity to stand on a relevance objection at the time that it initially responded to Symmetry’s data requests, and did not do so. Spire cannot now retroactively argue that it was entitled to unilaterally withhold documents based on relevance without informing Symmetry of its intent to do so.

¹² *See* Ex. 14 (Rebuttal Testimony of George Godat) at 24:22-23.

not produced any such forecasts. Similarly, Mr. Godat's witness preparation binder for his corporate representative deposition included a differently formatted forecast, titled "February 10 Weather Forecast," which provided additional information. Spire, however, did not produce that type of forecast for any other days in February. These forecasts are particularly important in light of the emphasis that Mr. Powers placed on them in his testimony. *See, e.g.*, Ex. 13 (Rebuttal Testimony of Justin Powers) at 4:16:20 ("Q. WHAT WAS DIFFERENT ABOUT THIS SITUATION THAT MADE YOU DECIDE THAT RECOMMENDING AN OFO WAS THE BEST DECISION? A. As I mentioned above, the forecasts across much of the county looked extremely dire. This was coupled with the fact that some of the largest producing areas in the country were forecasted to see near record low temperatures."); *see also id.* at 3:1-9 (discussing concerns relating to weather forecasts).

Similarly, Spire did not produce a supply forecast that provides the anticipated source of gas supply, which is a type of forecast that Spire would be expected to utilize.

Category 2(e): Daily supply cuts faced by Spire during February 2021 and all force majeure notices provided to Spire by its suppliers during February 2021: Spire produced information relating to supplier cuts for the dates of February 12-18, 2021, but again failed to provide that information for the days leading up to Spire's initiation of its OFO. This information is directly relevant to the core issue of whether Spire's OFO was properly issued in the first instance. Spire's production also does not include any force majeure notices.

Category 2(f): Daily throughput on the Missouri West system, broken down between sales customers and transportation customers: Although Spire produced a document showing what appears to be system demand, Spire has not produced any documents that provide a breakdown of daily throughput broken down by sale and transportation customers. A daily

throughput broken down by sale and transportation customer is relevant to whether Spire's penalty amounts to an improper demand that Symmetry subsidize gas that was purchased for Spire's gas sales customers.

Category 3(a)(i): Email and chat communications, from February 2021 through the present related to relevant topics (e.g., the issuance, duration, and termination of the OFO):

First, Spire has still produced no Microsoft Teams chats, even though Mr. Godat testified that Spire employees use that application. *See* Ex. 15 (Spire Rule 57.03(b)(4) Depo. Tr.) at 149:22-25. Symmetry remains concerned that, as a result of Spire's document preservation failures, these communications no longer exist.

Second, Spire has finally produced some ICE chats, after much argument, including before Judge Woodruff, that they were non-existent or hard to produce, but its production is patently incomplete. For example, Spire produced ICE chats involving Greg Hayes, a scheduler on Spire's Gas Supply team, but only for the dates of February 13 and 15-18—again excluding the dates leading up to Spire's initiation of the OFO.¹³ Spire also produced certain chats involving Mr. Powers, but they are undated, so there is no way to verify whether the production is complete. And, Spire produced no ICE chats for other members of its Gas Supply team.

Finally, Spire produced only three internal emails regarding its OFO: (1) an email from February 18 in which Mr. Powers states, "I have also heard SSC might lift their OFO tomorrow morning. Once they lift their OFO we will lift ours as well"; (2) an email from February 19 in which Mr. Powers states: "I think [the OFO] will be lifted effective at 9am this morning. Still

¹³ Spire's production of ICE chats on February 9, 2022 also included a more complete version of an ICE chat previously produced to Symmetry on September 9, 2021, indicating that Spire deliberately excerpted the previously produced version of the ICE chat. *Compare* Ex. 16 (produced on September 9, 2021) *with* Ex. 17 (produced on February 9, 2022).

waiting on a report to look through before I lift everything. SSC has lifted their OFO”; and (3) an email from February 11 regarding anticipated communications with Symmetry’s “larger customers.” *See* Ex. 18 (emails). The second of these emails also references a “report” that Mr. Powers apparently reviewed prior to deciding to lift the OFO. *See id.* at 3. Spire has not produced this “report,” even though that “report” would be responsive to Symmetry’s Data Requests. *See* Symmetry’s Data Request No. 33 (seeking documents relating to Spire’s evaluation, actions, and decisions regarding the duration of [any] OFO, including . . . the basis of Spire’s decision regarding when to terminate the OFO”). Further, all of the emails that Spire produced (including those exchanged with Southern Star, discussed below) reflect that they were forwarded by Mr. Powers to Spire’s counsel, Mr. Aplington, on February 8, 2022. *See, e.g.,* Ex. 18. In other words, they were not even collected until a year after the event, and only then on an ad hoc basis.

Category 3(a)(ii): Agreements and correspondence during or relating to February 2021 with Southern Star: Spire produced thirteen emails exchanged with Southern Star, but that production is also facially incomplete. For example, Mr. Powers testified that a chart included in his rebuttal testimony was provided to him by Southern Star, but Spire produced no communications attaching that chart. *See* Ex. 13 (Rebuttal Testimony of Justin Powers) at 6:14-16.

Notably, Spire’s Opposition to the Motion does not argue that any of the categories of document discussed above are irrelevant, or even unduly burdensome to produce.¹⁴ To be sure, Spire contends that it had “No Discretion” in issuing its penalty to Symmetry. But—although

¹⁴ Spire also has not claimed that the documents Symmetry seeks would be subject to the attorney-client privilege or any other protection. Nor has Spire produced a privilege log.

Symmetry contests that Spire's discretion was truly limited—Spire's argument puts the cart before the horse. The documents at issue in Symmetry's motion largely go to whether Spire properly issued (and maintained) the OFO that allegedly provided the basis for Spire's penalty. If Spire had no such legitimate basis, then Spire could not issue the penalty in the first place; its discretion under the Tariff is irrelevant. Symmetry is entitled to those documents, and the Commission should order Spire to produce them.

B. Spire's Belated Production Raises Questions About Its Collection and Preservation Practices, Which Its Opposition Does Not Answer

Spire's late production highlights several questions, discussed in Symmetry's Motion, about Spire's failure to properly preserve, collect and produce responsive documents, none of which Spire's opposition adequately addresses. For example, Spire's February 9 production revealed that it had not previously even attempted to collect ICE chats, or other communications by and among Spire gas traders and schedulers that Symmetry specifically sought in its initial Data Requests. Indeed, Mr. Aplington indicated in a recent hearing before Judge Woodruff that Spire was not aware of how to retrieve ICE chats, a process about which there is significant documentation online, including on the ICE website itself, and was instead attempting to fashion a makeshift search and collection effort a year after Symmetry requested these documents. Again, this is emblematic of Spire's approach to discovery: obfuscate, delay, and then throw something incomplete together at the last minute akin to the production in a pro se case.

Further, Spire's production shows that Spire did not even collect other basic categories of documents, such as emails or contracts, until *the day before they were produced last week*. All of the late-produced emails, for example, reflect that they were forwarded by Mr. Powers to Spire's counsel on February 8, 2022, and the transaction confirmations are date-stamped with the date of February 9, 2022. And, Spire *still* has produced no chats from Microsoft Teams, or even

indicated that it has collected or conducted a search of these communications, despite Mr. Godat's testimony that Spire employees use Microsoft Teams. *See* Ex. 15 (Spire Rule 57.03(b)(4) Depo. Tr.) at 149:22-25. Moreover, the deposition of Mr. Weitzel today raises yet more questions, revealing, as it did, that Spire has yet more documents to produce and will do so in the middle of depositions (thus prejudicing Symmetry); and that this key witness had no memory of being shown copies of Symmetry's data requests, had not been asked to collect communications relating to the February 2021 winter storm or OFO penalties, had saved documents locally (which he had not been asked to provide) and used Skype chat to communicate with colleagues (but was unaware whether anyone had searched those chats for responsive materials). Perhaps these chats, and Teams chats, were never preserved, perhaps they were deleted, or perhaps, like the ICE chats, they have never been properly reviewed. We still do not know. But one thing is plain: Spire's belated and *ad hoc* manual collections demonstrate a complete disregard for basic, reasonable document preservation, collection and production practices.

"Better late than never" is not a valid defense here. Spire's collection and production of chats, emails, and other documents last week, and its in-deposition production of the texts of multiple witnesses today, not only demonstrates the falsity of representations made by Spire's counsel and its corporate representative deponent, but also raises serious questions about what evidence has been lost or destroyed during Spire's delay in gathering documents, and what documents remain in Spire's possession. Remarkably, Spire does not explain in its Opposition what steps it took to preserve relevant documents when it anticipated that it would seek a \$150 million penalty against Symmetry—beyond its conclusory assertion that "Spire Missouri would argue that has appropriately preserved information relevant to this case." *Opp.* at 9. Even more

remarkably, Spire makes no attempt to justify its failure to put a litigation hold in place until late April 2021, two months after it demanded a penalty from Symmetry, and a month *after* Spire filed its own litigation against Symmetry in federal court in Missouri. *See* Mot. at 13-14. Spire’s only defense—that a “legal hold notice” is a requirement of federal and not state law, Opp. at 9—is not only untrue (Missouri law requires parties to take steps to preserve evidence once they “should have known . . . that litigation would arise surrounding the circumstances” that the evidence concerns, *Ball v. Allied Physicians Group, L.L.C.*, 548 S.W.3d 373, 386 (Mo. App. E.D. 2018)), but also self-defeating because *Spire sued Symmetry in federal court*. If Spire ignored the express document-retention requirements in its own federal lawsuit against Symmetry, how can the Commission trust that Spire adequately preserved documents for this action? As Spire admits, it does not follow the rules.

An order from the Commission compelling Spire to make a full production of the categories sought in Symmetry’s Motion would cut through all of this gamesmanship. Spire would surely abandon its shoddy document collection practices (though it should have never engaged in them in the first place). It would also be more readily forced to explain to the

Commission why documents it has been ordered to produce—and that the Commission and Symmetry know exist—cannot be located.¹⁵

C. Spire Offers No Basis for Concluding That Its Production Is Complete

Finally, the Commission must intervene because Spire has represented only that it has “responded to the documents requested for the settlement conference,” Opp. at 9, not that it has in fact completed its full production, *see id.* at 6, 9 (referring to Spire’s intent to continue collecting and producing documents). If Symmetry’s motion were truly “moot” as Spire contends, surely Spire would submit an unequivocal declaration, or make an express representation, that it has satisfied all of Symmetry’s document requests. It has not.

To the extent that Spire’s Opposition can be read as a(nother) representation that it has completed its document production, the Commission should not credit it. Spire offers no explanation in its Opposition for why—in light of its latest document production—its counsel previously represented to Symmetry that Spire’s production was complete as of last year. Nor does Spire explain why its corporate representative repeatedly made the same statement under oath in his December 2021 deposition. *See* Ex. 8 (Spire Rule 57.03(b)(4) Depo Tr.) at 25:3-4 (stating that Spire had “produced all the documents that Symmetry has requested.”). Notably,

¹⁵ Spire’s attempts to distinguish *Spire Mo. Inc. v. Office of Pub. Counsel*, 593 S.W.3d 546, 555 (Mo. Ct. App. 2019) and *State ex rel. Laclede Gas Co. v. PSC*, 392 S.W.3d 24, 27 (Mo. Ct. App. 2012) by pointing to the different factual or legal issues at play miss the mark because those cases are relevant to the specific discovery behavior that Spire engaged in then—and which it continues to engage in now. *See* Opp. at 7-8. In *Matter of Spire Missouri Inc.*, Spire unilaterally attempted to narrow discovery with an unreasonably narrow view of relevance. *See* 593 S.W.3d at 554. The Missouri Court of Appeals held that was unacceptable and overturned the Commission’s order. *See id.* That is analogous to the situation here, where Spire is producing no more than a subset of all of the documents at issue based on what appear to be unilateral determinations about relevance. *Laclede* involved the Commission taking action against Spire’s predecessor for numerous, improper objections—a situation analogous to the one here where Spire has repeatedly obstructed discovery. *See* 392 S.W.3d at 27. The point is that Spire is simply repeating discovery violations that have been remediated before, as they should be now.

Spire's corporate representative, Mr. Godat, was on all three of the email chains that Spire produced last week. *See* Ex. 18. Spire has not withdrawn this testimony. The fact that Spire's production remains incomplete, despite its latest representation that the 68 additional documents it produced last week "moot[ed]" Symmetry's motion, only confirms that the Commission needs to intervene to stop Spire's manipulation of the discovery process and this proceeding more generally.

At bottom, this is a \$150 million case, concerning serious questions about the propriety of Spire's actions, and involving multiple claimants. Symmetry has not been able to obtain the documents that it needs to put on its case. Due process rights hang in the balance. *See Weinbaum v. Chick*, 223 S.W.3d 911, 913 (Mo. Ct. App. 2007) (reversing agency determination on due process grounds because litigant was not allowed to present certain evidence at hearing). There should not be questions about whether relevant documents have been destroyed, whether emails and chats have been collected properly, or whether parties have actually received all relevant documents to which they are entitled. An order from the Commission will ensure that any further refusal by Spire to participate in discovery occurs when Spire is aware that the consequences will be severe. In short, the Commission must take action commensurate with the extent of Spire's failings and the significance of this case.

IV. CONCLUSION

For the reasons discussed above, Symmetry respectfully requests that the Commission grant Symmetry's Motion and issue the Proposed Order attached to the Motion.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of February 2022, a copy of the foregoing **Symmetry Energy Solutions, LLC's Reply in Support of Its Motion to Compel Production of Responsive Documents by Spire Missouri, Inc.** has been served on all parties on the official service list for this matter via filing in the Commission's EFIS system and/or email.

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