

**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 Motion to Compel Further Deposition Testimony from
Spire Missouri, Inc.’s Corporate Representative**

Symmetry Energy Solutions, LLC (“Symmetry”) respectfully requests that the Public Service Commission (“Commission”) order Spire Missouri, Inc. (“Spire”) to produce its corporate representative to continue his testimony regarding facts that are known or reasonably available to Spire on the following topics in Symmetry’s deposition notice dated November 11, 2021 (Ex. 1):¹ 1, 2(b); 2(f); 2(k); 2(l); 2(m); 3; 4; 6; 7; 8; and 9.

I. INTRODUCTION

The Commission should compel Spire to produce its corporate representative, George Godat, to complete his deposition on topics for which he was unprepared to offer testimony during his properly noticed deposition on December 13, 2021. Spire seeks to impose a \$150 million penalty on Symmetry based on Symmetry’s purported violation of an Operational Flow Order (“OFO”) that Spire issued in February 2021. Symmetry challenges the propriety of this OFO and associated penalties. Despite the severity of the fine it is attempting to impose, Spire has refused to provide Symmetry with the discovery to which Symmetry is entitled. One glaring example of Spire’s refusal to meet its discovery obligations is that Spire produced fewer than 60

¹ “Ex.” refers to Exhibits appended to this motion.

documents in response to Symmetry's 134 document requests.² That obstruction will be addressed in a separate motion.

This motion focuses on another aspect of Spire's refusal to meet its discovery obligations: Spire's tactical decision not to prepare its corporate representative to testify on multiple topics that Symmetry included in its deposition notice, and that are core to this litigation. Those topics include, among others:

- Spire's decision to issue the OFO and the reason why it was not lifted sooner, which are central questions in this case, but which Spire's corporate representative said would need to be asked of one of his subordinates;
- Spire's use of storage gas in February 2021, including any decisions to draw gas from storage or sell storage gas to third parties;
- The factual basis for multiple representations made by Spire's general counsel to Symmetry; and
- Spire's sales to Atmos Energy in February 2021.

Despite Spire's legal obligation to prepare Mr. Godat, he testified that he had limited knowledge regarding many of these topics, was not personally aware of certain facts (as if that were relevant for a corporate designee), and repeatedly directed Symmetry to another witness for key information. Under the Missouri discovery rules governing this proceeding, producing an unprepared corporate witness is tantamount to failing to appear for a deposition. Missouri courts have sanctioned litigants for less.

Spire's witness was also unprepared to testify on what Spire did to preserve, collect, and produce responsive documents in this case—information that would explain how it could

² On February 2, 2022, Spire—for the first time—made available to Symmetry additional documents that it previously produced to Constellation and Clearwater in their respective dockets, as well as several contracts between Spire and Symmetry transportation customers. But Spire has not explained why these documents were not previously produced in response to Symmetry's requests, despite the fact that many are clearly responsive to such requests.

possibly be that Spire produced fewer than 60 documents in response to Symmetry’s data requests. Testimony on this additional properly noticed topic would also provide valuable insight into whether Spire spoliated responsive documents, something that appears highly likely based on what Spire has told Commission Staff and the parties.

Unfortunately, Spire’s corporate deposition tactics are consistent with its approach to discovery overall, which has ranged from the slipshod to the directly obstructionist. Spire failed to put a timely litigation hold in place. Spire also apparently sat back as key communications such as ICE instant messages and Microsoft Teams chats were deleted. Whether because of that destruction or otherwise, Spire has produced a paltry number of documents in support of the issuance of an OFO pursuant to which it seeks \$150 million. Examples include a single document (a weather forecast) in response to Symmetry’s requests about the basis for Spire’s issuance of the OFO, and a single external email (from Southern Star) on the OFO’s lifting.

Having sought to stymie document discovery, Spire now is attempting to obstruct the deposition process, moving to block certain depositions entirely, while failing to prepare its corporate designee, and then opposing Symmetry’s efforts to reopen that deposition so that Symmetry can obtain the testimony to which it is entitled. This gamesmanship needs to come to an end. The Commission should compel Spire to produce a corporate representative prepared to testify on every topic noticed by Symmetry.

II. BACKGROUND

A. Spire Has Produced Little Discovery in This Important Case, Despite Symmetry’s Efforts

This case is about Spire’s attempt to misuse the OFO provision of its Tariff in order to improperly benefit from Winter Storm Uri—a storm that ravaged much of the American Midcontinent region in February 2021—by seeking to charge hundreds of millions of dollars in

improper OFO penalties to Symmetry and two other gas marketers, thereby driving up costs for the marketers' customers and potentially forcing the marketers out of the Missouri gas market entirely, to the benefit of Spire and its marketing affiliate. Symmetry is a natural gas marketer engaged in the purchase of natural gas from upstream suppliers and sale to end users, such as hospitals, schools, and manufacturing plants. Symmetry buys natural gas on its customers' behalf, and arranges for the transportation of that gas to its customers over interstate pipelines and local distribution companies. Spire is a local distribution company that serves numerous Symmetry customers in Missouri. Spire seeks to impose more than \$150 million in penalties on Symmetry, based on Symmetry's alleged violation of an OFO Spire issued in connection with Winter Storm Uri. A properly-issued OFO requires that Symmetry (and other shippers of gas on the system) balance their nominations with the actual amount of gas delivered to Spire's system within a certain tolerance range. Because of the drastic penalties associated with a failure to comply with an OFO, Spire's Tariff with the Commission allows OFOs only in certain specific and narrow circumstances, and sets conditions on the imposition of such OFOs and collection of associated penalties. On February 10, 2021, Spire issued an OFO in violation of the requirements of its Tariff and has unlawfully sought to recover exorbitant penalties from Symmetry in connection with that improperly-issued OFO.

Given these circumstances, Symmetry has filed this challenge to Spire's OFO and the associated \$150 million penalty Spire is seeking to impose. As Symmetry's petition discusses in more detail, Spire's OFO and associated penalties violate Spire's Tariff in at least four ways: (1) Spire did not have a proper basis to issue the OFO; (2) Spire kept the OFO in place longer than was allowable under its Tariff; (3) Spire failed to provide sufficient notice and instruction to its transportation customers as required under its Tariff; and (4) Spire failed to properly calculate

OFO penalties. *See generally* Symmetry’s Complaint and Motion for Expedited Treatment (March 26, 2021), Dkt. 1.

Symmetry has served Data Requests on Spire in order to obtain necessary discovery into the justifications and propriety of Spire’s OFO. It also noticed several depositions, including a deposition of Spire’s corporate representative pursuant to Mo. R. Civ. P. 57.03(b)(4). *See* Ex. 1 & 2. In response to Symmetry’s Data Requests, Spire produced to Symmetry fewer than 60 documents. That number of documents is implausibly small given the breadth of Symmetry’s requests and are the subject of Symmetry’s ongoing meet and confer efforts, as well as a forthcoming motion.

In response to Symmetry’s deposition notices, Spire has sought to block two individual depositions by filing motions for protective orders. Ex. 3.³ Spire, however, did not seek a protective order to bar Symmetry from proceeding with any of the topics it noticed for the deposition of Spire’s corporate representative, and the time to do so has passed.

B. Spire’s Corporate Representative Was Unprepared to Offer Testimony on Multiple Topics

Symmetry took the deposition of Spire’s corporate representative on December 13, 2021. Given Spire’s sparse responses to Symmetry’s data requests, Symmetry’s deposition notice included topics related to Spire’s document production, Data Request responses and document retention. *See* Ex. 1 at Topics 1 and 9. Spire’s corporate representative, George Godat, testified under oath that “Spire’s produced all the documents that Symmetry has requested.” Ex. 4 at 25:3-4. This was not true. Indeed, despite Mr. Godat’s statement, his own testimony revealed

³ Spire has so far claimed that just a single attorney who represents Spire—in a multi-hundred million dollar case with multiple parties—must defend all of Spire’s depositions. Spire has used this excuse to try to delay depositions of its witnesses from going forward in a timely manner while insisting that other parties produce their own witnesses.

additional categories of documents clearly responsive to Symmetry’s data requests that Spire had never produced. Spire also produced additional, previously unproduced documents at the deposition, which themselves indicate the existence of more unproduced documents. Spire later produced additional responsive documents on February 2, 2022. Nevertheless, neither Mr. Godat himself, nor Spire, has withdrawn Mr. Godat’s plainly untrue testimony.

Not only did Mr. Godat’s testimony reveal multiple gaping holes in Spire’s document production, but he was also unprepared to offer substantive testimony on many topics. *See generally* Appendix at A-i to A-iv. For example, even though one of Symmetry’s deposition topics sought information regarding “Spire’s collection and production of documents in this matter, including the basis for stating that ‘Spire has no additional responsive documents to produce at this time’ in Spire’s September 17, 2021 letter,” the only testimony Mr. Godat testified that he was prepared to offer on the subject was the fact that counsel was involved in document collections and productions, and that a document retention request had been circulated. *Id.* at 28:16-30:16; 30:24-31:3. Mr. Godat indicated that he was unprepared to offer any testimony on basic fact questions related to Symmetry’s deposition topics; or when a document retention notice was sent, who received it, or if there were any updates made to it, *id.* at 28:16-30:16.

Aside from document discovery issues, Mr. Godat was also unprepared to offer basic testimony on multiple other topics that went directly to Symmetry’s claims. Examples of these topics where Mr. Godat’s testimony revealed he was unprepared are discussed below and set forth in transcript excerpts contained in the Appendix to this motion.

Symmetry’s Topic 2 seeks the factual bases for a number of statements that Spire’s general counsel made in a letter purporting to justify Spire’s \$150 million on Symmetry.

Symmetry's Topic 2(b) seeks the basis for Spire's specific statement that "Spire reacted by initiating an OFO to all marketers for the projected start of the storm and short market." Ex. 1. During his deposition, Mr. Godat only offered testimony based on his personal knowledge of Spire's reaction to the Winter Storm, but he could not testify about what others at Spire did. Instead he referred counsel for Symmetry to other Spire witnesses for factual information on this topic. *See* Ex. 4 at 52:3-22; *see generally* Appendix at A-iv to A-v. Mr. Godat was also unable to testify about other facts covered by Symmetry's deposition notice, such as how Spire communicated with upstream suppliers during the storm, again deferring to other Spire witnesses. *See* Ex. 4 at 51:12-13.

Symmetry's Topic 2(f) seeks the factual basis for Spire's statement that "Symmetry customers largely did not conserve natural gas during this period." Ex. 1. Mr. Godat was unprepared to testify about the factual basis for Spire's statement, namely whether Spire tracked burn rates for individual customers. *See* Ex. 4 at 88:12-89:3; *see also* Appendix at A-v.

Symmetry's Topic 2(k) seeks the factual basis for Spire's statement that "Spire was faced with the choice of either shutting off natural gas to all of Symmetry's customers or buying additional gas to maintain their gas service." Ex. 1. In response, Mr. Godat was similarly unprepared to testify about how Spire could support this statement, as he could not even identify the days during the winter storm on which this statement was factually accurate. *See* Ex. 4 at 104:5-16; *see also* Appendix at A-v.

Symmetry's Topic 2(l) seeks the factual basis for Spire's statement that "Spire elected to do the right thing for the community by purchasing and delivering enough natural gas to cover for Symmetry's failure." Ex. 1. On the key factual question of whether there were other sources

of gas available to cover any alleged shortfall, however, Mr. Godat, testified only as to a single employee's opinion on the matter. *See* Ex. 4 at 107:10-108:4; *see also* Appendix at A-v to A-vi.

Symmetry's Topic 2(m) seeks the factual basis for Spire's statement that "Symmetry is charging its customers for gas Spire bought for them during the OFO period." Ex. 1. Mr. Godat testified that he did not even know what this statement was referring to. *See* Ex. 4 at 109:13-24 ("it was Mr. Aplington's statement, so I don't know if there was more to his statement because he may have been aware of something that I wasn't"); *see also* Appendix at A-vi to A-vii.

In sum, Spire's counsel made a series of factual allegations on behalf of the Company and, despite proper notice, the corporate representative that Spire elected to testify, on behalf of the Company, was unprepared and unable to testify about many of them.⁴

Symmetry's Topics 3 and 4 seek information about, respectively, "[a]ny analysis Spire engaged in concerning the issuance of the Operational Flow Order ("OFO") Spire issued on February 10, 2021, including why it was necessary, when it should be issued, and any internal discussions or communications with third parties about this topic," and "[a]ny analysis Spire engaged in concerning the lifting the OFO, including why it was lifted on February 20, 2021, why it was not lifted earlier, and any internal discussions or communications with third parties about this topic." Ex. 1. Mr. Godat testified that he did not have any knowledge of many aspects of this topic, including "any analysis done about how much supply Spire needed for marketers to maintain its system integrity." Ex. 4 at 62:1-8; *see also* Appendix at A-vii to A-viii.

⁴ After Mr. Godat's deposition, Spire has suggested that Mr. Godat cannot testify as to what Mr. Aplington meant in his letter. That is a red herring. First, Mr. Godat was required to discuss these statements with Mr. Aplington in order to be properly prepared to testify about them. Second, Symmetry's inquiry is into the *factual basis* for Mr. Aplington's statements, not Mr. Aplington's state of mind or any privileged advice.

Symmetry's Topic 6 seeks information on the “availability and use of storage gas by Spire in February 2021, including any decisions to draw from storage or to sell gas to third parties.” Ex. 1. Mr. Godat failed to offer Spire's knowledge in response to many of Symmetry's questions on this topic, including whether or not Atmos Energy was the only counterparty to which Spire sold gas. *See* Ex. 4 at 117:25-1188:13; *see also generally* Appendix at A-viii to A-x.

Symmetry's Topic 7 seeks testimony on “Spire's sales of gas to Atmos Energy Corporation in February 2021, including any discussions, communication, or analysis concerning this topic.” Ex. 1. Mr. Godat was unable to provide basic information in response to this question, such as who Spire's contact at Atmos was, and largely referred Symmetry to another Spire employee for additional information. *See, e.g.*, Ex. 4 at 123:10-13; 77:8-10; *see also generally* Appendix at A-x to A-xi.

The only topics Mr. Godat was apparently prepared to testify about related to Spire's calculation of penalties—a topic at the center of Spire's case, but that is only a single component of Symmetry's. *See, e.g.*, Ex 4 at 27:24-28:15.

C. Symmetry Has Attempted to Meet and Confer With Spire to Obtain Necessary Testimony, but Spire Has Stonewalled

Symmetry has attempted to meet and confer with Spire about continuing Spire's deposition on topics for which Mr. Godat was unable to offer testimony. Specifically, Symmetry sent a letter to Spire on January 19, 2022, *see* Ex. 5, and Symmetry discussed options for a further deposition on January 25, 2022, February 1 and February 2, 2022. Symmetry and Constellation also conducted a telephonic conference with Judge Woodruff on February 3, 2022 about topics including continuing the deposition of Spire's representative. Nevertheless, Spire

has refused to produce Mr. Godat or any other representative for a continued deposition on Symmetry's deposition topics.

The need for Mr. Godat's continued testimony (and that of Spire's head of records management, whose deposition Symmetry has also noticed but Spire has resisted) is underscored by Spire's recent and troubling responses to Symmetry's additional Data Requests regarding Spire's document retention. Spire's January 24, 2022 response to Symmetry's Data Request 3.3 stated that Spire did not issue a litigation hold until April 22, 2021. Ex. 6 at Response to DR 3.3. That means that Spire issued a litigation hold: (i) more than two months after it sent Symmetry a demand letter on February 24, 2021 seeking \$150 million in OFO penalties; (ii) almost two months after Symmetry responded on February 26 objecting to Spire's demand and refusing to pay the purported penalties; (iii) more than a month after Spire filed a lawsuit against Symmetry in federal court on March 22; and (iv) nearly a month after Symmetry filed this action against Spire on March 26. Further, the first litigation hold that was issued was sent to only seven individuals, **excluding** multiple members of Spire's Gas Supply and Gas Control teams who are critical to the events in question. *See Marmaduke v. CBL & Associates Mgt., Inc.*, 521 S.W.3d 257, 271 (Mo. App. E.D. 2017) (upholding sanctions order where party failed to meet its "duty to preserve all evidence relevant to [a] potential claim" once it was on notice of that claim); *Fid. Nat. Title Ins. Co. v. Captiva Lake Inv., LLC*, 4:10-CV-1890 CEJ, 2015 WL 94560, at *2 (E.D. Mo. Jan. 7, 2015) (finding that "the failure to impose a litigation hold resulted in the deletion of unknown numbers of emails" and "establishes the necessary intent to support the imposition of sanctions."). More than **seven** months after the already-belated first litigation hold, Spire added five additional individuals to the hold. *See* Ex. 6 at Response to DR 3.3. Moreover, Spire has

offered no accounting of what documents were deleted due to its delay in issuing a litigation hold. Nor has it offered any explanation for that delay.

III. DISCUSSION

The Commission should compel Spire to produce Mr. Godat to testify about the entirety of Spire’s knowledge regarding the deposition topics discussed above. Discovery conducted in a case pending before the Missouri Public Service Commission “may be obtained by the same means and under the same conditions as in civil actions in the circuit court.” 20 CSR 4240-2.090(1). As discussed below, Spire failed to meet its obligations under Missouri’s Rule of Civil Procedure 57.03(b)(4), which governs corporate deposition notices. The topics about which Symmetry seeks Spire’s testimony are not only relevant, but important. Therefore, the Commission should compel a continued deposition on those topics.

A. Spire Has Not Met Its Obligation to Produce a Prepared Corporate Representative

When a corporation’s deposition has been noticed, it must “designate one or more . . . persons who consent to testify on its behalf” for each noticed topic. Mo. R. Civ. P. 57.03(b)(4). The “persons so designated shall testify as to matters known or reasonably available to the organization” for each topic. *Id.* The “mandatory language employed” in Rule 57.03(b)(4) means that the corporation’s representative cannot “avoid testimony on the identified topics by stating that he or she has no personal knowledge of the subject matter.” *State ex rel. Reif v. Jamison*, 271 S.W.3d 549, 551 (Mo. 2008). Indeed, “[p]roducing an unprepared or unknowledgeable witness is tantamount to failure to appear” for a deposition—a sanctionable offense. *Garrett v. Albright*, 4:06-CV-4137-NKL, 2007 WL 9719077, at *2 (W.D. Mo. Oct. 3, 2007) (discussing the federal analog to Rule 57.03(b)(4), Fed. R. Civ. P. 30(b)(6)); *Hemme v. Bharti*, 183 S.W.3d 593, 597 (Mo. 2006) (“[W]here the Missouri and federal rules are essentially

the same, federal precedents constitute persuasive, although not binding, authority.”); *Resolution Trust Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993) (affirming sanctions order where corporation’s representative “is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, [because] the appearance is, for all practical purposes, no appearance at all.”); *see also Frontenac Bank*, 528 S.W.3d at 390 (Mo. R. Civ. P. 61.01, which governs discovery sanctions, “gives a trial court significant discretion to impose sanctions . . . when a party fails to attend depositions.”).

Here, Spire was obligated to prepare Mr. Godat to testify fully in response to Symmetry’s deposition topics. Spire designated Mr. Godat to testify on all of the topics in Symmetry’s deposition notice. *See generally* Ex. 4. While Spire raised objections to certain topics (but not to others), it did not seek a protective order, which would have been its only remedy if it believed that it was not required to prepare a witness to testify in response to the full scope of Symmetry’s deposition topics. *See State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 928 (Mo. 1992) (“If the corporation believes the deposition should not go forth, its remedy is to file a motion for a protective order.”). Accordingly Spire was obligated to prepare Mr. Godat so that he could “testify as to matters known or reasonably available to the organization” for each topic in Symmetry’s notice. Mo. R. Civ. P. 57.03(b)(4).

Spire did not come close to meeting its obligations. By his own admission, Mr. Godat was unprepared to talk about many of the noticed deposition topics relevant to Symmetry’s claims and defenses. There are dozens of instances in the attached Appendix alone where Mr. Godat indicated that he could not testify to what others did and that he could not speak for others. *See generally* Appendix. *But that is exactly what he was obligated to do as the corporate representative.* At best, Mr. Godat testified in response to some questions that he was

only testifying based on his personal knowledge and that, for example, others might be in “a position to represent [what] Spire was doing during” the Winter Storm. *E.g.*, Ex. 4 at 52:13-22 (stating that Mr. Godat’s testimony about what Spire did to prepare for disruption in the gas markets was limited to “the things that [he] can recall that [he] knew took place.”). But Missouri courts are clear that “[t]he purpose of deposing a corporate representative is not to uncover the representative's personal knowledge or recollection of the events at issue,” but to allow the deposing party to obtain comprehensive testimony “regarding the Defendant's knowledge of these matters.” *Jamison*, 271 S.W.3d at 551. Spire failed to meet this requirement.

Notably, Mr. Godat’s sparse, incomplete testimony on some of the topics at issue in this motion stand in stark contrast to the testimony he offered on other topics (such as Spire’s calculation of the OFO penalty) that are at the center of Spire’s argument, but not Symmetry’s case. However, without a prior court order, Spire is not entitled to unilaterally narrow the scope of testimony it must give; and its attempt to do so is sanctionable. *Cf. See Lopez v. Dlorah, Inc.*, No. 11-1101-CV-SJ-ODS, 2012 WL 4023439, at *3 (W.D. Mo. Sept. 12, 2012) (issuing sanctions where a party “unreasonably and improperly narrowed the topics for the 30(b)(6) deposition” and “failed to arrange for a corporate representative prepared to testify about those narrowed topics”).

Unfortunately, Spire’s tactic of trying to unilaterally limit discovery is consistent with its past abusive practices before this Commission. In late 2019, the Missouri Court of Appeals reversed a portion of an order from the Commission allowing Spire to collect costs it incurred to replace certain mains and service lines. *See Matter of Spire Missouri Inc.*, 593 S.W.3d 546, 554 (Mo. App. W.D. 2019). Spire had blocked discovery into the deterioration of its pipes, asserting that the pipes at issue “are by definition worn out or in a deteriorated condition.” *Id.* Because

Spire had improperly narrowed discovery in this way, the Court of Appeals reversed the related parts of the Commission's order as "not supported by competent and substantial evidence." *Id.* at 555. Spire's behavior in this case is no different because it amounts to Spire's unilateral determination about what is relevant. If that behavior is left unchecked, this proceeding risks not being supported by competent and substantial evidence. Accordingly, Spire must be compelled to testify on the topics Symmetry noticed; not just those on which Spire wants to offer testimony. And if it fails to do so after having been given a second chance, it should face severe sanctions.

B. The Further Testimony that Symmetry Seeks Goes to Important Issues in This Case

Symmetry is entitled to discovery regarding any matter that is relevant to the subject matter of the pending action. Mo. R. Civ. P. 56.01(b). As discussed above, the topics listed in the Background section go directly to Symmetry's arguments that Spire improperly issued its OFO, improperly left it in place for too long, and about Spire's purported actual costs—topics relevant to whether Spire violated its Tariff and whether, and how much, Spire is entitled to recover from Symmetry. Those topics go to the core issues in Symmetry's complaint, such as whether Spire had a valid basis for issuing the OFO, whether the OFO's duration was permissible under the Tariff, whether Spire provided sufficient notice and instruction to its transportation customers as required under its Tariff, and whether Spire properly calculated any purported OFO penalties. Symmetry is thus entitled to Spire's testimony on those topics.

Spire's further testimony on Symmetry's Topics 1 and 9, which concern Spire's document collection, production and preservation, are particularly important to the integrity of these proceedings. As discussed, Mr. Godat was unprepared to explain how Spire's representations that it had produced all responsive materials square with the fact that Spire had only produced 45 documents at the time of the deposition. Mr. Godat was similarly unprepared

to discuss what steps, if any, that Spire took to ensure documents were preserved or how it collected documents. That cannot stand. Spire must explain why its production is so implausibly small, or else neither Symmetry nor the Commission can have confidence that Spire has disclosed everything it is required to disclose.

Spire's further testimony on Topic 9 is particularly urgent in light of its recent, post-deposition admission that it did not issue a document preservation notice until April 22, 2021, months after it would have anticipated litigation with Symmetry and a month after it commenced litigation. Indeed, there is overwhelming circumstantial evidence that Spire's failure to issue a timely document preservation notice caused Spire to destroy responsive material. For instance, Mr. Godat testified that Spire personnel use emails, ICE instant messages, and Microsoft Teams chats to communicate. *See* Ex. 4 at 150:1-15; 155:21-24. But Spire has failed to produce any Microsoft Teams chats or ICE instant messages, except for one excerpt from an ICE chat, nor has it produced those types of communications, or even emails, from its gas traders and schedulers. Those communications would have been responsive to many of Symmetry's data requests. They are also relevant to whether Spire was justified (or not) in purchasing gas at spot prices, Spire's decisions to sell gas and capacity, and real-time discussions of supply and demand for natural gas on different systems. While Spire has suggested in previous discussions with Symmetry that Teams and ICE messages cannot be saved, that is not true. Indeed troublingly, Spire has produced one excerpt of one ICE instant message despite its claims that ICE messages were not preserved. The Commission and Symmetry need to know whether Spire spoliated evidence, such as Microsoft Teams chats, ICE messages, or emails within its Gas Supply and Control groups. Spire's further testimony on Symmetry's Topics 9 and 1 is therefore critical.

C. The Commission Should Compel Spire to Produce Its Witness to Complete the Corporate Deposition

While the Commission would be well within its discretion to sanction Spire for its obstructive tactics at this juncture, Symmetry prefers at this stage to first attempt to obtain all of the testimony it is entitled to. The Commission should therefore follow the lead of Missouri courts that have compelled an offending corporation to reproduce a representative who was initially unprepared to testify. For example, in *Jamison*, the Missouri Supreme Court held that the circuit court had abused its discretion by overruling a motion to compel production of a second corporate representative. *See* 271 S.W.3d at 551. In that case, the defendant corporation produced a corporate representative who testified, like Mr. Godat, based on his own knowledge of an incident, rather than gathering information from other employees that the corporation had admitted had first-hand knowledge of the same incident. *See id.* The Court held that, under those circumstances, the corporation had failed to “testify regarding [its] organizational knowledge of the identified deposition topics,” and so should be required to prepare and produce a witness for a further deposition. *Id.*

Jamison is directly on point here. Where Mr. Godat was not completely unprepared to address Symmetry’s topics, his refrain was that his personal knowledge was limited and that others at Spire could fill in the extensive gaps in his knowledge. *See, e.g.,* Ex. 4 at 78:23-79:1 (“ask Justin [Powers]”). Indeed, Spire’s counsel has suggested that Symmetry can address Spire’s admitted failure to prepare its corporate representative by producing other employees for individual depositions. But Spire is obligated to produce a corporate witness and cannot dictate a discovery plan for its litigation adversary. Moreover, Spire’s attempt to excuse its breach by offering individual testimony would undermine the purpose of Rule 57.03(b)(4), which “is to permit a party to depose an opposing corporation's representative under circumstances in which

the statements made by the witness on the identified topics will be admissible against and binding on the corporate party.” *Jamison*, 271 S.W.3d at 551. Spire’s witness shell game leaves Symmetry with “little access to what knowledge could be imputed to the corporation.” *Id.*; *cf.* Fed. R. Civ. P. 30(b)(6) Advisory Committee Notes (noting that the purpose of corporate representative depositions is to “curb the ‘bandying’ of organizations where a series of organizational employees are deposed in turn but each disclaims knowledge of facts that are clearly known to the persons in the organization and thereby to it.”).

Spire should be compelled to abide by the discovery rules that apply to this important proceeding and ordered to re-produce a corporate representative on the topics for which Mr. Godat was unprepared to testify. Should it fail to do so, Symmetry will move for sanctions.

IV. CONCLUSION

For the reasons discussed above, Symmetry respectfully requests that the Commission order Spire to produce its corporate representative to testify regarding facts that are known or reasonably available to Spire on the following topics in Symmetry’s deposition notice to Spire: 1, 2b; 2f; 2k; 2l; 2m; 3; 4; 6; 7; 8; and 9.

Dated: February 4, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February 2022, a copy of the foregoing **Symmetry Energy Solutions, LLC's Motion to Compel Further Deposition Testimony from Spire Missouri, Inc.'s Corporate Representative** 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.

/s/ Douglas L. Healy
Douglas L. Healy

Appendix

Examples of Spire's Failure to Prepare Mr. Godat to Testify on Duly Noticed Topics (All emphases added)

Topics 1 & 9

Topic 1: Spire's collection and production of documents in this matter, including the basis for stating that "Spire has no additional responsive documents to produce at this time" in Spire's September 17, 2021 letter (Attachment A).

Topic 9: "Spire's document retention policies."

Ex. 4 at 17:1-13:

Q. Okay. And do you feel qualified to testify on behalf of Spire -- Spire Missouri, Inc. and Spire Missouri West on each of these topics?

MR. GORE: I'm just going to object to the use of the term qualified as vague. You can answer.

A. Yeah. I'm going to -- yeah, I'm testifying on the fact that I've reviewed these documents and I'm familiar with the information that's been presented. I'm not necessarily the person that produced them, so to the extent I can talk about them, I don't necessarily have all the information that went into putting those together.

Ex. 4 at 27:24-28:15:

Q. What did you do specifically to prepare yourself to testify about this topic number one?

A. I reviewed the information that's in the binder. I could run through -- it's all of the information that was used to calculate the OFO penalties. It was -- it was the invoices that showed what our cost to gas was. It was the imbalance calculations on the spreadsheets that showed the nominated volumes versus actual volumes.

[...]

A. I reviewed all the Gas Daily pricing which is the -- the number that gets calculated in the OFO penalty calculation. So I mean, I could --I could go through every document here, but basically reviewed the information that had been turned over that was used to calculate the damage calculations.

Ex. 4 at 28:16-29:17:

Q. (By Mr. Bauer) Was there a time related to the winter storm event that Spire sent a request to its employees that they preserve any documents related to the winter storm?

A. Yes, I believe we had a retention request from -- from inside counsel.

Q. And when was that sent out?

MR. GORE: I'm going to object, beyond the scope of the notice. You can answer if you know.

A. Yeah, I don't know it off the top of my head.

Q. (By Mr. Bauer) Do you know, was it sent before or after Spire brought a lawsuit against Symmetry?

MR. GORE: I'm going to object, foundation. I will instruct the witness not to speculate if you don't know.

A. Yeah, I don't have that date off the top of my head.

Q. (By Mr. Bauer) Who sent it?

A. Yeah, I don't recall that off the top of my head either.

Q. Do you know who it was sent to?

A. I do not. I would have to find out who sent it and see who the list was on that distribution.

Ex. 4 at 30:18-3:13:

Q. (By Mr. Bauer) What did Spire do to collect documents related to this case?

A. I would have to -- I wasn't the one specifically collecting them, so that would -- that would have to be asked by our regulatory team that runs that process.

Q. So if I wanted to ask questions about Spire's collection of documents in this matter, who would I ask?

A. I would say Scott Weitzel and then our inside and outside counsel.

[...]

Q. (By Mr. Bauer) So the -- the folks that you mentioned earlier in legal and regulatory made the decisions of -- from whom to collect documents in this case?

A. That's my understanding of the process.

Q. Do you have -- do you know specifically who made the decisions in this case?

A. I do not know specifically.

[...]

Q. What I'm trying to understand -- tell you exactly what I'm doing. Is wondering whether it's just going to be a waste of everybody's time if I ask you about a certain data request and say Spire only produced one document or didn't produce any documents. Can you tell us about that? I don't want to go through that whole exercise if you don't know.

A. Yeah, like I say --

Q. So --

A. I was not the one that specifically pulled all the documents. So I'm prepared to talk about the information that was turned over, but I'm not in a situation to know if there was any -- yeah, if -- yeah. Like I say, I'm here to talk about the documents that are here. I couldn't tell you if --if there's another document out there that -- since I wasn't specifically in the position of preparing the documents.

Q. So let's say I ask you what are the documents that are within -- that were within Spire that are correspondence communications relating to whether or not to issue an OFO, and I showed you whatever documents that were produced in this case related to that. Would you be in a position to tell me whether there are others that were withheld or whether that's all there were or whether there are no documents?

MR. GORE: I'm going to object to the hypothetical, compound, beyond the scope.

A. Yeah. Like I say, it is my assumption when they asked the questions, that the documents in our possession have been produced.

Ex. 4 at 337:17-338:12:

Q. From whom did Spire collect documents when Spire was responding to the Symmetry data requests? I missed that question.

A. That -- that was a process that inside and outside counsel worked the -- the ones that -- the documents that I reviewed, and the individuals that I spoke to about the collection of those documents were the ones that I referred, which was Patty Reardon, Bob McKee, Scott Weitzel. Was there any others? Justin Powers.

Q. Did Spire collect documents from anyone else other than those persons?

A. Those are the individuals that I had the conversations with about the individual documents that I collected. I couldn't say that that is the full extent of anybody that was asked a question about the collection of the documents.

Q. And whom would I have to ask to get the answer to my question?

A. I would say our inside, outside counsel.

Topic 2b: The basis for Spire's statement that "(4) Spire reacted by initiating an OFO to all marketers for the projected start of the storm and short market."

Ex. 4 at 51:4-13:

Q. And then you also mentioned a lot of communications with upstream suppliers. Who had -- who is in charge of having those communications?

A. Mainly Justin Powers.

Q. And does he -- do you know -- I don't want to ask you a you know. But does Spire know how Mr. Powers communicates with those folks? Is it verbally or by e-mail or by text or --

A. You know, I don't know exactly. Yeah. I would have to ask Mr. Powers.

Ex. 4 at 51:14-52:22

Q. All right. So I want to make sure that I have given you the opportunity to give a full answer to what actions Spire took to prepare for the winter storm other than issuing the OFO. You've been testifying about that for a few minutes, but I just want to make sure, is there anything else that you haven't mentioned to me?

MR. GORE: I'm going to -- I'm going to object, vague as to time period. How far back do you want him to go?

MR. BAUER: The question is not limited by time period.

[. . .]

Q. (By Mr. Bauer) Okay. So --

A. If that -- I'm just saying there's a lot of activity and there's a lot of employees, so I mentioned some of the highlights of the things that I knew were going on, but I can't imagine that there probably wasn't a lot of other things taking place that I don't necessarily know about them.

Q. So now let me limit the question by time and say from the time that gas markets were forecast to become very short in February until the time of issuing the OFO, what did Spire do to prepare for the disruption in the gas markets?

A. Like I mentioned, the things that I can recall that I knew took place were what I just mentioned, but like I say, I don't think I'm in a position to represent everything that Spire was doing during that three- or four-day period.

Topic 2f: The basis for Spire's statement that "Symmetry customers largely did not conserve natural gas during this period."

Ex. 4 at 88:8-15:

Q. So on -- on a daily basis there is information within the Spire system that allows it to identify which customers are conserving natural gas and which ones aren't?

A. Yeah, I couldn't -- I couldn't answer whether we -- whether Spire has the information to -- to make that determination or not on an individual customer basis.

Topic 2k: The basis for Spire's statement that "(13) Spire was faced with the choice of either shutting off natural gas to all of Symmetry's customers or buying additional gas to maintain their gas service."

Ex. 4 at 104:5-16:

Q. (By Mr. Bauer) For what days during February does Spire believe that this sentence in topic 2K was factually accurate?

A. Yeah, based on the document review, I think that's something that Justin Powers would have to consult on.

Q. Okay. Sitting here today, you don't know?

A. Like I say, that's a hindsight review. I don't know if there's even a way to mathematically determine that. That's not an answer that I have today.

Topic 2l: The basis for Spire's statement that "(14) Spire elected to do the right thing for the community by purchasing and delivering enough natural gas to cover for Symmetry's failure."

Ex. 4 at 107:10-108:9:

Q. (By Mr. Bauer) So on a day in which Symmetry didn't deliver as much gas as it had nominated, did Spire have to buy that entire shortfall or are there any other sources for Spire to, as it says here, cover for Symmetry's failure?

MR. GORE: I'm going to object, improper hypothetical, foundation, beyond the scope of the notice. You can answer.

A. We were -- we were buying to cover the shortfall.

Q. (By Mr. Bauer) And do you have to buy --

A. According to Mr. Powers, he was buying to cover the shortfall.

Q. Did he have to buy the entire shortfall or were there other sources?

MR. GORE: I'm going to object, foundation, vague.

A. His position was that he had to buy to cover the entire shortfall during his conversation.

Q. (By Mr. Bauer) And you say his position, what -- what --

A. Talking with Justin, he felt like the incremental purchases he made were to cover the marketers' shortfall.

Topic 2m: The basis for Spire's statement that "(16) Symmetry is charging its customers for gas Spire bought for them during the OFO period."

Ex. 4 at 109:7-24:

Q. (By Mr. Bauer) Let's look at topic 2M.

It says (quote as read):

Symmetry is charging its customers for gas Spire bought for them during the OFO period.

What's Spire's basis for saying that?

A. I know we had a customer invoice where a customer was being charged the Gas Daily pricing. I don't recall off the top of my head if that was -- if that was a Symmetry invoice. Mr. Aplington must have been aware of that document. I just don't recall it off the top of my head here.

Q. And is that the -- is that the full factual basis for that statement?

A. Like I say, it was Mr. Aplington's statement, so I don't know if there was more to his statement because he may have been aware of something that I wasn't.

Topic 3: “Any analysis Spire engaged in concerning the issuance of the Operational Flow Order (‘OFO’) Spire issued on February 10, 2021, including why it was necessary, when it should be issued, and any internal discussions or communications with third parties about this topic.”

Ex. 4 at 62:1-8:

[Q.] And -- and let me just start with the question is was there any analysis done about how much supply Spire needed for marketers to maintain its system integrity?

A. Yeah, I wasn't specifically running the model. Yeah, I couldn't speak for Justin or for gas control as to whether or not they -- they knew what the expected burn was going to be for the marketers.

Ex. 4 at 136:9-19:

Q. Did -- did Spire considering lifting the OFO before Southern Star lifted theirs?

A. I can't speak for Justin, but I don't recall having any conversations because even as late as the 18th, you know, roughly 25 percent of the supply was still force majeure'd and the marketers were still shorting the system by a huge amount at that point. So like I say, if Justin had conversations, I'm not aware of those, but I don't recall any conversations prior to the day that we actually lifted it.

Ex. 4 at 247:18-248:16:

(By Mr. Howell) Okay. Respectfully, that's not an answer to the question that I asked. The question I asked concerned whether you looked at any Spire spreadsheet, analysis, data, anything that addressed this issue of demand -- projected demand increase.

A. I --

MR. GORE: Let me object. I'm going to object because you just asked a completely different question and framed it as a question that you previously asked. So I object to that misstatement. The current question I'm going to object to as compound and lacking foundation. You can answer.

A. Yeah, I mean, that being, what, six, eight months ago, I can't recall exactly everything I looked at. I know Justin and I had a lot of conversations about what he was seeing in the forecast from a demand perspective.

So I know we definitely spent ample time talking about what we saw, you know, as potential usage on the system. Now, whether I looked at the specific spreadsheet or he was giving me numbers, I don't recall that from, you know, months ago.

Topic 4: "Any analysis Spire engaged in concerning the lifting the OFO, including why it was lifted on February 20, 2021, why it was not lifted earlier, and any internal discussions or communications with third parties about this topic."

Ex. 4 at 269:13-270:4

Q. Okay. Did you conduct any analysis or have any conversations about lifting the OFO on gas day 14?

A. I'm not aware of any analysis. I mean, if Justin and his team had it and didn't raise it to my level -- I can't speak for them, but like I say, the situation was bad enough all the way through the 18th that it didn't even warrant a conversation.

Q. Are you aware of any analysis or did you have any conversations about lifting the OFO on gas day 15?

MR. GORE: I'm going to object, asked and answered.

A. Yeah, I mean, I'll give my same answer. I never had a conversation with Justin, but not to say that he didn't have that conversation with his team.

Topic 6: "The availability and use of storage gas by Spire in February 2021, including any decisions to draw from storage or to sell gas to third parties."

Ex. 4 at 117:18-118:13:

[Q:] I just want to make sure that in our last discussions that I asked you the broad question is, you know, did Spire sell any gas to third parties in February 2021?

A. We talked through the Atmos transaction where we sold gas to -- storage gas to Atmos.

Q. Anything else? Any other sales?

A. I don't recall any other sale transactions. I'm trying to remember if -- on the GSC -- yeah, I have to remember. There may have been -- I'm trying to recall. There may have been a day or two on the weekend where we had a day where we would have a little extra gas. I'd have

to look back, whether it was a party that -- to try to minimize the daily purchase where we may have sold a little bit back.

Q. And how is that analysis?

A. It was minimal. Huh?

Q. How was that analysis made at Spire?

A. That's something Justin Powers and his team would have been doing.

Ex. 4 at 120:17-121:11:

COURT REPORTER: Question: And did that factor into decisions by Spire to purchase gas during that period of time?

MR. GORE: Objection, beyond the scope of the notice, vague.

A. Yeah, I mean, all the moving parts from a gas supply perspective, I mean, Justin would have to be the one that actually talked about the daily decisions that he made, and that's where I keep getting back to the hindsight review of, you know, if you look back with perfect knowledge of everything happened, you could probably draw some conclusions one way or another, but you know, as monitoring the portfolio those are all factors that go into play.

Q. (By Mr. Bauer) So if I want to ask questions about the thinking that went into gas purchases on each day, Justin is the person I should ask?

A. That's correct.

Ex. 4 at 68:15-22:

Q. And so during the winter period did Spire always pull out the maximum that it could out of this conservative storage position that you all took?

A. Not necessarily on every day.

Q. But did you do it on any days?

A. You know, I would have to see. There was probably days that we came close.

Topic 7: “Spire’s sales of gas to Atmos Energy Corporation in February 2021, including any discussions, communication, or analysis concerning this topic.”

Ex. 4 at 123:10-13:

Q. Who was Spire’s contact at Atmos, do you know?

A. I do not know that off the top of my head.

Ex. 4 at 77:1-20:

Q. How was that price arrived at?

A. Justin did the transaction, so it would have been a negotiated price between Justin and Atmos.

Q. Okay. As the representative of Spire today, do you know anything about the back and forth of that negotiation?

A. Like I say, Justin was handling it. I don’t recall what the big offer price that went --it would have went back and forth.

Q. And was -- the 500,000 dekatherms, was that the amount that Spire offered for sale originally?

A. It was the amount that Atmos requested.

Q. Did Spire propose any different quantity of natural gas?

A. You know, I don’t -- I don’t recall a different volume being discussed. Justin may have had other conversations. I don’t -- I don’t recall another volume.

Ex. 4 at 124:7-125:3:

Q. My memory is not perfect, but I feel like I asked you all the questions, the who, what, whys, wheres about all of this and you knew some things and referred me to Mr. Powers on some others, including -- forgive me if I’ve asked this already, but how was the price arrived at?

A. That’s where I said it was just a negotiation between Justin and Atmos.

[...]

Q. And how was the amount of gas arrived at?

A. From what I remember, I would have to -- yeah, I'd have to confirm with Justin. Yeah, I would have to confirm that with Justin.

Ex. 4 at 78:23-79:1:

Q. When Atmos -- when Atmos and Spire began discussing this transaction, which party suggested that \$500,000 -- 500,000 dekatherm amount?

A. I'm not sure. I'd have to ask Justin.