

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

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

**THE EMPIRE DISTRICT GAS COMPANY’S RESPONSE TO SYMMETRY’S MOTION
FOR RELIEF FROM ORDER ON EMPIRE’S CORRECTED MOTION FOR
PROTECTIVE ORDER AND SYMMETRY’S PROPOSED ALTERNATE
PROTECTIVE ORDER**

Pursuant to Missouri Public Service Commission (the “Commission”) Rule 20 CSR 4240-2.080 and the Commission’s February 23, 2022 Order Withdrawing Protective Order and Directing Response, Respondent The Empire District Gas Company d/b/a Liberty Utilities or Liberty (“Empire”), by and through its undersigned counsel, hereby submits this response to Symmetry’s Motion for Relief from Order on Empire’s Corrected Motion for Protective Order and Symmetry’s Proposed Alternative Protective Order. Empire respectfully requests that the Commission grant its Corrected Motion for Protective Order and allow Empire to designate certain commercially sensitive commodity price, gas purchase, and customer materials—which are relatively few and irrelevant to the core issues in this proceeding—as “Highly Confidential” in accordance with Commission Rule 20 CSR 4240-2.135(4).

I. Background

In its Corrected Motion for Protective Order, Empire explained that due to the nature of certain materials that had been requested by Symmetry Energy Solutions, LLC (“Symmetry”)

relating to commodity prices, actual or planned purchases, and competitively sensitive information regarding natural gas retail and transportation customers and suppliers, it was requesting the ability to designate such materials as “Highly Confidential.”¹ Empire explained that the “Confidential” designation would likely not provide adequate protection because the materials—which are relatively few at this point in the proceeding—contain information that could provide a competitive advantage over Liberty.² Furthermore, Empire explained that some of the materials may include sensitive confidential information regarding the natural gas usage and meter data for retail and transportation customers.³

Symmetry, in its Motion for Relief, agreed to allow Empire to use the “Highly Confidential” designation.⁴ But rather than treat the designation consistent with the higher protection that should be provided by such designation it proposed to hollow out the designation of any meaning. Symmetry’s proposed protective order would allow “key employees who are subject matter experts and/or those who may file testimony to view information necessary for such testimony” to review such “Highly Confidential” materials after signing a non-disclosure agreement.⁵ Symmetry explains that the “Highly Confidential” designation would prevent certain Symmetry employees from accessing the competitive and extremely sensitive information that they “would have access under this Commission’s standard ‘Confidential’ procedure.”⁶ Symmetry also asserts that “there can be no prejudice to Empire.”⁷

¹ Corrected Motion for Protective Order, Case No. GC-2022-0062, at 2 (Feb. 11, 2022) (“Empire Motion”)

² *Id.*

³ *Id.*

⁴ Symmetry’s Motion for Relief from Order on Empire’s Corrected Motion for Protective Order and Symmetry’s Proposed Alternate Protective Order, Case No. GC-2022-0062, at 2 (Feb. 22, 2022) (“Symmetry Motion”).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 3. To be clear, Empire’s concerns with the disclosure of material designated as “Highly Confidential” has little to do with prejudice in this proceeding. Rather Empire is concerned with the competitive harms it may suffer by providing Symmetry’s self-selected employees with its commercially sensitive materials.

II. Empire’s Proposed Protective Order Strikes a Better Balance of Protecting the Disclosure of Commercially Sensitive Materials and Providing Necessary Persons Access to Such Materials

Empire’s issue with Symmetry’s approach is that by simply signing a protective order any Symmetry employees that it determines—presumably in its own discretion—to be subject matter experts or employees who Symmetry decides “may” file testimony will have access to all of the “Highly Confidential” materials Empire has sought to protect. For all Empire knows the Symmetry employees that will be granted such unfettered access may be the same employees who can help Symmetry gain a competitive advantage by reviewing Empire’s pricing and purchase information—an area in which Symmetry is a competitor of Empire—or gain a competitive advantage with respect to Empire’s transportation customers and suppliers. In short, Symmetry’s protective order would render the distinction between a “Highly Confidential” and “Confidential” designation largely meaningless.

Empire’s proposed protective order strikes a better balance. Empire’s proposed protective order maintains the meaning of the “Highly Confidential” designation provided in the Commission’s Rules by limiting the disclosure of Empire’s most competitively sensitive information to counsel rather than providing it to any Symmetry employee who signs a non-disclosure agreement. On the other hand, Empire’s protective order also provides Symmetry with a path to allowing its employees to review the materials Empire has designated as “Highly Confidential.” Specifically, Empire’s proposed protective order allows Symmetry to challenge

“Highly Confidential” designations which it disagrees with⁸ and work through the Commission’s dispute resolution procedures set forth in Commission Rule 20 CSR 4240-2.090(8).⁹

In Empire’s view, under Empire’s proposed protective order it would be valid for Symmetry to utilize the Commission’s dispute resolution procedures to challenge whether a particular Symmetry employee with a defined role could review particular materials designated as “Highly Confidential.” This approach would ensure that the “Highly Confidential” designation retained its intended meaning and the only exceptions were for Symmetry employees that need to see a particular “Highly Confidential” document. In the unlikely event that Symmetry and Empire could not reach an agreement regarding whether such employee could review such “Highly Confidential” material only then would the Commission need to be involved.

III. The “Highly Confidential” Materials are Irrelevant to this Proceeding

Symmetry’s insistence that its employees should have access to Empire’s sensitive commercial materials is at best puzzling given that such information has no relevance to this proceeding. Empire’s Tariff is crystal clear regarding how the operational flow order (“OFO”) penalties that Symmetry incurred and are at issue in this proceeding are to be calculated: \$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.¹⁰ Empire’s sensitive commercial information has nothing to do with this calculation or any other aspect of the case.

⁸ Apparently, “Symmetry does not agree that Empire’s discussions on gas pricing and premiums as well as how it determines its firm sales obligations would constitute Highly Confidential materials.” But the Symmetry Motion is the first that Empire has learned of such disagreement.

⁹ Empire Motion at 2-3 (“If a party disagrees with the “Highly Confidential” designation of any information, the party shall follow the informal discovery dispute resolution procedures set forth in Commission Rule 20 CSR 4240-2.090(8). If the party exhausts these dispute resolution procedures, the party may file a motion challenging the designation.”).

¹⁰ The Empire District Gas Company Transportation Service Natural Gas Tariff, P.S.C. Mo. No. 2, 1st Revised Sheet No. 43, effective April 1, 2020.

If the limited materials that Empire has designated as “Highly Confidential” were central or even relevant to Symmetry’s case, Empire might be more understanding of Symmetry’s request to allow certain Symmetry employees to review certain materials. But the “Highly Confidential” materials are not relevant to this proceeding and thus Symmetry’s proposal to give any employee who signs a non-disclosure agreement access to any and all of Empire’s “Highly Confidential” materials is troubling. This is particularly so given that Empire’s proposed protective order offered a better approach to balancing the parties’ respective interests.

IV. Conclusion

In light of the foregoing, Empire respectfully requests that the Commission grant its Corrected Motion for Protective Order and decline to adopt Symmetry’s Alternative Protective Order.

/s/ Elizabeth W. Whittle

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

Benjamin N. Reiter (*Admitted Pro Hac Vice*)

NIXON PEABODY LLP

799 9th Street, N.W., Suite 500

Washington, D.C. 20001

(202) 585-8338

ewhittle@nixonpeabody.com

(202) 585-8721

breiter@nixonpeabody.com

Counsel to The Empire District Gas Company

Sarah Knowlton (# 71361)

Liberty Algonquin Business Services

General Counsel, Liberty Utilities

116 North Main Street

Concord, NH 03301

(603) 724-2123

Sarah.knowlton@libertyutilities.com

Christopher M. Mason (*Admitted Pro Hac Vice*)

NIXON PEABODY LLP

55 West 46th Street, Tower 46

New York, New York 10036

(212) 940-3017

cmason@nixonpeabody.com

Counsel to The Empire District

Gas Company

Diana Carter (MBE#50527)

602 S. Joplin Avenue

Joplin, MO 64802

(417) 626-5976

Diana.Carter@libertyutilities.com

Dated: March 4, 2022

Certificate of Service

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 4th day of March 2022.

/s/ Diana Carter

Diana Carter