

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Symmetry Energy Solutions, LLC,)	
)	
Complainant,)	
)	
v.)	Case No. GC-2021-0316
)	
Spire Missouri, Inc. and its operating unit)	
Spire Missouri West,)	
)	
Respondents.)	

**SYMMETRY’S RESPONSE IN OPPOSITION TO SPIRE’S
MOTION FOR PROTECTIVE ORDER**

Symmetry Energy Solutions, LLC (“Symmetry”) respectfully requests that the Public Service Commission (“Commission”) deny the motion of Spire Missouri, Inc. (“Spire”) for a protective order prohibiting the depositions of Spire employees Robert McKee and Scott Carter.

I. INTRODUCTION

Spire’s cases now pending before the Commission involve three Complainants (including Symmetry) and more than \$200 million in disputed charges. At issue are the exorbitant penalties which Spire seeks to impose on Complainants and their customers for alleged noncompliance with Spire’s improperly-issued Operational Flow Order (“OFO”) in February 2021. Despite the enormous stakes for all litigants—as well as Missouri consumers—Spire has consistently blocked Complainants’ efforts to conduct meaningful discovery. That pattern now continues with testimonial discovery. Although entitled by statute to at least ten depositions per Complainant (for a total of thirty depositions), Complaints have to date noticed only seven witnesses total. Despite Complainants’ reasonable and targeted attempts at discovery, Spire now seeks to unjustifiably block Complainants access to two crucial witnesses: (1) Spire’s Manager of Records Retention, Robert McKee, whose testimony is critical to addressing serious concerns

regarding Spire's failure to preserve and produce key evidence in these matters; and (2) Spire Missouri President Scott Carter, who was directly and repeatedly consulted regarding Spire's critical OFO decisions and natural gas sales during February 2021, according to Spire's own corporate representative.

Spire's motion for a protective order is an extension of its broader efforts to thwart discovery on topics favorable to Symmetry's case. To date, Spire has produced to Symmetry fewer than 60 documents in response to the 103 Data Requests Symmetry served in March 2021 seeking information critical to testing the propriety of the OFO and associated penalties. Incredibly, Spire has not produced any internal emails, chats, or other contemporaneous internal communication during Winter Storm Uri in response to Symmetry's Data Requests, save for a single email, in response to Symmetry's Data Requests. For months, Spire has continued to represent that it had no additional responsive documents to produce.

Recent admissions raise profound questions about Symmetry's failure to disclose and/or preserve relevant evidence even after it was on notice regarding this litigation. First, Spire's corporate representative testified to the existence of broad categories of responsive documents that Spire has not produced, including emails, ICE chats and Microsoft Teams messages utilized by Spire employees. Second, on January 24, 2022, Spire admitted in writing that it did not institute a litigation hold until April 22, 2021, more than two months after issuing its demand letter and more than a month after filing suit against Symmetry in federal court. Third, Spire's counsel implied during a February 1, 2022 phone conference (with the Administrative Law Judge present) that Spire did not take steps to suspend its document destruction policies in a timely manner, thereby allowing evidence to be deleted.

Spire's decisions and actions regarding the implementation and duration of its OFO and its likely failure to preserve evidence are, simply put, two of the most crucial issues in this case. The depositions of the Manager of Records Retention, Robert McKee, and Spire Missouri President, Scott Carter, are necessary to shed light on these topics. Spire's latest attempt to evade its discovery obligations should be rejected, and its request for a protective order denied.

II. BACKGROUND

A. Spire Demands \$150 Million in OFO Penalties from Symmetry's Gas Customers Following Winter Storm Uri

This case is about Spire's improper attempt to benefit from Winter Storm Uri by misusing the OFO provisions of its Tariff to penalize gas marketers and their customers. Symmetry is a natural gas marketer engaged in the purchase of natural gas from upstream suppliers and sale to end use customers, 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 via interstate pipelines and local distribution companies. Spire is a local distribution company that physically transports gas to numerous Symmetry customers in Missouri.

In February 2021, Winter Storm Uri wreaked unprecedented havoc upon the natural gas supply throughout the American Midcontinent region. Spire seeks to impose more than \$150 million in penalties on Symmetry, based on Symmetry's alleged violation of an OFO issued by Spire 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 enormous and unjustifiable 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.

In order to obtain necessary discovery into the justifications for and propriety of Spire’s OFO, Symmetry has served Data Requests and noticed several depositions, including a deposition of Spire’s corporate representative pursuant to Mo. R. Civ. P. 57.03(b)(4). *See* Ex. 1 & 2.¹ Symmetry’s first set of Data Requests, which Symmetry served on Spire on March 26, 2021, seeks various categories of documents and information concerning the propriety of Spire’s OFO and associated penalties, including any documents and communications regarding the issuance and termination of the OFO. *See* Ex. 1. In response to those Data Requests, Spire produced to Symmetry fewer than 60 documents.² That number of documents is implausibly

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

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 some are clearly responsive to such requests.

small given the (reasonable) breadth of Symmetry's requests, which are the subject of Symmetry's ongoing meet and confer efforts, as well as Symmetry's motion to compel which was filed earlier today.

Symmetry took the deposition of Spire's corporate representative, George Godat, on December 13, 2021. *See Ex. 3.* Mr. Godat's testimony made clear that Spire's President, Scott Carter, is likely in possession of information relevant to the subject matter of the instant dispute. That testimony also raised serious questions about the potential spoliation of evidence in this case. Following Mr. Godat's testimony, the Complainants properly noticed the depositions of Messrs. Carter and McKee to obtain additional information on these vital issues. *See Ex. 4.* In response to Symmetry's deposition notices, Spire has sought to block these two individual depositions by filing motions for protective orders. *See Spire's Motion for Protective Order* (February 2, 2022), Dkt. 88 ("Mot.").

B. Mr. Godat's Testimony Demonstrates that the Deposition of Mr. Carter is Proper and Necessary

Scott Carter's deposition is proper and necessary because he has relevant information regarding Spire's actions that are central to this case including, but not limited to, Spire's February 2021 OFO and its sale of gas to Atmos during the OFO period. During his deposition in December, Spire's Vice President for Gas Supply, George Godat, testified that he reports directly to Spire Missouri President Scott Carter. *See Ex. 3* at 15:6-9. Mr. Godat also testified that the decision regarding when and whether to issue an OFO was made in direct consultation Mr. Carter:

Q. Who was involved at -- at Spire in February of 2021 when deciding when and whether to have an OFO?

Moreover, gaping holes in Spire's productions remain, not least the absence of contemporaneous internal communications on key topics, including the issuance of the OFO and its duration.

A. It was primarily Justin Powers who oversees gas supply and myself. I did -- I did consult with Scott Carter, my boss. But ultimately I was the one who made the decision.

See id. at 44:23-45:4. Mr. Carter was also involved in discussions regarding the sale of 500,000 dekatherms of gas to Atmos during the OFO. *See id.* at 75:17-76:10 (“I had a conversation with my boss Scott Carter to make sure he was aware of it.”). Mr. Godat also indicated that he provided information to Mr. Carter regarding the circumstances surrounding the OFO. *See id.* at 203:1-4 (“I kept him informed of what was going on and that . . . we were in a position where we thought we had to issue an OFO.”). However, Mr. Godat was unable to describe Mr. Carter’s actions or discussions surrounding these decisions, which are central to Symmetry’s case that the OFO was not properly executed. *See id.* at 203:14-18 (“So I mean, I had enough going on that I wouldn’t be able to speak for -- you know, for all the activities that Scott [Carter] undertook during that time, but you know, as far as the OFO I just kept him informed.”). What actions Mr. Carter took, who else he discussed the OFO and Atmos sale with, and why he, as Spire’s President, permitted its issuance, and blessed its continuation long after it was necessary, remain a mystery. In short, based on Mr. Godat’s testimony, it is clear that Mr. Carter possesses information that is properly the subject of a deposition in this matter.

C. Questions Raised For Mr. McKee Involving Spire’s Potential Destruction of Evidence

Since the onset of litigation, Spire has consistently impeded Symmetry’s attempts to obtain relevant documents and correspondence. On March 26, 2021, Symmetry served 103 Data Requests to Spire. In response to those 103 Data Requests, Spire has produced fewer than 60 documents *total* plus short, written responses to many of the requests, often simply incorporating other responses or documents by reference. *See Ex. 1*. This level of document production is implausibly small, particularly considering the significance of the topics addressed by the

requests. For example, Symmetry requested all documents relating to Spire’s evaluation of the need for an OFO (Data Request No. 3), but Spire produced just a one-page weather report for Kansas City from February 12, 2021. Despite the clear deficiencies in its productions, Spire represented in mid-September that “Spire has no additional responsive documents to produce at this time.” Ex. 5, Spire Letter of September 17, 2021.

New revelations have made it apparent, however, that Spire’s meager document production may be the result, at least in part, of Spire’s failure to take basic steps to preserve evidence. On December 13, 2021, Spire’s corporate representative testified to the existence of broad categories of responsive documents that Spire has not produced, including emails, Microsoft Teams chats and Intercontinental Exchange (“ICE”) chats utilized by Spire employees.³ For example, the Data Requests generally call for chat communications, in addition to emails and other documents.⁴ Mr. Godat said that he and others at Spire use Microsoft Teams chats. *See* Ex. 3 at 149:22-150:8. But Spire has not produced any Microsoft Teams chat logs. Similarly, Mr. Godat also testified that Spire uses the ICE platform in connection with the purchase and sale of natural gas. *Id.* at 155:21-156:4. Symmetry has propounded multiple requests regarding Spire’s purchases and sales of gas in February, which would have generated ICE chats. *See, e.g.*, Ex. 1 at Data Request 74. According to ICE’s publicly available

³ Mr. Godat’s testimony also revealed the existence of *specific* documents which Spire has failed to produce. For example, Data Request 74 required Spire to produce “correspondence and documents related to all gas purchase, sale, exchange, and other transactions” Ex. 1. Mr. Godat testified that Spire sold gas to the energy company Tenaska on February 13 or 14, 2021. *See* Ex. 3 at 299:16-300:8. Spire, however, has failed to produce to Symmetry any correspondence or transactions documents relating to that sale in response to this Data Request.

⁴ *See* Ex. 1 (First Set of Data Requests) at 3 (defining “correspondence” as “any document that reflects or constitutes the transmittal of information in any form, including through letters, faxes, e-mails, text messages, online chats, messaging apps, and recorded conversations or audio or video conferences or broadcasts”).

compliance policies, “[b]y default, ICE IM will log all messages ICE messages for a minimum of seven years” unless the administrator “elect[s] to purge their user’s logs from the ICE IM archive.” Ex. 6. Yet Spire has only produced one excerpted, incomplete ICE chat between one of its employees and a Symmetry employee.

Then, on January 24, 2022, Spire finally admitted in a written response to a Symmetry Data Request that it did not institute a litigation hold until April 22, 2021. Ex. 7 at Response to DR 3.1. Even then, the litigation hold was sent to only *seven* Spire employees *excluding* multiple members of Spire’s Gas Supply and Gas Control teams who are critical to the events in question, with five more added *almost seven months later* on November 23, 2021. *Id.* As a result, there was no Spire legal hold in place whatsoever until (i) more than two months after Spire’s February 24, 2021 demand letter to Symmetry seeking \$150 million; (ii) almost two months after Symmetry’s response on February 26 objecting to Spire’s demand; (iii) more than a month after Spire filed a lawsuit against Symmetry in federal court; and (iv) nearly a month after Symmetry filed this action against Spire before the Commission. Finally, Spire’s counsel appeared to argue during a February 1, 2022 phone conference (with the Administrative Law Judge present) that Spire did not destroy evidence if responsive documents, such as ICE chats, were instead deleted by automated document deletion settings. In other words, Spire either failed to suspend such automated document deletion settings in a timely manner or improperly set the online chat programs to automatically delete conversations, thereby allowing unknown quantities of relevant evidence to be destroyed.

D. Symmetry Seeks Depositions from Mr. McKee and Mr. Carter

Considering these striking admissions regarding Spire’s records, Symmetry has requested to depose Spire’s Manager of Records Retention, Robert McKee. *See* Ex. 2. Symmetry also seeks to depose Spire Missouri West President Scott Carter regarding the issuance and duration

of Spire’s OFO during Winter Storm Uri, the Atmos sale, and other key issues. Spire, however, has refused to produce Mr. McKee and Mr. Carter for deposition, and instead moves for a protective order. For the reasons discussed below, the Commission should deny Spire’s request and allow these critical depositions to go forward.

III. DISCUSSION

Under 20 CSR 4240-2.090(1), discovery in cases 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.” In Missouri civil proceedings, “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action” Mo. Sup. Ct. R. 56.01(b)(1). Such discovery should be “proportional to the needs of the case considering the totality of the circumstances” which include “the importance of the issues at stake in the action . . . the amount in controversy [and] whether the burden or expenses of the proposed discovery outweigh its likely benefit.” *Id.*

The depositions which Spire now seeks to block are entirely reasonable and appropriate given the needs of the case. Complainants have only sought seven total depositions to date (although they are entitled by statute to at least thirty total). Both Mr. McKee and Mr. Carter have unique, personal knowledge regarding critical aspects of this dispute—respectively, Spire’s apparent failure to preserve evidence in its own files and produce that evidence to Complainants, and Spire’s discussions and decisions regarding the implementation and duration of its OFO during Winter Storm Uri and its sale of huge quantities of gas to Atmos during the storm, which occurred at the highest level. These two depositions are surely proportional to the needs of this company-altering litigation involving more than \$200 million in disputed penalties. Spire’s protective order should therefore be denied and the depositions allowed to proceed.

A. Robert McKee's Testimony is Necessary to Understand Whether Spire Destroyed Relevant Evidence, and Why Key Documents Have Not Been Produced

Spire must not be allowed to gain a “tactical advantage” by destroying evidence favorable to Symmetry and then refusing to answer questions regarding its destruction. *See State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 606 (Mo. banc 2002) (“Discovery should be conducted on a level playing field, without affording either side a tactical advantage.”). As the Manager of Records Retention, Mr. McKee’s testimony is critical to understanding Spire’s potential spoliation of evidence in this high-stakes case. *See* Ex. 3 at 21:25-22:1 (“Bob McKee . . . He’s our records retention coordinator or manager.”). Other avenues of discovery have proven wholly inadequate. For example, Spire’s corporate representative, Mr. Godat, was unable to shed any light on these issues:

Q. 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?

...

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

Q. Do you know, was it sent before or after Spire brought a lawsuit against Symmetry?

...

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

Q. 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.

Id. at 28:16-29:17. Although Spire did produce some written document retention policies at Mr. Godat's deposition, these documents say nothing about whether the policies were followed in this case, and what steps were actually taken to preserve evidence once this litigation began. *See* Ex. 6. As Spire's corporate representative stated, these are questions that Mr. McKee must answer. *See* Ex. 3 at 32:24-25 ("Records retention requests go to Bob McKee.").

Incredibly, Spire claims that Symmetry is precluded from seeking discovery on spoliation because Symmetry did not allege spoliation in its complaint. *See* Mot. at 9-10 ("Complainants have not alleged that Spire violated its Tariff as a result of a failure to properly retain documents associated with the February OFO or that Spire's documents retention policies were (or are) in anyway deficient."). This is nonsense. Symmetry is entitled to seek discovery regarding "any matter, not privileged, that is relevant to the subject matter involved in the pending action" Mo. Sup. Ct. R. 56.01(b)(1). Evidence of spoliation is indeed relevant, given that "[t]he failure to adequately explain the destruction of evidence can give rise to an adverse inference of intent, such as under circumstances where the alleged spoliator had a duty or should have recognized a duty to preserve the evidence." *Ball v. Allied Physicians Grp., LLC*, 548 S.W.3d 373, 386 (Mo. App. E.D. 2018). Moreover, Symmetry only became aware of these issues due to Spire's own admissions and deficient document production after this litigation was filed. Indeed, it is difficult to imagine how any complainant could allege spoliation *in the complaint* since it is often the start of litigation itself that triggers the duty to preserve evidence. Spire is grasping at straws in an effort to avoid discussing serious and well-founded concerns regarding its failure to preserve evidence.

Spire also argues that there is "no evidence in the record even suggesting a spoliation issue." Mot. at 3. To the contrary, Spire's own admissions have laid bare Spire's failures to take

timely steps to preserve evidence thereby likely leading to its deletion. *See, e.g.*, Ex. 6 at Response to DR 3.1 (admitting that Spire did not send litigation holds to some relevant custodians until November 23, 2021, almost 10 months after sending its demand letter). It makes no difference whether Spire actively destroyed evidence or allowed it to be automatically destroyed. Indeed, Missouri courts have made clear that “[s]poliation may also be the concealment or suppression of relevant evidence *or the failure to determine whether certain evidence exists.*” *Ball v. Allied Physicians Grp., LLC, et al.*, 548 S.W.3d 373, 386 (Mo. App. E.D. 2018) (also noting that “[a]ppellants should have known here that litigation would arise...and therefore they should have known they had a duty to preserve for litigation the evidence involved in the breakage. Instead, Appellants agreed they allowed the needle that broke off in Ball's back to be destroyed”). Also as relevant here, the court in *Ball* made clear that “[t]he failure to adequately explain the destruction of evidence can give rise to an adverse inference of intent, such as under circumstances where the alleged spoliator ***had a duty or should have recognized a duty to preserve the evidence.***” *Id.* (emphasis added).

Similarly here, Spire knew of possible litigation relating to its OFO penalties as early as February 24, 2021, when it sent a demand letter to Symmetry for \$150 million and again by February 26, 2021 when Symmetry disputed Spire’s demand. Spire was most definitely on notice when it filed suit against Symmetry on March 22, 2021. Yet Spire did not institute a litigation hold until April 22, 2021, and based on Spire’s recent statements to the ALJ may have never suspended its automated document deletion systems. Mr. McKee’s testimony is therefore necessary to explain Spire’s document retention and legal hold policies, including to what extent those policies were applied to the evidence in this case. Only then can Symmetry understand the

extent to which Spire destroyed relevant evidence, whether affirmatively or by permitting its destruction, and when and why that occurred.

B. Scott Carter’s Testimony Is Necessary And Not Unduly Burdensome

Under Missouri law, Scott Carter should be produced for deposition because he has unique and important knowledge regarding Spire’s decisions to issue the OFO and when to lift it, and the decision to sell massive quantities of gas to Atmos during the storm (when supposedly Spire’s system was at risk and it was forced to buy gas at high spot prices). These issues are key to Symmetry’s case. “Opposing litigants may depose top-level executives who have discoverable information.” *Ford*, 71 S.W.3d at 606; *see also* Mo. Sup. Ct. R. 56.01(b)(1), 57.03(a). As Spire’s corporate representative testified, Mr. Carter was consulted directly regarding the decision to issue the OFO even before it took place. *See* Ex. 3 at 45:2-3 (“I did consult with Scott Carter, my boss [about when and whether to issue OFO]”); 256:18-21 (“I informed my boss, Mr. Carter, before we actually issued the OFO.”). Mr. Carter was also directly consulted on Spire’s decision to sell 500,000 dekatherms of natural gas for a total price of \$100 million while the OFO was in effect. *Id.* at 75:17-76:10. Mr. Carter is obviously a top-level employee for Spire—but these enormously consequential OFO decisions were made at the highest levels, according to Spire’s corporate representative.

Ford v. Messina, on which Spire heavily relies, does not support blocking the deposition of Mr. Carter in this case. In *Ford*, the Missouri Supreme Court expressly declined to adopt the “apex rule” for corporate officers which is utilized by some states, and instead held that “depositions of top-level decision-makers should proceed in accordance with Rules 56.01(b)(1) and 56.01(c)” and “[t]he party or person opposing discovery has the burden of showing ‘good cause’ to limit discovery.” *See Ford*, 71 S.W.3d at 607. Missouri courts recognize a protective order for top-level employees may be appropriate “if annoyance, oppression, and undue burden

and expense outweigh the need for discovery.” *See id.* at 607; *see also* Rule 56.01(c). In considering such a protective order, Missouri courts look to the following factors: (1) whether other methods of discovery have been pursued; (2) the proponent's need for discovery by top-level deposition and; (3) the burden, expense, annoyance, and oppression to the organization and the proposed deponent. *See Ford*, 71 S.W.3d at 607.

These factors weigh heavily in favor of allowing Mr. Carter’s deposition to go forward. First, Symmetry has tried other avenues of discovery but has been blocked at every turn. On March 26, 2021, Symmetry submitted 103 Data Requests for documents related to Spire’s OFO and gas sales during Winter Storm Uri, as discussed above, received fewer than 60 documents in response, and almost no communications. Spire claims that Symmetry “failed to first depose lower-level employees who undoubtedly have better information than Mr. Carter.” Mot. at 3. But this is *precisely* what Symmetry did when it deposed Mr. Godat, who is Mr. Carter’s direct-report. *See Ex. 3* at 15:6-9. Mr. Godat testified that he consulted with Mr. Carter regarding the OFO decisions, but he was unable to speak to Mr. Carter’s own actions and discussions surrounding the OFO. *See id.* at 203:14-19 (“So I mean, I had enough going on that I wouldn’t be able to speak for -- you know, for all the activities that Scott [Carter] undertook during that time . . .”).

Second, a top-level deposition is necessary given that Spire’s own corporate representative repeatedly referenced conversations and consultations with Mr. Carter regarding Spire’s OFO and gas sales. *See id.* at 45:2-3 (“I did consult with Scott Carter, my boss, but ultimately I made the decision.”); *id.* at 76:6-7 (“I had a conversation with my boss Scott Carter to make sure he was aware of [the gas sale during Spire’s OFO].”). The fact is, the decision to issue an OFO during Winter Storm Uri and the decision to sell \$100 million of natural gas during

the same OFO are deeply consequential, high-level judgments and therefore must be explained by high-level employees. Spire argues that a deposition of Mr. Carter is not warranted because Mr. Godat and Mr. Powers can testify regarding the issuance of the OFO and related matters. Mot. at 6-7. But as Mr. Godat made clear in his testimony, only Mr. Carter can speak to his actions and discussions as CEO regarding these high-stakes decisions. *See* Ex. 3 at 203:14-18. What Mr. Carter thought, who else he discussed these issues with, why he permitted the issuance of the OFO, the lifting of the OFO, and that Atmos sale, all require the testimony of Mr. Carter, testimony to which Symmetry is entitled.

Third, the deposition of Mr. Carter is not unduly burdensome or annoying for Spire. This is no minor litigation; rather, this is a significant dispute for all parties (significant enough that Spire has described this litigation in its public SEC filings), involving Spire's demand for more than \$200 million, with company-altering consequences for all litigants, and Mr. Carter has unique knowledge of the key issues. Although each of the Complainants could properly notice three separate depositions (at 7 hours apiece), the Complainants have coordinated their requests to minimize the impact on Spire witnesses such as Mr. Carter. It is unreasonable and unfair for Spire to attempt to collect hundreds of millions of dollars in penalties from Complainants (with significant potential impacts on Complainants and their customers), and then claim that Complainants' jointly-coordinated attempt to take a one-day deposition of Mr. Carter represents an undue burden and would cause "significant disruption" to Spire. *See* Mot. at 8-9.

This case is readily distinguishable from the top-level depositions that the court denied in *Ford* for several reasons. *Ford* was a product liability action in which plaintiffs claimed that their 1987 Ford Bronco and its tires were defective. 71 S.W.3d at 605. In 2002, Plaintiffs sought to depose Ford's then-executives regarding Ford's recall of another product in 2000, to

“contrast Ford’s [later] recall . . . with Ford’s failure to recall the 1987 Bronco II or its tires.” *Id.* The court noted that this was a “tangential inquiry,” and “Plaintiffs have little need to depose Ford’s top-level employees, absent a finding of substantial similarity between the products”—and “Ford has shown that the products are not substantially similar.” *Id.* at 608-09.

This case could not be more different. Complainants are not seeking to depose Mr. Carter regarding long-ago actions that are of only “tangential” relevance to the matters at issue here. To the contrary, Complainants seek to depose Mr. Carter regarding the precise matters at issue in the complaint, *in which Spire’s corporate representative testified Mr. Carter was directly involved.* The dissimilarities between this case and *Ford* do not end there. In *Ford*, the plaintiffs “did not [first] pursue the same information by available, less burdensome means.” 71 S.W.3d at 608. In this case, Symmetry has sought the same information regarding Spire’s OFO decisions through 134 Data Requests and a deposition of Spire’s corporate representative, but to no avail. In addition, three of the top-level employees sought in the *Ford* case submitted affidavits stating they had no personal involvement in the subject of the litigation, whereas Spire’s corporate representative testified that Mr. Carter was directly and repeatedly consulted regarding Spire’s OFO. 71 S.W.3d at 608; *see disc. supra* at 5-6. Finally, the defendant in *Ford* was an enormous company with over 300,000 employees and extensive litigation matters, making depositions of its most senior officers an undue burden. 71 S.W.3d at 608. Mr. Carter, by contrast, supervises 1,576 employees, and therefore a dispute involving \$200 million is presumably one of Spire’s most consequential litigation matters. *See Mot.* at 8-9. Mr. Carter’s deposition is therefore appropriate and necessary to investigate key issues relevant to Symmetry’s case.

This case is more analogous to the situation in *Cox v. Kan. City Chiefs Football Club, Inc.*, 473 S.W.3d 107 (Mo. banc 2015). In *Cox*, the Missouri Supreme Court found that the trial court had abused its discretion in preventing the plaintiff from deposing the Chairman and CEO of the Kansas City Chiefs, Mr. Clark Hunt. *Id.* at 127. The Court found that the plaintiff's theory of the case in *Cox* involved a company-wide policy instituted by Mr. Hunt. *Id.* As a result, there were "specific questions that only Mr. Hunt [could] answer" and preventing his deposition "materially affected [plaintiff's] presentation of the merits of his case." *Id.* at 127-28. Similarly here, Spire's President participated directly in discussions that go to the core of Symmetry's theory of the case, which involves the improper imposition and duration of Spire's OFO. Mr. Carter participated in conversations about these decisions in addition to others, including the \$100 million sale of gas during the OFO period.

Additionally, Spire's corporate representative conceded that he was not aware of all of the actions or conversations that Mr. Carter might have had relating to the OFO. To deny Symmetry to ask Mr. Carter about his recollection of those discussions and his own knowledge and actions related to the OFO and the large sale of gas to Atmos during that period would materially and unjustifiably affect Symmetry's presentation of its case. Finally, given the either apparent lack of documentation or Spire's destruction of that evidence, Symmetry's right to take the deposition of Mr. Carter may be the only method to obtain necessary and relevant discovery. Considering the stakes of the litigation and Mr. Carter's unique and discoverable knowledge, his deposition should move forward.

IV. CONCLUSION

For the reasons discussed above, Symmetry respectfully requests that the Commission deny Spire's motion for a protective order and order that Spire produce Mr. Robert McKee and Mr. Scott Carter for depositions without further delay.

Dated: February 8, 2022

HEALY LAW OFFICES, LLC

By: /s/ Douglas L. Healy

Douglas L. Healy, #51630
Peggy A. Whipple, #54758
Terry M. Jarrett, #45663
3010 E. Battlefield, Suite A
Springfield, MO 65804
doug@healylawoffices.com
peggy@healylawoffices.com
terry@healylawoffices.com
Telephone: (417) 864-7018

/s/ Steven M. Bauer

Steven M. Bauer (admitted *pro hac vice*)
Margaret A. Tough (admitted *pro hac vice*)
Katherine A. Sawyer (admitted *pro hac vice*)
Nathan M. Saper (admitted *pro hac vice*)
Latham & Watkins LLP
505 Montgomery Street, Suite 2000
San Francisco California 94111-6538
(415) 391-0600
steven.bauer@lw.com
margaret.tough@lw.com
katherine.sawyer@lw.com
nathan.saper@lw.com

*Attorneys for Complainant
Symmetry Energy Solutions, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February 2022, a copy of the foregoing **Symmetry Energy Solutions, LLC's Response to Spire Missouri, Inc.'s Motion for Protective Order** 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