

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 TO DISMISS**

Complainant Symmetry Energy Solutions, LLC (“Symmetry”) agrees with Respondents Spire Missouri, Inc. and its operating unit Spire Missouri West (collectively “Spire”) that a Complaint filed and served pursuant to 20 CSR 4240-2.070 and §386.390 *Revised Statutes of Missouri* must allege a violation or violations of “any tariff, statute, rule, order or decision within the commission’s jurisdiction.” Therefore, in full compliance with both the rule and the statute, the Complaint filed and served by Symmetry on March 26, 2021 alleges multiple violations of Spire’s Tariff and also of an Order of this Commission. Consequently, even given a cursory reading of Symmetry’s Complaint, Spire’s argument that Symmetry “makes no reference” to such violations is unfathomable. In fact, Symmetry pled four distinct violations of Spire’s Tariff. Equally unavailing is Spire’s argument that this Commission is not the proper forum for this dispute. Spire’s motion to dismiss should be summarily denied.

**LEGAL STANDARD**

Pursuant to 20 CSR 4240-2.070(1), “[a]ny person or public utility who feels aggrieved by an alleged violation of any tariff, statute, rule, order, or decision, within the commission’s jurisdiction may file a complaint.” Sections 4240-2.070(4)(D) and (E) instruct that a formal

complaint shall contain “[t]he nature of the complaint and the complainant’s interest in the complaint, in a clear and concise manner [and]. . . [t]he relief requested . . . .”

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the complainant’s petition. *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm’n*, 392 S.W.3d 24, 38 (Mo. Ct. App. 2012). The Commission must assume for purposes of the motion that all of the complainant’s averments are true, and liberally grant to complainant all reasonable inferences therefrom. *Id.* So long as the complaint “fairly presents for determination [that] such matter falls within the jurisdiction of the Commission it is sufficient.” *State ex rel. Chicago, B. & Q.R. Co. v. Pub. Serv. Comm’n*, 334 S.W.2d 54, 58 (Mo. 1960).

## **DISCUSSION**

### **A. Symmetry Pled Violations of This Commission’s Order**

Symmetry’s Complaint more than satisfies the requirements for a complaint before the Commission. As an initial matter, Spire inexplicably claims at page 2 of its motion that Symmetry’s Complaint “makes no reference to any violation of ‘statute, rule, order or decision.’” But, Paragraph 8 of Symmetry’s Complaint pleads Spire’s current Tariff to have been established by this Commission via its Report and Order issued in GR-2017-0215/0216 effective March 17, 2018. And, at Paragraph 8 of Spire’s Answer, Spire admits all of the allegations in Paragraph 8 of Symmetry’s Complaint. Consequently, all pleaded violations of Spire’s Tariff also constitute pleaded violations of this Commission’s Report and Order issued in GR-2017-0215/0216.

### **B. Symmetry Pled Four Violations of Spire’s Tariff**

Spire’s motion mischaracterizes Symmetry’s Complaint, focusing on Symmetry’s request for a waiver of Spire’s improperly-levelled penalties as if the waiver request were the basis of Symmetry’s Complaint. It is not; rather, Symmetry seeks a waiver as a *remedy* for Spire’s Tariff violations, and those violations are the bases of Symmetry’s Complaint. Specifically, the

Complaint alleges that Spire failed to comply with the requirements of its Tariff in assessing Operational Flow Order (“OFO”) penalties in four specific ways.

*First*, Spire did not have a proper basis to issue the OFO. Spire justified its OFO as being necessary to maintain and protect the integrity of its distribution system during Winter Storm Uri. Tariff Sheet No. 16.8(B)(2) provides that Spire “may issue [OFOs] to Transportation Customers as necessary to protect the integrity of its system or any portion thereof . . . .” However, as alleged in the Complaint, Spire in fact “did not at any time during the period of February 12, 2021 through February 19, 2021 experience an operational integrity issue on its system, nor was its ability to continue to make deliveries of gas as nominated on the system ever impaired.” Compl. ¶¶ 14, 29, 31.<sup>1</sup> Because Tariff Sheet No. 16.8(B)(2) permits the issuance of an OFO only where necessary to protect the integrity of Spire’s system, and Spire’s system integrity was not in peril during the storm, the Complaint states a claim for relief based on the issuance of the OFO in violation of Tariff Sheet No. 16.8(B)(2).

*Second*, Spire kept the OFO in place longer than was allowable under the Tariff. Spire’s Tariff Sheet No. 16.8(B)(2) requires that “[a]ny OFO, along with associated conditions and penalties, shall be limited, as practicable to address only the problem(s) giving rise to the need for the OFO.” The Complaint alleges that “even if Spire did experience or anticipate limited, isolated pipeline integrity issues during the OFO period, the OFO in this case was kept in place beyond the time Spire knew or should have known that the conditions requisite for an OFO did not exist and were not necessary to protect the integrity of its system, as the Tariff requires.” Compl. ¶ 32; *see also id.* (“Once apparent that the Spire system had not in fact experienced

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<sup>1</sup> Indeed, in a filing before the Federal Energy Regulatory Commission, Spire Missouri Inc. acknowledged it did not face any imminent threats to its system reliability. *See* Protest and Request for Maximum Suspension and Hearing of Spire Missouri Inc., *Southern Star Central Pipeline, Inc.*, No. RP21-778-000, at 9 (FERC) (“Spire Missouri relied heavily on storage to meet its customer’s [sic] requirements during the recent Polar Vortex, and it had sufficient storage in inventory to do so.”).

system integrity issues, had seen no potentially harmful drop in system pressures . . . [and] had experienced no actual or likely interruption in their ability to make deliveries, Spire should have withdrawn the OFO.”). By keeping the OFO in place beyond the time when conditions may have necessitated the OFO, Spire violated its Tariff.

*Third*, Spire failed to provide sufficient notice and instruction to its transportation customers. Spire’s Tariff Sheet No. 16.8(B) provides that “[n]otice of an OFO shall specify the nature of the problem sought to be addressed, the anticipated duration of the required compliance and the parameters of such compliance. Upon termination of an OFO, Spire West will post on its website the rationale for lifting that particular OFO.” The Complaint alleges that Spire’s notices may not have been “properly given” or “provided the requisite specification of the nature of the problem to be addressed, the anticipated duration of the required compliance and the parameters of such compliance, as required by the Tariff.” Compl. ¶ 33. By failing to provide proper notice, Spire violated its Tariff.

*Fourth*, Spire failed to calculate OFO penalties properly. Spire’s Tariff Sheets Nos. 16.13 and 16.14 address the manner of calculating OFO penalties. The Complaint alleges that Spire sent Symmetry two invoices in the amounts of \$150,468,473.65 and \$150,468,378.61 which appear to include OFO penalties without any detailed explanation of the invoiced amounts. Compl. ¶ 1 fn.1, ¶ 22. Because Spire did not explain how it arrived at the OFO penalties, Symmetry alleges that the penalties may not have been calculated in compliance with the Tariff.

Each of these four alleged violations of Spire’s Tariff—and hence of an Order of the Commission—is properly pled, and Spire’s Motion to dismiss must be denied.

### C. Spire's Other Arguments Are Without Merit

None of Spire's other arguments compels a different conclusion. To begin with, Spire's claim that the Complaint impermissibly challenges "future conduct," and thus seeks a "declaratory judgment" that can only be entertained by a court is flatly wrong on the facts and on the law. Mot. at 4.

*First*, the Complaint includes and explains Spire's February 24, 2021 letter that both (1) imposed \$150 million in OFO penalties on Symmetry and (2) included a written threat "to bill these OFO penalties directly to each of your transportation customers, who retain ultimate financial responsibility for these amounts under the tariff."<sup>2</sup> Symmetry filed its Complaint on March 26. At that time, Spire's written threat to bill over \$150 million in penalties to Missouri customers was already a past and unlawful action. Consequently, Spire's claim at Paragraphs 14 – 16 of its motion that its written threat was nothing more than "future conduct" over which this Commission has no jurisdiction is simply inaccurate.

*Second*, Spire's cited cases (Mot. at 4, ¶ 15) are inapposite: in both cases the parties were seeking declaratory relief (which Symmetry does not seek here), and in neither case was a regulatory agency being asked to rule whether a regulated entity was complying with the terms of its tariff (which is what Symmetry *does* seek here). *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 75-76 (Mo. 1982); *Lightfoot et al. v City of Springfield*, 236 S.W.2d 348, 669-70 (Mo. 1951). Unsurprisingly, Spire cites no authority to counter the clear reading of the statute and the rules that it is the Commission, not the courts, that is the proper body to adjudicate whether a utility like Spire has violated the terms of its Tariff. 20 CSR 4240-2.070 and §386.390 *Revised Statutes of Missouri*.

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<sup>2</sup> See Compl. ¶¶ 1, 18, 19, 21, 35 and Exhibit A.

In another attempt to mischaracterize the Complaint, Spire argues that Symmetry seeks to have Spire waive the *requirements* of its Tariff. Mot. at 3. This, too, is inaccurate. Rather, Symmetry seeks a determination that the OFO penalties Spire imposed *violated* its Tariff, and, as a result, those penalties should be waived (among other remedies). The Commission, and only the Commission, is positioned to adjudicate such a dispute. *See, e.g., PUC v. Office of Pub. Counsel (In re Emerald Point Util. Co.)*, 438 S.W.3d 482, 491 (Mo. Ct. App. 2014) (in complaint suit challenging whether utility was authorized to collect a charge pursuant to its tariff, “the Commission had the authority to determine whether [the utility] violated the tariff by collecting the . . . charge”).

This should come as no surprise to Spire; its own affiliate Spire Marketing—which, like Symmetry, is a gas marketer—intervened in a pending proceeding before the Federal Energy Regulatory Commission (“FERC”) and asked that FERC compel a pipeline operator to waive OFO penalties imposed on Spire Marketing during Winter Storm Uri.<sup>3</sup> The Commission here, like FERC in that case, is the proper body to determine whether OFO penalties comply with a utility’s tariff or should be waived.

Further, although motions to dismiss are supposed to focus on the shortcomings of a Complaint as pled, at pages 3-4 of its motion Spire inappropriately offers what appears to be its idea of a defense for its own actions. Because Spire cannot deny the existence of its February 24, 2021 demand for payment by Symmetry and written threat to directly bill Missouri customers for over \$150 million in penalties, Spire asserts that it won’t keep that money for itself but will instead shift it from one class of its customers to another class of its customers. But

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<sup>3</sup> *See* Spire Marketing Inc.’s Motion to Intervene, Comments, and Limited Protest to Panhandle Eastern Pipe Line Company, LP’s Request for Limited Waiver Determination before the Federal Energy Regulatory Commission, Docket No. RP21-616-000, at 5.

Spire is well aware that this Commission’s Staff will consistently seek “to minimize cost shifts between classes.” *In the Matter of Laclede Gas Company’s Tariff to Revise Natural Gas Rate Schedules*, Case No. GR-2002-356, 2002 Mo. PSC LEXIS 1367 at \*22 (Mo. P.S.C. Oct. 3, 2002). Spire’s argument is not only improper on a motion to dismiss, but premature. It is not grounds to dismiss this Complaint.

Finally, the Commission should disregard Spire’s claims that it is somehow different from the numerous other participants in the natural gas markets that have affirmatively moved to waive OFO penalties in connection with Winter Storm Uri—in marked contrast to Spire, which is attempting to improperly and unfairly collect hundreds of millions of dollars in penalties. (Mot. at 3-4.) Spire attempts to distinguish itself from pipelines that have waived OFO penalties on the basis that “Spire Missouri is not, of course, an interstate pipeline company” but is instead “a local distribution company.” (*Id.* at 4.) But the Complaint *does* specifically refer to other LDCs that have rescinded or waived OFOs. Compl. ¶ 34 and FN 4.<sup>4</sup> This is no reason to grant the motion, either.

#### **D. Symmetry’s Request For Expedited Treatment Was Proper**

Given the immediacy of Spire’s February 24, 2021 written threat to directly bill Missouri customers for over \$150 million in penalties, when Symmetry filed its Complaint herein, it simultaneously, prudently and responsibly moved this Commission for expedited treatment.

### **CONCLUSION**

WHEREFORE, Symmetry respectfully requests that Spire’s motion to dismiss be denied.

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<sup>4</sup> For example, Black Hills Kansas Gas Utility Company and Vectren Indiana have both sought to relieve their customers from OFO penalties. *See* Order Approving Temporary Waiver, *In re Black Hills*, Docket No. 21-BHCG-370-ACA (Kan. Corp. Comm’n 2021); Vectren Gas Tracking System (“GTS”) Announcement (“After reviewing the operational results of that weekend, CenterPoint Energy has decided to take steps that will allow for the waiver of OFO related penalties for the days related to this event.”).

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May 2021, a copy of the foregoing **Symmetry's Response in Opposition to Spire's Motion to Dismiss** 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  
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