

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Constellation NewEnergy-Gas)
Division, LLC,)
)
Complainant,)
)
v.)
)
Spire Missouri, Inc. and its operating unit)
Spire Missouri West,)
)
Respondents.)

Case No. GC-2021-0315

CNEG’S RESPONSE IN OPPOSITION TO SPIRE’S MOTION TO DISMISS

Pursuant to the Commission’s Order of April 30, 2021, Constellation NewEnergy-Gas Division, LLC (“CNEG”) files this Response to the Motion to Dismiss filed by Spire Missouri, Inc. and its operating unit, Spire Missouri West (collectively, “Spire”).

INTRODUCTION

Spire’s Motion claims that CNEG’s Complaint does not allege that Spire violated its Tariff. This is not true. CNEG identified multiple ways in which Spire violated its Tariff, including: (1) issuing the Operational Flow Order (“OFO”) without a proper basis; (2) failing to provide sufficient notice and instruction to its transportation customers; (3) keeping the OFO in place longer than was justifiable under the Tariff; and (4) failing to calculate OFO penalties properly. CNEG explicitly filed its complaint to address Spire’s failure to comply with the requirements of its Tariff in assessing approximately \$35 million in Operational Flow Order (“OFO”) penalties and it described those violations in a manner more than sufficient to satisfy the applicable pleading standards. Spire’s motion to dismiss is not well-grounded and should be denied.

STANDARD

Section 386.390, RS-Mo. provides that a “Complaint may be made by ... any corporation or person.... by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any ... public utility in violation, or claimed to be in violation, of [a] any provision of law subject to the commission's authority, [b] of any rule promulgated by the commission, [c] of any utility tariff,”¹ A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff’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 plaintiff’s averments are true, and liberally grant to plaintiff all reasonable inferences therefrom. *Id.* As the movant, Spire bears the burden of establishing that the allegations in CNEG’s Complaint fail to state a cause of action. *See Weicht v. Suburban Newspapers of Greater St. Louis, Inc.*, 32 S.W.3d 592, 598 (Mo. Ct. App. 2000).

ARGUMENT & AUTHORITIES

A. CNEG identified multiple ways in which Spire violated its Tariff.

CNEG’s Complaint identified a number of ways in which Spire violated its Tariff. Any of one these allegations is sufficient to deny Spire’s Motion to Dismiss. CNEG’s Complaint expressly states its intent “to address Spire’s failure to comply with the requirements of its Tariff in assessing Operational Flow Order (“OFO”) Penalties.” Complaint ¶ 1. CNEG’s Complaint then details at least four specific violations of the Tariff.

¹ 20 CSR 4240-2.070(1) also provides that “[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.” The Missouri Supreme Court has held that “Complaints or other pleas before Public Service Commission are not tested by rules applicable to pleadings in general and if complaint or petition fairly presents for determination such matter which falls within the jurisdiction of 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).

Spire justified its OFO as necessary to maintain and protect the integrity of its distribution system. Tariff Sheet No. 16.8(B)(2) provides that “Company may issue Operational Flow Orders (OFO’s) to Transportation Customers as necessary to protect the integrity of its system or any portion thereof...” The Complaint alleges that Spire “did not at any time during the period 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.” Complaint ¶ 14, 29, 31.

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.” Complaint ¶ 32.

Spire’s Tariff Sheet No. 16.8(B) provides that “Notice 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 had failed to show “that its OFO notices were properly given and 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.” Complaint ¶ 33.

Spire’s Tariff Sheets No. 16.13, 16.14 address the manner of calculating the OFO penalties. The Complaint alleges that Spire sent CNEG two invoices in the amounts of \$39,197,396.85 and

\$35,526,510.86 which appear to include OFO penalties without any detailed explanation of the invoiced amounts. Complaint at ¶ 1 fn.1, ¶ 22.

Under the applicable pleading standards, a Complaint must merely “set... forth any act or thing done or omitted to be done by any ... public utility in violation, or claimed to be in violation, of any provision of law subject to the commission’s authority, of any rule promulgated by the commission, of any utility tariff, or of any order or decision of the commission;” RS-Mo. § 386.390.1. CNEG’s Complaint meets and exceeds this standard because Spire is “claimed to be in violation” of its Tariff. For purposes of considering a Motion to Dismiss, the Commission takes all of CNEG’s averments are true and liberally grants to all reasonable inferences therefrom. Spire’s Motion to Dismiss must be rejected.

B. Spire fails to articulate any legitimate reason why its OFO penalties should not be waived, as other parties affected by the February 2021 Cold Weather Event have done, in light of the event’s extraordinary effects.

CNEG’s Complaint also noted that a number of pipelines (and now LDCs) which are similarly situated to Spire had affirmatively moved to waive OFO penalties. Complaint ¶¶ 24-27. In its Motion to Dismiss, Spire claims that it is somehow different from those pipelines in connection with the imposition of OFO penalties. It is not.

As the Commission’s Staff Report noted in the separate Workshop proceeding regarding the February 2021 Cold Weather Event, the winter storm had an extraordinary impact on natural gas prices. The first of the month Index gas price for Southern Star for February was \$2.52 per MMBtu. On February 20, 2021, the first day following the OFO period, the Gas Daily Index gas price was \$7.94 per MMBtu. The Commission Staff’s Report noted that “[e]ven though more volatile, it is rare for the daily market price to exceed \$10.00/MMBtu.”² In contrast, the escalation

² MPSC April 30, 2021 Staff Report In the Matter of the Cause of the February 2021 Cold Weather Event and its Impact on Investor Owned Utilities, File No. AO-2021-0264 (“April 30, 2021 Staff Report”) at 63.

in the Southern Star Gas Daily Index price (shown below) was “without precedent for interstate pipelines serving Missouri”:³

Flow Date(s)	Price	Volume (000s)	Deals
FOM	\$2.520	83	14
Feb. 12	\$44.780	104	26
Feb. 13-16	\$329.595	50	7
Feb. 17	\$622.785	16	2
Feb. 18	\$44.530	75	13

Because of the extraordinarily high prices, and the fact that OFO penalties (including Spire’s) are calculated using multiples of those prices, other pipelines and LDCs have chosen to waive or seek a waiver of the penalties. Those requests have been granted by the regulators. For example, the Federal Energy Regulatory Commission (“FERC”) granted Southern Star’s application for waiver of OFO penalties, finding that “these extreme penalties do not accomplish the purpose of penalties, which is to deter behavior that could impair system reliability” where “extreme weather event presented circumstances outside the control” of those who would bear the burden of the penalties and there was “no evidence of gamesmanship.”⁴ Enable Gas Transmission, LLC affirmatively waived OFO penalties for the month of February citing “the specific nature of and circumstances surrounding the cold weather event that impacted the EGT system during

³ April 30, 2021 Staff Report at 63. In comparison, the Staff Report notes, that “[b]ecause of the high price of gas at the time of the Cold Weather Event, any penalties assessed by pipelines to shippers would be correspondingly high. For example, if the gas price was normally \$3/Dth and the February 12, 2021 price was instead \$600/Dth, the increase of 200 times the normal price would be used in the calculation of the penalty assessed on February 12, 2021.” *Id.* at 22.

⁴ FERC’s April 9, 2021 Order granting Southern Star Central Gas Pipeline, Inc.’s request for waiver of the invoicing, collection and related crediting of penalties associated with Operational Flow Orders (OFO) issued February 11 through February 19, 2021, Docket No. RP-21-618-000.

February.”⁵ Algonquin Gas Transmission Pipeline posted on its electronic bulletin board (“EBB”) that it will waive all OFO penalties from February 15, 2021 through February 18, 2021. ANR Pipeline Company posted that it will waive all OFO penalties related to Winter Storm Uri. Tallgrass Interstate Gas Transmission announced waiver of certain OFO penalties. Texas Eastern Transmission, LP posted on its EBB that it will waive all OFO penalties for the period of February 15, 2021 through February 18, 2021. Vectren has taken action to relieve OFO costs for both its Indiana utilities, including the allowance of imbalance trading for the OFO days as well as reverting to imbalance fees based on non-OFO days. Similarly, Atmos recently announced that “[a]fter discussions with its regulator, Atmos Pipeline – Texas has decided not to assess to its customers Critical Weather Event Imbalance Fees incurred during the historic winter storm in February 2021” in part “because of the unprecedented natural gas prices during the winter storm and their corresponding impact on fees.” Finally, Black Hills Kansas Gas Utility Company, LLC recently obtained an order from the Kansas Corporation Commission approving a waiver of “daily penalties based on OFO days or System Overrun or Critical Days and Unauthorized Delivery Charges until a determination is made as to what penalties will be assessed by the FERC regulated interstate gas pipelines.” Spire has taken an entirely different approach from the one adopted by other pipelines, LDCs, and regulators, one it cannot justify on any policy or economic ground.

The purpose of an OFO penalty is to provide an incentive to performance.⁶ Under certain conditions—such as where gas markets are disrupted, gas supplies have been cut off or significantly reduced, available pipeline capacity is limited, and gas prices have reached unprecedented levels—OFO penalties are no longer effective as a reasonable incentive. Instead,

⁵ Enable Gas Transmission, LLC’s May 11, 2021 OFO Penalty Waiver notice is available here <http://pipelines.enablemidstream.com/pdfs/OFOOPENALTYWAIVER.PDF>

⁶ MPSC April 30, 2021 Staff Report at 19.

they become disproportionately punitive and do not serve their legitimate purpose. That is the reason other pipelines have affirmatively sought to waive those penalties and the respective regulatory agencies have ordered waiver.⁷ As a multiple of the already exorbitant Gas Daily Index price, Spire's OFO penalties are, by definition, a windfall to Spire at the expense of Missouri ratepayers who use the Spire system to transport their gas supplies.⁸

The waiver of Spire's OFO penalties is appropriate under the extraordinary circumstances of the February 2021 Cold Weather Event and consistent with the growing number of regulatory decisions around the country regarding such penalties.

C. Whether Residential Ratepayers would receive a windfall from the OFO penalties is irrelevant to a Motion to Dismiss and improper as a matter of policy.

Spire's Motion to Dismiss places special emphasis on its contention that "every dollar of OFO penalties collected by Spire Missouri is a dollar less that its customers will pay in PGA/ACA charges." Motion at 4.

As an initial matter, whether Spire would cross-subsidize its residential ratepayers through these OFO penalties is irrelevant to whether or not CNEG's Complaint may be dismissed. A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 392 S.W.3d 24, 38 (Mo. Ct. App. 2012). At this stage of the proceeding the Commission is not tasked with addressing the

⁷ See e.g., MPSC April 30, 2021 Staff Report at 22-24; Exhibit A, Southern Star Central Gas Pipeline, Inc., Docket No. RP21-618-000, Request for OFO Penalties Waiver (Mar. 11, 2021); Exhibit B, Gulf South Pipeline Co., LLC, Docket No. RP21-630-000, Request for OFO Penalties Waiver (Mar. 19, 2021).

⁸ Notably, Spire has refused to disclose any information about its actual gas costs during this period despite press reports that the February 2021 Cold Weather Event may have already resulted in a "windfall" for Spire with Spire reporting second-quarter net economic earnings of \$195.6 million, up \$51.6 million year over year. See Tom DiChristopher, *Spire boosts profit outlook on winter storm tailwinds, says 'storage matters'*, Market Intelligence (May 7, 2021).

merits of the claims. Rather it is obligated to “accept all of plaintiff’s averments are true, and liberally grants to plaintiff all reasonable inferences therefrom.”

Other regulatory bodies have cited the risk of subsidization or cost shifting not as a basis for OFO penalties, but as grounds for waiver. In granting Black Hills Kansas Gas Utility Company, LLC’s waiver request, the Kansas Commission based its determination in part on the policy that “penalties were never meant to be a profit center or produce an unreasonable windfall for Sales customers.”⁹ The FERC’s April 9, 2021 Order on Southern Star’s application for waiver also noted that “no shipper (including Empire) has a right to a windfall as the result of administration of penalties on other entities.” Indeed, Spire appears to propose a form of cross-subsidization that this Commission has clearly prohibited in other contexts and should not permit here. *State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm’n of State*, 103 S.W.3d 753, 764 (Mo. 2003) (affirming the adoption of affiliate transaction rules in response to “cross-subsidization” by public utilities in which utilities have the opportunity and incentive to shift their non-regulated costs to their regulated operations with the effect of unnecessarily increasing the rates charged to the utilities’ customers”); *United States v. Western Elec. Co.*, 592 F.Supp. 846, 853 (D.D.C. 1984) (“As long as a [utility] is engaged in both monopoly and competitive activities, it will have the incentive as well as the ability to ‘milk’ the rate-of-return regulated monopoly affiliate to subsidize its competitive ventures”). The fact that Spire has sales customers whom it contends would receive a credit from the collection of OFO penalties is not relevant to the question of whether Spire violated its tariff or whether, as a matter of public policy, the OFO penalties should be waived.

⁹ Order Approving Temporary Waiver, In the Matter of the Application of Black Hills Kansas Gas Utility Company, LLC d/b/a Black Hills Energy, for a Waiver of Tariff, Docket No. 21-BHCG-370-ACA at 2.

D. Spire’s threat to bill \$39 million in OFO penalties to Missouri transportation customers is not “future conduct” but a present threat to act on the existing violations of its Tariff subject to the Complaint.

Spire also seeks to have CNEG’s Complaint dismissed by mischaracterizing its threat to bill Missouri transportation customers directly, as opposed to billing them through CNEG, as a “future action” beyond the ability of the Commission to regulate. Spire’s Answer acknowledges as “true and correct” its Feb. 24, 2021 letter in which it states that “Spire will need to bill these OFO penalties directly to each of your transportation customers, who customers, who retain ultimate financial responsibility for these amounts.” When CNEG filed its Complaint on March 26, 2021, Spire’s written threat to bill approximately \$39 million¹⁰ in penalties to Missouri customers was already a past and unlawful action predicated on the violations of the Tariff that CNEG challenges in its Complaint. Spire’s claim that its written threat was nothing more than “future conduct” over which this Commission has no jurisdiction is simply inaccurate.

Moreover, as the Commission has recognized, “it has subject matter jurisdiction to apply existing law to resolve the issues before it. More specifically, ‘executive agencies may exercise ‘quasi-judicial powers ‘that are ‘incidental and necessary to the proper discharge’ of their administrative functions, even though be doing so they at times determine questions of a ‘purely legal natures.’ [internal citations omitted]”. *In the Matter of MoGas Pipeline, LLCs Application and Complaint*, Order Regarding Motion to Dismiss, Case No. GC-2011-0138, P. 5(*quoting Mikel v. Pott Industries/St. Louis Ship*, 896 S.W.2d 624, 626 (Mo. en banc. 1995). Here, Constellation is presenting significantly more than questions of a “purely legal nature.” Rather it has presented the Commission with specific violations of Spire’s tariff. Clearly the Commission has jurisdiction and statutory authority to resolve the issues presented by Constellation’s complaint.

¹⁰ Or \$34 million depending on which of the Spire invoices it ultimately seeks to enforce.

WHEREFORE, CNEG respectfully requests that Spire's motion be denied.

Respectfully submitted,

By: 

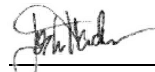
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May 2021, a copy of the foregoing CNEG'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.



Joshua Harden