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**Exhibit No.:** \_\_\_\_\_  
**Issue:** Class Cost of Service and Rate Design;  
Gas Transportation Service Proposed and Filed Tariff  
OFO Penalties  
**Witness:** Raymond Gifford  
**Type of Exhibit:** Direct Testimony  
**Sponsoring Party:** Constellation  
NewEnergy-Gas Division, LLC and  
Symmetry Energy Solutions, LLC  
**File No.:** GR-2022-0179

**BEFORE THE PUBLIC SERVICE COMMISSION**  
**OF THE STATE OF MISSOURI**  
**FILE NO. GR-2022-0179**  
**DIRECT TESTIMONY**  
**OF**  
**RAYMOND L. GIFFORD**  
**ON BEHALF OF**  
**CONSTELLATION NEWENERGY-GAS DIVISION, LLC AND SYMMETRY ENERGY**  
**SOLUTIONS, LLC**

**September 9, 2022**

1 Direct Testimony of Raymond L. Gifford

2 **Q. Please state your name and title.**

3 A. I am Raymond L. Gifford, Denver Office Managing Partner of Wilkinson Barker Knauer,  
4 LLP.

5 **Q. Please describe your professional experience.**

6 A. I began my career in regulatory law in 1996 as First Assistant Attorney General in the  
7 Regulatory Law unit of the Colorado Attorney General's Office. In 2000, I was appointed to the  
8 Colorado Public Utilities Commission, where I served as Chairman from 2000-2004. From  
9 there, I went on to become President of The Progress & Freedom Foundation, a Washington,  
10 D.C.-based think tank, that focused its work on regulatory policy relating to network industries.  
11 While there, I co-founded the Institute for Regulatory Law & Economics, an annual seminar for  
12 state regulators and staff that teaches the legal and economic principles underlying regulation.  
13 For the last twelve years, I have practiced regulatory law in Denver, Colorado, focusing my  
14 practice on energy regulation at both the state and federal level. A copy of my C.V. is attached  
15 as Schedule No. RG-1.

16 **Q. What is the purpose of your testimony?**

17 A. My testimony will provide a framework for the Commission to use in analyzing the  
18 Operational Flow Order (OFO) tariff language before it in Spire Missouri, Inc.'s (Spire)  
19 suspended tariff Sheet No. 9 (and existing tariff Sheet No. 16) relating to gas transportation  
20 customers.

21 **Q. On whose behalf are you testifying?**

22 A. I am testifying in this matter as an expert on behalf of Constellation New Energy-Gas  
23 Division LLC (Constellation) and Symmetry Energy Solutions, LLC. (SES).

1 **Q. Why should your opinion matter to the Commission over this proposed gas**  
2 **transportation tariff sheet?**

3 A. Because, as regulators, the Commission has the delicate job of balancing the interests of all  
4 the relevant parties using the gas infrastructure within its jurisdiction to promote the public  
5 interest and just and reasonable outcomes. The monopoly local gas distribution company (LDC)  
6 utility like Spire should not be able to unilaterally set rates that subject gas transportation  
7 customers or retail gas marketers (RGM) like Constellation and SES to outsized penalties under  
8 the OFO portions of Spire's tariff. In particular, when those proposed OFO penalties fail to meet  
9 the purpose of such a clause in the first place, the tariff language must be reformed to ensure that  
10 all customers' rates are "just and reasonable" and serve the public interest.

11  
12 My particular expertise here is bringing a regulatory policy lens to bear on how the Commission  
13 should think about the proposed Spire tariff changes. In the end, I conclude that, without  
14 revisions, Spire's tariff for this particular OFO issue will not beneficially balance the interests of  
15 customers, transportation customers, RGMs and Spire itself.

16  
17 **Q. What do you want the Commission to do?**

18 A. Specifically, I urge the Commission to consider that the tariff including OFO penalty  
19 language based on a *multiplier* of the index price for natural gas will:

20 a) Not result in "just and reasonable" rates;

21 b) Create incentives for transportation and RGM customers to *not* use the Spire  
22 system because it subjects them to potentially ruinous OFO penalties that are outside their power  
23 to control;

1 c) Make RGM contracts to end-use customers unattractive and uneconomic because  
2 of the risk OFO penalties present during extreme price events;

3 d) Harm end-use retail customers by driving transportation and RGMs away from  
4 the Spire system, leaving the retail customers to pick up a higher share of fixed system costs than  
5 they otherwise would with greater use of gas transportation services by the RGMs;

6 e) Create perverse incentives for Spire to trigger windfall penalty opportunities when  
7 index prices spike and in turn subsidize other rate classes with those windfalls;

8 f) Harm end-use consumers who use transportation services on Spire's pipeline  
9 because they are forced to 'insure' an OFO risk with ruinously high potential for penalties;

10 g) Potentially drive actual market prices up resulting in higher and higher market  
11 prices; and,

12 h) Create a potentially enormous pool of dollars which when applied to LDC's cost  
13 of gas account creates a windfall for system customers.

14  
15 Put simply, the tariff language must be reformed in a balanced way that meets both the  
16 regulatory policy needs of ensuring operational integrity of the gas system with the  
17 countervailing concern that potential OFO penalties do not go beyond that purpose to create  
18 windfall penalty potential. Reform of this penalty language can take many forms other than the  
19 extreme price event lottery that it is now. A fixed OFO penalty structure would protect the  
20 operational integrity of the Spire system while avoiding the perverse outcomes created by Spire's  
21 current multiplier penalty structure.

22

23 **Q. How is your testimony structured?**

1 My testimony is comprised of two main parts. The first portion includes my observations  
2 about the Spire tariff itself and the regulatory purpose for OFO penalty clauses. The second part  
3 of my testimony addresses public policy considerations that should guide the Commission's  
4 decision making. Taken together, I believe reform of the tariff is warranted to bring the possible  
5 OFO penalties in line with the regulatory and operational purpose of such penalties.

6

7 **Q. Have you reviewed the Spire tariff provisions Sheet No. 9.0 and specifically Sheets No.**  
8 **9.17-9.23?**

9 A. I have. These proposed tariff provisions define the availability and terms for gas  
10 transportation service on the Spire gas distribution system. LDCs like Spire use these tariffs to  
11 specify terms and conditions applicable to transportation customers on the natural gas system.

12

13 **Q. Do all LDCs have tariffs that define terms and conditions for gas transportation**  
14 **customers?**

15 A. Yes, because the system must be operated as an integrated whole and the LDC as operator of  
16 the system needs to know how much gas is coming on and being taken off the system, the tariff  
17 will define not just the rates for transportation, but also the terms and conditions under which  
18 that transportation can happen. One of these terms and conditions concerns OFO penalties.

19

20 **Q. Where do OFO penalties come into play?**

21 A. OFOs are a well-used tariff term meant to ensure the operational integrity of the gas system.  
22 The purpose of the tariff penalties is to create incentives such that gas transportation customers  
23 neither show up with too much or too little gas for the system. The potential OFO penalty then

1 must be calibrated so that transportation customers are economically obliged to deliver the  
2 amounts of gas they said they would.

3

4 **Q. How does the Spire OFO Penalty Clause Work?**

5 A. The Spire OFO penalty contained in Sheet No. 9.23 is structured as a “multiplier times index  
6 price penalty;” that is, the penalty is calculated based on “the greater of \$5 or 2 ½ times the daily  
7 midpoint stated on the S&P Platts Gas Daily Index...”. The Emergency OFO penalties are  
8 double that, the greater of \$10 or 5 times the daily midpoint. A Period of Curtailment (POC)  
9 penalty can go even higher than that with a 10-times penalty based on the gas index.

10

11 **Q. How would this work in practice?**

12 A. It is simple math. If, for instance, you imagine a “normal” or, rather, “new normal” gas price  
13 of, say, \$8 MMBtu, then an OFO penalty would be 2½ times that, or \$20 MMBtu, as a Standard  
14 OFO Penalty; it would be 5-times that, or \$40 MMBtu, as an Emergency OFO Penalty; and,  
15 finally 10-times that, or \$80 MMBtu, as a POC penalty.

16

17 **Q. What is objectionable about that?**

18 A. This type of multiplier penalty structure creates too much uncertainty and leads to  
19 overdeterrence, even when gas prices are “normal.” To be sure, a multiplier OFO penalty  
20 structure is not ruinous during normal times, but it still is not anchored to any proportion of  
21 actual harm. Recall that the purpose of these OFO penalties is to create disincentives for  
22 transportation customers from over- or under-supplying gas on Spire’s system. The potential

1 penalty should be proportional to the jeopardy the system might be put in when gas prices are  
2 normal and supply is likewise.

3

4 **Q. Where then is the objection?**

5 A. The mismatch between potential penalty and actual harm becomes acute when times are not  
6 normal (Emergency and POC). When gas prices become extremely volatile. When extreme  
7 weather events introduce steep, unforeseen and unforeseeable natural gas price spikes. When  
8 weather or upstream operational events mean there may not be gas available at *any* price.

9

10 And we've lived through these not normal times during Winter Storm Uri. Under these  
11 extraordinary circumstances, the OFO penalties cease to operate with proportional incentives to  
12 maintain the operational integrity of the system. Instead, the penalties introduce a series of  
13 perverse incentives that regulation should seek to avoid.

14

15 Among those perverse incentives:

- 16 • The penalty may act as an upward price-driver of volatile natural gas prices, in effect  
17 acting as a price umbrella for increasing prices to gravitate toward.
- 18 • The penalty cannot align transportation customers' incentives to maintain system  
19 integrity when there is no gas to be had *at any price*. If there is no gas in the market to  
20 make up for a delivery shortfall, the penalty simply increases transportation customers'  
21 costs with no correlate benefit to the system.

- 1 • The penalty becomes a casino event, where transportation customers are enormous losers  
2 and sales customers reap an enormous windfall. This is exactly backwards of the  
3 regulators' goal to avoid cross-subsidies between classes of customers.
- 4 • The RGMs and transportation customers cannot reasonably anticipate and hence insure  
5 against a precipitous price spike that in turn spikes potential OFO penalties by a  
6 multiplier. On the margin, this discourages gas transportation customers and RGMs and  
7 drives them from the system.

8  
9 **Q. Are you then saying there should be no OFO penalties applicable to transportation**  
10 **customers?**

11 A. Not at all. Properly calibrated OFO penalty clauses serve a necessary purpose to maintain  
12 operational integrity of the gas system. However, they need to be proportionate to avoid the  
13 expected harm. There is a reason that default remedies for breach of traditional commercial  
14 contracts require proof of actual damages to the aggrieved party, rather than by a pre-determined  
15 formula that does not bear any relation to actual harm suffered.

16  
17 Regulators superintend tariff language for a reason, and public utility law requires that  
18 regulators, in essence, step back and ask, "what is a particular provision trying to accomplish?"

19  
20 Here, the relevant sections of the tariff are related to protecting the operational integrity of the  
21 pipeline system from failure due to over- or under-delivery of gas. All provisions related to  
22 OFOs and penalties assessed under the tariff relate to that purpose.



1 **Q. Why do you think that Spire’s tariff language fails to accomplish that purpose?**

2 A. At one level, it certainly does introduce a deterrent against over- or under-supply of gas by  
3 transportation customers. But it is akin to saying, “we will randomly institute the death penalty  
4 for jaywalking.” A multiplier times index price penalty system makes RGMs and their  
5 transportation customers essentially have to insure themselves against unforeseen and  
6 unforeseeable events and thus introduces an extreme disincentive to participate in the  
7 RGM/transportation customer market.

8

9 As the Commission saw during Winter Storm Uri, OFO penalties quickly become exorbitant  
10 under the “multiplier times market index price” penalty clause in the tariff. During Uri, gas  
11 prices spiked to heretofore unimaginable levels – peaking at \$622 per MMBtu, which calculated  
12 to a 2½ times index penalty of \$1,555 per MMBtu. Such a penalty serves no public purpose, and  
13 in fact leads to *overdeterrence* of the behavior the penalty is meant to discourage. It would be an  
14 outcome that is absurd and inequitable, on its face.

15

16 Such penalties do not assist in ensuring system integrity. To the contrary, they would be purely  
17 punitive.

18

19 **Q. Why should the Commission step in and reform this OFO penalty tariff?**

20 A. Because that is what the Commission is supposed to do when a monopoly provider attempts  
21 to impose unreasonable terms on its customers. This Commission has seen first-hand that the  
22 current structure can create disastrous scenarios for one set of customers and an enormous  
23 windfall for another set. This goes against the goal of just and reasonable rate setting. The

1 Commission should recognize this and create a penalty structure that stands the stress test  
2 brought about by Winter Storm Uri. The RGMs here understandably find the OFO language to  
3 be unreasonable, perhaps even ruinous during extreme events. By entering into and refereeing  
4 this dispute such that the tariff language becomes just and reasonable to all parties on the system,  
5 the Commission can ensure that the public interest is maintained.

6

7 **Q. Do you have any other concerns about the multiplier times price index OFO penalty**  
8 **terms?**

9 A. Yes, an OFO penalty clause such as Spire's frustrates Missouri's express regulatory policy  
10 which I understand dates from the 1980s to allow for competitive gas procurement by  
11 transportation customers. My understanding is that this policy was such a success that, in 2002  
12 the legislature expressly provided that school districts could engage in aggregate purchasing for  
13 natural gas in Section 393.310 R.S.Mo. The potential imposition of ruinous OFO penalties on  
14 transportation customers (and by extension RGMs) creates a barrier to entry for competitive gas  
15 supply. I am not suggesting anything sinister is afoot with this term, but as a matter of regulatory  
16 policy, Missouri's statute (for schools) and regulatory policy (for other transportation customers)  
17 has allowed and encouraged competitive gas supply. The OFO tariff term frustrates that.  
18 Indeed, Spire may view that as a feature, not a bug, of being able to impose such outsized  
19 penalties.

20

21 **Q. What sort of OFO penalty clause would you recommend be put into the tariff instead?**

22 A. I believe that a tariff constructed using a fixed penalty structure would be more equitable and  
23 predictable. That fixed penalty could be set at similar increments to the current tiered structure

1 of Spire's tariff such that there is an inclining penalty for a regular OFO, a higher one for an  
2 Emergency OFO and still higher for a POC. That penalty could then be buttressed by  
3 authorizing Spire to obtain incremental costs it incurs because of over or under-delivery of gas  
4 by the transportation customer.

5

6 **Q. Do you have any specific proposed language?**

7 A. I don't necessarily have specific language for the Commission to adopt, but I would point the  
8 Commission to other gas utilities with OFO penalties following this "fixed penalties plus  
9 incremental costs incurred" method. For instance, Atmos Energy Kansas and Centerpoint in  
10 Indiana each have OFO tariff provisions that follow this "fixed penalties plus incremental cost"  
11 method. I have attached the relevant portions of these utilities' tariffs as Schedule RG-2 as  
12 examples. These types of OFO penalty clauses work much better conceptually to meet the  
13 regulatory goals the Commission seeks to accomplish here.

14

15 **Q. Wouldn't the introduction of the incremental cost calculation introduce uncertainty and**  
16 **burden in determining the "right" penalty?**

17 A. No, every LDC including Spire has to calculate the cost of gas it provides to its customers.  
18 Regarding a penalty formula, when looking to get the regulatory incentives right for all the  
19 interested stakeholders, the Commission should look first to getting the balance right and  
20 equitable. The OFO penalty clauses in gas LDC tariffs are meant to deter over- or under-supply  
21 of gas to the system, and any remedy for such action should be calculated to do just that. It  
22 should not be a remedy that creates potentially ruinous penalties and perverse cross-subsidies.  
23 That there is some burden to getting a penalty "right" should not stop the Commission from

1 wanting to avoid over- or under-deterrence of behavior. By contrast, the relative administrative  
2 simplicity and shortcut of the “multiplier times index” penalty, we know, does not result in the  
3 right amount of deterrence. To the contrary, it creates big problems, frustrates the regulatory  
4 policy of competitive gas supply and leads to inequitable outcomes for entire classes of gas  
5 customers.

6

7 **Q. Do you have any other observations about the tariff and public policy considerations?**

8 A. Yes. As I mentioned at the beginning of my testimony, I have found that it sometimes makes  
9 sense to step back and consider the broader context of a particular case. In this matter, the  
10 experience of OFO penalties during Winter Storm Uri illustrates the draconian potential of this  
11 penalty clause. The tariff language would potentially lead to particularly perverse public policy  
12 outcomes. End-use customers are unlikely to know with any precision exactly how much natural  
13 gas they have used on any given day, whether there has been an over- or under-delivery, or what  
14 the spot price of gas is that would be used for penalty assessment. Spire, however, is the one  
15 party that may have this information. Such information asymmetry combined with an extreme  
16 penalty structure would result in a public policy outcome that the Commission should seek to  
17 avoid.

18

19 By contrast, a fixed tariff penalty would avoid these extreme outcomes, bringing predictability  
20 and stability to the process. Parties in advance could be aware of and account for the potential  
21 penalties they might face. What is more, if the OFO clause also allowed Spire to obtain any  
22 incremental costs it might incur to maintain operational integrity, then all parties would be made

1 whole. Thus, this would achieve the public policy end of “just and reasonable” terms and  
2 conditions.

3

4 Q. Does this conclude your testimony?

5 A. Yes, it does.

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

In the Matter of Spire Missouri, Inc. d/b/a )  
 Spire's Request for Authority to Implement a ) Case No. GR-022-0179  
 General Rate Increase for Natural Gas )  
 Services Provided in the Company's Missouri )  
 Service Areas )

**AFFIDAVIT OF RAYMOND L. GIFFORD**

STATE OF COLORADO )  
 )  
 COUNTY OF Denver ) ss.

I, Raymond Gifford, of lawful age, being first duly sworn, deposes and states:

1. My name is Raymond L Gifford. I am Managing Partner of Wilkinson Barker Knauner, LLP. My business address is 2138 W 32nd Ave., Suite 300, Denver, Colorado 80211.
2. Attached hereto and made part hereof is my direct testimony on behalf of Constellation NewEnergy-Gas Division, LLC and Symmetry Energy Solutions, LLC.
3. Under penalty of perjury, I hereby declare that the foregoing is true and correct to the best of my knowledge and belief.

  
 Raymond L. Gifford

9 Sept 2022  
 Date

Signed and sworn before me, Larissa J. Debski,  
 in this County of Denver, State of Colorado.



LARISSA JAYNE DEBSKI NOTARY PUBLIC STATE OF COLORADO NOTARY ID 20204034063 MY COMMISSION EXPIRES SEPTEMBER 30, 2024
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