

**IN THE CIRCUIT COURT OF JACKSON COUNTY  
STATE OF MISSOURI**

VICINITY ENERGY KANSAS CITY, INC.,	)	
	)	
Plaintiff,	)	
	)	Case No. 2116-CV07877
v.	)	
	)	Division No. 11
SYMMETRY ENERGY SOLUTIONS, LLC	)	
	)	
Defendant.	)	

**SECOND AMENDED PETITION**

Plaintiff Vicinity Energy Kansas City, Inc. (“Vicinity”), a private district thermal energy utility company, files its Second Amended Petition against Symmetry Energy Solutions LLC (“Symmetry”) and respectfully submits the following in support of its Second Amended Petition:

**INTRODUCTION**

Symmetry arranges for the delivery of natural gas to customers in, among other places, the Kansas City area where it has nearly 200 customers. Almost all of its contracts in the Kansas City area provide that Symmetry will provide “firm” services meaning that Symmetry is obligated to provide uninterrupted natural gas to its customers regardless of the circumstances. This is so that Vicinity, an entity that provides heating and process steam to a diverse collection of essential civic and business entities in downtown Kansas City, Missouri, can provide consistent and reliable service to its customers who rely upon Vicinity for critical heat. Symmetry’s contract with Vicinity isn’t only “firm,” but it also contains a special provision designed to prevent Vicinity from having to pay exorbitant natural gas pricing during periods of unusual price spikes.

In mid-February 2021, the Midwest region of the U.S., including Kansas City, Missouri, was hit with a winter and ice storm event that produced abnormally low temperatures (“Winter Storm Uri”). While some fluctuations in energy pricing are reasonably expected during this type

of weather event, Symmetry and other natural gas suppliers saw an opportunity. As hundreds of thousands of citizens experienced extended energy blackouts and businesses struggled to remain functioning during Winter Storm Uri, Symmetry fraudulently charged outrageous rates to Vicinity and others – sometimes price increases in excess of **24,000%** over an eight-day period.<sup>1</sup>

Like most of Symmetry’s customers, Vicinity received a devastating natural gas bill for the month of February. Symmetry’s exorbitant prices, if sustained, could ultimately have to be borne by Vicinity’s customers - the Downtown Kansas City Public Library, a hospital, civic buildings, a tuition-free charter school, state and federal court houses, numerous churches, condominiums, apartments, and other key commercial spaces.

Since 2011, the price for natural gas has reached double digits only twice, \$31.26/MMBtu on February 6, 2014 and \$13.76/MMBtu on March 4, 2014, and since 2016 there have been only five days when the price for natural gas exceeded \$5.00/MMBtu notwithstanding the fact that there have been hundreds of very significant weather events in the United States, and in Missouri, over that time period.<sup>2</sup> On February 1, 2021, Symmetry charged Vicinity \$2.55/MMBtu, but on February 17, 2021, knowing that natural gas was a mandatory purchase for Vicinity on behalf of its customers, Symmetry fraudulently charged Vicinity \$622.79/MMBtu representing a **24,323.1%** price increase in just a matter of weeks.

But despite claiming to have performed its contracts and sending out egregiously inflated bills, it turns out that Symmetry did not actually deliver natural gas to its Kansas City-based

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<sup>1</sup> The situation immediately caught the attention of elected officials at the city, state, and federal levels. For example, on February 18, 2021, U.S. Senator Josh Hawley, on behalf of Missouri citizens and businesses like Vicinity, sent a letter to the Federal Energy Regulatory Commission (“FERC”) stating, in relevant part, “We respectfully request FERC to expeditiously review the circumstances of this situation as it relates to natural gas supplies, the rates of interstate transmission of natural gas, and take the necessary steps needed to address this crisis.”<sup>1</sup> Missouri Governor Parson issued a statement that warned against such unlawful practices just days after Winter Storm Uri and requested that Missouri’s Attorney General’s Office launch an immediate investigation on behalf of Missourians who have been and will be harmed by the massive spike in natural gas prices.

<sup>2</sup> Pricing based on the Southern Star Index.

customers during Winter Storm Uri, at all. Instead, Symmetry chose to route all of its available gas elsewhere and Symmetry's Kansas City-based customers, including Vicinity, were left to the mercy of other gas providers who, at least in some cases, stepped in to fill the void that Symmetry left. At least one of those alternative providers is now demanding payment from Symmetry for the gas that it delivered to Vicinity and other of Symmetry's customers. But, in a brazen attempt at after-the-fact arbitrage, Symmetry is now both refusing to pay the gas provider for the gas delivered to Vicinity and simultaneously demanding payment from Vicinity for natural gas that Symmetry never owned and never delivered.

In reliance on Symmetry's assertion that it delivered the natural gas that Vicinity utilized during Winter Storm Uri, and in accordance with its contract with Symmetry, Vicinity paid Symmetry what Vicinity believed to be the reasonable and fair value for its natural usage during February 2021. But, Vicinity has now learned that Symmetry never delivered any gas to Vicinity during Winter Storm Uri. All of the gas Vicinity utilized was delivered by other providers, not Symmetry. As a result, Symmetry, which breached its contract to provide firm gas service to Vicinity, is owed nothing from Vicinity and instead, owes Vicinity both for the amounts that Vicinity paid in reliance on Symmetry's false representations of performance and for Symmetry's failure to perform.

## **PARTIES**

1. Vicinity is a private company in Kansas City, Missouri, that owns, operates and maintains an energy system that provides clean steam to public and private business in the downtown Kansas City, Missouri, area.

2. Symmetry is a Delaware limited liability company with its principal place of business in Houston, Texas. Symmetry is a natural gas marketer that markets natural gas to

business in Missouri and other states. Symmetry may be served through its registered agent for service CT Corporation System 120 South Central Ave., Clayton MO, 63105.

### **JURISDICTION AND VENUE**

3. This Court has subject matter jurisdiction because Vicinity is seeking an amount in excess of the minimum jurisdictional requirements of this Court.

4. Venue is proper because all or a substantial part of the events giving rise to the dispute occurred in Jackson County, Missouri. Further, the contract at issue in this lawsuit expressly provides that it is to be performed in Jackson County.

### **BACKGROUND**

#### **A. The Winter Storm in February 2021**

5. In February 2021, the continental United States experienced Winter Storm Uri that occurred from approximately February 13, 2021 through February 19, 2021.

6. Because certain energy producers and market participants, like Symmetry, were not adequately prepared, Winter Storm Uri caused the market to stop functioning appropriately (*i.e.*, the price ceased impacting demand) thereby creating an opportunity for willing gas suppliers and marketers to grossly inflate prices and then hold in place those exorbitant prices knowing full well that energy providers, such as Vicinity, had no choice but to purchase gas regardless of how exorbitant the price in order to continue to serve their customers. There is a point when scarcity pricing becomes unlawful price gouging – which is precisely what occurred with the natural gas prices charged by Symmetry during Winter Storm Uri.

7. The self-inflicted chaos surrounding Winter Storm Uri caused by market participants like Symmetry also presented opportunity for shady inside dealing, opaque billing practices and outright fraud. Symmetry took full advantage of this situation to the detriment of

Vicinity and others in the Kansas City, Missouri area.

## **B. The Contract**

8. Vicinity purchases natural gas solely from Symmetry. That relationship is governed by a Base Contract for Sale and Purchase of Natural Gas that Vicinity and Symmetry entered on October 19, 2005 (the “Contract”, attached as Ex. A).

9. Under the Contract, Symmetry promised to “sell and deliver” natural gas to Vicinity on a “firm” basis. “Firm” means that either party may interrupt its performance without liability only the extent such performance is prevented for reasons of “Force Majeure.” See Ex. A at 2.17.<sup>3</sup>

10. Symmetry, and not some other third party, has “the sole responsibility for transporting the [natural gas] to the [Delivery Points]. See Ex. A at 4.1.<sup>4</sup> Symmetry is also obligated to deliver natural gas to Vicinity that meets the “pressure, quality and heat content requirements of the Receiving Transporter.”

11. Symmetry warranted that it has the right to convey and will transfer good and merchantable title to all natural gas delivered to Vicinity, free and clear of all liens, encumbrances, and claims. See Ex. A at 8.2. In fact, Symmetry agreed to indemnify Vicinity and hold it harmless from all losses, liabilities or claims including reasonable attorneys’ fees and costs of court from any claims of title to the natural gas before title passes to Vicinity at the Delivery Point. See Ex. A at 8.3.

12. In short, unless there is a valid “force majeure” notice provided to Vicinity, then Symmetry and only Symmetry is obligated to both sell and deliver natural gas in sufficient quantity

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<sup>3</sup> The Contract itself does not set the price for Vicinity’s purchases of natural gas. Terms for individual transactions are memorialized in a Transaction Confirmation that specifies the quantity to be delivered by Symmetry at a specified price, at a specified delivery point for a specified term (the “Transaction Confirmation”, attached as Ex. B). The price that Symmetry charges Vicinity for natural gas is equal to the Gas Daily daily midpoint price as reported in Platt’s Gas Daily: Southern Star Central: Texas, Oklahoma, Kansas.

<sup>4</sup> The “Delivery Point” under the Contract is the “Utility Citygate – Missouri Gas Energy” which is a physical location in or around Kansas City, Missouri.

and quality to the Kansas City Utility Citygate for further transportation to Vicinity's plant in Kansas City. As set forth below, during critical periods of Winter Storm Uri, Symmetry did none of these things.

13. In addition to receiving "firm" delivery, Vicinity also bargained for the right to be protected from the type of price spikes resulting from Winter Storm Uri. The Special Conditions Provision in the Transaction Confirmation states as follows:

Notwithstanding anything hereinabove to the contrary, during the term of any period of daily balancing, operational flow order, critical notice or other like circumstance declared by any Transporter for any transaction, Seller will use commercially reasonable efforts to secure additional reasonable quantities or sell excess reasonable quantities of Gas requested by Transporter, and all such additional or excess quantities purchased or sold by Buyer in excess or short of the Contract Quantity, will be billed or credited to Buyer as the first quantities through the meter that Day at a cost equal to the prices of Gas available to Seller at such time, as reasonably determined by seller.

14. Based upon this Special Conditions provision, Symmetry was obligated to use "commercially reasonable efforts" to secure additional quantities of natural gas so that during an operational flow order or like circumstance Symmetry would be able to provide natural gas to Vicinity at "cost equal to the prices of Gas" available to Symmetry at such time. In other words, had Symmetry performed as obligated, Symmetry would have had access to an adequate supply of natural gas at all times and at a reasonable price so that Vicinity wouldn't be subject to inflated gas prices.

15. The Contract includes a disputed payment provision under Section 7.4, which gives the parties a contractual mechanism to challenge invoiced amounts. Specifically, Section 7.4 provides that:

If the invoiced party, in good faith, disputes the amount of any such invoice or any part thereof, such invoiced party will pay such amount as it concedes to be correct; provided, however, if the invoiced party disputes the amount due, it must provide supporting documentation acceptable in industry practice to support the amount

paid or disputed. In the event the parties are unable to resolve such dispute, either party may pursue any remedy available at law or in equity to enforce its rights pursuant to this section.

Notably, an invoiced party's good-faith dispute of the amount charged for gas in accordance with Section 7.4 does not constitute a failure to pay giving rise to a payment default under the Contract.

### **C. Symmetry's Numerous Breaches of the Contract.**

16. In or around February 2, 2021, Symmetry was made aware of a "Winter Weather Watch" beginning February 6, 2021 issued by Southern Star pipeline which carries the natural gas at issue in this lawsuit. Despite this advanced notice of potentially bad weather and Symmetry's promise to deliver natural gas to its customers on a "firm" basis, Symmetry failed to reasonably react and ensure that it had access to an adequate supply of natural gas for its customers – including Vicinity.

17. Rather than invest reasonable funds to maintain enough natural gas in storage to cover its customer needs during an ice storm, Symmetry instead chose the cheaper route and gambled that it would be able to buy enough natural gas on the "spot" market if customer demand spiked or natural gas became scarce.

18. Far from using "commercially reasonable efforts" to plan for this contingency as required under the Special Conditions provision of its contract with Vicinity, Symmetry instead overpromised its "firm" obligations to deliver natural gas uninterrupted to numerous customers.

19. On or about February 6, 2021, just as Southern Star predicted, temperatures started to drop in the Midwest, demand for natural gas increased, and Symmetry realized that it didn't have adequate reserves to meet its customers' needs.

20. According to a Symmetry representative's sworn testimony before the Missouri Public Service Commission ("PSC"), Symmetry scrambled to purchase as much natural gas as

possible on the “spot market” during this time period, but it was unable to do so because, among other things, “multiple suppliers were not willing to increase [Symmetry’s] credit lines to allow Symmetry to purchase additional natural gas.” But for Symmetry’s perceived economic hardship, Symmetry believes that it could have obtained access to additional natural gas supplies during Winter Storm Uri.

21. On or about February 15, 2021, according to Symmetry’s testimony before the PSC, Symmetry could no longer meet the “firm” obligations to all its customers. Because of Symmetry’s poor planning and execution, it could only deliver natural gas to some, but not all, of its customers during the critical periods of Winter Storm Uri.

22. Symmetry knew that Vicinity provided “heat” to numerous “at risk” customers in Kansas City including hospitals, churches, schools, and hotels. Cutting off Vicinity’s supply of natural gas during Winter Storm Uri could have had catastrophic consequences for Vicinity’s customers.

23. Despite knowing the potential consequences of not delivering natural gas to the Kansas City area during Winter Storm Uri, Symmetry’s Vice President of Gas Supply, Scheduling and Asset Management, William Lee, testified under oath before the PSC that Symmetry did not deliver natural gas to Kansas City during critical periods of Winter Storm Uri.

24. Symmetry made a business decision to, as Mr. Lee testified, “de-prioritize” the delivery of natural gas into Northwest Missouri and instead direct all of its available gas supply to Atmos Energy (“Atmos”) – Symmetry’s own business partner. Symmetry’s decision to divert available natural gas from Vicinity and other Missouri customers to Atmos was purely a business decision. “De-prioritize” is a clunky euphemism for Symmetry’s conscious decision to leave Vicinity and other Kansas City-area customers literally and figuratively “out in the cold” during



Winter Storm Uri.

25. On or about February 15, 2021, Symmetry sent an email to Vicinity and potentially other potential customers claiming that:

This letter serves as written notification of a Force Majeure event beginning no later than February 15, 2021, and continuing until further notice, due to the failure of gas supply caused by extremely low temperatures that have caused freezing or failure of wells or lines of pipe affecting the entire geographic region, including but not limited to market areas served by Kansas Gas Service (KGS) and Missouri Gas Energy (MGE) pipelines. These events have caused Symmetry Energy Solutions' supply to be cut, and this Force Majeure event will result in the suspension of either full or partial deliveries under the base contract until further notice. We are working to expeditiously resolve this issue and will continue to provide you with periodic updates.

See Email attached as Ex. C.

26. Symmetry fraudulently covered up the fact that real reason that Symmetry might not have been able to deliver gas into Kansas City was Symmetry's decision to favor its business partner over its customers and divert all of its available natural gas supply to Atmos.

27. Clearly it was possible for Symmetry to provide "firm" service to Vicinity as obligated under the Contract during Winter Storm Uri. According to documents submitted to the PSC by Spire Missouri, Inc. ("Spire"), the company that allegedly delivered natural gas to Vicinity during Winter Storm Uri, marketers other than Symmetry were able to provide natural gas to their customers in Missouri during Winter Storm Uri. According to Spire, Symmetry failed to provide natural gas for delivery to Kansas City during Winter Storm Uri because of "inadequate supply planning."

28. Having already decided to provide all of its available natural gas supply to its business partner, Atmos, Symmetry's fraudulent "Force Majeure" notice does not relieve it of its "firm" delivery obligations pursuant to Section 11.3 of the Contract:

[T]he benefit of the provisions of Force Majeure” to the extent performance is affected by any or all of the following circumstances: (i) the curtailment of interruptible or secondary Firm transportation unless primary in path, Firm transportation is also curtailed; (ii) the party claiming excuse failed to remedy the condition and to resume the performance of such covenants or obligations with reasonable dispatch, (iii) economic hardship to include, without limitation, Seller’s ability to sell Gas at a higher or more advantageous price than the Contract Price, Buyer’s ability to purchase Gas at a lower or more advantageous price than the Contract Price, or a regulatory agency disallowing, in whole or in part, the pass through of costs resulting from this agreement.

29. Based upon Mr. Lee’s testimony before the PSC, Symmetry’s “firm” performance was affected by both economic hardship or loss and a failure of Symmetry’s gas supply. Therefore, under Sections 11.3 (i) and (iii) of the Contract, Symmetry’s bogus “force majeure” event does not excuse Symmetry’s “firm” obligation to deliver natural gas to Vicinity during Winter Storm Uri.

30. According to Spire, it elected to provide natural gas for “hundreds of Missouri” natural gas customers due to Symmetry’s decision to divert its natural gas supply to Atmos. Upon information and belief, Symmetry has collected millions of dollars from its Missouri customers related to Winter Storm Uri notwithstanding the fact it neither delivered nor paid for natural gas that was actually delivered to Symmetry’s customers by someone other than Symmetry.

#### **D. Symmetry’s February 2021 Invoice to Vicinity.**

31. Under the Contract, Symmetry is required to invoice Vicinity for natural gas actually “delivered” in the preceding month, along with supporting documentation acceptable in industry practice to support the amounts charged. See Ex. A at 7.1 (“Seller shall invoice Buyer for Gas delivered and received in the preceding Month ...”)(emphasis added).

32. Notably, the Contract expressly contemplates Vicinity’s right to dispute any amounts that are not conceded (as set forth above).

33. Symmetry sent to Vicinity Sales Invoice # 977381, dated March 16, 2021 (the “February Invoice”, attached as Ex. D). The February Invoice demands from Vicinity payment of

over \$18,000,000.00 for gas allegedly “delivered” to Vicinity from Symmetry in February 2021.

34. Of the over \$18,000,000.00 demanded by Symmetry for natural gas it allegedly delivered to Vicinity during the month of February 2021, Vicinity recently discovered that Symmetry did not actually deliver *any* gas to the Delivery Point during most of Winter Storm Uri.

35. According to Spire, Symmetry refuses to pay it anything for the natural gas that Spire allegedly provided to Vicinity from February 15, 2021 through February 19, 2021.

36. In the February Invoice, Symmetry is falsely demanding that Vicinity pay Symmetry well over \$14,000,000.00 for natural gas that it did not own, and that it did not deliver to Vicinity.

#### **E. Vicinity’s Good-Faith Payment.**

37. On April 5, 2021, Vicinity sent a letter to Symmetry specifying that Vicinity was disputing the February Invoice under Section 7.4 of the Contract. The February Invoice covers multiple transactions throughout February. However, the only transactions contained in the February invoice that Vicinity disputed related to the eight days covering February 11-19, 2021, where Symmetry unlawfully charged Vicinity as much as \$622/MMBtu for natural gas that it either over charged or did not pay for or deliver to Vicinity.

38. Vicinity, in good faith, paid \$3.19/MMBtu for the disputed portions of the February Invoice, and otherwise paid the entirety of the other transactions, including overtake and transportation charges yielding a total payment to Symmetry in the amount of \$999,776 (the “Payment”, attached as Ex. E). Vicinity, by paying for what it didn’t dispute at the time in good faith, is doing precisely what Symmetry agreed Vicinity should do under the circumstances pursuant to Section 7.4 of the Contract.

39. Symmetry never disclosed to Vicinity that Symmetry did not deliver approximately

\$14,000,000 of natural gas that it demands Vicinity pay for. Upon information and belief, Symmetry has collected millions of dollars from its other Kansas City customers for gas that it did not own, deliver or pay for during Winter Storm Uri.

**F. Symmetry's Fraudulent Scheme to Conceal its Illegal Actions.**

40. As the Midwest faced the brunt of Winter Storm Uri, Symmetry began its fraudulent scheme to dupe its Kansas City-based customers into paying Symmetry for natural gas that Symmetry never delivered or paid for.

41. On February 15, 2021, Symmetry made a business decision to cut off its Kansas City-based customers from natural gas deliveries in order to divert its natural gas supply to its business partner, Atmos.

42. Rather than disclose to its Kansas City-based customers that Symmetry had in fact cut off natural gas into Kansas City and why, on February 15, 2021, Symmetry instead issued a fraudulent "Force Majeure" notice claiming that deliveries *may* be cut due to freezing temperatures.

43. Symmetry never disclosed to Vicinity that Symmetry did not deliver the approximately \$14,000,000.00 of natural gas during Winter Storm Uri that Symmetry now demands Vicinity pay for. In fact, representatives of Symmetry knowingly made fraudulent statements to Vicinity about the source of the natural gas being delivered to Vicinity during Winter Storm Uri. Although Symmetry had already decided to cut off Vicinity's supply of natural gas at the time, on or around February 17, 2021, a Symmetry Representative told a Vicinity representative that Symmetry was able to "manage its customer pool" in order to ensure natural gas delivery to Vicinity at the time. This statement was false at the time it was made because there was no viable "customer pool" of natural gas available to Vicinity during the time period that

Symmetry wasn't delivering natural gas into the Kansas City market.

44. Symmetry knowingly made these fraudulent statements to induce Vicinity and other Missouri customers to ultimately pay Symmetry for natural gas that it did not own, deliver or pay for.

45. By any objective standard, the prices Symmetry charged Vicinity (and presumably expects Vicinity to pass on to its customers) for the fuel Symmetry actually delivered to Vicinity during Winter Storm Uri were excessive, exorbitant, gross, fraudulent, and shocking, and are therefore, unconscionable and amount to unlawful price gouging in violation of Missouri public policy. Although Winter Storm Uri was unusual, the legal doctrines that guard against unlawful pricing and unconscionable market excesses are firmly rooted.

46. Missouri, like 35 other states including Oklahoma, has declared it illegal for the providers of essential services to charge excessive prices within a disaster area when businesses and consumers are at the mercy of those providers. Missouri's public policy against price gouging in a disaster area is reflected in its statutes. For instance, 15 CSR 60-8.030(1) Price Gouging,

It is an unfair practice for any person in connection with the advertisement or sale of merchandise to . . . (B) Charge within a disaster area an excessive price for any necessity; or (C) Charge any person an excessive price for any necessity which the seller has reason to know is likely to be provided to consumers within a disaster area.

Missouri has long held that unconscionable contracts are unenforceable. Eaton v. CMH Homes, Inc., 461 S.W.3d 426, 432 (Mo. 2015). Substantive unconscionability involves undue harshness or oppression in the contract terms. Id.

### **COUNT I – BREACH OF CONTRACT**

47. Vicinity realleges and incorporates each allegation set forth above.

48. Under the Contract, Symmetry promised to “sell and deliver” natural gas to Vicinity

on a “firm” basis. “Firm” means that either party may interrupt its performance without liability only the extent such performance prevent for reasons of “Force Majeure.” See Ex. A at 2.17.

49. Symmetry, and not some other third party, has “the sole responsibility for transporting the [natural gas] to the [Delivery Points]. Id., at 4.1. Symmetry is also obligated to deliver natural gas that meets the “pressure, quality and heat content requirements of the Receiving Transporter.”

50. Symmetry warranted that it has the right to convey and will transfer good and merchantable title to all natural gas delivered to Vicinity, free and clear of all liens, encumbrances, and claims. Id., Ex. A at 8.2. In fact, Symmetry agreed to indemnify Vicinity and hold it harmless from all losses, liabilities or claims including reasonable attorney’s fees and costs of court from any claims of title to the natural gas before title passes to Vicinity at the Delivery Point. Id., at 8.3.

51. The contract provide a specific remedy if Symmetry breaches its “firm” obligation to deliver natural gas to Vicinity. Pursuant to Section 3.2: Spot Price Standard:

The sole and exclusive remedy of the parties in the event of a breach of a Firm obligation to deliver or receive Gas shall be recovery of the following: (i) in the event of a breach by Seller on any Day(s), payment by Seller to Buyer in an amount equal to the difference between the Contract Quantity and the actual quantity delivered by Seller and received by Buyer for such Day(s); multiplied by the positive difference, if any, obtained by subtracting the Contract Price from the Spot Price; . . . .

52. Under Section 3.2, if Symmetry does not deliver natural gas to Vicinity, then Symmetry is obligated to pay Vicinity the value of the natural gas that was provided to Vicinity by someone other than Symmetry.

53. Based upon Symmetry’s breach of its “firm” obligation to deliver natural gas to Vicinity during Winter Storm Uri, Symmetry owes Vicinity an amount equal to the difference between the “Contract Quantity” and the actual quantity delivered by Symmetry and received by

Vicinity. By Symmetry's own calculations, it now owes Vicinity in excess of \$14,000,000.00 for Symmetry's unexcused failure to provide "firm" delivery during Winter Storm Uri. Symmetry has failed to pay Vicinity anything for Symmetry's failure to provide "firm" delivery of natural gas during Winter Storm Uri.

54. Symmetry also failed to use "commercially reasonable efforts" to secure additional reasonable quantities of natural gas in order to prevent Vicinity from paying for dramatic price spikes. The Special Conditions Provision in the Transaction Confirmation states as follows:

Notwithstanding anything hereinabove to the contrary, during the term of any period of daily balancing, operational flow order, critical notice or other like circumstance declared by any Transporter for any transaction, Seller will use commercially reasonable efforts to secure additional reasonable quantities or sell excess reasonable quantities of Gas requested by Transporter, and all such additional or excess quantities purchased or sold by Buyer in excess or short of the Contract Quantity, will be billed or credited to Buyer as the first quantities through the meter that Day at a cost equal to the prices of Gas available to Seller at such time, as reasonably determined by seller.

55. Instead of using "commercially reasonable efforts" to provide affordable natural gas to Vicinity, Symmetry diverted all of its supply to Atmos and then engaged in a coordinated scheme to cover up its actions.

56. After breaching this Contract, Symmetry sent the February Invoice to Vicinity seeking millions of dollars as a result of Symmetry's failure to comply with the Special Provision.

57. Symmetry refused Vicinity's reasonable request for financial information pursuant to Section 7.4, asking Symmetry to provide documentation to establish that it complied with the Special Provision, among other requests.

58. Based upon the February Invoice, Vicinity has already paid Symmetry for natural gas that wasn't actually delivered to Vicinity by Symmetry during Winter Storm Uri. Symmetry has breached the Contract by refusing to return this money to Vicinity with interest.

59. In total, Symmetry has breached at least the following provisions in the Contract:
- Sec. 3.1: Failure to deliver natural gas to Vicinity on a “firm” basis during Winter Storm Uri;
  - Sec. 3.2: Spot Price Standard: Failure to pay Vicinity in an amount equal to the amount of natural gas that Symmetry did not deliver to Symmetry on a “firm” basis during Winter Storm Uri;
  - Sec. 4.1: Failure to be the sole responsible party to deliver natural gas to Vicinity;
  - Sec. 5: Failure to deliver natural gas that meets the pressure, quality and heat content requirements during Winter Storm Uri;
  - Sec. 7.1: Failure to invoice Vicinity for natural gas actually delivered to Vicinity in February 2021;
  - Sec. 7.1: Failure to provide supporting documentation to support the amount charged in the February Invoice;
  - Sec. 7.6: Failure to provide Vicinity the right to examine Symmetry’s books, records, and other financial information; and
  - Transaction Confirmation – Special Conditions: Failure to use “commercially reasonable efforts” to secure additional, reasonably priced quantities of natural gas for Vicinity.

60. Because of Symmetry’s prior material breach of the agreement, Vicinity is not required to pay the amount stated within the February Invoice.

Accordingly, Vicinity prays that this Court find that Symmetry breached its obligations under the Contract, and as a result that Vicinity has been damaged in an amount to be proven at trial. Furthermore, Vicinity is not required to pay the February Invoice as a result of Symmetry’s



prior material breach of the Transaction Confirmation, and for such other relief in law or equity as the Court deems just and proper.

### **COUNT II – UNJUST ENRICHMENT**

61. The preceding paragraphs are incorporated by references as if fully alleged herein.

62. Symmetry exploited vulnerable natural gas purchasers by representing that it delivered all of the gas to its customers during Winter Storm Uri, when in fact, it did not.

63. Upon information and belief, Symmetry has not paid for the gas it purported to deliver to Vicinity during Winter Storm Uri.

64. In litigation filed against Symmetry by Spire, Spire asserts that Symmetry failed to nominate and deliver sufficient natural gas to Spire.

65. Because Symmetry failed to provide the natural gas and is still seeking to recoup the expenses for gas it did not purchase, it would be unjust for Symmetry to recover from Vicinity the gas Symmetry failed to acquire or pay for. Injustice can only be avoided by refusing to allow Symmetry to receive the benefit of an exorbitant payment from Vicinity, where Symmetry paid no money and failed to acquire the gas that it purported to deliver to Vicinity.

Accordingly, Vicinity prays that this Court to find that Symmetry was unjustly enriched by invoicing its customers, including Vicinity, for natural gas that Symmetry did not deliver and is refusing to pay for itself.

### **COUNT III – BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING**

66. The preceding paragraphs are incorporated by reference as if fully alleged herein.

67. Symmetry has breached its implied duties of good faith and fair dealing as described herein by charging Vicinity for gas it did not deliver during Winter Storm Uri.

68. Symmetry has breached its implied duties of good faith and fair dealing as

described herein by charging Vicinity during a period of declared emergency disaster exorbitant and outrageous amounts that Vicinity did not agree to pay.

69. Symmetry has breached its implied duties of good faith and fair dealing by misrepresenting to Vicinity that it acquired and purchased the gas at such an exorbitant and outrageous amount during Winter Storm Uri.

70. As a direct result of Symmetry's breaches, Vicinity has been damaged in an amount yet to be determined.

Accordingly, Vicinity prays that this Court to find that Symmetry breached its duty of good faith and fair dealing by failing to deliver the gas it purported to deliver and charging Vicinity for the gas it failed to deliver, and in addition, for unconscionably requesting that Vicinity pay exorbitant and outrageous amounts for gas that it never agreed to pay for.

#### **COUNT IV – FRAUD**

71. The preceding paragraphs are incorporated by reference as if fully alleged herein.

72. Symmetry fraudulently represented to Vicinity on numerous occasions that Symmetry sold and delivered natural gas to Vicinity during Winter Storm Uri.

73. By issuing its misleading "Force Majeure" notice on February 15, 2021, Symmetry fraudulently represented to Vicinity and others that it could not deliver natural gas into the Kansas City market. On the same date that it issued the fraudulent "Force Majeure" notice, Symmetry had made a business decision to divert all of its available natural gas supply to its business partner. Symmetry's representations in the "Force Majeure" notice were false and Symmetry made such representations with actual knowledge as to the falsity or with deliberate ignorance as to the truth or falsity of the representations. Symmetry fraudulently covered up the fact that it decided to cut off natural gas into Kansas City during Winter Storm Uri so that Symmetry could avoid its "firm"

contractual obligations to provide natural gas to its customers regardless of the circumstances.

74. Further, on or about February 17, 2021, Rick Pemberton of Symmetry told Vicinity's representatives that Symmetry was delivering natural gas to Vicinity at that time because Symmetry was able to manage its customer pools in the Kansas City area.

75. Pemberton's representations were false and Pemberton made such representations with actual knowledge as to the falsity or with deliberate ignorance as to the truth or falsity of the representations.

76. On or about April 15, 2021, John Williamson, Symmetry's Chief Financial Officer, sent an email to John Gibson, Vicinity's Chief Operating Officer. Williamson's email attached a copy of the February Invoice along with alleged "supporting documentation" indicating that Symmetry, and not Spire, delivered natural gas to Vicinity during Winter Storm Uri.

77. Just like the February Invoice itself, Williamson's representations were false and Williamson made such representations with actual knowledge as to the falsity or with deliberate ignorance as to the truth or falsity of the representations.

78. Williamson sent this fraudulent information to Gibson in furtherance of Symmetry's fraudulent scheme to force its Kansas City-based customers, including Vicinity, to pay Symmetry for natural gas that Symmetry neither bought itself nor delivered to Kansas City during Winter Storm Uri.

79. Vicinity had a right to rely on Symmetry's representations. Symmetry's representations were material to Vicinity's decision on how to operate Vicinity's Kansas City plant, how allocate its financial resources after February 2021, and to pay Symmetry for natural gas as demanded in the February Invoice.

80. As a consequent and proximately caused result of Symmetry's fraud, Vicinity has

suffered foreseeable consequential damage including but not limited to the amount that Vicinity has already paid Symmetry for natural gas that someone other than Symmetry delivered to Vicinity during Winter Storm Uri.

Accordingly, Vicinity demands judgment against Symmetry for money damages in such amounts as are fair and reasonable, plus judgment for punitive damages in such amounts as are fair and reasonable, plus costs and such further amounts as are fair and reasonable.

### **COUNT V – DECLARATORY JUDGMENT**

81. The preceding paragraphs are incorporated by references as if fully alleged herein.

82. The controversies between the parties constitutes present, substantial, controversies between Vicinity and Symmetry, which have adverse legal interests, and the controversies are susceptible to immediate resolution and are capable of present judicial enforcement.

83. Vicinity has no adequate remedy at law to determine whether the Contract requires Vicinity to pay unconscionable and unlawful prices for natural gas.

84. Accordingly, Vicinity respectfully asks for the following declarations:

- a. Vicinity is only required to pay prices for fuel obtained pursuant to the Contract and any Transaction Confirmation that are conscionable and lawful.
- b. Vicinity disputes, in good faith, a portion of the amount stated in the February Invoice under Section 7.4 of the Contract, thereby initiating Section 7.4's dispute resolution process.
- c. Vicinity is not required to pay for natural gas that was not delivered to Vicinity by Symmetry.
- d. Vicinity must return all money Vicinity paid to Symmetry for natural gas that was delivered by an entity other than Symmetry.
- e. Symmetry is obligated to indemnify Vicinity and hold Vicinity harmless from all claims, including reasonable attorney's fees and court costs, from all persons arising out of claims of title to natural gas delivered to Vicinity before title of the natural gas transferred to Vicinity.

- f. A good faith dispute under Section 7.4 does not constitute a default under the Contract.
- g. Symmetry's prior material breach of the Contract and Transportation Confirmation relieves Vicinity from having to pay anything additional for the February Invoice.

**JURY DEMAND**

85. Plaintiff hereby demands a trial by jury on all claims so triable.

**CONCLUSION AND PRAYER**

86. For these reasons, Vicinity asks to be awarded the following relief against

Symmetry:

- a. Declaratory judgments;
- b. Court costs;
- c. Consequential and Incidental damages in an amount to be proven at trial;
- d. Punitive damages;
- e. Pre and post-judgment interest;
- f. Reasonable attorney's fees; and

- g. All other relief, general or special, at law or in equity to which Vicinity may be justly entitled.

Dated: January 3, 2022

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2022, through undersigned counsel, the foregoing was filed with the court's electronic filing system, sending notice to the following counsel of record:

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