

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

Constellation NewEnergy-Gas Division, LLC	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. GC-2021-0315
	)	
Spire Missouri, Inc. and its operating unit Spire Missouri West	)	
	)	
Respondent;	)	
	)	
Symmetry Energy Solutions, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
Spire Missouri, Inc. and its operating unit Spire Missouri West	)	Case No. GC-2021-0316
	)	
Respondent;	)	
	)	
Constellation NewEnergy-Gas Division, LLC	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. GC-2021-0353
	)	
Spire Missouri, Inc. and its operating unit Spire Missouri West	)	
	)	
Respondent;	)	
	)	

**CONSTELLATION’S REPLY IN SUPPORT OF ITS MOTION TO COMPEL  
DISCOVERY FROM SPIRE**

Constellation NewEnergy-Gas Division, LLC (“CNEG”) files this Reply in support of its February 8, 2022 Motion to compel Spire Missouri, Inc. and its operating unit Spire Missouri West (“Spire”) to produce all documents and data responsive to the requests outlined therein.

**I. ARGUMENT & AUTHORITIES**

Spire appears to have no sense of its discovery obligations other than the belief that it can pick and choose what considers relevant and produce such documents if and when it chooses. Just today, February 15, 2022 at 1:12 p.m. Central, in the middle of the deposition of Spire’s Vice

President of Regulatory and Governmental Affairs, Scott A. Weitzel, Spire produced text messages directly relevant to the issues in the case what should have been produced a long time ago.<sup>1</sup> The discovery rules that apply in these proceedings cannot be allowed to be so flagrantly disregarded.

The content of these late-produced documents suggests a motive for waiting to withhold them—perhaps Spire hoped to get a ruling on its motion for protection seeking to exempt its President, Scott Carter, from having to give sworn testimony in this proceeding before these documents were produced. Spire argued that Mr. Carter was “consulted” but not otherwise involved in any issues relevant to this proceeding including the decision to issue an OFO. This testimony is contradicted by text messages exchanged between Mr. Carter and Mr. Weitzel regarding outreach to this Commission, curtailing customers including schools, and subjective concerns about pressures on the system. These documents, and likely other responsive documents that Spire has yet to produce, show that Mr. Carter is not a disinterested figurehead of a leader who might be informed but not involved in a serious decision such as to issue an OFO that ultimately imposed \$195 million in penalties and costs on Missouri consumers. He is an active and involved President. Indeed, he has not hesitated to provide sworn testimony to this Commission in the past to justify rate increases.<sup>2</sup> Spire should be ordered to produce of his correspondence regarding the OFO Spire issued in February 2021, whether in the form of email, text, chat, instant message or other electronic format, including but not limited to Mr. Carter’s correspondence with Mr. Godat, Mr. Weitzel, and Mr. Powers and he should be compelled to give a deposition in this case.

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<sup>1</sup> Exhibit A, Spire’s February 15, 2022 production.

<sup>2</sup> Mr. Carter submitted direct testimony in December 2020 in Case No. GR-2021-0108, In the Matter of Spire Missouri Inc.'s d/b/a Spire Request for Authority to Implement a General Rate Increase for Natural Gas Service Provided in the Company's Missouri Service Areas, available at [https://efis.psc.mo.gov/mpsc/commoncomponents/view\\_itemno\\_details.asp?caseno=GR-2021-0108&attach\\_id=2022002818](https://efis.psc.mo.gov/mpsc/commoncomponents/view_itemno_details.asp?caseno=GR-2021-0108&attach_id=2022002818)

The Commission should reject Spire’s false premise that the Commission’s May 26, 2021 Order denying Spire’s Motion to Dismiss results in the exceedingly narrow scope of discovery Spire has used to justify its objections and refuse to produce (or worse, simply fail to search for or even retain) responsive and relevant documents. Spire takes the position that “it is ridiculous to suggest that this case... hinges” on Spire’s correspondence related to the issuance of its OFO<sup>3</sup> yet the Commission has already found that “the justification for issuance of operational flow orders” is at the heart of this proceeding.<sup>4</sup> Spire’s Response reveals the tenuous basis on which its demand for \$195 million in OFO penalties rests—it cites no actual operational considerations it was experiencing on the pipeline but only that Southern Star issued an OFO<sup>5</sup> and there was an extraordinary weather event. Spire’s Tariff imposed a higher standard.<sup>6</sup> Spire’s conduct in discovery appears to be a calculated ploy to enable it to pick and choose which documents it will disclose (or shield from discovery that such justification simply did not and does not exist). CNEG is entitled to full and fair discovery on this issue, including Spire’s contemporaneous discussion of those issues on ICE chat, Microsoft Teams chat or any other medium. During Mr. Weitzel’s deposition, given this very day, on February 15, 2022, he testified that in addition to ICE chat and Microsoft Teams chat, Spire uses Skype chat; and voicemail to email transcription. Spire should

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<sup>3</sup> Spire’s Response at 2.

<sup>4</sup> Commission’s May 26, 2021 Order denying Spire’s Motion to Dismiss.

<sup>5</sup> In contrast to Spire, Southern Star has sought to waive those penalties in recognition that “OFO penalties would add an enormous burden to what were already exorbitant gas costs for customers.” Southern Star Central Gas Pipeline, Inc. Operational Flow Order Penalties Waiver Request, Federal Energy Regulatory Commission, Docket No. RP21-618-000.

<sup>6</sup> Spire’s Tariff Sheet No. 16.8(B)(2) provides that Spire “may issue Operational Flow Orders (OFO’s) to Transportation Customers *as necessary to protect the integrity of its system* or any portion thereof and/or to insure compliance with the requirements of upstream pipeline companies.” Spire’s Tariff Sheet No. 16.8(B)(2) also 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.”

be required to search for and produce any responsive electronic documents, regardless of form or application used to generate those documents.

Notably, at least one Spire Missouri employee independently realized the relevance of chats using the Intercontinental Exchange, Inc. trading platform (“ICE Chats”), took a screenshot in order to preserve it.<sup>7</sup> In contrast, Spire itself made no effort to preserve such evidence. Its legal hold notice, issued months later, fails to instruct its recipients to preserve chats of any kind, whether ICE or Microsoft Teams, despite knowing (because their own employee took the time to preserve it) that such chat software existed, were used by Spire personnel on Spire systems, and were actually used to communicate by Spire personnel regarding the subject matter of this dispute. Spire’s response on this point is little more than an admission. It failed to preserve an important source of communications regarding this dispute, saved one such instance because its own witness thought it important enough to do so, and has failed to produce anything further as to CNEG.<sup>8</sup> Spire thus judicially admits exactly the kind of selective collection and production of evidence that CNEG feared had occurred.

In addition, Spire’s own testimony undermines its claims that the decision to issue an OFO was as limited as Spire has portrayed in its efforts to stymie discovery. Spire’s Vice President of Regulatory and Governmental Affairs, Scott A. Weitzel, has testified that “internal teams were activated when we forecasted low temperatures in our service territory” and that he himself “consulted on the curtailment plans, communication plans, and issuance of OFOs” and was “part

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<sup>7</sup> Spire’s Response at 5 (“As noted by CNEG, Spire Missouri produced a screenshot of one ICE Chat early in this process. (Motion, p. 3). It was previously explained that the Spire Missouri employee involved in that exchange had taken a screenshot in real time of the subject chat because he believed in the absence of such, he would be unable to retrieve the chat.”).

<sup>8</sup> Spire’s reliance on its production and discovery responses to Symmetry in response to a motion to compel by CNEG is an implicit acknowledgment of its failure to fully comply with its discovery obligations to CNEG.

of an emergency team that met frequently to get operational updates and provide solutions for meeting the needs of our customers.”<sup>9</sup> Spire’s own testimony thus contradicts Spire’s assertion in its Response that the decision to issue the OFO was limited to Mr. Godat<sup>10</sup> to excuse the lack of production of communications or other documents regarding the justification for the OFO. It simply is not credible that such an important decision could be made without such contemporaneous documents. Yet if this \$195 million decision was in fact made in such a cavalier manner, CNEG is entitled to know that. Spire’s objections should be overruled and its responses should be amended accordingly.

In addition, CNEG is troubled by Spire’s reliance on its production and discovery responses to Symmetry in response to a motion to compel by CNEG. As Spire is well aware, CNEG has independent claims pending against Spire. While the Commission has ordered a joint proceeding for purposes of discovery, Spire does not satisfy its discovery obligations to CNEG merely by responding to Symmetry’s discovery requests nor producing documents responsive to Symmetry’s requests. Spire has an obligation to produce all responsive documents to CNEG’s discovery requests to CNEG. Even its attempts to excuse this lapse by pointing to its responses and production to Symmetry, Spire raises more questions than it answers. Spire’s recent joint production of documents produced to each of the three marketers indicates only 33 documents produced to Symmetry while Symmetry’s correspondence to Spire indicates that Spire produced 45 documents to Symmetry on Sept. 9, 2021, and an additional 68 documents to Symmetry on February 9, 2022 including “13 chats” in addition to the 1 received by CNEG.

Finally, Spire’s reliance on its Retention Policy is misplaced. A Retention Policy, no matter how comprehensive or complete, does not excuse a party in a judicial proceeding from its common

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<sup>9</sup> Rebuttal Testimony of Scott A. Weitzel 5:4-9.

<sup>10</sup> Spire’s Response at 5.

law obligations to preserve potentially relevant evidence. Spire's Retention Policy is neither comprehensive nor complete. It appears to have failed to address a key source of documentation about a \$195 million-dollar decision. For example, it fails to address ICE chats, a source of information that Spire's own employees affirmatively sought to preserve (albeit selectively) and about which CNEG still cannot get a straight answer about whether or not a good faith effort to obtain these documents has been undertaken. Spire indicates that it "will be investigating other possible search methods this upcoming week" to include ICE chats and Microsoft Teams chats, but it offers no explanation for (a) its failure to exercise any retention oversight of systems that are obviously used by Spire personnel to conduct its business; and (b) why Spire has apparently failed to make such an investigation to search for and produce such documents long before now.<sup>11</sup>

Spire's willful disregard for its discovery obligations in this proceeding requires Commission intervention. Spire's boilerplate objections should be overruled. Spire should be ordered to produce all responsive documents to CNEG's requests. Spire should be ordered to state with particularity what documents, if any, it is withholding to all such requests and on what basis Spire withholds those documents. Spire should be ordered to identify any documents such as ICE Chats or Microsoft Teams Chats that it is able to identify but is not unable to recover, including the time frames for which no such chats are recoverable for each of the witnesses who have submitted testimony to this Commission or been identified as people with knowledge of the events at issue in this proceeding in the course of discovery.

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<sup>11</sup> As an example, Symmetry's correspondence indicates that the documents it received on February 9, 2022 were forwarded by Justin Powers to Spire's counsel, Mr. Aplington, on February 8, 2022, indicating that it these documents simply had not been collected until a day before they were produced.

II. CONCLUSION

WHEREFORE, Constellation respectfully reiterates its request that Spire be compelled produce all documents responsive to the requests outlined herein and/or for any such documents that once existed but cannot now be produced, explain the circumstances of any loss of data that has resulted in Spire's inability to produce such documents.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 15<sup>th</sup> day of February 2022, a copy of the foregoing **Reply** 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/ Joshua Harden

Joshua Harden