

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

Symmetry Energy Solutions, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. GC-2022-0062
	)	
The Empire District Gas Company	)	
d/b/a Liberty,	)	
	)	
Respondent.	)	

**EMPIRE’S REPLY TO SYMMETRY’S RESPONSE IN OPPOSITION TO  
EMPIRE’S MOTION FOR SUMMARY DETERMINATION**

Pursuant to Missouri Public Service Commission (“Commission”) Rule 20 CSR 4240-2.080(13) and the Commission’s October 19, 2021 *Order Establishing Time to Reply* in the above-captioned docket, Respondent The Empire District Gas Company d/b/a Liberty (“Empire”), by and through its undersigned counsel, hereby submits this Reply to Symmetry Energy Solutions, LLC’s (“Symmetry”) Response in Opposition to Empire’s Motion for Summary Determination and Symmetry’s Statement of Additional Material Facts that Remain in Dispute and Memorandum in Support (“Response”).

**I. INTRODUCTION**

Despite Symmetry’s attempts to distract the Commission with baseless allegations not raised in its Complaint and irrelevant declarations, the material facts in this proceeding remain undisputed. This case is a simple matter of whether the Commission will apply the plain terms of Empire’s Tariff or allow Symmetry to evade taking responsibility for its admitted non-compliance with Empire’s Winter Storm Uri Operational Flow Order (“OFO”) and shift the costs for that non-compliance onto Empire’s residential customers. Contrary to Symmetry’s assertion, there will be

no “windfall” to Empire; rather, each and every dollar of the OFO penalty collected—to the extent not applied to make Empire whole for the gas it procured on Symmetry’s behalf—will flow directly to Empire’s customers under Empire’s Purchase Gas Adjustment (“PGA”) clause contained in its Tariff.

Symmetry’s attempts to justify this massive cost shift and excuse its noncompliance all come back to the Federal Energy Regulatory Commission’s (“FERC”) decision to grant a requested waiver of OFO penalties for interstate gas pipeline Southern Star Central Gas Pipeline, Inc. (“Southern Star”) pursuant to the terms of Southern Star’s Tariff.<sup>1</sup> But, as Empire explained in its Motion for Summary Determination, Empire issued its own OFO, pursuant to the terms of its own Tariff, for its own intrastate gas distribution system, that is under this Commission’s jurisdiction. FERC’s decision in *Southern Star* has no bearing on this proceeding.

## II. ARGUMENT

The Commission may grant a motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show (1) that there is no genuine issue as to any material fact, (2) that any party is entitled to relief as a matter of law as to all or any part of the case, and (3) the Commission determines that it is in the public interest. Because all three elements are present here, the Commission should put an end to Symmetry’s attempts to evade the plain terms of Empire’s Tariff and grant Empire’s Motion for Summary Determination.

### A. There are No *Genuine* Issues as to Any Material Fact

In examining whether there are issues of material fact in dispute, the Commission only looks to whether the issues are genuine.<sup>2</sup> As the Missouri Supreme Court has stated “‘Genuine’ implies that the issue, or dispute, must be a real and substantial one—one consisting not merely of

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<sup>1</sup> *Southern Star Central Gas Pipeline, Inc.*, 175 FERC ¶ 61,015 (2021) (“*Southern Star*”).

<sup>2</sup> Rule 20 CSR 4240-2.117(1)(E).

conjecture, theory and possibilities.”<sup>3</sup> “[A] ‘genuine issue’ exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts.”<sup>4</sup>

The issues that Symmetry raises with respect to the thirteen material facts put forth by Empire are not of the genuine variety. In its Response, Symmetry admits—at least in part—to all but one of the material undisputed facts asserted by Empire.<sup>5</sup> To the extent it doesn’t fully admit a fact, Symmetry most often does so because it disagrees with Empire’s “paraphrasing the Tariff language,”<sup>6</sup> thinks that Empire has misquoted the Tariff,<sup>7</sup> or takes issue with some minor, non-material part of an asserted fact—like whether Empire is a “local gas distribution company” or rather “a legal entity that owns gas distribution facilities/assets.”<sup>8</sup> The Commission should ignore Symmetry’s splitting of hairs and recognize it for what it is: an attempt by Symmetry to delay the Commission’s determination and needlessly prolong this proceeding. The issues Symmetry raises with respect to Fact Nos. 1, 5, 6, 7, 8, and 9 are not genuine issues.

With respect to other facts established by Empire that Symmetry only partially admits, Symmetry not only fails to show that they present genuine issues, but fails to demonstrate they present issues that are in dispute at all. Specifically, for Facts Nos. 10 and 11, Symmetry partially denies them because, according to Symmetry, an email that Empire cited (among other evidence) to support its statement that it called an OFO on February 11, 2021 “offers no proof that Empire

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<sup>3</sup> *Rice v. Hodapp*, 919 S.W.2d 240, 234 (Mo. 1996) (citing *ITT Commercial Finance v. Mid-America Marine*, 854 S.W.2d 371, 376 (Mo. banc 1993)).

<sup>4</sup> *Big River Telephone Company, LLC v. Southwestern Bell Telephone*, 2012 Mo. PSC LEXIS 1253, at 2, Case No. TC-2012-0284 (Dec. 19, 2012) (quoting *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 382 (Mo. 1993)).

<sup>5</sup> Response at 2-7.

<sup>6</sup> Response at 4-5, Fact Nos. 8, 9.

<sup>7</sup> Response at 3-4, Fact Nos. 5, 6, 7.

<sup>8</sup> Response at 2, Fact No. 1. Symmetry fully admits Facts 2, 3, and 4 and thus either fully admitted or submitted an evasive partial admittance as described above for the first 9 asserted facts.

notified Symmetry” of the OFO.<sup>9</sup> Symmetry reaches this conclusion because the exhibit only shows “persons with ‘libertyutilities.com’ email addresses.”<sup>10</sup> Symmetry is playing games and wasting the Commission’s time.

Symmetry knows this fact—that Empire properly called an OFO on February 11—is not in dispute. Indeed, as the Affidavit of Symmetry’s own Director of Trading explains, “[i]t appears one or more Symmetry employees may have been blind carbon copied on that email.”<sup>11</sup> Symmetry also attaches an email from “mark.wolf@symmetryenergy.com” that is a response to Empire’s February 11 OFO call demonstrating that Symmetry in fact received the notification.<sup>12</sup> This information was all separately confirmed in the Affidavit Empire cited in support of this fact, which specifically says that “I notified Symmetry via email that a new OFO for Empire would go into effect on February 13, 2021 with instructions to ‘Please adjust your nominations to ensure you are NOT SHORT. OFO Penalties will apply to unauthorized deliveries.’ A copy of my email is attached as Exhibit A-2.”<sup>13</sup> Symmetry has thus failed to support—and has actually provided evidence that contradicts—its partial denial.<sup>14</sup> Facts 10 and 11 are simply not in dispute.

Symmetry’s partial denial as to Fact 12 is not so much a denial of the factual allegation so much as it is a reassertion of Symmetry’s legal theory that it should not have to pay any OFO

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<sup>9</sup> Response at 5-6, Fact Nos. 10, 11.

<sup>10</sup> *Id.*

<sup>11</sup> Response, Exh. 10, ¶ 7.

<sup>12</sup> Response, Exh. 8.

<sup>13</sup> Affidavit of Tatiana Earhart in Support of Motion for Summary Determination (“Aff. of T. Earhart”), ¶ 10. With respect to the email attached to the Affidavit notifying Symmetry of the OFO, Symmetry argues that “Empire cannot remedy its failure through the inconsistent testimony of Tatiana Earhart...” Response at 10. Symmetry then cites a case in which an affidavit submitted in response to a motion for summary judgment directly contradicted the affiant’s deposition testimony. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 388 (Mo. 1993). Of course, in this case there is no inconsistency. Rather the Affidavit is entirely consistent with the email and even the testimony of Symmetry’s own Director of Trading.

<sup>14</sup> In attempting to create a disputed fact where none exists Symmetry violates the Commission’s rules. Specifically, Rule 20 CSR 4240-2.080(6)(D) requires that “denials of factual contentions [be] warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.” Symmetry possesses the information necessary to confirm Fact Nos. 10 and 11 and thus its partial denials are not reasonably based on a lack of information.

penalties.<sup>15</sup> Fact 12 states that “Empire calculated Symmetry’s OFO penalty pursuant to the Tariff and billed Symmetry that amount.”<sup>16</sup> Nowhere in Symmetry’s multi-paragraph denial does it actually take issue with Empire’s calculation of the approximately \$11 million—which it admits it was billed—that it owes under the terms of the Tariff. Rather, Symmetry argues a legal conclusion that Empire cannot impose the OFO penalties on it because they “are not permitted under the Tariff.”<sup>17</sup> Similarly, with respect to Fact No. 13, Symmetry objects that the asserted fact is a “legal conclusion” and offers a legal denial to match it. On this, Empire would agree that this is a legal issue for the Commission’s consideration and not a genuine issue of material fact that prevents it from granting summary determination in Empire’s favor.<sup>18</sup>

Having failed to create a genuine issue of material fact with respect to Empire’s facts, Symmetry turns its attention to creating its own laundry list of “material facts that remain in dispute.”<sup>19</sup> Symmetry’s material facts, however, are irrelevant, unsupported, incendiary, and contradicted by Symmetry’s own pleadings. For example, Symmetry asserts that “[t]he operational integrity and reliability of Southern Star’s pipeline, from which Empire receives a portion of its gas, was not jeopardized during Winter Storm Uri.”<sup>20</sup> Of course, Southern Star’s interstate pipeline is not at issue in this proceeding. And even if it were at issue, Southern Star has explained—in the materials cited by Symmetry—that its “OFO period coincide[d] with the unprecedented severe and extreme cold and winter weather conditions *experienced on Southern Star’s system during that period.*”<sup>21</sup> Similarly, Symmetry claims that the OFO issued by Southern Star was not to

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<sup>15</sup> Response at 6-7.

<sup>16</sup> Motion for Summary Determination, ¶ 12.

<sup>17</sup> Response at 6.

<sup>18</sup> It is important to note that despite Symmetry’s claims that material facts remain in dispute, it never requests that the Commission grant it additional time to conduct discovery—as Rule 20 CSR 4240-2.117(1)(D) allows—nor identifies what more information it would need to render a fact not in dispute.

<sup>19</sup> Symmetry does not even attempt to claim that such disputes are genuine. Response at 8-9.

<sup>20</sup> Response at 8, Fact No. 14.

<sup>21</sup> Response, Exh. 2, at 35; Complaint, Exh. C (emphasis added).

“marketers such as Symmetry...”<sup>22</sup> It is unclear why it matters who Southern Star issued its OFO to since Symmetry admits that “Empire issued its own OFO,”<sup>23</sup> Symmetry was notified of it,<sup>24</sup> and Empire’s Tariff permits it to issue an OFO when *Empire’s* “transporters or suppliers call the equivalent of an OFO,”<sup>25</sup> not Symmetry’s. But if it were relevant, the materials attached to Symmetry’s response include Southern Star’s contradictory explanation that it “issued Storage and Delivery Location OFOs during the Polar Vortex,” and expanded “the Delivery Location OFO to System Wide...”<sup>26</sup>

Despite not having any credible supporting evidence, Symmetry also continues to assert that Empire is seeking a windfall.<sup>27</sup> Symmetry’s allegation ignores facts in the record that it made no effort to dispute. The OFO penalty provision of Empire’s Tariff has two components. **One component—the make whole component—is designed to simply allow Empire to recoup the costs it incurs in having to provide gas on behalf of marketers like Symmetry who fail to comply with an OFO.** Under the terms of Empire’s Tariff, this component requires that Empire impose an OFO penalty in the amount of “the Gas Daily Index price for the applicable Interstate Pipeline for such Unauthorized Overruns during the duration of an OFO.”<sup>28</sup> In its materials supporting its Motion for Summary Determination, Empire established that Symmetry’s inactions, including failure to comply with the OFO, resulted in Empire’s storage reserves being depleted and requiring Empire “to step into Symmetry’s shoes and procure gas on Symmetry’s behalf—at a time when gas prices went over \$600.”<sup>29</sup> Empire also demonstrated that the vast majority of the

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<sup>22</sup> Response at 8, Fact Nos. 19, 21.

<sup>23</sup> Complaint ¶ 23.

<sup>24</sup> Response, Exh. 10, ¶¶ 6, 7.

<sup>25</sup> Tariff, Sheet No. 43.

<sup>26</sup> Response, Exh. 2, at 35-36; Complaint, Exh. C.

<sup>27</sup> Response at 1, 8, 16.

<sup>28</sup> Tariff, Sheet No. 43.

<sup>29</sup> Aff., ¶¶ 14, 18.

OFO penalty charges that Symmetry incurred (\$11,031,566.93 of the total \$11,871,298.69) under Empire's Tariff were imposed to make Empire whole for the costs it incurred in supplying gas to Symmetry's customers when the cost of gas was exorbitantly high.<sup>30</sup> **These are charges that Symmetry would have incurred had it complied with the OFO and thus, if anyone is currently receiving a windfall, it is Symmetry and it is doing it on the backs of Empire's residential customers. If Symmetry does not pay this portion of the OFO, its customers will have not been charged for millions of dollars' worth of gas.**

The other component of Empire's OFO penalty—the actual penalty—requires that Empire impose a charge of \$25 Mcf in order to deter marketers from simply not complying with OFOs.<sup>31</sup> As Empire demonstrated in its Summary Disposition materials this component of the OFO penalty makes up a small portion (\$839,731.76 of \$11,871,298.69) of Symmetry's total OFO penalty.<sup>32</sup> But even this portion of the OFO penalty is not a windfall to Empire. Rather, **every dollar of this penalty will redound to the benefit of Empire's customers under the PGA clause contained in Empire's Tariff.**<sup>33</sup>

Finally, the Commission should find it telling that Symmetry, for all its protestations and incendiary accusations, does not actually dispute that it engaged in the bad behavior that Empire chronicled in its Summary Determination materials. During the “unprecedented severe and extreme cold and winter weather conditions”<sup>34</sup> brought on by Winter Storm Uri when Empire was taking actions to maintain its system's stability so its customers could continue to heat their homes, Empire could not even get Symmetry to respond to emails.<sup>35</sup> And when Symmetry did finally

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<sup>30</sup> Aff. of T. Earhart, ¶ 21.

<sup>31</sup> Tariff, Sheet No. 43.

<sup>32</sup> Aff. of T. Earhart, ¶ 21.

<sup>33</sup> Tariff, Sheet Nos. 54-65.

<sup>34</sup> Response, Exh. 2, p. 35.

<sup>35</sup> Aff. of T. Earhart ¶¶ 13-16.

respond it provided minimal information about whether it planned to comply with the OFO and deliver gas.<sup>36</sup> Symmetry now spends multiple paragraphs repeating vague excuses for its non-compliance with the OFO, but there are no valid excuses for what Symmetry did not do to meet its obligations to its customers.

Despite Symmetry's best attempts to make it otherwise, this case remains one of simple Tariff interpretation. The few genuine material facts necessary for the Commission to grant Summary Determination are not in dispute and they are not complicated: Empire issued an OFO under the terms of its Tariff and Symmetry did not comply with the OFO. Empire's Tariff requires it impose OFO penalties on Symmetry for its noncompliance.

## **B. The Tariff Is Clear and Empire is Entitled to Judgment as a Matter of Law**

### *1. Empire's OFOs Remain Valid*

In Symmetry's limited attempt to address the legal arguments presented by Empire it continues to display a fundamental misunderstanding of OFOs, the terms of Empire's Tariff, and the difference between this Commission's jurisdiction and that of FERC. Most of Symmetry's arguments, however, come down to its unrelenting belief that Southern Star's waiver of its OFO penalties means that—like magic—the OFO never occurred and thus neither did Empire's OFO or, for that matter, the devastating winter conditions brought on by Winter Storm Uri.

In reality, Winter Storm Uri presented “unprecedented severe and extreme cold and winter weather conditions”<sup>37</sup> that required interstate pipelines like Southern Star and local distribution companies like Empire to take actions necessary to keep their systems stable and supply their customers (and Symmetry's) with gas. Southern Star, Empire, and many other inter and intrastate

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<sup>36</sup> Aff. of T. Earhart ¶ 17.

<sup>37</sup> Response, Exh. 2; Complaint, Exh. C.



pipelines managed these conditions by calling OFOs to require compliance with the Tariff's receipt and delivery obligations and, for those who did not comply, imposing requisite OFO penalties.

Although some of the pipelines have tariff provisions that allow them to waive OFO penalties—which Empire does not—and they have subsequently volunteered to do so, that does not mean that the existence of the OFO magically disappears. Indeed, as Southern Star reported to FERC, the OFO it issued was necessary “to protect the integrity of its pipeline system,”<sup>38</sup> and “helped enable the pipeline to continue to provide firm service without curtailment.”<sup>39</sup> Moreover, one of the conditions that allows Empire to call an OFO—i.e. “[w]hen any of [Empire's] transporters or suppliers call the equivalent of an OFO”—is based on the issuance of such equivalent OFO and not whether penalties arise from it. Symmetry's argument that “now that Southern Star's OFO penalties have been waived, there is no ‘problem’ for Empire's OFOs to address,”<sup>40</sup> is only plausible in some alternate reality where there was no Winter Storm Uri.

## 2. *Symmetry Ignores the Plain Terms of Empire's Tariff*

Symmetry's attempt to interpret Empire's Tariff appears to be similarly derived from an alternate reality. For example, Symmetry argues that “Empire never faced any actual threat to system integrity,” (and thus its OFO is invalid) because Empire admitted that it was able to maintain its operations and keep its system stable.<sup>41</sup> Under this rationale, the only time an Empire OFO would be valid is if Empire failed to maintain its operations and its system collapsed.

Of course, this is not the purpose behind an OFO and it ignores the plain terms of Empire's Tariff. OFOs are issued at critical times with specific instructions to customers so that system

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Response at 17.

<sup>41</sup> Response at 17.

integrity can be *maintained*.<sup>42</sup> Empire’s Tariff is consistent with this purpose and provides it the “the right to issue an Operational Flow Order that will require actions by the Customer to alleviate conditions that, in the sole judgment of [Empire], jeopardize the operational integrity of the Company’s system *required to maintain system reliability*.”<sup>43</sup> In short, Empire’s Tariff does not require it to wait for its system to collapse and its customers to lose their gas supply, as Symmetry suggests, for it to issue an OFO. Empire, in its sole judgment, can issue an OFO to “maintain system reliability”<sup>44</sup> and that is exactly what it did on February 9 and February 11.<sup>45</sup>

FERC has reached a similar conclusion in denying complaints—like the one brought by Symmetry—that attempt to force a pipeline into waiving its OFO penalties. In *Panhandle Eastern Pipe Line Company, LP*,<sup>46</sup> marketers and other shippers brought complaints against Panhandle Eastern Pipe Line Company, LP (“Panhandle”) because it did not waive all OFO penalties that the Complainants incurred during Winter Storm Uri.<sup>47</sup> FERC denied the complaints on the grounds that Panhandle’s tariff gave it “the discretion to waive some or all penalties incurred by shippers as a result of an OFO violation.”<sup>48</sup> In doing so, FERC explained that “OFOs and penalties are important tools to correct and deter shipper behavior that threatens the reliability of the pipeline system” and that “a pipeline’s ability to administer penalties is especially important during critical periods when system reliability is most in jeopardy.”<sup>49</sup> In other words, OFOs and associated penalties are meant to deter irresponsible shipper behavior and maintain system reliability while the OFO is in effect and they don’t disappear just because system reliability is maintained.

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<sup>42</sup> Aff. of T. Earhart ¶ 6.

<sup>43</sup> Tariff, Sheet No. 43.

<sup>44</sup> Tariff, Sheet No. 43.

<sup>45</sup> Aff. of T. Earhart ¶¶ 9, 10.

<sup>46</sup> 177 FERC ¶ 61,027 (2021).

<sup>47</sup> *Id.* ¶ 5.

<sup>48</sup> *Id.* ¶ 39.

<sup>49</sup> *Id.* ¶ 42.

Symmetry’s alternative reality continues by taking issue with Empire’s OFOs based on non-existent Tariff provisions. Symmetry faults Empire for giving “no explanation for its issuance of either OFO” and not explaining that its OFOs were independent of Southern Star’s.<sup>50</sup> Empire’s Tariff, however, only requires that it direct the customer to comply with certain conditions and be based on one of the five bulleted events described in Empire’s Tariff.<sup>51</sup> It is undisputed that Empire included clear directions to Symmetry to “NOT SHORT” and that one or more of the five events— e.g. “unusual conditions [that] jeopardize the operation of [Empire’s] system” and “any of [Empire’s] transporters or suppliers call the equivalent of an OFO”<sup>52</sup>—were present on February 9 and February 11.<sup>53</sup> Moreover, Symmetry requested no such explanation or clarification when the OFO was called nor has it until now.

### 3. *Collateral Estoppel Does Not Apply Here*

For the first time in its Response,<sup>54</sup> Symmetry argues that Empire is precluded by the doctrine of collateral estoppel from defending itself against Symmetry’s complaint because of FERC’s decision to grant a waiver to Southern Star.<sup>55</sup> “[O]ffensive collateral estoppel<sup>56</sup> normally involves the attempt by a plaintiff to rely on a prior adjudication of an issue to prevent the

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<sup>50</sup> Response at 12.

<sup>51</sup> Tariff, Sheet No. 43.

<sup>52</sup> Tariff, Sheet No. 43. It should be noted this provision allows Empire to call an OFO when *its* transporter or supplier calls an OFO and thus Symmetry’s argument that the “OFO issued by Southern Star was not addressed to marketers such as Symmetry” is irrelevant. Response at 5.

<sup>53</sup> Aff. of T. Earhart ¶¶ 5, 8, 9, 10.

<sup>54</sup> In its Response, Symmetry not only asserts new positions not contained in its Complaint, but it moves the goal posts on what this proceeding is about by mischaracterizing its Complaint. For example, Symmetry says Empire has “impermissibly shift[ed] focus away from the actual issues presented by Symmetry’s Complaint, namely . . . Whether Empire timely notified Symmetry of lawful and proper OFOs applicable to Symmetry.” Response at 11. But whether Empire notified Symmetry of the OFO is not an issue Symmetry raised at all in its Complaint and, in fact, it admitted notice was not an issue in alleging that “Empire issued its own OFO, writing to Symmetry, as follows” and then proceeding to quote the notification it received. Complaint ¶ 23.

<sup>55</sup> Response at 13-15.

<sup>56</sup> In explaining at length what defensive collateral estoppel is, Symmetry appears to forget that it filed the Complaint to commence this proceeding, is the named Complainant, and thus the collateral estoppel it attempts to assert is offensive.

defendant from challenging a fact necessary to the plaintiff's case and on which the plaintiff carries the burden of proof.”<sup>57</sup> “Offensive collateral estoppel is disfavored by courts, and it will not be applied when doing so would be inequitable in light of these four factors.”<sup>58</sup> Those four factors are as cited in Symmetry’s Response, however, the Commission need not go further than addressing the first: whether the issue decided in the prior adjudication was *identical* to the issue presented in the present action.<sup>59</sup>

Symmetry says that “the FERC Order quoted herein obviously addressed and ruled upon the same issues Symmetry has raised in this Complaint case – there was no system integrity or reliability issue to warrant an OFO...”<sup>60</sup> To arrive at this conclusion Symmetry must also have an alternate definition of “identical” and “obviously.” FERC’s Order in *Southern Star* was absolutely silent as to the integrity of Empire’s system—which is the system at issue in this proceeding. Moreover, the issues that FERC made findings on in *Southern Star* were whether (i) Southern Star had authority to waive OFO penalties under its Tariff;<sup>61</sup> (ii) it acted in good faith in applying for the waiver;<sup>62</sup> (iii) Southern Star limited the scope of its waiver;<sup>63</sup> (iv) it addressed a concrete problem with the waiver;<sup>64</sup> (v) its waiver did not have undesirable consequences;<sup>65</sup> and (vi) the filed rate doctrine barred the waiver.<sup>66</sup> Southern Star’s FERC Tariff and FERC’s waiver policy present very different issues and determinations than Empire’s Tariff and the policies of this Commission.

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<sup>57</sup> *James v. Paul*, 49 S.W.3d 678, 685 (Mo. 2001).

<sup>58</sup> *Coop. Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 581 (Mo. 2017).

<sup>59</sup> *Id.*

<sup>60</sup> Response at 14.

<sup>61</sup> *Southern Star* ¶ 21.

<sup>62</sup> *Id.* ¶ 23.

<sup>63</sup> *Id.* ¶ 24.

<sup>64</sup> *Id.* ¶ 25.

<sup>65</sup> *Id.* ¶ 26.

<sup>66</sup> *Id.* ¶ 27.

FERC itself has declined to apply the doctrine of collateral estoppel when its previous decision was based on a matter of policy and courts have approved of this approach.<sup>67</sup> The approach recognizes that if the doctrine of collateral estoppel were extended to agency decisions based upon particular policies—such as FERC’s waiver policy<sup>68</sup>—it “would hamstring agencies from refining their policy judgments over time.”<sup>69</sup> Given that FERC itself would likely not give preclusive effect to its own decision in *Southern Star*, it is absurd to suggest that this Commission should be collaterally estopped from reaching its own decision in this very different case based upon its own distinct policies.

Furthermore, as Empire explained<sup>70</sup> and Symmetry ignored, The Empire District Electric Company’s interest in the *Southern Star* case—as stated in the pleadings filed at FERC—was as a mere intervenor on behalf of two combined cycle gas-fired generating facilities (and their associated electric customers) that complied with Southern Star’s OFO at great cost.<sup>71</sup> The Empire District Electric Company’s arguments had nothing to do with The Empire District Gas Company’s local gas distribution system or the OFOs that The Empire District Gas Company itself issued. The issues raised and decided by FERC in *Southern Star* are far from identical to the issue presented in this case and in no way bind this Commission.<sup>72</sup>

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<sup>67</sup> *Second Taxing Dist. v. FERC*, 683 F.2d 477, 484 (D.C. Cir. 1982). See also, *Columbia Gas Transmission LLC v. Crawford*, 2010 U.S. Dist. LEXIS 39614, 6 (N.D. Ohio 2010) (“Second, even if the FERC certificate had decided the irreparable harm issue, quasi-legislative administrative decisions—like the FERC certificate here—cannot serve as a final judgment for purposes of issue preclusion.”) (citing *Panhandle E. Pipe Line Co. v. Fed. Power Comm’n*, 236 F.2d 289, 292 (3d Cir. 1956) (holding, in context of res judicata, that proceedings of FERC’s predecessor agency culminating in issuance of certificate of public convenience and necessity were quasi-legislative and thus could not carry preclusive effect)).

<sup>68</sup> Proposed Policy Statement on Waiver of Tariff Requirements and Petitions or Complaints for Remedial Relief, 171 FERC ¶ 61,156 (2020).

<sup>69</sup> *Columbia Gas Transmission LLC v. Crawford*, 2010 U.S. Dist. LEXIS 39614, 6 (N.D. Ohio 2010).

<sup>70</sup> Memorandum in Support of Motion for Summary Determination, at 12, fn. 70.

<sup>71</sup> See *Motion to Intervene and Protest of The Empire District Electric Company*, FERC eLibrary No. 20210318-5087 (Mar. 18, 2021).

<sup>72</sup> “The FERC has no jurisdiction over LDCs which come under the authority of their respective state regulatory commissions.” *Mo. Pub. Service Co.*, Opinion, File No. GR-89-104, 30 Mo. P.S.C. (N.S.) 39, 1989 Mo. PSC LEXIS 19, at 5 (Oct. 19, 1989).

**C. Conserving Commission Resources and Not Allowing Symmetry to Shift the Costs Associated with Its Irresponsible Behavior onto Empire’s Customers is in the Public Interest**

The Commission has found that where, as here, there is no genuine issue as to material facts “the public interest clearly favors the quick and efficient resolution ... by summary determination without an evidentiary hearing...”<sup>73</sup> Symmetry admits or partially admits to all of the facts established by Empire that are necessary for summary determination. Empire has shown that Symmetry’s basis for not fully admitting facts is not grounded in a genuine dispute over such facts, but is rather a result of Symmetry’s hair-splitting, disagreements over Empire’s quoting or paraphrasing of the Tariff, assertions that are contradicted by its own evidence, or based on Symmetry’s erroneous legal conclusions. And Symmetry’s additional facts are not material nor do they create genuine issues and should be viewed as nothing more than disingenuous attempts to delay the Commission’s decision. The Commission should see through Symmetry’s attempts to prolong this proceeding and waste Commission resources by granting Empire’s Motion for Summary Determination.

The Commission should also recognize that granting Empire’s Motion for Summary Determination will ensure that Empire’s customers are not the ones to shoulder the burden of Symmetry’s non-compliance with the OFO. As Empire explained, the vast majority of the OFO penalties that Symmetry incurred are related to the OFO cost recovery part of the Tariff.<sup>74</sup>

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<sup>73</sup> *Missouri Coalition for Fair Competition v. Laclede Gas Co.*, Order Granting Summary Determination, File No. GC-2007-0169, at 5 (April 19, 2007) (“Moreover, the public interest clearly favors the quick and efficient resolution of this matter by summary determination without an evidentiary hearing in as much as ‘[t]he time and cost to hold hearings on [a] matter when there is no genuine issue as to any material fact would be contrary to the public interest.’”) (quoting Determination on the Pleadings, *In the Matter of the Application of Aquila Inc. for an Accounting Authority Order Concerning Fuel Purchases*, Case No. EU-2005-0041 (Oct. 7, 2004)), *See also Northeast Missouri rural Telephone Co. v. AT&T Corp.*, Order Granting Partial Summary Determination regarding Affirmative Defense of Accord and Satisfaction, File No. IC-2008-0285, at 6 (Oct. 7, 2008) (“In general, the public interest is served by the granting of a motion for summary determination when doing so reduces the Commission’s expenditure of time and resources to hear an issue that can be appropriately resolved in a summary fashion.”).

<sup>74</sup> Tariff, Sheet No. 43.

Specifically, only \$839,731.76 of the total \$11,871,298.69 in OFO penalties stem from the actual \$25 Mcf penalty portion of Empire’s Tariff. And the OFO penalties will all be applied to the benefit of Empire’s customers through its PGA clause. It is in the public interest that residential customers—particularly during times of high gas demand—don’t have to shoulder the additional burden caused by a gas marketer’s failure to live up to the terms of the Tariff it operates under.

### III. CONCLUSION

In light of the foregoing, Empire respectfully requests that the Commission grant its Motion for Summary Determination and dismiss Symmetry’s Complaint.

*/s/ Elizabeth W. Whittle*

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Dated: November 4, 2021

**Certificate of Service**

I hereby certify that this document was filed in EFIS, with notice sent to all counsel of record, and also sent by email to Staff, OPC, and all other counsel of record.

Dated this 4th day of November 2021.

/s/ Diana C. Carter  
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