

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

In the Matter of Evergy Metro, Inc.)
d/b/a Evergy Missouri Metro’s Request)
for Authority to Implement A General)
Rate Increase for Electric Service)

Case No. ER-2022-0129

In the Matter of Evergy Missouri West,)
Inc. d/b/a Evergy Missouri West’s)
Request for Authority to Implement A)
General Rate Increase for Electric)
Service)

Case No. ER-2022-0130

RESPONSE TO EVERGY’S MOTION TO STRIKE

COMES NOW the Office of the Public Counsel (“OPC”) and for its *Response to Evergy’s Motion to Strike*, states as follows:

1. On September 1, 2022, Evergy Missouri Metro and Evergy Missouri West (collectively “Evergy” or “the Company”) filed a motion to strike portions of OPC witness Lena Mantle’s *True-Up Rebuttal Testimony*.

2. Evergy argues that the disputed section of testimony should be struck because it does not respond to matters raised in another party’s true-up direct testimony.

3. Evergy’s motion to strike misrepresents the nature of Ms. Mantle’s testimony and fails to engage in meaningful analysis of the disputed section.

4. The disputed section clearly responds to true-up direct testimony filed by both Evergy and the Commission’s Staff (“Staff”) and is necessary to explain the

issues with the proposal of other parties to this case given in that same true-up direct testimony.

5. The disputed section of testimony therefore is proper rebuttal testimony under the Commission's rules. 20 CSR 4240-2.130(7)(B).

6. Evergy's motion to strike is not based on genuine concerns and is aimed at achieving an improper advantage over the OPC by denying the OPC's witness the opportunity to (1) explain the negative ramifications of the Company's proposed FAC base factor rates and (2) present the OPC's alternative recommendation to the Commission regarding FAC base factor rates.

7. The motion to strike should therefore be denied

Review of the Disputed Testimony

8. Both Evergy and Staff filed true-up direct testimony that updated their respective FAC base factor calculations. (Surrebuttal & True-Up Direct Testimony of Linda J. Nunn, pg. 19 ln. 11 – pg. 20 ln. 20, ER-2022-0129, EFIS Item No. 237; Surrebuttal & True-Up Direct Testimony of Linda J. Nunn, pg. 19 ln. 11 – pg. 20 ln. 20, ER-2022-0130, EFIS Item No. 248; Surrebuttal / True-Up Direct Testimony of Amanda C. Conner, pg. 4 ln. 13 – pg. 5 ln. 4; ER-2022-0129, EFIS Item No. 191; Surrebuttal / True-Up Direct Testimony of Amanda C. Conner, pg. 4 ln. 13 – pg. 5 ln. 4; ER-2022-0130, EFIS Item No. 202).

9. OPC witness Lena Mantle filed true-up rebuttal testimony responding to these calculations. (True-Up Rebuttal Testimony of Lena M. Mantle, ER-2022-

0129, EFIS Item. No. 282; True-Up Rebuttal Testimony of Lena M. Mantle, ER-2022-0130, EFIS Item. No. 300).

10. Ms. Mantle’s true-up rebuttal testimony begins with a paragraph outlining its purpose:

In this testimony I provide the Commission with a comparison of the fuel adjustment clause (“FAC”) base factors as proposed by Staff and Evergy, Inc. (“Evergy”) to the actual fuel and purchased power costs of Evergy Metro, Inc. (“Evergy Metro”) and Evergy Missouri West, Inc. (“Evergy West”). I explain why it is important that Evergy West’s base factor not be set too low in this case. Finally, I recommend the Commission set, for Evergy West, the base factor at \$0.03320 per kilowatt-hour (“kWh”) calculated using the actual fuel costs incurred and the actual net system input (“NSI”) for the twelve months ending with the true-up date of May 31, 2022. I recommend the Commission set the base factor for Evergy Metro at \$0.01829 per kWh.

Id at pg. 1 lns. 7 – 15.

11. The section that Evergy seeks to strike begins at the portion identified in the above paragraph where Ms. Mantle seeks to “explain why it is important that Evergy West’s base factor not be set too low in this case” and continues on to encompass the rest of the paragraph.

12. In other words, Evergy seeks to deny the OPC the ability to: (1) explain what the negative impacts will be if Evergy West’s base factor is set too low in this case (as the Company is currently seeking to do), and (2) deny the OPC the ability to provide a recommendation for what Evergy West’s base factor should be in response to the number proposed by both Staff and Evergy.

13. To further reinforce that, it is necessary to examine the testimony in question.

14. Ms. Mantle begins her testimony with an explanation of what the FAC base factor is and a comparison of the true-up position of both Staff and the Company to the actual cost of fuel incurred by Evergy during the true-up period. *Id.* at pg. 1 ln. 16 – pg. 4 ln. 11.

15. Most importantly, Ms. Mantle explains that the FAC base factors calculated by Evergy and Staff are far lower than they should be considering the actual costs being incurred by the Company:

Q. What is important for the Commission to understand from this table?

A. The FAC net costs have increased nearly \$100 million above the estimated FAC net costs in the last case. This is shown in the table above in comparing the FAC Net costs of the “Last 2 AP” (\$297 million) to the “Current BF” FAC Net costs (\$199 million). The FAC net costs for the 12 months ending May 31, 2022 are 33% higher than they were in the last case.

Q. Is this large increase reflected in Staff and Evergy’s FAC base factors?

A. No. Evergy’s normalized FAC net costs, while \$27.5 million higher than the current base FAC Net Cost, are still 24% or \$71 million below the actual incurred for the 12 months that ends on May 31, 2022. Staff’s estimate is a bit closer but is still 13% or \$38 million below what actually occurred through true-up.

Id. at pg. 4 lns. 1 – 11.

16. After explaining that Evergy and Staff’s FAC base factors were calculated using fuel and purchased power costs that are much lower than the Company’s actual costs incurred during the true-up period, Ms. Mantle then spends

the next roughly two pages directly rebutting the rationale presented by Evergy and Staff as to why they chose to use lower numbers. *Id.* at pg.4 ln. 12 – pg. 6 ln. 8.

17. This, finally, leads to the section that Evergy now seeks to strike which begins with the question posed being “[w]ith the actual FAC costs passing through the FAC, why does it matter if the base factor is set on costs that are much lower than actual?” *Id.* at pg. 6 lns. 9 – 10. Before even addressing the answer, it should be obvious on its face that this question posed is a continuation of the argument Ms. Mantle is providing in response to the FAC base factors included in the true-up direct testimony of both Evergy and Staff. Ms. Mantle has already explained that those base factors are too low and now seeks to address why that is a concern despite the intrinsic operation of the FAC. Her answer is as follows:

Prior to the passing of Plant In-Service Accounting (“PISA”) statute, I would have been okay with the fuel costs used to set the base factor being much lower than what I thought they should be. I am not an attorney, but it is my understanding that when Evergy West elected PISA, its rates became constrained to no more than a three percent compound annual growth rate (“CAGR”). If average rates go over the 3% CAGR cap in a rate case, then the revenue requirement is capped at that 3% CAGR and Evergy West does not get to recover the revenue requirement above that amount. Statute refers to this as a “performance penalty.” However, if the average rate increases above the 3% CAGR because of an adjustment to the FAC rate, Evergy West gets to not only defer the amount that causes the rates to go above the 3% CAGR but also gets to earn interest at the weighted average cost of capital (“WACC”).

In summary, if Evergy West can keep the rate increase in this case below the PISA cap and instead pass the increase through the FAC rate, then it eventually gets to impose a higher rate increase on its customer by earning a return on any portion of fuel expense that is deferred. If the revenue requirement in this case includes a realistic but higher fuel cost, then Evergy is at risk of hitting the PISA cap. In addition with a higher FAC

base, it is less likely to be able to defer any costs and will not earn a return on any of the fuel expenses. PISA provides utilities an incentive to underestimate the FAC costs included in revenue requirement in a rate case; an incentive that is greater than the 5% loss that it will assume through the FAC for underestimating the FAC costs.

Id. at pg. 6 ln. 11 – pg. 7 ln. 6 (emphasis added).

18. When the portion of testimony that Evergy seeks to strike is actually examined, it becomes clear what its purpose is. The testimony is explaining the Company’s motivation to purposefully undervalue its FAC net base energy factor in order to avoid hitting the legislatively imposed PISA caps.

19. This is Ms. Mantle’s explanation of the **true** reason why the FAC base factors Evergy proposed in true-up direct testimony are so much lower than the actual values incurred during the true-up period. It is an essential part to the OPC’s rebuttal argument regarding those same FAC base factors that Evergy proposed in its true-up direct testimony. It is therefore “responsive to the testimony and exhibits contained in any other party’s direct case.” 20 CSR 4240-2.130(7)(B).

20. As such, this testimony is properly defined as rebuttal-testimony *Id.*

21. The remaining portions of Ms. Mantle’s true-up rebuttal provide further clarifying information related to Evergy’s attempt to manipulate the FAC base factor in order to avoid the PISA cap. These are included in answers to the following three questions: (1) “Is Evergy West near the 3% CAGR cap?” (2) “Would you walk through the scenario of what costs would be facing Evergy West’s customers if the FAC base factor is set artificially low?” and (3) “In the alternative, what is the impact of

including higher FAC Net Cost in the revenue requirement in this case?” (True-Up Rebuttal Testimony of Lena M. Mantle, pg. 7 ln. 7 – pg. 8 ln. 7, ER-2022-0129, EFIS Item. No. 282; True-Up Rebuttal Testimony of Lena M. Mantle, pg. 7 ln. 7 – pg. 8 ln. 7, ER-2022-0130, EFIS Item. No. 300). It should be very clear from just reading the questions that the purpose of this section of testimony is to continue the previous stated argument as well as the larger point of Ms. Mantle’s rebuttal, which, again, is that the FAC base factors included in Staff and Evergy’s respective true-up direct testimonies are being set artificially low.

22. The next question and answer contains Ms. Mantle’s recommendation in response to the artificially low FAC base factors provided in the true-up direct testimony of both Evergy and Staff:

Q. What is your recommendations regarding Evergy West’s base factor?

A. Since neither Staff nor Evergy updated fuel and market prices that reflect the rise in these costs during the true-up period, the Commission should use the NSI and actual FAC net costs for the twelve month time period ending May 31, 2022 as shown in the table above. If the Commission cannot agree with this base factor, it should order, for Evergy West, the Staff’s FAC base factor shown Table 2 above.

Id. at pg. 8 lns. 8 – 13.

23. It is important to note that, notwithstanding anything else argued in this response, this recommendation makes no mention of either PISA or the CAGR. Evergy’s motion to strike this section of Ms. Mantle’s testimony is therefore improper if for no other reason than because the allegation made by the motion (that this

portion of Ms. Mantle's testimony discusses either PISA or the CAGR) is demonstrably untrue.

24. The fact that Evergy included sections that do not even address either PISA or the CAGR in its motion to strike – despite that rationale being both the only one offered by the Company **and** inherently faulty, as discussed above – demonstrates even further how illegitimate Evergy's request is.

25. The final paragraph that Evergy seeks to strike from Ms. Mantle's testimony is the following:

Q. Is this a punitive attempt to punish Evergy West?

A. No. Evergy West elected PISA. With PISA, Evergy is still recovering much more than it would under traditional ratemaking and customers are paying more. Evergy West also asked for continuation of the FAC. The established process for determining the FAC base factor should not be manipulated to avoid the customer protection provided in PISA. Evergy's shareholders are benefiting greatly from PISA, and they will continue to benefit from PISA even if their average rates hit the PISA cap.

Id. at pg. 8 lns. 14 – 20.

26. After reading the passage, it should be easy to see that this is but one more part of the OPC's larger argument in response to the FAC base factors offered in true-up direct by both Evergy and Staff. Specifically, Ms. Mantle wanted to clearly state that her recommendation was not meant as an attempt to punish the Company.

27. To summarize, Ms. Mantle's rebuttal testimony provides a response to the FAC base factor calculations included in the true-up direct testimony of both Evergy and Staff. Ms. Mantle's argument is as follows:

- a. The FAC base factors included in the true-up direct of both Evergy and Staff is too low with Evergy being much lower than Staff. *Id.* at pg. 4 lns. 1 – 11.
- b. Evergy in particular has a vested interest in purposely undervaluing its FAC base factor so as to avoid PISA caps. *Id.* at pg. 6 ln. 11 – pg. 8 ln. 7.
- c. In response, Ms. Mantle proposes using the NSI and actual FAC net costs for the twelve month time period ending May 31, 2022, (*i.e.* the true up period) as set forth in her testimony. *Id.* at pg. 8 lns. 8 – 13.

28. As previously stated, every section of this argument is responsive to the true-up direct testimony of both Staff and Evergy and is therefore proper rebuttal under the definition of the Commission's rules. 20 CSR 4240-2.130(7)(B).

29. Evergy's argument that Ms. Mantle's testimony is not rebuttal simply because it discusses PISA and the CAGR is absurd. These concepts are being discussed solely as they relate to the FAC base factor recommendations made by both Evergy and Staff.

30. Because the FAC base factor has a direct impact on the PISA legislation and the CAGR, those topics are proper for rebuttal that analyzes the interplay between the two concepts. Moreover, Evergy should be fully aware of this fact.

31. Ms. Mantle has called Evergy out for its attempt to manipulate its FAC base factor so as to avoid the PISA legislation imposed CAGR cap, and the Company

now seeks to hide this from the Commission's attention through a bad-faith effort to strike the OPC's proffered testimony.

32. This motion should thus be denied.

Response to claims of prejudice and Due Process of Law violations

33. Evergy makes an assertion that the sections of Ms. Mantle's testimony that it seeks to strike "necessarily prejudice the Company and every other party who will have no opportunity to reply to or rebut their assertions in contravention of those parties' right of Due Process of Law, leaving the Commission's rate case decision subject to reversal on appeal." Motion to Strike, pg. 2 ¶ 5, ER-2022-0129, EFIS Item No. 298; Motion to Strike, pg. 2 ¶ 5, ER-2022-0130, EFIS Item No. 316). This is an absurd claim for two separate but equally important reasons.

34. First, the pre-filed testimony in question has not been offered or accepted by the Commission.

35. At the time the testimony is offered, the witnesses sponsoring that testimony will be tendered for cross-examination by all parties including Evergy.

36. This cross-examination is the means by which Evergy and other parties may rebut the assertions made by the witness. *State ex rel. Util. Consumers Council v. Pub. Serv. Com.*, 562 S.W.2d 688, 694 (Mo. App. E.D. 1978) ("The purpose of cross-examination is to sift, modify or explain what has been said, to develop new or old facts in a view favorable to the examiner, and to test the correctness of the information from the witness with an eye to discrediting the accuracy or truthfulness of the witness." (internal citations omitted)).

37. Because Evergy, and all other parties, will have the opportunity to cross-examine Ms. Mantle once her testimony is offered, neither Evergy nor any other party can justifiably claim to have been prejudiced.

38. For the same reason, neither Evergy nor any other party can claim to have had their respective right to due process of law violated.

39. The Missouri Supreme Court, citing the U.S. Supreme Court, has held that "due process is flexible and calls for such procedural protections as the particular situation demands." *Jamison v. Dep't of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 405 (Mo. banc 2007) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). However, "[t]he fundamental requisite of due process of the law is the opportunity to be heard," which includes "an effective opportunity to defend by confronting any adverse witnesses." *Doughty v. Dir. of Revenue*, 387 S.W.3d 383, 387 (Mo. 2013) (quoting *Goldberg v. Kelly*, 397 U.S. 254, 266-67 (1970)). The Missouri Supreme Court has therefore concluded:

in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. Therefore, the protections of confrontation and cross-examination apply in cases where administrative actions that seriously injure an individual are under scrutiny.

Id. quoting (quoting *Goldberg*, 397 U.S. 269-70) (internal citations omitted). This has been directly applied to the Missouri Public Service Commission. *State ex rel. Util. Consumers Council*, 562 S.W.2d at 694.

40. As previously stated, Ms. Mantle will be made available for cross-examination by Evergy and all other parties at the time her testimony is offered onto the record.

41. Because Evergy, and all other parties, will be afforded an opportunity for cross-examination, said parties will be given all the process of law they are due.

42. Thus, no party, Evergy included, will be able to raise a claim of due process violation in response to the testimony offered by the OPC.

43. Notwithstanding the foregoing, there is a second major reason why Evergy cannot claim to be prejudiced.

44. Evergy entered into a stipulation and agreement with the OPC on August 30, 2022. (Stipulation and Agreement (Public & Confidential), ER-2022-0129, EFIS Item No. 294; Stipulation and Agreement (Public & Confidential), ER-2022-0130, EFIS Item No. 312).

45. The Stipulation and Agreement resolved the FAC base factor issue (save for final determination of the issue related to the Central Nebraska Public Power and Irrigation District hydro issue). *Id.* at pg. 4 ¶ 6.

46. If the stipulation is approved by the Commission, then the Company's motion to strike will be rendered moot as the FAC base factors will be set according to the terms of the stipulation, so any argument about them being too high or too low will no longer be relevant in the immediate case.

47. Because Evergy has already signed the Stipulation, and no other party has objected to it, the Company's efforts to strike testimony related to a conditionally

resolved issue represents a profound waste of administrative resources and further demonstrates Evergy's bad faith in filing its motion.

Considered application of Evergy's cited Commission decision

48. Evergy cites to the Commission's decision in case ER-2016-0156 to support its motion to strike. (Motion to Strike, pg. 2 ¶ 6, ER-2022-0129, EFIS Item No. 298; Motion to Strike, pg. 2 ¶ 6, ER-2022-0130, EFIS Item No. 316).

49. Evergy offers no evaluation of this decision and makes no attempt to apply it to the present motion.

50. There is a good reason for this.

51. The Order Evergy is citing concerns a motion to strike filed by KCP&L Greater Missouri Operations Company ("GMO") (the former predecessor of Evergy West) against the OPC. (Order Granting Motion To Strike, ER-2016-0156, EFIS Item No. 159).

52. In that filing, GMO claimed that certain **direct** testimony filed by the OPC was "prematurely filed rebuttal testimony." *Id.* at pg. 2.

53. The testimony in question addressed portions of the direct testimony of GMO witnesses. *Id.*

54. The OPC argued that it was entitled "to prepare its 'entire' case-in-chief on direct by including testimony that responds to GMO's direct case." *Id.*

55. The Commission disagreed and concluded that the disputed testimony was, in fact, rebuttal. *Id.*

56. As a result, the Commission ordered the testimony struck but allowed it to be re-filed as rebuttal. *Id.* at pg. 4.

57. There are two points to take away from this Commission ruling.

58. The first is that if the OPC *had* made the argument that Evergy is purposefully undervaluing its true-up FAC base factors in order to avoid PISA caps in true-up direct testimony – which, it needs to be stressed, would have been **functionally impossible** until after the OPC knew what Evergy would propose in its true-up direct testimony – the Company would have moved to strike the testimony as improper direct.

59. This leads to the second problem, which is that Evergy now seeks to use this ruling to create an impossible double standard for the OPC.

60. Under Evergy’s theory, if the OPC files testimony that **is** responsive to another party, then the ER-2016-0156 decision states that it is **not** direct.

61. At the same time, however, Evergy now argues that the OPC’s response to the Company’s proposed FAC base factors and corresponding recommendation should have been filed in direct.

62. As a result, Evergy is arguing that the OPC’s testimony both should and should not have been filed as direct testimony because it both responds to Evergy’s true-up direct FAC base factors and presents the OPC’s recommendation in response.

63. The end result of Evergy’s claim would be that the OPC would not be allowed to make any recommendation in response to the Company’s own true-up

direct, which is obviously both what Evergy wants and not how 20 CSR 4240-2.130(7) was intended to function.

64. When considering the full application of the Commission's ER-2016-0156 decision that Evergy cites, it becomes clear why Evergy's motion must be denied.

Conclusion

65. The section of testimony that Evergy seeks to strike shows that the FAC base factor rates that Evergy proposed in its true-up direct testimony are much lower than the actual costs incurred by the Company during the true-up. The testimony then goes on to explain why Evergy would want to purposefully undervalue its FAC base factor calculations in order to avoid statutory PISA caps before offering a counter-recommendation to use the actual fuel and purchase power costs incurred by the Company during the true-up period.

66. The testimony in question is therefore responsive to the testimony Evergy filed in its true-up direct and thus properly developed rebuttal testimony under the Commission's rules. 20 CSR 4240-2.130(7)(B).

67. Evergy continues to have an opportunity to address the OPC argument through cross-examination and has already entered into a stipulation and agreement with the OPC that would resolve the issue and render the motion to strike moot. Evergy consequently cannot claim to be prejudiced.

68. The Commission should therefore deny Evergy's motion to strike the requested excerpts.

