

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held by telephone and internet audio conference on the 5th day of August, 2020.

In the Matter of the Second Prudence)
Review of the Missouri Energy Efficiency)
Investment Act (MEEIA) Cycle 2 Energy) **File No. EO-2020-0227**
Efficiency Programs of Evergy Metro, Inc.)
d/b/a Evergy Missouri Metro)

In the Matter of the Second Prudence)
Review of the Missouri Energy Efficiency)
Investment Act (MEEIA) Cycle 2 Energy) **File No. EO-2020-0228**
Efficiency Programs of Evergy Missouri)
West, Inc. d/b/a Evergy Missouri West)

**ORDER CONSOLIDATING CASES AND
SETTING PROCEDURAL SCHEDULE**

Issue Date: August 5, 2020

Effective Date: August 5, 2020

File Nos. EO-2020-0227 and EO-2020-0228 are the second prudence reviews of Cycle 2 costs related to the Missouri Energy Efficiency Investment Act for two affiliated companies. File No. EO-2020-0227 relates to the prudence review of Evergy Metro, Inc. d/b/a Evergy Missouri Metro (“Evergy Metro”); while File No. EO-2020-0228 relates to Evergy Missouri West, Inc. d/b/a Evergy Missouri West (“Evergy West”, referenced together as “Evergy”). In both cases, Staff of the Missouri Public Service Commission (“Staff”) recommended certain disallowances or adjustments. In both cases, Evergy disagreed and requested a hearing. There is no operation of law date in either case.

All parties agree that the two cases involve affiliated companies and related questions of law and fact. The same counsel represents both Evergy Metro and Evergy West. Moreover, the two proposed schedules contemplate the two cases proceeding together. The Commission finds that consolidation of the cases will avoid unnecessary costs and delay.¹ The cases will be consolidated, with File No. EO-2020-0227 as the lead number.

The Commission directed the parties to submit a joint proposed schedule, but received one proposed schedule jointly filed by Staff and the Office of the Public Counsel (“Public Counsel”), and a second proposed schedule from Evergy.

The schedules have mostly identical deadlines and hearing dates. The differences are as follows:

- Evergy’s proposed schedule contemplates that only Evergy will file direct and surrebuttal testimony, and allows Staff and Public Counsel to file cross-rebuttal testimony before Evergy files surrebuttal.
- Evergy’s proposed schedule delays by one week the proposed deadline for Evergy-only surrebuttal.
- Evergy’s proposed schedule delays by one week the proposed deadlines for: List of Issues; Order of Witnesses; Order of Cross-Examination; Joint Stipulation of Facts; and the Last Day to Issue Discovery Requests, Subpoenas, or Take Depositions.
- Staff and Public Counsel’s schedule contemplates three rounds of prefiled testimony – direct, rebuttal, and surrebuttal – with each round open to all parties.

¹ 20 CSR 4240-2.110(3).

Evergy states that it has the initial burden to support its rate and tariff as just and reasonable, hence only Evergy would file direct testimony. Staff argues that it initiated these cases on February 3, 2020, by its filing of notices of the start of the prudence reviews. Evergy responds that the prudence reviews are required by Evergy's tariffs, and thus the cases were not initiated by Staff.

Evergy argues that the shifting burden of proof applicable to prudence reviews, outlined in *State ex rel. Associated Natural Gas Company v. Public Service Commission of the State of Missouri*,² requires that Evergy also get the final word, to respond to any serious doubts as to the prudence of an expenditure raised by other parties. Summarizing *Associated Natural Gas*:

- a prudence review has a shifting burden of proof;
- the utility's costs are presumed to be prudently incurred;
- the burden is on another party to create a serious doubt as to the prudence of an expenditure; and
- the burden then shifts back to the utility to dispel these doubts.³

The schedule proposed by Evergy allows only Evergy to file direct testimony. Evergy would support its rates and tariff, with the burden then shifting to Staff and Public Counsel to raise any serious doubts in rebuttal testimony and cross-rebuttal testimony. Evergy, having the burden to dispel any serious doubts raised in rebuttal and cross-rebuttal, would respond with the final word in surrebuttal.

The schedule proposed by Staff and Public Counsel includes three rounds of prefiled testimony to all parties, and does not give any one party the first or last word. This

² 954 S.W.2d 520 (Mo. Ct. App. 1997).

schedule recognizes that Staff's report is typically filed as direct testimony. Evergy's rebuttal testimony would then be a response to any serious doubts raised in the other parties' direct testimony. This schedule offers Staff and Public Counsel an opportunity to respond via surrebuttal testimony to Evergy's defense to any serious doubts raised, which is not available under Evergy's proposed schedule. And finally, Staff and Public Counsel's proposed schedule offers Public Counsel an opportunity to raise serious doubts in its direct testimony in addition to those raised by Staff in its report, which is also not available under Evergy's proposed schedule.

Commission rules define direct testimony as all testimony and exhibits asserting and explaining that party's entire case-in-chief. Where all parties file direct testimony, rebuttal testimony must respond to direct testimony. If only one party files direct, rebuttal testimony shall include all testimony that explains why a party rejects, disagrees, or proposes an alternative to the moving party's direct case. Surrebuttal testimony must be responsive to another party's rebuttal testimony. The concept of cross-rebuttal testimony is not addressed in the regulation.⁴

The Commission has reviewed the two proposed schedules and finds that a compromise is appropriate. The Commission will allow Evergy to have the final word while also giving Staff and Public Counsel the opportunity to challenge Evergy's explanation of prudence. The *Associated Natural Gas* decision sets forth a burden shifting mechanism, and while it does not dictate the order or participation of witnesses, it does provide a reasonable framework that can be accommodated within the Commission's current rules for receiving prefiled testimony.

³ 954 S.W.2d 520, 528-529 (Mo. Ct. App. 1997).

The Commission will adopt a compromise schedule. Staff will file its direct testimony, which shall include, but is not limited to, its report, as is typical in prudence reviews. Public Counsel may also file direct testimony. In rebuttal testimony, Evergy will respond to any serious doubts raised by Staff and Public Counsel’s direct testimonies. However, as rebuttal testimony responds to direct, all parties will be permitted to file rebuttal. Surrebuttal, as defined by rule, must be responsive to another party’s rebuttal testimony, which will be Staff and Public Counsel’s opportunity to respond to Evergy’s rebuttal testimony. The Commission will extend a further round of testimony, only to Evergy, to respond to the surrebuttal testimony of other parties. The Commission will adjust the briefing dates to allow ten business days for the filing of the transcript. The Commission will also alter procedural requirement (e) to reflect the submission of testimony and documents in a teleconferenced virtual hearing.

THE COMMISSION ORDERS THAT:

1. The following procedural schedule is established:

August 12, 2020	Direct Testimony (Staff and Public Counsel)
September 12, 2020	Rebuttal Testimony (all parties allowed)
September 23, 2020	Settlement Conference
October 14, 2020	Surrebuttal Testimony (Staff and Public Counsel, responsive to Rebuttal Testimony)
October 21, 2020	Sur-surrebuttal Testimony (Evergy, responsive to Surrebuttal Testimony); Last Day to Issue Discovery Requests, Subpoenas, or Take Depositions
October 26, 2020	List of Issues, Order of Witnesses, Order of Cross-Examination Joint Stipulation of Facts

⁴ 20 CSR 4240-2.130.

October 28, 2020	Statements of Position
November 5 - 6, 2020	Evidentiary Hearing
November 23, 2020	Transcripts due
December 11, 2020	Initial Post-Hearing Briefs
December 28, 2020	Reply Briefs

2. The parties shall comply with the following procedural requirements:

(a) Testimony shall be prefiled as defined in Commission Rule 20 CSR 4240-2.130, including the requirement that testimony be filed on line-numbered pages.

(b) Although not all parties may agree upon how each issue should be described or on whether a listed issue is in fact a proper issue in this case, the parties shall agree upon and file a list of the issues to be heard, the witnesses to appear on each day of the hearing, the order in which they will be called, and the order of cross-examination for each witness. The list of issues should be detailed enough to inform the Commission of each issue that must be resolved. The Commission will view any issue not contained in this list of issues as uncontested and not requiring resolution by the Commission.

(c) Each party shall file a simple and concise statement summarizing its position on each disputed issue. Position statements shall track the list of issues. Any position statement shall set forth any order requested, cite any law authorizing that relief, and allege facts relevant under the law with citations to any pre-filed testimony in support.

(d) All pleadings, briefs, and amendments shall be filed in accordance with 20 CSR 4240-2.080. Briefs shall follow the same list of issues as filed in the case and must set forth and cite the proper portions of the record concerning the remaining unresolved issues that are to be decided by the Commission.

(e) If testimony or documents are prefiled and served upon the parties before a hearing, a party need only provide an emailed copy of the testimony or document to exhibits@psc.mo.gov. If not prefiled and served upon the parties, then a party who has a document marked for use at the hearing shall email it to the presiding officer, and counsel for each other party, prior to the hearing if possible.

(f) All parties shall provide copies of testimony (including schedules), exhibits, and pleadings to other counsel by electronic means and in electronic form, essentially concurrently with the filing of such testimony, exhibits, or pleadings where the information is available in electronic format (.PDF, .DOC, .WPD, .XLS, etc.). Parties are not required to put information that does not exist in electronic format into electronic format for purposes of exchanging.

(g) Public documents filed in the Commission's Electronic Filing and Information System ("EFIS") shall be considered properly served by serving the same on counsel of record for all other parties via email. The parties agree confidential documents may be obtained from EFIS and so agree not to serve those documents via email.

(h) Counsel for each party shall receive electronically from each other party serving a data request, an electronic copy of the text of the "description" of that data request contemporaneously with service of the data request. Data requests issued to or by Staff shall be submitted and responded to in EFIS, if feasible, or in electronic format on compact disc, or by other means agreed to by counsel, if infeasible. Regarding Staff-issued data requests, if the description contains confidential information, or is voluminous, a hyperlink to the EFIS record of that data request shall be considered a sufficient copy. If a party desires the response to a data request that has been served on another party, the party desiring a copy of the response must request a copy of the response from the party answering the data request. Data requests, other than data requests submitted through EFIS, shall be sent by e-mail to counsel for the other parties. Counsel may designate other personnel to be added to the service list for data requests, but shall assume responsibility for compliance with any restrictions on confidentiality. Data request responses, other than responses to data requests in EFIS, shall be served (electronically, if feasible and practical) on counsel for the requesting party, unless waived by counsel, and shall also be served by e-mail (if feasible and practical) on the requesting party's employee or representative who submitted the data request at the e-mail address provided in the data request.

(i) The parties shall make an effort to not include confidential information in data requests. If confidential information must be included in a data request, the confidential information shall be appropriately designated as such pursuant to 20 CSR 4240-2.135.

(j) Prior to the due date for filing Direct Testimony, the time for responding to, objecting to, or notifying the requesting party that more time will be needed to respond to data requests shall be as set forth in the Commission's discovery rule, 20 CSR 4240-2.090. Beginning on the due date for filing Direct Testimony, the response time for all data requests shall be ten days, with five business days to object or notify the requesting party that more than ten days will be needed to provide the requested information. If a data request has been responded to, a party's request for a copy of the response shall be timely responded to without waiting the full response time allowed.

(k) Unless included as part of a party's prefiled testimony or submitted as an exhibit at hearing, workpapers prepared in the course of developing a testimony need not be filed with the Commission, but shall be submitted to each party within two (2) business days following the filing of the testimony, unless a party has indicated that it does not want to receive some or all of the workpapers.

Workpapers containing confidential information shall be appropriately marked. If there are no workpapers associated with testimony, the party's attorney shall so notify the other parties within the time allowed for providing those workpapers.

(l) Where workpapers or data request responses include models or spreadsheets or similar information originally in a commonly available format where inputs or parameters may be changed to observe changes in inputs, if available in that format, the party providing the workpaper or response shall provide this type of information in that original format with formulas intact.

3. The Commission shall hold an evidentiary hearing on November 5-6, 2020, beginning at 10:00 a.m.

4. Participants shall appear at the evidentiary hearing telephonically via WebEx conference call. As the hearing will be live-streamed, the Commission requests interested persons who will not be actively participating in the hearing to watch or listen via the live-stream. The link and access code to participate in the hearing via WebEx conference call will be emailed to all parties. Anyone needing accommodations to participate should call the Public Service Commission's Hotline at 1.800.392.4211 (voice) or Relay Missouri at 711 before the evidentiary hearing. As the impact of COVID-19 in November 2020 is unknown at the time this Order is issued, an in-person hearing may be arranged closer to the hearing upon request of the parties or by the Commission on its own motion.

5. This order shall be effective when issued.



BY THE COMMISSION

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Silvey, Chm., Kenney, Rupp, Coleman, and
Holsman CC., concur.

Hatcher, Regulatory Law Judge