

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

In the Matter of the Second Prudence Review)
of the Missouri Energy Efficiency Investment) File No. EO-2020-0227
Act (MEEIA) Cycle 2 Energy 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) File No. EO-2020-0228
Act (MEEIA) Cycle 2 Energy Efficiency)
Programs of Evergy Missouri West, Inc. d/b/a)
Evergy Missouri West)

**APPLICATION FOR RECONSIDERATION AND/OR REHEARING OF
EVERGY MISSOURI METRO AND EVERGY MISSOURI WEST**

COME NOW, Evergy Metro, Inc. d/b/a Evergy Missouri Metro (“Evergy Missouri Metro”) and Evergy Missouri West, Inc. d/b/a Evergy Missouri West (“Evergy Missouri West”) (collectively, “Evergy” or “Company”), pursuant to Section 386.500 RSMo and 20 CSR 4240-2.160, files its application for reconsideration and/or rehearing of the Report and Order (“Report and Order”) issued on May 4, 2022. In support of its application, the Company states as follows:

I. Legal Principles That Govern Applications for Rehearing.

1. All decisions of the Commission must be lawful, with statutory authority to support its actions, as well as reasonable. State ex rel. Ag Processing, Inc. v. PSC, 120 S.W.3d 732, 734-35 (Mo. en banc 2003). An order’s reasonableness depends on whether it is supported by substantial and competent evidence on the record as a whole. State ex rel. Alma Tel. Co. v. PSC, 40 S.W.3d 381, 387 (Mo. App. W.D. 2001). An order must be neither arbitrary, capricious, nor unreasonable, and the Commission must not abuse its discretion. Id.

2. In a contested case, the Commission is required to make findings of fact and conclusions of law pursuant to Section 536.090. Deaconess Manor v. PSC, 994 S.W.2d 602, 612

(Mo. App. W.D. 1999). For judicial review to have any meaning, it is a minimum requirement that the evidence, along with the explanation thereof by the Commission, make sense to the reviewing court. State ex rel. Capital Cities Water Co. v. PSC, 850 S.W.2d 903, 914 (Mo. App. W.D. 1993). In order for a Commission decision to be lawful, the Commission must include appropriate findings of fact and conclusions of law that are sufficient to permit a reviewing court to determine if it is based upon competent and substantial evidence. State ex rel. Noranda Aluminum, Inc. v. PSC, 24 S.W.3d 243, 246 (Mo. App. W.D. 2000); State ex rel. Monsanto Co. v. PSC, 716 S.W.2d 791, 795 (Mo. en banc 1986); State ex rel. A.P. Green Refractories v. PSC, 752 S.W.2d 835, 838 (Mo. App. W.D. 1988); State ex rel. Fischer v. PSC, 645 S.W.2d 39, 42-43 (Mo. App. W.D. 1982), cert. denied, 464 U.S. 819 (1983).

3. In State ex rel. GS Technologies Operating Co. v. PSC, 116 S.W.3d 680, 691-92 (Mo. App. W.D. 2003), the Court of Appeals described the requirements for adequate findings of fact when it stated:

While the Commission does not need to address all of the evidence presented, the reviewing court must not be “left ‘to speculate as to what part of the evidence the court found true or was rejected.’” ... In particular, the findings of fact must be sufficiently specific to perform the following functions:

[F]indings of fact must constitute a factual resolution of the matters in contest before the commission; must advise the parties and the circuit court of the factual basis upon which the commission reached its conclusion and order; must provide a basis for the circuit court to perform its limited function in reviewing administrative agency decisions; [and] must show how the controlling issues have been decided[.]

[St. Louis County v. State Tax Comm’n, 515 S.W.2d 446, 448 (Mo. 1974), citing Iron County v. State Tax Comm’n, 480 S.W.2d 65 (Mo. 1972)].

4. The Commission cannot simply recite facts on which it bases a “conclusory finding,” and must rather “fulfill its duty of crafting findings of fact which set out the basic facts

from which it reached its ultimate conclusion” in a contested case. Noranda, 24 S.W.3d at 246. “Findings of fact that are completely conclusory, providing no insights into how controlling issues were resolved are inadequate.” Monsanto, 716 S.W.2d at 795.

5. A review of the evidentiary record in this case demonstrates that the Report and Order fails to comply with these principles in certain respects and that reconsideration and/or rehearing should be granted as to the issues discussed below.

II. Issues on Which Rehearing Should be Granted.

A. **The Report and Order is Unlawful, Unsupported by Competent and Substantial Evidence on the Whole Record, Arbitrary, Capricious and Otherwise Unreasonable in that the Commission’s Order Penalizes the Company for the Failure of Customers to Participate in the Residential Programmable Thermostat Program Even Though the Company followed its Approved Tariffs in Offering the Residential Thermostat Program and also Made Reasonable Efforts to Encourage All Customers Who Received Free Thermostats to Participate in the Program.**

6. The Order is unlawful and unreasonable when it orders that Evergy Metro “shall refund to ratepayers the prudence adjustment amount of \$108,080 and Evergy West shall refund the amount of \$114,665” plus interest. (Order, p. 27)

7. The Order correctly recognizes at page 17, para. 41:

The do-it-yourself method of joining the voluntary Residential Programmable Thermostat Program begins with the provision of a free programmable thermostat to the home of the ratepayer. The ratepayer is then responsible for the installation and activation of the free programmable thermostat to participate in the voluntary Residential Programmable Thermostat Program. (Order, p. 17)(emphasis added).

8. The Order disallows \$108,080 and \$144,665 from EMM and EMW, respectively, for the failure of the customers to carry through on their responsibilities to install the free thermostats, even though the Company followed its tariffs and was diligent in its efforts to encourage all customers who received thermostats to install them and participate in the program.

The Order finds “Evergy acted imprudently in giving away thermostats to customers who did not ultimately participate in the program.” (Order, p. 19) This finding is based upon hindsight analysis, is arbitrary and capricious, an abuse of discretion, not based upon competent and substantial evidence, and is contrary to the MEEIA tariffs approved by the Commission.

9. The Order is premised upon an incorrect finding that “Participants are the only authorized recipients of the free programmable thermostats through the voluntary Residential Programmable Thermostat Program.” (Order, p. 18) This finding is not based upon competent and substantial evidence, and is therefore unreasonable and unlawful.

10. The Commission’s finding that only participants are eligible for free thermostats is in direct conflict with the Commission’s finding on page 14, paragraph 24 where the Commission states: “Evergy has a Residential Programmable Thermostat Program as a part of its demand-side programs. The program is available for any customer currently receiving service under any residential rate schedule.” (emphasis added)

11. The Commission’s finding that only “participants” are eligible for free thermostats is also in direct conflict with the Commission-approved MEEIA tariffs (Ex. 106a, EMM P.S.C. Mo. No. 2, Sheet 2.32; and EMW P.S.C. No. 1, First Revised Sheet No. R-107), that state:

The program is available for the Program Period to any customer currently receiving service under any residential rate schedule

12. By holding that only “participants” are eligible to receive a free thermostat, the Commission creates an impossible standard for determining which residential customers are eligible to receive a free thermostat. The Company has no way to determine who will install the thermostat and become a “participant” at the time it provides the thermostat for those customers that will be installing the thermostats themselves. Indeed, the Company knew that a small percentage of Do-It-Yourself installation method customers will not install thermostats for a

variety of reasons such as moving to a different residence. (Ex. 5, File Rebuttal, p. 15) Even with the potential for customer non-install, the DIY program is cost-effective. The evaluated cost effectiveness of the thermostat program reflects actual customer participation (not those who didn't install the thermostat or connect to Wi-Fi) and actual costs (including those thermostats paid for but not connected). Evergy's programmable thermostat program was proven to be cost effective even considering the fact that some customers did not fully complete the activation/participation process. The benefit cost tests for the programmable thermostat programs yielded favorable results and improvement over time. (Ex. 5, File Rebuttal, p. 16)

13. As described in the rebuttal testimony of Evergy witness Brian File, the Company engaged in extensive and fruitful outreach with the small number of non-participating customers that received free residential thermostats.

While most all customers understand the offer and requirements for receiving their device, there were a minority that still don't complete the process for possible reasons as described above. These customers were a strong focus of our marketing and customer outreach as early as 2017 in order to help encourage these customers to finish the process. Across both jurisdictions, the Company sent over 15,000 emails, made almost 6,000 phone calls and sent 3,200 mailers to customers. From these contacts, the Company was able to convince over 5,700 customers to complete the thermostat installation. The Company's multiple customer engagement tactics improved the activation rate of installations during the Cycle from around 80% to over 93%. This superior DIY installation rate recognized by vendor partners as above industry average and in fact won an award at Chartwell's EMACS 2018 Customer Experience Conference for the marketing campaign used to best engage customers to prompt participation. As a point of reference, per Google Nest representatives' other utilities see on average ~80% installation and activation rates, showing that Evergy is well above average in encouraging every customer to install and activate eligible devices.

Ex. 5, File Rebuttal Testimony, Pg. 16-17. The actions of the Company show that it reasonably and prudently dealt with the known problem of "non-installers" and therefore should not be penalized by Commission-adopted disallowances.

14. No party presented evidence that the Company should have done more to encourage “non-installers” to install the thermostats and participate in the program. The Company did all that could be reasonably expected to do to encourage the non-installers to install the thermostats. Yet, the Commission’s Order disallows \$108,080 from EMM and \$116,665 from EMW simply because the Company’s customers did not follow through on their responsibility to install the thermostats.

15. The Order did not find that it was imprudent for Evergy to have used the Do-It-Yourself installation method as one of the three methods used in the program for having thermostats installed. Quite to the contrary, the Commission approved budget and tariff for the thermostat program provided that DIY customers will receive thermostats at no cost for participating in the program. The DIY channel is meant to significantly increase participation in the thermostat program and do so by providing an easy experience where the customer can sign up and have a device delivered directly to their home for installation on their own terms. (Ex. 5, File Rebuttal, p. 15) However, the disallowances are completely based upon a hindsight review of the small percentage of customers who did not follow through on their responsibility to install the thermostats themselves. This approach is unlawful, arbitrary and capricious, and should be reconsidered or a rehearing granted on this issue.

16. The Order correctly stated on page 8 the prudence standard when it stated that:

J. In determining whether a utility’s conduct was prudent, the Commission will judge that conduct by:

Asking whether the conduct was reasonable at the time, under all circumstances, considering that the company had to solve its problem prospectively rather than in reliance on hindsight. In effect, [the Commission’s] responsibility is to determine how reasonable people would have performed the tasks that confronted the company. (footnote omitted).

17. Yet, the disallowances are not based upon whether the Company's conduct was reasonable at the time, under all the circumstances, but instead is based upon information that was not available at the time the decision was made to provide a free thermostat to customers. As discussed in paragraph 11 above, the Company's decision to provide free thermostats to customers was reasonable as it was a Commission tariffed program. There was not information available to the Company at the time the decision was made to deliver the free thermostats to determine which, if any, customers would fail to follow through on their responsibility to install the thermostat.

18. The amount of the disallowances is also based solely upon information that was not available to the Company at the time it made the decision to deliver the thermostats to customers. The disallowances are based upon a hindsight review of the number of customers that failed to follow through on their responsibility to install the thermostats. If fewer customers had followed through on their responsibility to install the thermostats, then the disallowances presumably would have been less, or alternatively, if more customer had failed to follow through on their responsibility to install the thermostats, then the disallowance would have been greater. The Commission's approach is unlawful, arbitrary and capricious, and an abuse of discretion.

19. The findings of fact and conclusions of law are inadequate under Section 536.090 since the Order fails to explain the basis for holding EMM and EMW responsible for the failure of their customers to follow through on their responsibility to install the free thermostats. A reviewing court will be left to speculate on the basis for this decision, and it is therefore a violation of the requirement to issue an Order with adequate findings of fact and conclusions of law.

WHEREFORE, Evergy Missouri Metro and Evergy Missouri West respectfully request that the Commission grant reconsideration or rehearing of its Report and Order, as more fully described herein.

Respectfully submitted,

/s/ Roger W. Steiner

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**Attorneys for Evergy Missouri Metro and
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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand delivered, emailed or mailed, postage prepaid, this 2nd day of June 2022, to all parties of record.

/s/ Roger W. Steiner

Roger W. Steiner