

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

In the Matter of the Joint Application of)
Evergy Metro, Inc. d/b/a Evergy Missouri)
Metro and Evergy Missouri West, Inc. d/b/a) **Case No. ET-2024-0061**
Evergy Missouri West for Approval of Tariff)
Revisions to TOU Program)

Staff’s Motion to Suspend

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and in satisfaction of the Commission’s *Order and Notice* of September 11, 2023, states as follows:

Facts:

1. On September 8, 2023, after 7:00 pm, Evergy Metro, Inc. d/b/a Evergy Missouri Metro and Evergy Missouri West, Inc. d/b/a Evergy Missouri West (collectively, Evergy) filed their *Application* requesting four modifications to change its Time-of-Use (“TOU”) Implementation Program tariffs. Specifically, those four requests are:

- (i) Modifications to multiple tariff sheets so that the default residential rate plan beginning October 1, 2023, will be Schedule RPKA, “Residential Peak Adjustment Service,” rather than Schedule RTOU-2, “Residential Time of Use – Two Period,” as contained in the currently effective tariff;
- (ii) Modify the tariffs to, among other things, allow residential customers to opt-in to Evergy Missouri West rate plans MORG and MORN, and Evergy Missouri West rate plan 1RS1A/RESA beginning May 1, 2024;¹

¹ Under the effective tariff language for these rate plans currently states, “Starting on October 1, 2023 service under this rate schedule will be limited to Customers without AMI metering due to opt-out of AMI metering or due to technological barriers limiting the installation of AMI metering.”

(iii) Restrict rate switching;

(iv) Revise the estimates of education, outreach and implementation costs consistent with the revisions requested to be approved in the Application.

2. Together with the *Application*, Evergy filed proposed tariffs bearing an effective date of October 8, 2023. However, the *Application* includes a motion for expedited treatment, in which Evergy asks the Commission to approve the tariffs no later than September 29, 2023, because, Evergy states, it is otherwise bound by its lawfully promulgated effective tariffs to begin taking actions to switch customers' rate plans beginning October 1, 2023.

3. On September 11, 2023, the Commission issued its *Order and Notice*, stating that, in an effort to accommodate Evergy's request for expedited treatment, the Commission will reserve a time for hearing on less than ten days' notice, simultaneously finding that it is in the public interest to set a hearing on less than ten days' notice because of the imminent implementation of the TOU program no later than October 1, 2023; shortening the time for intervention requests to September 14, 2023; and making parties to Evergy's prior rate cases (ER-2022-0129 and ER-2022-0130) parties to this case without the need to request intervention. Additionally, the Commission directed its Staff to file a *Recommendation* on Evergy's four requests, or a status report stating when it expects to file its *Recommendation*, no later than September 13, 2023; and directed that any other responses to the *Application* or to Staff's pleading be filed no later than September 15, 2023. Finally, the Commission directed that, "[i]f needed," a hearing on the tariff shall be held on September 19, 2023, beginning at 9 a.m. at the Commission's office at the Governor Office Building in Jefferson City, Missouri.

Discussion:

The first question that inevitably arises in this case is whether or not the Commission can lawfully provide the expedited relief that Every seeks. In fact, it cannot.

Consideration of All Relevant Factors is Required:

Why is that? The Public Service Commission is a “creature of statute” and its “powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted.”² The Commission is vested with the state's police power to set “just and reasonable” rates for public utility services, subject to judicial review of the question of reasonableness.³ This power is not unlimited, however. Among other things, the Commission cannot “change the rate making scheme set up by the legislature.”⁴ Section 393.270.4, RSMo., provides:

In determining the price to be charged for gas, electricity, or water the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies.

“[T]he courts have held that this statute means that the PSC's determination of the proper rate for [utility service] is to be based on all relevant factors rather than on consideration

² *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 47 (Mo. banc 1979) (“*UCCM*”); *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo. banc 1958)..

³ *St. ex rel. City of Harrisonville v. Pub. Serv. Comm'n of Missouri*, 291 Mo. 432, 236 S.W. 852 (1922); *City of Fulton v. Pub. Serv. Comm'n*, 275 Mo. 67, 204 S.W. 386 (1918), *error dis'd*, 251 U.S. 546, 40 S.Ct. 342, 64 L.Ed. 408; *City of St. Louis v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 509, 207 S.W. 799 (1919); *Kansas City v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 539, 210 S.W. 381 (1919), *error dis'd*, 250 U.S. 652, 40 S.Ct. 54, 63 L.Ed. 1190; *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951).

⁴ *UCCM*, *supra*, p. 56.

of just a single factor.”⁵ Of particular relevance here, the Missouri Supreme Court has stated, “[e]ven under the file and suspend method, by which a utility’s rates may be increased without requirement of a public hearing, the commission must of course consider all relevant factors including all operating expenses and the utility’s rate of return, in determining that no hearing is required and that the filed rate should not be suspended.”⁶ How does the Commission consider all relevant factors? Through a general rate case.

Single-Issue Ratemaking is Prohibited:

Why is consideration of all relevant factors required? “Ratemaking is a balancing process. Although there are general guidelines and restrictions placed upon a regulatory body’s discretion concerning rates, that discretion is very broad within those parameters.”⁷ “It is axiomatic that a just and reasonable utility rate is a bilateral proposition. Like a coin, it has two sides. On the one side it must be just and reasonable from the standpoint of the utility. On the other side it must be just and reasonable from the standpoint of the utility’s customers.”⁸ It is the consideration of all relevant factors that ensures bilateral fairness.

When a utility’s rate is adjusted on the basis of a single factor, without consideration of all relevant factors, it is known as single-issue ratemaking.⁹

⁵ *State ex rel. Midwest Gas Users’ Ass’n v. Pub. Serv. Comm’n or State*, 976 S.W.2d 470, 479 (Mo. App., W.D. 1998), as modified (Sept. 1, 1998).

⁶ *UCCM*, *supra*, p. 49.

⁷ *State ex rel. Union Elec. Co. v. Pub. Serv. Comm’n*, 765 S.W.2d 618, 622 (Mo. App., W.D. 1988).

⁸ *State ex rel. Valley Sewerage Co. v. Public Service Commission*, 515 S.W.2d 845, 850 (Mo. App. 1974).

⁹ *State ex rel. Public Counsel v. Public Service Com’n*, 397 S.W.3d 441, 448 (Mo. App., W.D. 2013).

Single-issue ratemaking is generally prohibited in Missouri “because it might cause the [Commission] to allow [a] company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area.”¹⁰ The tariff changes proposed here by Evergy, in the absence of a general rate case proceeding, necessarily constitute illegal single-issue ratemaking. Further, evidence will demonstrate that the tariff promulgation requested by Evergy is reasonably expected to result in increased annual revenues. Evergy cannot change its tariffs to increase its revenues without first obtaining Commission authorization via a general rate case.

The Amended Report and Order:

The tariffs that Evergy proposes to change resulted from the Company’s last general rate case. The Commission issued its *Amended Report and Order* in cases ER-2022-0129 and ER-2022-0130 on December 8, 2022, effective December 18, 2022. Therein, the Commission made extensive findings of fact, a conclusion of law, and set out a lengthy discussion of the various considerations it weighed regarding the prospective rate structure to be authorized for Evergy. The Commission gave certain and unmistakable direction to the Company:

To summarize, residential rates for Evergy are authorized to be Evergy’s 2-period TOU proposed rate as the default rate beginning October 1, 2023. Staff’s low differential rate is approved as an opt-in rate, without a lead-in time. Evergy’s additional residential TOU proposals are also authorized on an opt-in basis, without a lead-in time. Customers are authorized to opt-out of the default high differential rate into one of the four additional TOU rates approved here. Existing 3-period TOU customers shall stay on their existing 3-period TOU rate during and after the transition of non-TOU residential customers to the 2-period TOU rate unless those customers request to switch to the 2-period TOU rate or an alternative opt-in TOU rate. Evergy shall implement a program to engage and educate customers in the approximate ten-month lead-in time until its 2-period TOU

¹⁰ *Id.*, at 480; and see extended discussion in *UCCM*, 51-58.

rate takes effect as the default rate for residential customers beginning October 1, 2023. Evergy shall work with Staff and OPC and permit them a chance to review materials related to the education program and to the implementation of TOU rates from October 1 through December 31, 2023, to ensure the program and implementation have a maximum potential for success. Further Evergy will eliminate the identified residential rate codes and transition customers to the identified existing codes on or after October 1, 2023, as they transition to the 2-period TOU rate.¹¹

On December 30, 2022, the Commission approved tariffs in compliance with the *Amended Report and Order*. Now, Evergy seeks in summary fashion to change those approved and effective tariffs in a manner not contemplated by the *Amended Report and Order*. That is simply not possible under Missouri law.

The Filed Tariff Doctrine:

A tariff is a schedule of rates and charges.¹² “In the context of cases before the [PSC], the terms ‘tariff’ and ‘rate schedule’ are synonymous.”¹³ Under traditional, cost-of-service ratemaking, a tariff can only be modified after a general rate proceeding during which all relevant factors are considered.¹⁴ Between rate cases, the tariff is fixed and immutable.¹⁵ Under the “Filed Tariff Doctrine,”¹⁶ the tariff and the rates it contains is

¹¹ *In the Matter of In the Matter of Evergy Metro, Inc. d/b/a Evergy Missouri Metro*, Case No. ER-2022-0129, and *In the Matter of In the Matter of Evergy West, Inc. d/b/a Evergy Missouri West*, Case No. ER-2022-0130 (*Amended Report & Order*, issued December 8, 2022) p. 74 (hereafter, “*Amended Report & Order*”).

¹² *Public Service Com'n of State v. Missouri Gas Energy*, 388 S.W.3d 221, 227 (Mo. App., W.D. 2012).

¹³ *In the Matter of Kansas City Power & Light Co.'s Request for Auth. to Implement a Gen. Rate Increase for Elec. Serv. v. Missouri Pub. Serv. Comm'n*, 509 S.W.3d 757, 782–83 (Mo.App. W.D. 2016); *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 311 S.W.3d 361, 364 n. 3 (Mo.App.W.D.2010).

¹⁴ See discussion *infra*, p. 3 ff.

¹⁵ This regime has been made progressively less absolute by the enactment or recognition of various exceptions. These include certain taxes; rate adjustment mechanisms; and certain surcharges, none of which apply to the present circumstance.

¹⁶ Also known as the “Filed Rate Doctrine.” “... the ‘filed rate’ doctrine has its genesis in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251-252, 71 S.Ct. 692, 695, 95 L.Ed. 912 (1951). There, this Court examined the reach of ratemakings by FERC's predecessor, the Federal Power Commission (FPC). * * * [M]any state courts have applied the filed rate doctrine of

binding on the Company, its customers, and the Commission itself.¹⁷ More specifically and regardless of how a rate case commences, at its conclusion the Commission issues a report and order describing just and reasonable rates and directs the utility to file proposed tariffs in compliance with its order.¹⁸ The compliance tariffs are then approved by the Commission in summary fashion once the Staff files its recommendation stating that the tariffs do indeed comply with the Commission’s order.¹⁹ The tariffs filed by Evergy on September 8, 2023, are not compliance tariffs and therefore may not be approved in summary fashion. In fact, as noted above, they are clearly *not* in compliance with the *Amended Report and Order*. Rather, they are tariffs proposing new rates, charges, rules, or regulations and, under the file-and-suspend method, a new general rate case is thereby commenced and all relevant factors must be considered.²⁰

Tariff Suspension:

Section 393.150, RSMo., authorizes the Commission to suspend “any schedule stating a new rate or charge, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service or to any general privilege or

Montana-Dakota to decisions of state utility commissions and state courts that concern matters addressed in FERC ratemakings.” *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 962, 964, 106 S.Ct. 2349, 2354-55, 2356, 90 L.Ed.2d 943, ___ (1986). Missouri courts have uniformly applied the Filed Rate Doctrine to decisions of the PSC, see, e.g., *State ex rel. AG Processing, Inc. v. Public Service Commission*, 311 S.W.3d 361 (Mo. App., W.D. 2010); *Bauer v. Southwestern Bell Tel. Co.*, 958 S.W.2d 568 (Mo. App., E.D. 1997).

¹⁷ *In the Matter of Missouri-American Water Co. and DCM Land, LLC v. Office of the Public Counsel*, No. SC99978 (Mo. banc, August 15, 2023) slip op. at p. 7: “In addition to binding the utility and the public, the tariff also binds the Commission.”

¹⁸ *In the Matter of Kansas City Power & Light Co.*, *supra*, 509 S.W.3d at 783, quoting *In re KCP&L Greater Mo. Operations Co.*, 408 S.W.3d 175, 178 (Mo. App., W.D. 2013).

¹⁹ *In the Matter of Kansas City Power & Light Co.*, *supra*, 509 S.W.3d at 783-4.

²⁰ *UCCM*, at 48: “Pursuant to § 393.150, a utility may file a schedule stating a new rate or charge, rule or regulation, which shall become valid unless suspended by the commission, on its own motion or upon complaint of interested parties as authorized by the statute.”

facility” for 120 days plus six months beyond the effective date stated on the tariff as filed. This ten-month suspension allows sufficient time for the complex, contested-case procedures that characterize a general rate case, including intervention, discovery, pre-filed testimony, and a multiple-day hearing at which all parties have an opportunity to present their cases, adduce evidence, and engage in cross-examination.²¹ The proposed tariffs filed herein by Evergy – and Due Process -- require no less.²²

Minimum Filing Requirements:

The Commission has established certain minimum filing requirements for electric utility rate cases that Evergy has not met.²³ Staff recommends that if Evergy fails to file to meet the minimum filing requirements required by rule within a reasonable interval, that the Commission dismiss this action for failure to meet the minimum filing requirements.

WHEREFORE, as explained herein, because the Commission may only approve the tariff changes proposed by Evergy following a general rate case, Staff hereby moves that the Commission suspend those tariffs for 120 days plus six months as allowed by law, give appropriate notice, set a procedural schedule, and enter into general rate case procedures; and grant such other and further relief as is just in the circumstances.

²¹The Commission’s exercise of the suspension authority at § 393.150, RSMo., requires the Commission to hold a hearing and thereby converts the case from a non-contested case to a contested case.

²² Should the Commission refuse to suspend and indeed approves Evergy’s proposed tariffs in summary fashion, there can be no question but that the decision will be reversed on appeal.

²³ 20 CSR 4240-2.065(1), 20 CSR 4240-3.030, 20 CSR 4240-3.160.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **13th day of September, 2023**, to the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

/s/ Kevin A. Thompson