

**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 )

**MOTION TO SUSPEND HEARING**

COMES NOW the Office of the Public Counsel (the “OPC”), and in response to the Public Service Commission of the State of Missouri’s (the “Commission”) Order and Notice (Doc. 4) respectfully states:

The OPC respectfully requests that the Commission suspend the previously scheduled hearing in this matter. In its September 11, 2023 Order and Notice, the Commission ordered that “[i]f needed, a hearing on the tariff shall be held on September 19, 2023.” (Order and Notice 3, Doc. 4). The mere seven-and-one-half days<sup>1</sup> between when the Commission issued its Order and Notice and when the hearing is scheduled to begin fails to provide sufficient time to prepare for the hearing, which in turn violates the due process rights of all parties who wish to participate.<sup>2</sup>

The Missouri Court of Appeals, Western District (the “Western District”) has addressed what constitutes due process in an administrative proceeding. *See In re KCP&L Greater Mo. Operations Co.*, 515 S.W.3d 754, 757-58 (Mo. Ct. App. 2016). The Western District held that

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<sup>1</sup> The Commission issued its Order and Notice at 12:34 p.m. on September 11, 2023.

<sup>2</sup> The OPC notes that yesterday, September 13, 2023, the Staff of the Commission (“Staff”) filed both a Motion to Suspend and Status Report. (Docs. 6, 7). In its Motion to Suspend, Staff raises many concerns with the Commission’s expedited consideration of Evergy’s Application for Approval of Tariff Revisions to Time-of-Use Program, Request for Waiver of 60 Day Notice Requirement, and Motion for Expedited Treatment (the “Application”). (*See generally* Mot. to Suspend). Based on these concerns, Staff asks that the Commission suspend the tariffs that Evergy filed with its Application “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.” (*Id.* 8). In the Status Report, Staff states that it will provide an “interim recommendation no later than close of business on Friday, September 15, 2023.” (Status Report 3). It further states, “a full recommendation can be provided only after contested case proceedings following an ample opportunity for discovery.” (*Id.*).

In an administrative proceeding, '[d]ue process is provided by affording parties the opportunity to be heard in a meaningful manner. The parties must have knowledge of the claims of his or her opponent, and have a full opportunity to be heard, and to defend, enforce and protect his or her rights.'

*Id.* at 757 (quoting *Harter v. Mo. Pub. Serv. Comm'n*, 361 S.W.3d 52, 58 (Mo. Ct. App. 2011)). Citing to § 386.390.5 RSMo., which requires ten days' notice prior to a hearing, and 20 CSR 4240-2.130(9),<sup>3</sup> which allows testimony to be taken live, the Western District concluded that the Commission did not violate the OPC's due process rights in that case. *Id.* at 757-58.

However, in that case, the Commission gave the parties ten business days to prepare for hearing (fifteen calendar days). *Id.* at 757; (see Order Establishing Procedural Schedule 1, 3, Doc. 32, Case No. EA-2015-0256 (issuing the Procedural Schedule on January 27, 2016, and scheduling the evidentiary hearing for February 11, 2016)). Further, during the approximately 111 days<sup>4</sup> that existed between the time that Kansas City Power and Light ("KCP&L") filed its Application and the date when the Commission issued its Report and Order, the parties:

- "engaged in discovery, including the depositions of witnesses;"
- "presented a Non-Unanimous Stipulation of Agreed Upon Facts;"
- "filed written position statements regarding the joint list of issues;"
- "made opening statements;"
- "presented and cross-examined witnesses;"
- "offered rebuttal testimony; and"
- "filed written briefs at the conclusion of the case."

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<sup>3</sup> At the time of the Western District's decision, the rule appeared at 4 CSR 240-2.130(9). See *In re KCP&L Greater Mo. Operations Co.*, 515 S.W.3d at 758.

<sup>4</sup> Approximately ninety-one days existed between the time that KCP&L filed its Application and the Commission held the evidentiary hearing in the matter. (See Docket Sheet, Case No. EA-2015-0256 (identifying that KCP&L filed its Application on November 12, 2015); Tr. 7, Doc. 53, Case No. EA-2015-0256 (identifying that the Commission held the evidentiary hearing on February 11, 2016)).

*In re KCP&L Greater Mo. Operations Co.*, 515 S.W.3d at 758; (see Docket Sheet, Case No. EA-2015-0256 (identifying that KCP&L filed its Application on November 12, 2015, and the Commission issued its Report and Order on March 2, 2016)).

This case differs greatly from the case the Western District considered in *In re KCP&L Greater Mo. Operations Co.* Most pointedly, unlike the ten business days that the Commission gave parties to prepare for the evidentiary hearing in *In re KCP&L Greater Mo. Operations Co.*, here the Commission gave the parties only a mere five-and-one-half business days or seven-and-one-half calendar days to prepare. See 515 S.W.3d at 757. This fails<sup>5</sup> to meet the ten-day requirement identified in § 386.390.5 RSMo.<sup>6</sup>

Another important distinguishing factor between this case and *In re KCP&L Greater Mo. Operations Co.* is that the parties will have only little opportunity to engage in discovery in this

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<sup>5</sup> The OPC acknowledges that § 386.390.5 RSMo. allows the Commission to set a hearing on less than ten-days' notice if the Commission "find[s] that the public necessity requires that such hearing be held at an earlier date." § 386.390.5 RSMo. In setting the hearing for this matter, the Commission found "it is in the public interest to set a hearing on less than ten days' notice because of implementation of the TOU program no later than October 1, 2023." (Order & Notice 2). Evergy's belated request to change the tariff sheets to implement its TOU rates, which was made a mere twenty-three days before the TOU rates are to be implemented and eight months after the Commission issued its Amended Report and Order ordering the use of mandatory TOU rates, should not constitute a reason to infringe upon parties' due process rights. (See Am. Report & Order 58-76, Doc. 658, Case No. ER-2022-0129; Am. Report & Order 58-76, Doc. 673, Case No. ER-2022-0130).

<sup>6</sup> The OPC recognizes that § 386.390.5 RSMo. refers to a hearing on a complaint. See § 386.390.5 RSMo. ("The commission shall fix the time when and the place where a hearing will be had upon the complaint and shall serve notice thereof, not less than ten days before the time set for such hearing . . ."). However, the Western District relied on this ten-day requirement in reaching its decision in *In re KCP&L Greater Mo. Operations Co.*, which considered whether the Commission violated the OPC's due process rights in a case concerning a utility's application for a certificate of convenience and necessity. See 515 S.W.3d at 756, 758. Therefore, the OPC presumes that § 386.390.5 RSMo. provides at least a starting point for considering whether the Commission's notice of a hearing date violates a party's due process rights. See *id.*

The OPC also notes that the Missouri Administrative Procedure Act, found in Chapter 536 of the Revised Statutes of Missouri, includes a similar requirement that parties to a contested case receive at least ten days' notice of a hearing. § 536.067(4) RSMo. (recognizing that the notice of a hearing "shall in every case be given a reasonable time before the hearing. Such reasonable time shall be at least ten days . . ."). Similar to §386.390.5 RSMo., § 536.067(4) RSMo. includes a provision allowing for exceptions to the ten days' notice requirement. See § 536.067(4) RSMo. (requiring ten days' notice for a hearing "except in cases where the public morals, health, safety or interest may make a shorter time reasonable . . ."). For the same reasons that the Commission's cited reason fails to satisfy the exception requirement of § 386.390.5 RSMo, it also fails to satisfy the exception provision of § 536.067(4) RSMo.

matter.<sup>7</sup> *See* 515 S.W.3d at 758. Only approximately ten calendar days<sup>8</sup> or six business days exist between the time that Evergy filed its Application and the currently scheduled hearing. Without the opportunity to conduct robust discovery, no party can be said to have had “a full opportunity to be heard, and to defend, enforce and protect his or her rights.” *See In re KCP&L Greater Mo. Operations Co.*, 515 S.W.3d at 757 (citation omitted).

Further, the *In re KCP&L Greater Mo. Operations Co.* case is distinguishable, because in this case, there has been no order to—and there will be no time to prepare—a joint list of issues or to adequately prepare for hearing. *See* 515 S.W.3d at 758. Here, the Commission has not identified what the upcoming hearing will address, which significantly hinders all parties’ ability to prepare. (*See* Order & Notice 3 (scheduling a “hearing on the tariff . . .”). It is unclear from the Order and Notice whether this hearing will be an evidentiary hearing or some other type of hearing entirely. (*See id.*). Similarly, the Commission has not ordered the parties to file a list of issues or witnesses. Without these critical pieces of information, the parties cannot be sure that whatever preparation they complete within this condensed timeframe will correspond to how the hearing will proceed. For instance, with little discovery and without knowledge of the witnesses’ identities, no party can be certain that they will prepare adequate cross-examination or that they will present the appropriate witnesses to persuasively respond to another witnesses’ claims. Simply put, parties to this case must prepare for an uncertain hearing in a void, with no knowledge of what the hearing will address, who will testify, or what those witnesses may say during their

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<sup>7</sup> The OPC acknowledges and appreciates that Evergy has responded to some of the OPC’s data requests issued in this case. However, given the condensed timeframe in which Evergy asks the Commission to review this case, the OPC has the ability to conduct only limited discovery.

<sup>8</sup> Evergy filed its Application at approximately 7:03 p.m. on Friday, September 8, 2023.

testimony. Due process requires more than this. *See In re KCP&L Greater Mo. Operations Co.*, 515 S.W.3d at 757 (citation omitted).

Finally, parties to a contested case are “entitled to present oral arguments or written briefs at or after the hearing.” § 536.080.1 RSMo. It is clear that the parties to the *In re KCP&L Greater Mo. Operations Co.* case received this opportunity. 515 S.W.3d at 758 (recognizing that the parties “filed written briefs at the conclusion of the case.”). Here, the Commission has not ordered—and there will be no time to prepare—written briefs in time for the Commission to issue an order that is effective by Evergy’s requested date of September 29, 2023. If the Commission intends to rely on parties’ ability to present oral argument at the hearing, then parties must be given an opportunity to consider the evidence presented at the hearing—the only evidence available in this case—prior to being asked to present those arguments.

WHEREFORE, the Office of the Public Counsel respectfully requests that the Commission suspend the hearing currently scheduled for September 19, 2023.

Respectfully submitted,

/s/ Lindsay VanGerpen  
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Senior Counsel

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### **CERTIFICATE OF SERVICE**

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this 14th day of September 2023.

/s/ Lindsay VanGerpen