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 Evergy Missouri West for Approval of Tariff Revisions to TOU Program	)))))	Case No. ET-2024-0061

RESPONSE TO EVERGY'S APPLICATION, REQUEST FOR WAIVER OF 60 DAY NOTICE REQUIREMENT, MOTION FOR EXPEDITED TREATMENT, AND MOTION TO APPROVE TARIFFS ON LESS THAN 30 DAYS' NOTICE; AND MOTION TO DISMISS

COMES NOW the Office of the Public Counsel (the "OPC") and in response to Evergy Metro, Inc. d/b/a Evergy Missouri Metro ("Evergy Metro") and Evergy Missouri West, Inc. d/b/a Evergy Missouri West's ("Evergy West," and collectively with Evergy Metro, "Evergy") 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," Doc. 1) respectfully states:[1]

The OPC is cognizant of the concerns surrounding the implementation of Evergy's mandatory time-of-use ("TOU") rates. It has heard the concerns expressed by Commissioners during Agenda and is aware that some of the public sentiment regarding implementation of these rates is negative. The OPC is also aware of Evergy's statements to Commissioners that based on Evergy's study, conducted by Oracle/Opower, after implementation of the TOU rates and with no assumed behavioral changes, 89% to 91% of customers will see no change or will see savings

[1] The OPC recognizes that the Public Service Commission of the State of Missouri (the "Commission") has cancelled the September 19, 2023 hearing and appreciates the Commission recognizing Staff of the Commission ("Staff"), the OPC, and Renew Missouri's concerns. (*See generally* Order Cancelling Hearing, Doc. 12). Recognizing that the Commission has previously ordered that responses to Evergy's Application be filed by September 15, 2023, the OPC submits this response. (September 11, 2023 Order 3, Doc. 4). The OPC makes this filing in order to preserve its arguments, but recognizes that it has not been updated to reflect the rapid filings made on September 15, 2023. (*See* Docs. 9-14).

based on their historical usage. (*See* Statements of Evergy, Aug. 10, 2023 Agenda at approximately 45:20, http://psc.mo.gov/Videos/VideoDetail.aspx?Id=6626). This is consistent with Evergy's prior study, conducted by the Brattle Group, which concluded that approximately 68% to 74% of customers would have essentially the same bill or some level of savings. (*Id.* at approximately 40:00; *see also* Notice of Workshop Presentation, Ex. A. "March 28, 2022 Evergy Presentation" 14,[2] Doc. 5, Case No. Evergy West-2023-0199). The Commission after reviewing extensive testimony and conducting a lengthy evidentiary hearing made its decision regarding these rates. Respectfully, sufficient time should be allowed for that decision to be implemented so that the true impacts of these new rates can be appropriately evaluated and analyzed.

The OPC strongly opposes Evergy's request to change its tariff sheets regarding its TOU rates on both legal and policy grounds. This pleading will focus most substantively on the legal grounds. The OPC intends to address its policy oppositions in the future either at the hearing or in a forthcoming pleading. The OPC also opposes Evergy's timing requests, including its request for expedited treatment, to allow the proposed tariff sheets to take effect on less than thirty (30)-days' notice, and to waive the Commission's Rule that requires Evergy to file a sixty (60)-day notice. Finally, the OPC asks the Commission to dismiss Evergy's Application as an improper collateral attack on the Commission's December 8, 2022 Amended Report and Order, issued in Evergy Metro and Evergy's West's most recent general rate cases.

I. Background

Prior to addressing the OPC's opposition to Evergy's Application, it is important to understand the background which preceded Evergy's Application.

[2] This number corresponds to the page number of the March 28, 2022 Evergy Presentation.

On November 21, 2022, the Commission issued a Report and Order (the "Original Report and Order") in both Evergy Metro and Evergy West's most recent general rate cases. (*See* Report & Order, Doc. 648, Case No. ER-2022-0129; Report & Order, Doc. 663, Case No. ER-2022-0130). The Original Report and Order took effect on December 6, 2022. (*See id.*). In pertinent part, in the Original Report and Order, the Commission ordered Evergy to implement mandatory TOU rates and did not approve "any traditional ratemaking structure for residential customers." (*Id.* 68-69). Specifically, the Commission stated "residential rates for Evergy are authorized to be Evergy's 2-period TOU proposed rate as the default rate beginning six months after the tariffs become effective." (*Id.* 68). The Commission approved "Staff's low-differential rate . . . as an opt-in rate, without a lead-in time" and "Evergy's additional residential TOU proposals . . . on an opt-in basis, without a lead-in time." (*Id.*). The Commission "authorized" customers "to opt-out of the default high-differential rate into one of the four additional TOU rates approved here." (*Id.*).

On December 5, 2022, Evergy filed a Motion for Reconsideration, or in the Alternative Application for Rehearing[3] (the "Rate Case Application for Rehearing," Doc. 655, Case No. ER-2022-0129; Doc. 670, Case No. ER-2022-0130). In pertinent part, Evergy requested seven modifications to the Commission's decision to implement mandatory TOU rates. (*See id.* 7-11). These requests included changing the mandatory, default rate to "Staff's proposed low-differential TOU rates."[4] (*Id.* 7).

On December 8, 2022, the Commission issued an Amended Report and Order (the "Amended Order") in both cases. (*See* Am. Report & Order, Doc. 673, Case No. ER-2022-0129;

[3] The Staff of the Commission ("Staff") also filed a Request for Clarification and Motion for Expedited Treatment. (Doc. 649, Case No. ER-2022-0129; Doc. 664, Case No. ER-2022-0130).

[4] In the Rate Case Application for Rehearing, Evergy explicitly stated that it "agrees that any traditional ratemaking structure will no longer be offered following a mandatory, default TOU rate implementation." (Rate Case Appl. for Rehearing 7).

Am. Report & Order, Doc. 658, Case No. ER-2022-0130). In the Amended Order, the Commission appears to have granted many of Evergy's requested changes. However, it appears to have denied Evergy's request to change the default TOU rate by continuing to order that "Evergy's 2-period TOU proposed rate" be "the default rate beginning October 1, 2023." (*Id.* 74). It also did not "approv[e] any traditional ratemaking structure for residential customers to be used after December 31, 2023 . . . with the exception of those residential customers without AMI meters." (*See id.* 71-74).

It is important to recognize that Evergy did not file either a Motion for Reconsideration or an Application for Rehearing in response to the Commission's Amended Report and Order.

On September 8, 2023, a Friday, at approximately 7:00 p.m., Evergy filed the Application. The following Monday, September 11, 2023, at 12:34 p.m. the Commission issued the Order and Notice (the "September 11, 2023 Order"). (Doc. 4). In the September 11, 2023 Order, the Commission ordered, in pertinent part, that Staff 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." (*Id.* 3). The Commission also required that "any [other] responses to the application or to Staff's pleading shall be filed no later than September 15, 2023," one week after Evergy filed the Application. (*Id.*). Finally, the Commission scheduled "a hearing on the tariff" for September 19, 2023. (*Id.*). This meant the hearing began a mere seven-and-one-half calendar days or five-and-one-half business days after the Commission issued its September 11, 2023 Order and approximately ten calendar days or six business days after Evergy filed the Application. (*See* Docket Sheet).

II. Summary of Evergy's Requested Relief

In the Application, Evergy requests four changes to the tariff sheets detailing its TOU rates. (*See* Appl. 3, 9-13). Evergy also requests expedited treatment, such that the Order ruling on the Application is *effective* no later than September 29, 2023. (*Id.* 13). It further requests that its proposed tariff sheets take effect on less than thirty-days' notice and that the Commission waive its rule that requires the filing of a notice sixty-days prior to a party filing a new case. (*Id.* 13-15). Finally, Evergy requests that the Commission "immediately schedule and convene an evidentiary hearing" regarding the Application. (*Id.* 14). Evergy asserts that "[w]hile this Application is pending before the Commission, Evergy intends to pause its current communication efforts with customers designed to encourage customers to choose a new rate option." (*Id.* 3).

To add a bit more detail, first, Evergy's requested changes to the tariff sheets detailing its TOU rates include:

> (i) Modify the default TOU rate from the high differential 2-period TOU rate [i.e. Standard Peak Saver] to the low differential Peak Adjustment TOU rate [i.e. Peak Reward Saver];
>
> (ii) Modify the tariffs to allow residential customers to opt-in to the traditional residential rate (i.e. "Anytime Plan") which has historically been in effect and is proposed to be offered as an option beginning May 1, 2024 rather than being terminated as scheduled under the approved TOU Implementation Program;
>
> (iii) Restrict rate switching to mitigate adverse revenue impacts by selective switching between the offered tariffs to artificially lower a customer's annual bill below reasonable cost of service through tariff selection only;
>
> (iv) Revise the estimates of education, outreach and implementation costs consistent with the revisions requested to be approved in the Application.

(Appl. 3).

In regards to its request for expedited treatment, Evergy requests a Commission order that is effective no later than September 29, 2023, "so that [Evergy] . . . may transition all applicable

customers to a TOU rate plan by the end of the year, as ordered by the Commission." (*Id.* 13). Evergy asserts that there "will be no negative effect on [Evergy's] . . . customers or the general public if the Commission acts by this date." (*Id.*). Evergy further states that "[t]his application was filed as soon as it could have been following the Commissioner discussion at the August 30, 2023, Agenda meeting." (*Id.*).

Next, in regards to its Motion to Approve Tariffs on Less than 30 Days' Notice, Evergy requests that its proposed tariff sheets "be allowed to go into effect on less than 30-days' notice (by September 29, 2023) . . . ." (*Id.*). As to good cause for this request, Evergy asserts that "the changes to the TOU Implementation Plan are needed and in the public interest to avoid further confusion and misinformation regarding the Commission-mandated TOU rates." (*Id.* 14). Evergy also cites its desire to "avoid the high differential 2-period TOU rate from going into effect as the default rate in October 2023." (*Id.*).

As to its request to waive the 60-day notice requirement from 20 CSR 4240-4.017(1) Evergy asserts that good cause exists "because [it] . . . is currently under the requirement to implement the TOU program no later than October 1, 2023 and the 60-day notice requirement would delay the filing of the Application after this date." (*Id.*). Evergy recognizes that it "has had some communication with the office of the commission within the prior 150 days regarding substantive issues involving the implementation of its TOU rate plans." (*Id.*). Evergy points out that these communications include "discussions" with "Commissioner[s] and legal advisor staff . . . at an Agenda Meeting on August 10, 2023, the TOU implementation workshop in File No. Evergy West-2023-0199 and other more informal discussions concerning TOU implementation." (*Id.* 15).

Finally, Evergy requests an "evidentiary hearing." (*Id.* 14). Evergy specifically requests that the Commission "immediately schedule" the hearing and that the hearing include "live testimony from the Company, and any other interested stakeholder."[5] (*Id.* 14).

III. Evergy's Request to Expeditiously Change its Tariff Sheets Implementing its TOU Rates Days Before They Are to be Implemented Unfairly and Unlawfully Infringes Upon the OPC's Rights

Nine months after the Commission issued is December 8, 2023 Amended Order and less than one month before it is to begin implementing the TOU rates, Evergy has requested that the Commission make substantive changes to the tariff sheets describing those rates. In filing this Application, Evergy requests that the Commission issue an Order approving its requested changes to be effective a mere three weeks after its Friday evening filing. To allow such a process to fundamentally change a material portion of the Commission's Amended Report and Order unfairly and unlawfully infringes upon the OPC's rights to both challenge the Commission's decision and its due process rights to challenge the Application in total.

A. Granting Evergy's Request to Issue an Order with an Effective Date of September 29, 2023 Will Likely Violate Court Precedent, Leading to Reversible Error

It is nearly certain that the Commission will be unable to issue an order that is both effective by Evergy's requested date of September 29, 2023, and includes a ten-day effective date. Court precedent makes clear that any shortening of this timeframe to less than ten-days "is presumptively unreasonable." *State ex rel. Office of the Pub. Counsel v. Pub. Serv. Comm'n of the State of Mo.*, 409 S.W.3d 522, 528-29 (Mo. Ct. App. 2013) (hereinafter the "*Western District Writ Case*"); *see State ex rel. Office of the Pub. Counsel v. Pub. Serv. Comm'n*, 236 S.W.3d 632, 636 (Mo. banc

[5] As noted above, the Commission appears to have granted Evergy's request for a hearing in the September 11, 2023 Order. (*See* Sept. 11, 2023 Order 3). In its Motion to Suspend Hearing, the OPC points out the due process concerns with holding the hearing on an expedited basis and requests that the Commission suspend the hearing. (*See generally* Mot. to Suspend Hearing, Doc. 8).

2007) (hereinafter the "*Supreme Court Writ Case*"). To do so, requires the Commission "to demonstrate that the circumstances surrounding the case are so extraordinary as to clearly warrant further encroachment on the time provided to the parties in which to exercise their right to apply for rehearing and/or appeal and that the time allowed was reasonably sufficient." *W. Dist. Writ Case*, 409 S.W.3d at 528-29.

The ten days referenced by court precedent is the amount of time between when the Commission issues its order and when a party must file its application for rehearing. This is shown in the *Western District Writ Case* where the Commission issued its order on January 23, with an effective date of January 26. 409 S.W.3d at 524-25. The Missouri Court of Appeals, Western District (the "Western District") recognized that "any application for review was required to be filed on or before 11:59 p.m. on January 25." *Id.* at 525. The Western District later stated that the OPC was given "two-plus days" to file an application for rehearing in that case. *Id.* at 527. Similarly, in the *Supreme Court Writ Case*, the Supreme Court of the State of Missouri referenced that the Commission issued its report and order in that case at 3:40 p.m. on December 29, 2006. 236 S.W.3d at 634. The Commission made the rates effective "as of the following Monday, January 1, 2007." *Id.* The Court recognized that because of the Commission's Rules regarding filing deadlines and the holidays during that time, the OPC had "at most, one hour and 20 minutes in which to file an application for rehearing." *Id.* at 635.

To comply with Evergy's requested September 29, 2023 effective date and to ensure that any party who wishes to file an application for rehearing has the full ten days referenced by the Western District, the Commission must issue an order no later than the end of the day on September 18, 2023.[6] This recognizes that any application for rehearing must be filed by 11:59 p.m. on

[6] The OPC notes that this understanding is also consistent with the Commission's Rules, which state that "[i]n computing any period of time prescribed or allowed by the commission, the day of the act, event, or default shall not

September 28, 2023. *See* § 386.500.2 RSMo. ("No cause or action arising out of any order or decision of the commission shall accrue in any court to . . . public counsel . . . unless that party shall have made, *before the effective date of such order or decision*, application to the commission for a rehearing." (emphasis added)). However, currently, the Commission has reserved a hearing in this matter to begin at 9:00 a.m. on the day following when it must issue its Order: September 19, 2023. (Sept. 11, 2023 Order 3). Therefore, to comply with the clear directive of the Western District, the Commission must issue its order no later than the day *before* it holds the hearing. To do so, violates the due process rights of all parties who wish to opine on Evergy's Application. *See In re KCP&L Greater Mo. Operations Co.*, 515 S.W.3d 754, 757 (Mo. Ct. App. 2016) (describing the due process requirements in administrative proceedings, which include the right to "'have a full opportunity to be heard, and to defend, enforce and protect his or her rights.'" (quoting *Harter v. Mo. Pub. Serv. Comm'n*, 361 S.W.3d 52, 58 (Mo. Ct. App. 2011))).

However, even assuming that the ten days required by the *Westen District Writ Case* is calculated from the effective date of the order, as opposed to the time when a party must file an application for rehearing, the Commission must issue the order in this matter by September 19, 2023. To accomplish this, several unlikely events must occur. Given the unlikeliness of each of these events occurring, it appears nearly impossible for the Commission to issue an order on September 19, 2023.

First, the hearing—which will be the parties' only opportunity to present evidence and arguments on the issues addressed in Evergy's Application—must be concluded within one day.

---

be included." 20 CSR 4240-2.050(1). In accordance with this Rule, if the Commission files its order on September 18, 2023, the first day that would be included in counting the applicable ten-day timeline would be September 19, 2023. The Missouri courts follow a similar rule in calculating timelines. *See* Mo. R. Civ. P. 44.01(a) ("In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included.").

This presumes not only that the parties could present all evidence in a single day, but that counsel for each of the parties would then have sufficient time to review all of the evidence presented and to formulate and present a persuasive oral argument to the Commission. *See* § 536.080.1 RSMo. (stating that "[i]n contested cases each party shall be entitled to present oral arguments or written briefs at or after the hearing.").

Second, the hearing must end with sufficient time left in the day for the Regulatory Law Judge to draft a report and order containing findings of facts and conclusions of law in compliance with § 536.090 RSMo. and the case law interpreting those requirements on that same day.

Third, following the conclusion of the hearing and the Regulatory Law Judge's drafting of the report and order, the Commission must then convene an Agenda meeting to consider and reach a majority vote on the draft report and order.[7]

Given the extremely compressed timeline in this matter, it is very likely that the Commission will violate the plain language of the Western District's mandate that parties generally be given at least ten days to file applications for rehearing. To comply with this mandate, the Commission must issue its order prior to holding the hearing in this matter. To do so violates parties' due process rights. Further, even assuming that the Commission could comply with the Western District's mandate by issuing the order on the same day that it holds the hearing, several unlikely events must occur.

[7] It should be noted that § 610.020.2 RSMo. typically requires notice of an Agenda meeting be given "at least twenty-four hours, exclusive of weekends and holidays when the facility is closed, prior to the commencement of any meeting of a governmental body." § 610.020.2 RSMo. However, the OPC acknowledges that the statute allows for an exception from the rule when "for good cause such notice is impossible or impractical, in which case as much notice as is reasonably possible shall be given." *Id.* Likely the Commission would have to rely on the fact that Evergy is to begin implementing the TOU rates on October 1, 2023, to meet the "good cause" requirement of § 610.020.2 RSMo. Such a reason does not constitute good cause here. Evergy has cited to nothing to show that it could not have brought this case sooner. Evergy's belated filing, which necessitates the extremely shortened timeframe, cannot constitute the good cause necessary for the Commission to fail to provide at least twenty-four hours' notice of its agenda meeting.

Because the Commission is likely to violate the Western District's mandate, it will have to "demonstrate that the circumstances surrounding the case are so extraordinary as to clearly warrant further encroachment on the time provided to the parties in which to exercise their right to apply for rehearing and/or appeal and that the time allowed was reasonably sufficient." *W. Dist. Writ Case*, 409 S.W.3d at 529.

In the *Western District Writ Case*, the Western District found it insufficient that the Commission shortened the time between the issuance of its order and the effective date of that order to approximately two-plus days, to ensure that the order became effective by the end of the suspension period. *Id.* at 528. The Commission asserted that the end of the suspension period of the utility's proposed tariff—which allegedly showed "the general assembly's stated desire to have tariff matters resolved within eleven months of the initial tariff filing"—justified its encroachment on the OPC's right to file an application for rehearing. *Id.* at 527. This proposed justification did not persuade the Western District. *Id.* at 524, 528 (stating "[t]he [Commission's] . . . failure to meet appropriate timelines cannot justify or constitute 'good cause' for infringing upon the due process rights of the parties.").

Likely, the only basis that the Commission could cite to meet this standard would be Evergy's request that the tariff sheets filed with its Application take effect no later than September 29, 2023, or, relatedly, that Evergy must begin implementing the TOU rates no later than October 1, 2023. (*See* Appl. 13). Either of these related reasons is unlikely to meet the standard set forth by the Western District. It has been over nine months since the Commission issued its Amended Order that mandated how Evergy Metro and Evergy West were to implement their TOU rates. (*See* Am. Report & Order 70-76, Case No. ER-2022-0129; Am. Report & Order 70-76, Case No. ER-2022-0130). In that time, it is clear that Evergy has been preparing for the implementation of the

mandatory TOU rates as ordered by the Commission.[8] For instance, the Commission has convened a working group docket to discuss Evergy's customer education and outreach regarding the introduction of default TOU rates. (*See* Order Opening a Working Case 1, Doc. 2, Case No. Evergy West-2023-0199). Since the Commission opened the working case, stakeholders have met with Evergy to discuss these issues and made various filings in the working group docket addressing them. (*See* Docket Sheet, Case No. EW-2023-0199). Even in the Application itself, Evergy maintains that "[v]ery high customer awareness of the mandated move to TOU" exists. (*See* Appl. 5). Further, Evergy has alleged no change in circumstances sufficient to support the belated filing of its Application. For at least these reasons, both Evergy's requested effective date and the date when it is to begin implementing the TOU rates fail to justify shortening the time period in which those stakeholders have an opportunity to file an application for rehearing.

B. Granting Evergy's Request to Issue an Order Effective by September 29, 2023, Inhibits all Stakeholders' Ability to Effectively Present Their Cases

In requesting that the Commission issue an order effective by September 29, 2023, Evergy has effectively requested that the Commission significantly hinder all interested stakeholders' ability to effectively present their cases and violate their due process rights.

First, no party will be allowed to participate in the full and robust discovery it would typically pursue regarding the requested changes in Evergy's Application.[9] Pursuant to Commission Rule, parties have 20 days to respond to data requests and 10 days to object or request additional time to answer. 20 CSR 4240-2.090(2)(C)-(D). Here, Evergy filed its Application after

[8] The OPC recognizes only that Evergy has had communications with its customers regarding the implementation of its TOU rates. The OPC takes no position as to whether Evergy has sufficiently educated its customers regarding the implementation of these rates.

[9] 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.

7:00 p.m. on Friday, September 8, 2023. On September 11, 2023, at 12:34 p.m. the following Monday, the Commission scheduled a hearing on the tariff for Tuesday, September 19, 2023. (Order & Notice 3). Therefore, less than twenty days exist between when Evergy filed the Application and when the Commission will hold the evidentiary hearing. Rather, this is a mere approximately ten days. Further, only seven-and-one-half days exist between when the Commission scheduled the hearing and when the Commission will hold the hearing. It simply cannot be said that any party will have the opportunity to engage in full and robust discovery prior to the evidentiary hearing.

Further, even absent the limitation on discovery, given the extremely shortened timeframe between when the Commission scheduled the hearing and when the hearing will take place, there is insufficient time to prepare for hearing. The Commission scheduled this matter for a hearing with a mere seven-and-one-half days' notice. It did not order the parties to prepare any witness or exhibit lists. It also did not require that parties prepare any list of issues. Therefore, not only will parties have insufficient time to prepare for the hearing, they will also be preparing in a void, with little to no idea of which witnesses will be appearing and the scope of the issues to be discussed.

Similarly, there will be insufficient time to prepare either a written brief or oral argument based on the evidence presented at the hearing. *See* § 536.080.1 RSMo. If the Commission attempts to comply with the Western District's mandate that parties receive ten days to prepare and file an application for rehearing by issuing the order on the same day that it holds the hearing, then the parties must prepare either their written briefs or oral arguments immediately following the close of the hearing. *See* § 536.080.1 RSMo. (mandating that parties to contested cases be allowed to "present oral arguments or written briefs at or after the hearing"). This allows, at best,

a very short window of time in which to evaluate the evidence presented and then draft either the written brief or oral argument.[10]

Due process requires more than this. *See In re KCP&L Greater Mo. Operations Co.*, 515 S.W.3d at 757. The Western District has held that

> 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. (quoting *Harter*, 361 S.W.3d at 58). Citing to § 386.390.5 RSMo., which requires 10 days' notice prior to a hearing, and 20 CSR 4240-2.130(9),[11] 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.* However, in that case, the Commission gave the parties ten *business* days to prepare for hearing (fifteen calendar days). (*See* 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)). The Western District also recognized that 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;"

---

[10] As discussed above, to comply with the plain language of the Western District's mandate regarding the timeframe to file an application for rehearing, the Commission must issue its order prior to holding the evidentiary hearing. In that circumstance, there will be no opportunity for a party to either file a written brief or present an oral argument. This is so because the hearing will be the parties' only opportunity to hear and present evidence in this case. Such an outcome does not comply with § 536.080.1 RSMo., which requires that "[i]n contested cases each party shall be entitled to present oral arguments or written briefs at or after the hearing." § 536.080.1 RSMO.

[11] 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.

- "offered rebuttal testimony; and"
- "filed written briefs at the conclusion of the case."

In re KCP&L Greater Mo. Operations Co., 515 S.W.3d at 758. Approximately 111 days existed between the time that Kansas City Power and Light ("KCP&L") filed its Application in that case and the date when the Commission issued its Report and Order. (*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)). That equated to approximately ninety-one days between the time that KCP&L filed its Application and when the Commission held the evidentiary hearing in the matter. (*See id.* (identifying that KCP&L filed its Application on November 12, 2015, and the Commission held the evidentiary hearing on February 11, 2016)).

This case differs greatly from the case the Western District considered in *In re KCP&L Greater Mo. Operations Co.*. Most importantly, 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 parties were given only a mere five-and-one-half business days or seven-and-one-half calendar days to prepare.[12] This fails[13] to meet the ten-day requirement identified in § 386.390.5 RSMo.[14] Further, as addressed above, there will simply be no opportunity to participate in full

[12] The Commission issued its September 11, 2023 Order setting the hearing date at 12:34 p.m.

[13] 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 for September 19, 2023, 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." (Sept. 11, 2023 Order 2). As addressed above, 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 should not constitute a reason to infringe upon parties' due process rights by scheduling a hearing on less than ten days' notice.

[14] 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

and robust discovery here. Because of this, it is highly unlikely that the parties will be able to come to an agreement regarding any agreed upon facts, aside from the mere procedural facts of the case. Further, there will be insufficient time to prepare a joint list of issues or to file position statements. Finally, there will be insufficient time to adequately prepare a persuasive oral argument or written brief addressing each parties' position. Due process requires more than what is contemplated in this case.[15]

Granting Evergy's request to have any Commission order addressing the Application be effective no later than September 29, 2023, requires the Commission to violate the requirement that parties be given ten days to file an application for rehearing, infringes upon parties' ability to effectively present their cases, and requires the Commission to violate stakeholders' due process rights. Therefore, the Commission should deny Evergy's request to have a Commission order be effective by September 29, 2023. Should the Commission wish to consider the requests Evergy makes in the Application, it must afford parties their due process rights by affording them the "opportunity to be heard in a meaningful manner." *See In re KCP&L Greater Mo. Operations Co.*, 515 S.W.3d at 757.

---

certificate of convenience and necessity. *See In re KCP&L Greater Mo. Operations Co.*, 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.

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.

[15] The OPC addresses due process more fully in its Motion to Suspend Hearing, that analysis is incorporated here by reference. (*See generally* Mot. to Suspend Hearing).

IV. Evergy's Timing Requests are Deficient

Evergy's requests for expedited treatment, for the Commission to approve the proposed tariff sheets on less than 30-days' notice, and for waiver of the 60-day notice requirement are deficient. The OPC will address each in turn.

A. The Request for Expedited Treatment

Citing to 20 CSR 4240-2.080(14), Evergy requests that the Commission "issue an order in this docket as soon as possible with an effective date no later than Friday, September 29, 2023." (Appl. 13). The OPC objects to Evergy's requested expedited treatment not only for the reasons mentioned above, but also because it objects to many of the statements Evergy made to meet the criteria necessary to request expedited treatment.

Commission Rule 20 CSR 4240-2.080(14) requires:

> (14) Any request for expedited treatment shall include the words "Motion for Expedited Treatment" in the title of the pleading. The pleading shall also set out with particularity the following:
>
> (A) The date by which the party desires the commission to act;
>
> (B) The harm that will be avoided, or the benefit that will accrue, including a statement of the negative effect, or that there will be no negative effect, on the party's customers or the general public, if the commission acts by the date desired by the party; and
>
> (C) That the pleading was filed as soon as it could have been or an explanation why it was not.

20 CSR 4240-2.080(14).

Though, on its face, it appears that Evergy's Motion for Expedited Treatment meets each of these criteria, the OPC objects to many of Evergy's statements made in support of its request. Specifically, Commission Rule requires the motion to set out with particularity the "harm that will be avoided, or the benefit that will accrue, including a statement of the negative effect, or that there will be no negative effect, on the party's customers or the general public, if the commission acts by the date desired by the party." 20 CSR 4240-2.080(14)(B). Evergy maintains "[t]here will be

no negative effect on the Company's customers or the general public if the Commission acts by this date." (Appl. 13). However, this statement overlooks all of the potential harm that could accrue to Evergy's customers and the overall general public if the Commission makes changes to the tariff sheets implementing Evergy's TOU rates at this late date. For instance, it is clear that Evergy has been communicating with its customers regarding the implementation of TOU rates. (*See* Appl. 5 (asserting that "[v]ery high customer awareness of the mandated move to TOU" exists)). Making changes to the tariff sheets that will implement Evergy's TOU rates a few days before Evergy begins to implement the transition will generate additional customer confusion and hardships as customers work to understand why Evergy has made changes to its TOU rates and to identify those changes.[16] Because Evergy requests these changes to take effect on an extremely short timeframe there will be little to no opportunity to educate customers on these changes prior to the rate plans taking effect on October 1, 2023.

Similarly, Evergy has requested that the Commission "approve the inclusion of the additional costs associated with education, outreach, and implementation of the revised TOU Implementation Plan to be tracked and deferred to a regulatory asset . . . for consideration of possible recovery in a future rate case." (Appl. 12). Though Evergy now estimates these incremental costs as only $250,000, ratepayers will likely or, at a minimum, will likely be asked to, bear these increased costs. (*See* Not. of Incremental Cost Estimate 1, Doc. 5).

Further, Evergy has previously asserted to the Commission that two studies show that a majority of its customers will either see benefits from the transition to TOU rates or will see no change to their bills. (Statements of Evergy, Aug. 10, 2023 Agenda at approximately 45:20, 40:00 http://psc.mo.gov/Videos/VideoDetail.aspx?Id=6626). Evergy makes no reference to these

[16] Further, it appears that upon filing the Application, Evergy has ceased at least certain communications with its customers. (*See* Appl. 3). This break in communication is also likely to generate customer confusion.

studies in its Application and overall fails to address how these customers who would have seen benefits from the transition to the Commission's mandated default TOU rates will be effected by the changes Evergy now wishes to make. (*See generally* Appl.). Similarly, Staff asserts in its Motion to Suspend that "evidence will demonstrate that the tariff promulgation requested by Evergy is reasonably expected to result in increased annual revenues." (Mot. to Suspend 5, Doc. 7). These are just a few of the examples of potential customer harm that Evergy fails to identify in its request for expedited treatment. *See* 20 CSR 4240-2.080(14)(B) (requiring a party requesting expedited treatment to identify with particularity "[t]he harm that will be avoided, or the benefit that will accrue, including a statement of the negative effect . . . if the commission acts by the date desired by the party").

Further, the Commission's Rule requires that Evergy state with particularity "[t]hat the pleading was filed as soon as it could have been or an explanation why it was not." 20 CSR 4240-2.080(14). Evergy asserts that "[t]his application was filed as soon as it could have been following the Commissioner discussion at the August 30, 2023, Agenda meeting." (Appl. 13). Though Evergy identifies a discussion that took place amongst the Commissioners during the August 30, 2023 Agenda meeting, it fails to identify why this discussion necessitated the filing of the Application or why this suggests that the Commission must act in such an expedited manner.

B. The Request that the Proposed Tariffs Be Allowed to Go Into Effect on Less than 30-Days' Notice

In addition to its request for expedited treatment, Evergy requests that its proposed tariff sheets be allowed to take effect on less than 30-days' notice. (Appl. 13-14). Section 393.140(11) of the Revised Statutes of Missouri allows the Commission to approve changes to tariff sheets on less than thirty days' notice "for good cause shown." § 393.140(11) RSMo. Evergy fails to show good cause for why these tariffs should be allowed to take effect on less than thirty-days' notice.

Evergy asserts that "good cause" exists for its requests because "the changes to the TOU Implementation Plan are needed and in the public interest to avoid further confusion and misinformation regarding the Commission-mandated TOU rates, and to avoid the high-differential 2-period TOU rate from going into effect as the default rate in October 2023." (Appl. 14). Though it may be true that the changes are necessary to "avoid the high-differential 2-period TOU rate from going into effect as the default rate in October 2023," the OPC questions how making changes to the Commission-approved tariff sheets a mere one day before Evergy is to begin implementing the new TOU rates will avoid customer confusion and misinformation. (*See id.*).

As addressed above, to make changes to the planned TOU rates at this late date will likely create additional customer confusion as customers work to identify the changes to the TOU rates and why Evergy made those changes. Again, because Evergy asks that the Commission make these changes effective the last business day before Evergy is to begin implementing these rates, there will be little to no opportunity to educate customers on these changes prior to them taking effect. Similarly, Evergy asserts in the Application that it "intends to pause its current communication efforts with customers designed to encourage customers to choose a new rate option." (Appl. 3). Evergy's failure to further engage with its customers regarding the implementation of TOU rates a mere few days prior to the date it was to begin implementing those rates is likely to create additional customer confusion.

Further, Evergy does not identify how making the requested changes will avoid "misinformation regarding the Commission-mandated TOU rates." (*See id.*). For instance, Evergy provides no indication that it will increase communications with customers in an effort to combat the misinformation.

For at least these reasons, the Commission should find Evergy's grounds to satisfy the good cause requirement for tariffs to take effect on less than 30-days' notice are deficient and should deny its request.

C. **Evergy's Request for a Waiver of the Commission's 60-Day Notice Requirement**

Finally, Evergy requests that the Commission waive the requirement that Evergy file a notice at least 60 days prior to filing a new case with the Commission. (Appl. 14-15). Again, Evergy's identified "good cause" is insufficient to support its request. Evergy has also violated the plain language of the Commission's Rule requiring the 60-day notice.

Commission Rule 20 CSR 4240-4.017(1) requires in most cases that "[a]ny person that intends to file a case shall file a notice with the secretary of the commission a minimum of sixty (60) days prior to filing such a case." 20 CSR 4240-4.017(1). This notice must "detail the type of case and issues likely to be before the commission and shall include a summary of all communication regarding substantive issues likely to be in the case between the filing party and the office of the commission that occurred in the ninety (90) days prior to filing the notice." *Id.* The Rule itself explicitly allows for waivers for "good cause." 20 CSR 4240-4.017(1)(D). In discussing good cause, the Rule states that

> [g]ood cause for waiver may include, among other things, a verified declaration from the filing party that it has had no communication with the office of the commission within the prior one hundred fifty (150) days regarding any substantive issue likely to be in the case[17] or that circumstances prevented filing the required notice and delaying the filing for sixty (60) days would cause harm.

Id.

[17] Evergy explicitly acknowledges in the Application that it has had "some communication with the office of the commission within the prior 150 days regarding substantive issues involving the implementation of its TOU rate plans." (Appl. 14-15). Therefore, Evergy cannot rely on its lack of communication with the Commission to form the basis for good cause to grant the waiver. *See* 20 CSR 4240-4.017(1)(D).

Evergy asserts that good cause exists to grant the waiver in this case because it "is currently under the requirement to implement the TOU program no later than October 1, 2023 and the 60-day notice requirement would delay the filing of the Application after this date." (Appl. 14). Though this statement appears to suggest that "delaying the filing for sixty (60) days would cause harm," it does not allege that any "circumstances prevented filing [of] the required notice." *See* 20 CSR 4240-4.017(1)(D). Rather, as addressed above, Evergy has identified no reason why it could not have requested these changes sooner, including at some point in the nine months since the Commission issued its Amended Report and Order. Also, it appears that Evergy has raised at least one of the same arguments (i.e. that the Commission modify the tariff sheets to allow Staff's proposed low-differential rate to be the mandatory, default rate), that the Commission has previously rejected. (*See* Rate Case Appl. for Rehearing 7; Am. Order 58-76). Evergy chose not to raise this point again after the Commission rejected it in the Amended Order. Evergy's attempted second bite at the apple and delayed filing simply cannot support a finding of good cause to grant a waiver from the Commission's Rule.

Further, assuming that Evergy should have filed the 60-day notice, the Rule explicitly requires that the notice "include a summary of all communication regarding substantive issues likely to be in the case between the filing party and the office of the commission that occurred in the ninety (90) days prior to filing the notice." 20 CSR 4240-4.017(1). Here, Evergy asserts only that

> Since there has been intense interest by the public, legislators, the press and other interested parties, the Company has had some communication with the office of the commission within the prior 150 days regarding substantive issues involving the implementation of its TOU rate plans. These discussions include Commissioner and legal advisor staff participation at an Agenda Meeting on August 10, 2023, the TOU implementation workshop in File No. EW-2023-0199 and other more informal discussions concerning TOU implementation.

These statements, especially the statement that "other more informal discussions concerning TOU implementation" have taken place, fail to provide the necessary "summary of all communication" contemplated by 20 CSR 4240-4.017(1).

Because Evergy fails to meet the requirements of 20 CSR 4240-4.017, the Commission should deny its request for a waiver of the sixty-day notice requirement.

For the reasons addressed above, each of Evergy's timing requests are deficient and the Commission should deny each of them.

V. Motion to Dismiss: Evergy's Request Constitutes a Collateral Attack on the Commission's December 8, 2022 Amended Report and Order

Should the Commission determine that it will consider Evergy's Application even considering the significant concerns noted above, the Commission must dismiss Evergy's Application as an improper collateral attack on the Commission's December 8, 2022 Amended Order.

Section 386.550 of the Revised Statutes of Missouri mandates that "[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." § 386.550 RSMo. The Western District has recognized that "[t]his statute is indicative of the law's desire that judgments be final." *State ex rel. Ozark Border Elec. Coop. v. Pub. Serv. Comm'n*, 924 S.W.2d 597, 601 (Mo. Ct. App. 1996) (citing *State ex rel. Harline v. Pub. Serv. Comm'n*, 343 S.W.2d 177, 184 (Mo. Ct. App. 1960)). In *Ozark Border Electric Cooperative*, the Western District made clear that "[t]his statutory provision makes a decision of the Commission immune to collateral attack. If a complaint does not allege a change in circumstance it would be in conflict with this section providing for finality." *Id.*

Evergy has identified no change in circumstance that gave rise to its belated requests. Rather, in its first request, Evergy asks for the *same* relief that it requested in its Rate Case

Application for Rehearing. (*Compare* Appl. 9 (requesting that the Commission change the default TOU rate to Staff's proposed low differential plan), *with* Rate Case Appl. for Rehearing 7 (requesting that the Commission on reconsideration adopt "Staff's proposed low-differential TOU rates . . . as the mandatory, default rate that would be implemented after an education period.")).

Further, in its second request, Evergy appears to have walked back from its agreement "that any traditional ratemaking structure will no longer be offered following a mandatory, default TOU rate implementation." (*See* Rate Case Appl. for Rehearing 7). Rather, here Evergy requests that the Commission allow it to "[m]odify the tariffs to allow residential customers to opt-in to the traditional residential rate . . . which has historically been in effect and is proposed to be offered as an option beginning May 1, 2024 rather than being terminated." (Appl. 3). Therefore, Evergy appears to be asking the Commission to allow it to continue to offer a traditional ratemaking structure following the implementation of the mandatory TOU rates.

In issuing its December 8, 2022 Amended Order the Commission decided the issues regarding Evergy's implementation of mandatory TOU rates. (*See generally* Am. Report & Order). Evergy had the opportunity to file an Application for Rehearing in that matter, and, in fact, took advantage of that opportunity following the issuance of this Commission's initial Report and Order. (*See generally* Rate Case Appl. for Rehearing). Following the Commission's issuance of the Amended Report and Order, Evergy choose not to seek rehearing. Because it has identified no material change in circumstance that would allow it to request a change to the Commission's prior order, Evergy cannot now—a mere three weeks prior to implementing the mandatory TOU rates—seek fundamental changes to the tariffs to implement the TOU rates. *See Ozark Border Elec. Coop.*, 924 S.W.2d at 601 (citation omitted). For this reason, the OPC respectfully asks that the Commission dismiss Evergy's Application.

VI. Conclusion

Again, the OPC is aware of the Commissioner concerns associated with Evergy's implementation of its TOU rates. The OPC is also aware of the public sentiment regarding the rates themselves. However, Evergy itself has presented two studies to the Commission that show that a significant portion of its customers will either benefit from the transition to TOU rates or will be unaffected by them. Therefore, even aside from the legal and policy concerns that arise with changing the tariff sheets at this last stage, the rates as ordered by the Commission should be allowed to go into effect. If Evergy later wishes to seek changes to its tariff sheets in accordance with the Commission's rate case procedure, a process exists for it to do so. *See, e.g.*, § 393.140(11) RSMo. This process allows an opportunity for all parties to engage in discovery on Evergy's requested changes, for the Commission to consider the viewpoint of all stakeholders, and for the Commission to consider all relevant facts.

WHEREFORE, for the reasons addressed above, the Office of the Public Counsel respectfully requests that the Commission deny each of Evergy's requested timing changes and dismiss Evergy's Application.

Respectfully submitted,

/s/ Lindsay VanGerpen
Lindsay VanGerpen (#71213)
Senior Counsel

Missouri Office of the Public Counsel
P.O. Box 2230
Jefferson City, MO 65102
Telephone: (573) 751-5565
Facsimile: (573) 751-5562
E-mail: Lindsay.VanGerpen@opc.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this 15th day of September 2023.

/s/ Lindsay VanGerpen