

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

The Staff of the Missouri Public Service Commission,
Complainant,
v.
Every Metro, Inc. d/b/a Every Missouri Metro; and Every Missouri West, d/b/a Every Missouri West, Inc.,
Respondents.

Case No. EC-2024-0092

**STAFF’S RESPONSE IN OPPOSITION TO
EVERGY’S MOTION FOR SUMMARY DISPOSITION
AND/OR DETERMINATION ON THE PLEADINGS**

COMES NOW, the Staff of the Missouri Public Service Commission (“Staff”), by and through counsel, and in response to Every Metro, Inc. d/b/a Every Missouri Metro and Every Missouri West, Inc. d/b/a Every Missouri West’s (collectively, “Every” or the “Company”) *Motion for Summary Disposition and/or Determination on the Pleadings*, states as follows:

Introduction

1. On April 24, 2024, Every filed a *Motion for Summary Disposition and/or Determination on the Pleadings, and Memorandum in Support* (“*Motion*”) pursuant to 20 CSR 4240-2.117.
2. On April 29, 2024, the Commission entered an *Order Directing Filing*, requiring the Staff to file its response to said *Motion* “no later than May 9, 2024.”
3. On April 30, 2024, Staff filed a *Motion for Additional Time to File Response to Respondent’s Motion for Summary Disposition and/or Determination on the Pleadings*, asking for 30 days to respond, in accordance with 20 CSR 4240-2.117(1)(C). Said motion

was granted, and Staff was given until May 24, 2024, to file its response to Everygy's *Motion*.

4. The Commission may grant a motion for determination on the pleadings and “dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest.” 20 CSR 4240-2.117(2).

5. “In reviewing the grant of a motion for judgment on the pleadings, this Court must decide whether the moving party is entitled to judgment as a matter of law on the face of the pleadings.” *City of St. Louis v. State*, 682 S.W.3d 387, 396, citing *Emerson Elec. Co. v. Marsh & McLennan Cos.*, 362 S.W.3d 7, 12 (Mo. banc 2012). The facts of “the non-moving party’s pleading are treated as admitted for purposes of the motion.” *Gross v. Parson*, 624 S.W.3d 877, 883 (Mo. banc 2021).

6. Commission Rule 20 CSR 4240-2.117(1)(B) requires the party filing a motion for summary determination to “state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue.”

7. The Commission may grant the motion for summary determination only if the movant can “show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest.” 20 CSR 4240-2.117(1)(E).

8. “[I]n determining a summary judgment motion, the judge ... is not to decide what the facts are or to make credibility determinations, but simply to determine whether there is a triable issue of fact.” *Sauvain v. Acceptance Indem. Ins. Co.*, 339 SW3d 555, 569 (Mo.App. W.D. 2007), citing *Care and Treatment of Schottel v. State*, 159 S.W. 3d 836, 844 (Mo. banc 2005).

9. “A ‘material fact’ is one having such probative value that it would control or determine the litigation.” *Auto-Owners Mut. Ins. Co., Inc. v. Newman*, 851 S.W.2d 22, 24 (Mo.App. W.D. 1993).

10. Staff has filed with this document a *Legal Memorandum* in support of its *Response in Opposition to Evergy’s Motion for Summary Disposition and/or Determination on the Pleadings* setting forth its reasons and legal arguments why the Company is not entitled to relief as a matter of law as to all or any part of this case and that this matter should proceed to a hearing on the merits, as genuine issues of material fact exist between the parties. See, *Staff’s Legal Memorandum in Support of Its Response in Opposition to Evergy’s Motion for Summary Disposition and/or Determination on the Pleadings*, which is attached hereto as **Attachment A** and incorporated herein by reference.

**Staff Response to Evergy’s
Motion for Determination on the Pleadings**

Dismissal of Staff’s *Complaint* would be contrary to law or to the public interest and should, therefore, not be dismissed, and in support thereof, Staff states as follows:

1. Evergy sets forth four arguments in its *Motion* as the basis for its reasoning that Staff’s *Complaint* in this case should be dismissed. They essentially revolve around Evergy’s reasoning that Staff’s “Counts 1-6 have had existing dockets and/or discussions with Staff and other parties that have addressed the underlying substantive issues related to these allegations, and these counts are being addressed by the Commission in those dockets.”¹ Evergy argues that because the issues are already being considered in other “pending dockets” the Commission need not deal with them here.

¹ Evergy’s *Motion* at page 2, Paragraph 8.

2. Evergy's argument fails in several respects, in that the important distinction in this case is that Evergy has established a pattern of failing to abide by its *Stipulation and Agreement*² commitments and Commission Orders to a point that Staff was obligated to bring the matter to the Commission's attention by filing this Complaint. It is in the public interest to maintain this complaint, as Evergy's actions and inactions necessitate Commission follow-up, or Evergy will recognize that it is free to disregard its obligations so long as it eventually does something, no matter how delayed or inadequate, related to a stipulated or ordered matter.

3. With regard to Count 1, the EO-2024-0002 case regards the substance of Evergy's data provision commitments, this EC case regards Evergy's failures to abide by its Stipulation commitments.

4. The Rate Modernization Discussions discussed in Count 2 of the Complaint were not meaningful, were scheduled unreasonably, and did not accept or incorporate stakeholder feedback. Evergy's positions in the Direct Testimony of Brad Lutz in a rate case for a single Evergy jurisdiction filed eight months after the ordered date for discussion do not constitute material facts upon which the Commission could rely to dismiss Staff's Complaint.

5. The allegations in Count 3 of the Complaint continue to be relevant, in that Evergy's testimony in ET-2024-0182 is essentially that it would not have filed to make the indicated tariff changes if Staff had not filed this complaint. This complaint is still relevant

² On August 30, 2022, Evergy signed onto a *Stipulation and Agreement* agreeing it would provide the information that had been set out in Staff witness Sarah Lange's direct testimony in rate case ER-2022-0129 and ER-2022-0130. The *Stipulation and Agreement* was approved by the Commission by its September 22, 2022 *Order Approving Four Partial Stipulations and Agreements*, effective October 2, 2022.

because Evergy's plan was to violate the Commission's defaulting order at all times from January of 2023 – September of 2023, and it continues to restrict rate plan access without tariff authorization to this day.

6. Count 4, 5, and 6, while related, are also distinct. EW-2023-0199 is not a contested case, and the Commission cannot order any meaningful relief in that docket, nor address Evergy's actions which caused massive public confusion.

7. There is an intense public interest concern that utilities follow the Stipulations they sign and Orders entered concerning the information to be included by the utility in future filings.

**Staff Responses to Evergy's
Statement of Material Facts for which there is No Genuine Issue**

Pursuant to 20 CSR 4240-2.117(1)(C), Staff provides the following responses to Evergy's factual statements:

Count 1

8. The statement made by Evergy in Paragraph 16 fails to set forth material facts essential to the cause of action asserted. To the extent that a response is required, Staff admits that the statement quoted in Paragraph 16 is a direct quote from Paragraph 13 of Staff's Amended Complaint.

9. Evergy makes multiple factual statements in Paragraph 17, in violation of 20 CSR 4240-2.117(1)(B), which requires the moving party to "state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue." Furthermore, the statements in Paragraph 17 are argumentative, and irrelevant and have no bearing on the cause of action. To the extent a response is required, Staff states that the issues in EO-2024-0002 are what are

Evergy's estimates of the cost to provide each piece of information it agreed to provide in the ER-2022-0129 and 0130 Stipulations, and whether the Commission should order Evergy to provide the specified information at the specified costs.³ The relief requested under Count 1 of Staff's *Complaint* in this case includes statutory penalties or other relief as the Commission deems fit based on its failure to provide that information. As such, Evergy's statements in Paragraph 17 are factually inaccurate, and therefore Staff denies the same.

10. The statements in Paragraph 18 fail to allege material fact, lack evidentiary foundation, and are opinion. To the extent a response is required, Staff alleged in Staff witness Sarah Lange's direct testimony in this EC docket that Evergy's testimony in the EO-2024-0002 docket was insufficient for compliance with the ER-2022-0129 and ER-2022-0130 *Stipulation and Order*.⁴ As such, Evergy's statements in Paragraph 18 are factually inaccurate, and therefore Staff denies the same.

11. The statements made by Evergy in Paragraph 19 contain vague and ambiguous assertions and fail to set forth material facts essential to the cause of action asserted. Evergy's statement set forth in Paragraph 19 is actually the substance of Count 1 of Staff's *Complaint* and is subject to disagreement of material fact. Staff witness Lange's filed testimony demonstrates that Evergy has not performed those obligations.⁵ Furthermore, even if Evergy's theory that the EO-2024-0002 case substitutes for litigation of Count 1, this allegation would not hold unless the Commission determined in that case that Evergy complied with the ER-2022-0129 and 0130 *Stipulation and Order*, which is

³ See, *Staff's Statement of Position's* filed in EO-2024-0002, which is attached hereto, and made a part herein as Attachment B.

⁴ See, Sarah Lange Direct Page 2, lines 18 – 24, page 3 lines 5 - 14.

⁵ See, Lange Direct Page 14, line 7 –page 15, line 18.

not at issue in that case. As such and to the extent a response is required to Paragraph 19, Staff denies the same.

Count 2

12. The statement made by Evergy in Paragraph 21 fails to set forth material facts essential to the cause of action asserted. To the extent that a response is required, Staff admits that the statement quoted in Paragraph 21 is a direct quote from Paragraph 23 of Staff's Amended Complaint.

13. Evergy makes multiple factual statements in Paragraph 22, in violation of 20 CSR 4240-2.117(1)(B), which requires the moving party to "state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue." To the extent a response is required, Staff denies the first statement re: whether "Evergy met w/ stakeholders to discuss rate modernization within 212 days of its tariff effective date." In support of this statement Evergy cites to the transcripts in File No. EO-2024-0002; however those transcripts reflect Staff's refutation of Evergy's assertion that superficial discussion on August 8, 2024, satisfied the Commission order. This dispute was specifically discussed in the transcript Evergy cites in its motion:

Q. I'm asking you whether we had a conversation
·6· ·190 days after the tariffs were in effect. That was the
·7· ·first meeting, correct?
·8· · · · A. A conversation about what?
·9· · · · Q. Rate modernization whenever the Company
10· presented its rate modernization proposal.
11· · · · A. The Company didn't present what I would
12· consider a rate modernization proposal. The Company
13· presented a description of add-on tariffs such as
14· subscriber tariffs and buffet-style pricing.⁶

⁶ See, EO-2024-0002, Tr. 291, Lines 6-14.

and

9 · · · · · THE WITNESS: · So to clarify, the issue is a lot
10 · less with the ten days difference and a lot more with the
11 · content of the presentation. · Does that answer your
12 · question? · And that's what the issue is is addressed in
13 · the complaint as I recall.
14 · BY MR. FISCHER:
15 · · · · Q · That wasn't my question but that's okay. · It's
16 · not so much about the ten days that we were late, but
17 · it's the fact that we didn't have additional
18 · conversations about rate modernization?
19 · · · · A · The complaint is the complaint. · From my
20 · personal perspective, if we had met at 190 days and had a
21 · good conversation about what the Commission directed that
22 · conversation to be, personally I wouldn't have had a
23 · problem with it.⁷

Additionally, Evergy alleges in Paragraph 22 that “Evergy has also filed testimony discussing Rate Modernization issues” as part of the pending ER-2024-0189 rate case. Staff admits that two and a half pages of Mr. Lutz’s testimony in ER-2024-0189 concerning Evergy West is denoted “Rate Modernization Plan,” but denies that the content included therein is relevant to the Commission’s order in ER-2022-0129 and ER-2022-0130.

14. The statements made by Evergy in Paragraph 23 contain vague and ambiguous assertions and opinion and fail to set forth material facts essential to the cause of action asserted. To the extent that a response is required, Staff states that a determination as to what action the Commission should take on Count 2 is a determination for the Commission, and not one for Evergy to assert herein. As such, Staff denies the statements contained in Paragraph 23.

⁷ See, EO-2024-0002 Tr. 322 Lines 9-23.

Count 3

15. The statement made by Evergy in Paragraph 25 fails to set forth material facts essential to the cause of action asserted. To the extent that a response is required, Staff admits that the statement quoted in Paragraph 25 is a direct quote from Paragraph 33 of Staff's Amended Complaint.

16. Evergy makes multiple factual statements in Paragraph 26, in violation of 20 CSR 4240-2.117(1)(B), which requires the moving party to "state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue." Additionally, Evergy makes statements that are vague and ambiguous assertions and are opinions that fail to set forth material facts essential to the cause of action asserted. To the extent that a response is required, Staff admits that Evergy filed its *Notice of Tariff Revisions and Motion to Open New Docket* in ET-2024-0182⁸ on December 1, 2023, and that parties filed briefs on April 19, 2024. However, the issues in ET-2024-0189 concerned what modifications to be made prospectively to Evergy's SSR tariffs, and would not be subject to re-litigation in this Complaint docket, where the issue is the failure of each Evergy utility to timely take necessary actions regarding its tariffs. As such, Staff denies the remainder of the statements contained in Paragraph 26.

17. The statements made by Evergy in Paragraph 27 are legal conclusions, not statements of fact. Additionally, the statements made by Evergy are vague and ambiguous assertions and opinions and fail to set forth material facts essential to the cause of action asserted and therefore denies the statements made in Paragraph 27.

⁸ Evergy incorrectly refers to this case in its Motion as ET-2024-0189. The case number for the solar subscription case is actually ET-2024-0182. The rate case filed by Evergy is ER-2024-0189.

To the extent a response is required, Staff submits Evergy's *Motion* misrepresents the thrust of Count 3 of Staff's Complaint, which addresses Evergy's inaction to file tariffs to either restrict the availability of the Solar Subscription Rider ("SSR") to customers on the Residential Peak Adjustment ("RPKA") rate plan, or to file SSR tariffs to address billing provisions for customers on rate plans other than RPKA during a nine month period in which the Commission had ordered Evergy to place customers on rate plan RTOU2. From January 2023 until the September 27, 2023, Agenda approving the order changing the default rate plan, in File ET-2024-0061, Evergy's stated intent was to violate the Commission's rate case order regarding the default rate plan for residential customers, and restricting the rate plan options of SSR customers without tariff authority.⁹ Evergy's failed to communicate this plan to the Commission nor request relief in any proceeding as it related to the default rate plan for SSR-participating customers prior to December 1, 2023, when it filed the ET-2024-0182. Staff asserts that this action or lack thereof is a concern for the Commission's determination, and not one for Evergy to assert herein.

18. The statements made by Evergy in Paragraph 28 contain vague and ambiguous assertions and opinion, and fail to set forth material facts essential to the cause of action asserted. The statements made by Evergy in Paragraph 28 also contain legal conclusions, not statements of fact. Therefore, Staff denies the statements made in Paragraph 28. To the extent a response is required, Staff asserts that Evergy made an independent commitment which the Commission relied upon in ER-2022-0129 and ER-2022-0130. On June 7, 2023, Evergy filed its response to a Staff recommendation concerning the tariff sheets in which Evergy stated that it would file a new ET docket for

⁹ See Lange Direct pages 28 – 30.

the Commission’s consideration of the ToU and the Service and Access charge issues contained in Staff’s Recommendation in ER-2022-0129 and -0130. In particular, in its June 7, 2023 Response filed in in ER-2022-0129 and -0130, Evergy stated, “However, the ‘appropriate rate plan’ issue discussed on p. 4 of Staff’s Recommendation, which the Company understands to be made up of the Time-of-Use (“TOU”) and the Service and Access charge issues contained in Staff’s Recommendation, should not be addressed in the EO docket, which will be focused on Staff’s construction audit. *The Company will file a new ET docket by June 30, 2023, for those issues to be addressed.*” **[emphasis added]**.¹⁰ Staff denies that Evergy’s eventual taking of action moots this Count related to its delay of nearly a year to take any action.

Count 4

19. The statement made by Evergy in Paragraph 30 fails to set forth material facts essential to the cause of action asserted. To the extent that a response is required, Staff admits that the statement quoted in Paragraph 30 is a direct quote from Paragraph 42 of Staff’s Amended Complaint.

20. Evergy makes multiple factual statements in Paragraph 31, in violation of 20 CSR 4240-2.117(1)(B), which requires the moving party to “state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue.” Evergy also makes assertions and opinions, and further fails to set forth material facts essential to the cause of action asserted. As such and to the extent a response is required to Paragraph 31, Staff denies the same, in that there is no evidence to support the allegations contained in Paragraph 31. To the extent a response

¹⁰ Evergy’s June 9, 2023 *Response* in ER-2022-0129 and -0130.

is required, Staff asserts that Evergy apparently desires the Commission accept as a fact Evergy's testimony that it did not **want** to file a Residential ToU rate design in their next rate cases based on lessons learned from the TOU service first promulgated in ER-2018-0145, and ER-2018-0146 constituted a satisfaction of its commitment to submit a Residential ToU rate design in their next rate cases based on lessons learned from the TOU service first promulgated in ER-2018-0145 and ER-2018-0146.

21. Evergy makes multiple factual statements in Paragraph 32, in violation of 20 CSR 4240-2.117(1)(B), which requires the moving party to "state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue." The statements made in Paragraph 32 also contain assertions and opinion, and therefore Staff denies such statements. To the extent a response is required, Staff admits the allegation that "the Commission has adopted a TOU default rate as a result of its various orders," as alleged by Evergy in Paragraph 32.

22. The statements made by Evergy in Paragraph 33 contain vague and ambiguous assertions and opinion, and fail to set forth material facts essential to the cause of action asserted. Therefore, Staff denies the statements made in Paragraph 33.

Count 5

23. The statement made by Evergy in Paragraph 35 fails to set forth material facts essential to the cause of action asserted. To the extent that a response is required, Staff admits that the statement quoted in Paragraph 35 is a direct quote from Paragraph 47 of Staff's Amended Complaint.

24. The statements made in Paragraph 36 contain vague and ambiguous assertions and opinion, and fail to set forth material facts essential to the cause of action

asserted. Therefore, Staff denies the statements made in Paragraph 36. To the extent a response is required, Staff states that Evergy did not reasonably implement a program to engage and educate customers in the approximate ten-month lead-in time until its 2-period TOU rate was ordered to take effect as the default rate for residential customers, nor did Evergy meaningfully 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.¹¹

25. Evergy makes multiple factual statements in Paragraph 37, in violation of 20 CSR 4240-2.117(1)(B), which requires the moving party to “state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue.” To the extent a response is required, Staff admits Evergy generally has recited procedural details of the EW-2023-0199 docket.

26. Evergy makes multiple factual statements in Paragraph 38, in violation of 20 CSR 4240-2.117(1)(B), which requires the moving party to “state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue.” To the extent a response is required, Staff admits Evergy generally has recited procedural details of the EW-2023-0199 docket.

27. Evergy makes multiple factual statements in Paragraph 39, in violation of 20 CSR 4240-2.117(1)(B), which requires the moving party to “state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue.” To the extent a response is required, Staff admits Evergy generally has recited procedural details of the EW-2023-0199 docket.

¹¹ Lange Direct page 34 lines 12 – 16.

28. Evergy makes multiple factual statements in Paragraph 40, in violation of 20 CSR 4240-2.117(1)(B), which requires the moving party to “state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue.” Statements made in Paragraph 40 also contain vague and ambiguous assertions and opinion, and fail to set forth material facts essential to the cause of action asserted. To the extent a response is required, Staff admits Evergy filed its *Response to Order Directing Time-of-Use Customer Choice Transition Reporting* on October 10, 2023, as alleged by Evergy. However, Staff denies that Evergy’s filing “contains extensive evidence of the overall success,” and states that such determination is what is at issue in this case and is a determination for the Commission, and not one for Evergy to assert herein. As such, Staff denies the statements made in Paragraph 40.

29. The statements made by Evergy in Paragraph 41 contain vague and ambiguous assertions and fail to set forth material facts essential to the cause of action asserted. To the extent a response is required, Staff denies the statements contained in Paragraph 41.

30. Evergy makes multiple factual statements in Paragraph 42, in violation of 20 CSR 4240-2.117(1)(B), which requires the moving party to “state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue.” Furthermore, Evergy’s statements contain vague and ambiguous assertions and opinion, and fail to set forth material facts essential to the cause of action asserted. To the extent a response is required, Staff denies Evergy’s assertions that customers “continue to increase their understanding of the plan details.”

Staff admits that the remaining allegations in Paragraph 42 generally summarize portions of Evergy's presentation for April 2, 2024.

31. The statements made by Evergy in Paragraph 43 contain vague and ambiguous assertions and opinion, and fail to set forth material facts essential to the cause of action asserted. Therefore, Staff lacks sufficient knowledge to admit or deny the statements contained in Paragraph 43, and therefore denies the same.

Count 6

32. The statement made by Evergy in Paragraph 46 fails to set forth material facts essential to the cause of action asserted. To the extent that a response is required, Staff admits that the statement quoted in Paragraph 46 is a direct quote from Paragraph 54 of Staff's Amended Complaint.

33. The statements made by Evergy in Paragraph 47 are legal conclusions, not a statement of fact. Additionally, the statements made by Evergy are vague and ambiguous assertions and opinions and fail to set forth material facts essential to the cause of action asserted. Therefore, Staff denies the statements made in Paragraph 47.

34. The statements made by Evergy in Paragraph 48 contain vague and ambiguous assertions and opinion, and fail to set forth material facts essential to the cause of action asserted. Therefore, Staff denies the statements made in Paragraph 48.

35. The statements made by Evergy in Paragraph 49 contain vague and ambiguous assertions and opinion, and fail to set forth material facts essential to the cause of action asserted. Therefore, Staff denies the statements made in Paragraph 49.

Additional Material Facts that Remain in Dispute

Pursuant to 20 CSR 4240-2.117(1)(C), Staff sets forth the following additional material facts that remain in dispute:

Count 1

36. Count 1 of Staff's Amended Complaint alleges that Evergy failed to timely provide estimates of the cost to produce specified data in lieu of the provision of the specified data, as required by the Commission's *Order Approving Four Partial Stipulations and Agreements* in Case Nos. ER-2022-0129 and ER-2022-0130 ("Stipulation Order"), effective October 2, 2022.¹²

37. Staff alleges that Evergy did not file direct testimony stating "the reason why it cannot provide the requested data and its individual estimate of the cost to provide each set of requested data, for the further consideration of the parties and the Commission," by July 1, 2023, as Staff understood the Stipulation Order to require.¹³ Evergy disputes that the Stipulation Order required direct testimony be filed by July 1, 2023.¹⁴

38. Staff alleges that the November 1, 2023 direct testimony filed by Evergy in EO-2024-0002 "did not explain why the information cannot be provided beyond the explanation known at the time the Stipulation was signed."¹⁵

39. Staff alleges that the November 1, 2023 direct testimony filed by Evergy in EO-2024-0002 did not provide a good faith estimate of distribution and rate design-related information.¹⁶

¹² Amended Complaint, page 5 para 13, referencing.

¹³ Lange Direct, page 2. Lines 10 – 24. Evergy did not file direct testimony until November 1, 2023.

¹⁴ Lutz Rebuttal, page 7, lines 3 – 10. Mr. Lutz testifies that Evergy filed a motion to establish an EO docket prior to July 1, 2023. This is inconsistent with the Commission's official case record, EFIS, which indicates that Evergy's motion to open File No. EO-2024-0002 was made on July 6, 2023.

¹⁵ Lange Direct, page 3, lines 5 – 9.

¹⁶ Lange Direct, page 5 line 13 – page 6, line 22.

40. Evergy alleges that the Staff testimony referenced “misrepresents the Company testimony,”¹⁷

41. Evergy alleges that the Staff interpretation of the Stipulation Order is inaccurate, and concedes that “In short, we disagree on the meaning of ‘individual.’”¹⁸ The interpretation of “individual,” is material to a determination of whether or not Evergy has complied with its obligations under the Stipulation Order.

Count 2

42. Count 2 of Staff’s Amended Complaint alleges that Evergy failed to meet with stakeholders within 180 days of its tariff effective date to discuss rate modernization as ordered by the Commission. Evergy agrees the meetings were held more than 180 days later, as alleged.¹⁹ The fact that meetings were held more than 180 days after the effective date of the tariffs is not in dispute.

43. However, whether or not the substance of the meeting was in compliance with the Commission’s order remains in dispute and is what is at issue herein. As described in Staff witness Sarah Lange’s Direct Testimony, “The rate modernization discussion in the presentation ... was primarily related to residential rate options” and not with “its non-residential rate modernization plan as ordered by the Commission in Ordered Paragraph 14 of the Amended Report and Order.”²⁰

44. As Ms. Lange testified in the EO-2024-0002 hearing, which Evergy cites in its *Motion*:

¹⁷ Lutz Rebuttal, page 9, lines 1-2.

¹⁸ Lutz Rebuttal, page 9, lines 16 – 20.

¹⁹ See, Bradley Lutz Rebuttal, Page 12, Lines 19-20; *Evergy Missouri Metro’s and Evergy Missouri West’s Answer to Amended Staff Complaint*, Paragraph 32.

²⁰ Lange Direct, Page 27, Lines 9-13.

The Company didn't present what I would
12· consider a rate modernization proposal. The Company
13· presented a description of add-on tariffs such as
14· subscriber tariffs and buffet-style pricing.²¹
and
9· THE WITNESS: So to clarify, the issue is a lot
10· less with the ten days difference and a lot more with the
11· content of the presentation. Does that answer your
12· question? And that's what the issue is is addressed in
13· the complaint as I recall.
14· BY MR. FISCHER:
15· . . . Q: That wasn't my question but that's okay. It's
16· not so much about the ten days that we were late, but
17· it's the fact that we didn't have additional
18· conversations about rate modernization?
19· . . . A: The complaint is the complaint. From my
20· personal perspective, if we had met at 190 days and had a
21· good conversation about what the Commission directed that
22· conversation to be, personally I wouldn't have had a
23· problem with it.²²

45. Evergy states in its Motion that it “substantially complied with its agreement to hold discussions on Rate Modernization issues.” Staff denies Evergy’s assertion, and, to illustrate the inadequacy of Evergy’s rate modernization discussions, Staff has attached to this pleading a copy of Evergy’s ToU Workshop 1 presentation presented on March 28, 2023, in case number EW-2023-0199 and the most recent Ameren Missouri rate modernization presentation presented in case number EW-2024-0031 on May 9, 2024. A copy of each presentation is attached hereto as **Attachment C and D**, respectively, and incorporated herein by reference. For the reasons stated and by the examples given, therefore, the issues raised in Count 2 of Staff’s Complaint remain in dispute in this case.

²¹ See, EO-2024-0002, Tr. 291, Lines 6-14.

²² See, EO-2024-0002 Tr. 322 Lines 9-23.

Count 3

46. Count 3 of Staff's Amended Complaint alleges that "Evergy has not filed its solar subscription ET case as it committed to do in Case Nos. ER-2022-0129 and ER-2022-0130 and as reflected in related case filings EO-2023-0423 and EO-2023-0424."²³

47. Evergy alleges that Count 3 of the Complaint is of substantive identity to the issues litigated in ET-2024-0189.²⁴ Staff disputes this allegation in that the issues in ET-2024-0189 concern revisions to be made to the Evergy utilities' SSR tariffs, while the issue in Count 3 in this Complaint is whether Evergy's continued inaction and its restriction of rate access without tariff authority were lawful.²⁵

Count 4

48. Count 4 of Staff's Amended Complaint alleges that Evergy failed to file a Residential ToU rate design in their next rate cases as required by the commitments it made in the Stipulation it entered into in ER-2018-0145 and -0146.²⁶ Evergy disputes these allegations and sets forth additional facts to substantiate its claims in its Answer and its *Motion*.²⁷ In fact, Evergy witness Lutz states in his Rebuttal testimony, "It would appear there is a difference in interpretation as to what constitutes a 'Residential TOU rate design.'"²⁸ By his own words, Evergy admits a dispute as to material fact exists.

²³ Amended Complaint paragraph 33.

²⁴ Motion page 10 para 26

²⁵ Lange Direct, page 30 line 18 – 31 line 5.

²⁶ See, *Non-Unanimous Stipulation and Agreement Concerning Rate Design Issues* filed in ER-2018-0145 and -0146 (pages 2-8), which is attached hereto, and made a part herein as Attachment E.

²⁷ See, *Evergy Missouri Metro's and Evergy Missouri West's Answer to Amended Staff Complaint*, Paragraphs 60, 62, 63, 64, and 65.

²⁸ Lutz Rebuttal, Page 18, Lines 13-14.

Count 5

49. Count 5 of Staff's Amended Complaint alleges Evergy failed to comply with the Commission's Order to implement a program to properly and adequately engage and educate its customers regarding its 2-period ToU rate as the default rate for residential customers prior to it becoming effective. This allegation is related to Count 6, in that not only does Staff allege that Evergy failed to adequately educate its customers as required by the Commission, but Staff claims Evergy provided those ratepayers "wrong and misleading" information.²⁹

50. Staff's filed testimony discusses its concerns and provides examples of ways in which Evergy failed to comply with the Commission's Order.³⁰ If this matter were not a material fact at issue in this case, Evergy would not have included facts in its *Motion* to rebut the position taken by Staff, as it did in paragraphs 38 -42, for example.

51. Evergy's prefiled rebuttal testimony of Katie McDonald, submitted May 6, contains multiple factual inaccuracies and misleading statements, which Staff will address in its surrebuttal testimony concerning Evergy's willingness to accept Staff feedback and the nature of the discussions between parties to the workshop.

52. Because these material facts are at issue is precisely the reason this docket is the appropriate forum to address whether Evergy complied with its commitments and the Commission's Orders.

Count 6

53. Count 6 of Staff's Amended Complaint alleges shortfalls in Evergy's compliance with the requirements regarding customer education under its obligations set

²⁹ Lange Direct, Page 34, Lines 1-4.

³⁰ See, Staff witness Sarah Fontaine Direct Testimony.

forth in the *Stipulation and Order* entered into in ER-2022-0129 and -0130. In support of those claims, Staff set forth examples of the “misleading, alarmist, and inaccurate content” and materials used by Evergy that failed to satisfy its obligations.³¹

54. It also alleges violations of 20 CSR 13.015(C) in Evergy’s billing practices, which requires billing periods of 26-35 calendar days. When customers requested a different rate plan in the middle of a billing cycle, Evergy chose to issue bills closing out the service on the customer’s then-current rate code, which may be issued for a service period of less than 26 days. Evergy then issued a bill for service on the new ToU rate reflecting the remaining days in the billing cycle plus the next billing cycle, which may have exceeded 35 calendar days.³²

55. Evergy’s Motion fails to address either of those issues as set forth in Staff’s Amended complaint, and therefore, they remain in dispute in this case.

56. Evergy’s pre-filed rebuttal testimony of Katie McDonald, submitted May 6, contains multiple factual inaccuracies and misleading statements, which Staff will address in its surrebuttal testimony concerning Evergy’s willingness to accept Staff feedback and the nature of the discussions between parties to the workshop.

Conclusion

In its response to Evergy’s *Motion for Summary Determination and/or Determination on the Pleadings*, Staff presented multiple examples of issues and facts that continue to be at issue in this case. While some of the issues involve facts adduced in cases litigated prior to this one being filed by Staff, the answers to those issues still

³¹ Examples of Evergy’s failures relating to their customer education materials are attached to Staff witness Fontaine’s Direct Testimony’s Schedule SF-d4 and also referenced in Staff’s Amended Complaint. .

³² Staff’s Amended Complaint, p. 25

need resolving. For example, were the steps taken by Evergy to educate its ratepayers on ToU rates satisfactory? Did Evergy actually abide by the terms of the Stipulations it signed and the Orders the Commission entered against it? If Evergy failed to comply or violated its obligations, is the Company subject to penalties? These are material facts with which each party to this case vehemently disagree and which need to be litigated. It is in the public interest to resolve these issues so that both parties and the Commission can move forward for the good of the Commission and the ratepayers.

WHEREFORE, for the reasons set forth herein and as set forth in Staff's Legal Memorandum attached hereto and incorporated herein by reference as Attachment A, Staff submits its *Response in Opposition to Evergy's Motion for Summary Disposition and/or Determination on the Pleadings* and requests that Respondent's *Motion* be denied in this case and for such other orders as are just and reasonable under the circumstances.

Respectfully submitted,

/s/ Carolyn H. Kerr

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Attorney for Staff of the
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic mail, on this 24th day of May, 2024, to all counsel of record.

/s/ Carolyn H. Kerr

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

The Staff of the Missouri Public Service Commission,)	
)	
Complainant,)	
)	
v.)	<u>Case No. EC-2024-0092</u>
)	
Evergy Metro, Inc. d/b/a Evergy Missouri Metro; and Evergy Missouri West, d/b/a Evergy Missouri West, Inc.,)	
Respondents.)	

**STAFF’S LEGAL MEMORANDUM IN SUPPORT OF ITS
RESPONSE IN OPPOSITION TO EVERGY’S
MOTION FOR SUMMARY DETERMINATION AND/OR
DETERMINATION ON THE PLEADINGS**

COMES NOW the Staff of the Missouri Public Service Commission, by and through undersigned counsel, pursuant to 20 CSR 4240-2.117(1)(C), and in support of its *Response in Opposition to Evergy’s Motion for Summary Determination and/or Determination on the Pleadings (Motion)* hereby sets forth the following legal memorandum:

Introduction

Commission Rule 20 CSR 4240-2.117(1)(A) allows a party to “seek disposition of all or any part of a case by summary determination....” Further,

the Commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest.

Evergy is not entitled to relief as a matter of law because there are genuine issues of material fact still pending before the Commission that have not yet been resolved in this case. See, *Gateway Hotel Holdings, Inc. v. Chapman-Sander, Inc.*, 474 S.W.3d 579, 584

(Mo.App. E.D. 2013). “A ‘material fact’ is one having such probative value that it would control or determine the litigation.” *Auto-Owners Mut. Ins. Co., Inc. v. Newman*, 851 S.W.2d 22, 24 (Mo.App. W.D. 1993). A motion for summary determination must be denied if the factual assertions are not sufficient to entitle the movant to judgment as a matter of law. *Almat Builders & Remodeling, Inc. v. Midwest Lodging, LLC*, 615 S.W. 3d 70, 84 (Mo.App. E.D. 2020), citing *Jordan v. Peet*, 409 S.W.3d 553 (Mo.App. W.D. 2013).

The burden of proof in this case, as in all cases arising under Chapter 386, RSMo, and the powers granted to the Staff to bring this action before the Commission shall be upon the party adverse to such action or “seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order ... is unreasonable or unlawful.” § 386.430, RSMo. Everyg fails to meet its burden to show that it should be granted a summary determination in this case, as genuine issues of material fact remain to be decided herein. An evidentiary hearing must be granted before any decision on the merits can be rendered.

Argument

Everyg states that there are no disputes of material fact, yet introduces new “facts” in support of this allegation improperly in its *Motion*. In several instances, Everyg sets forth facts that are at issue in this case, facts with which the parties disagree. “If the record ‘contains competent evidence that two plausible, but contradictory, accounts of essential facts exist,’ then a genuine issue of material fact remains to be resolved.” *Bickerton, Inc. v. American States Ins. Co.*, 898 S.W/2d 595, 600 (Mo.App. W.D. 1995),

citing *D.E. Properties Corp. v. Food for Less*, 859 S.W.2d 197, 200 (Mo.App.1993). “Such evidence must be substantial and essential facts cannot be inferred nor may they rest upon speculation or conjecture. *Id.*, citing *Courtney v. Emmons*, 702 S.W.2d 139, 141 (Mo.App.1985).

In its *Motion*, Evergy makes several claims that the actions it took in prior cases, including the EO-2024-0002, EW-2023-0199, and ET-2024-0182 cases, satisfied its obligations under the Stipulations, Orders, and other commitments it undertook or was directed to take, and therefore, the Staff’s cause of action pursuant to its *Amended Complaint* in this case is “moot.” In support of those claims, Evergy introduces facts in its *Motion* to support its argument. In several instances, Staff responds that the statements set forth in Evergy’s *Motion* are factually inaccurate, thus raising a genuine dispute of material fact. For example, under Count 1, Evergy claims it “already performed its obligations required by the Rate Case Stipulation,” while Staff contends that Evergy has not fully done so. Regardless of whether the EO-2024-0002 case has been finally decided by the Commission, the question of whether Evergy should be assessed penalties, as pled by Staff in its Amended Complaint, for its alleged failures, is still an open question in this case. As such, the issue is not “moot,” as Evergy claims and remains a material fact at issue.

Conclusion

The facts in this case leave many questions open for the commission to decide. There is without a doubt a genuine dispute as to the material facts which would entitle only one of the parties herein to relief in this case under the law. As such, Respondent Evergy’s *Motion for Summary Determination and/or Determination on the Pleadings* should be denied, and this matter should proceed to an evidentiary hearing in order for

the Commission to determine how those disputed, material facts should apply to the applicable law, and whether, in fact, Evergy violated the Stipulations, agreements, and commitments described in Staff's Amended Complaint, whether Evergy should be ordered to take the actions sought by Staff as outlined in its Amended Complaint, and whether action should be taken to seek monetary penalties against Evergy for those violations, as Staff contends.

WHEREFORE, for the reasons set forth herein and in its *Response in Opposition to Evergy's Motion for Summary Determination and/or Determination on the Pleadings* Staff requests that Respondent's *Motion for Summary Determination and/or Determination on the Pleadings* be denied and for such other orders as are just and reasonable under the circumstances.

Respectfully submitted,

/s/ Carolyn H. Kerr

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Missouri Public Service Commission

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic mail, or First Class United States Postal Mail, postage prepaid, on this 24th day of May, 2024, to all counsel of record.

/s/ Carolyn H. Kerr