

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

In the Matter of the Application of)
Evergy Missouri West, Inc. d/b/a Evergy Missouri) File No. EO-2022-0061
West For Approval of a Special High Load Factor)
Market Rate)

**RESPONSE OF EVERGY MISSOURI WEST TO PUBLIC COUNSEL’S
SECOND MOTION FOR REHEARING AND RECONSIDERATION**

COMES NOW, Evergy Missouri West, Inc. d/b/a Missouri West (“EMW” or “Company”) and pursuant to 20 CSR 4240-2.080 submits its response to the Public Counsel’s *Second Motion For Rehearing and Reconsideration* (“2nd Motion”) filed by the Office of the Public Counsel (“OPC”) on April 1, 2022. In support thereof, EMW states as follows:

1. On April 1, 2022, OPC filed its Motion in response to the Commission’s Amended Report and Order (“Order”) issued on March 24, 2022. The OPC Motion raised the same arguments that OPC raised in its first *Motion For Clarification, Rehearing and Reconsideration* filed on March 11, 2022 (“Original Motion”) with regard to the EDR issue. EMW fully addressed those arguments in its response to OPC’s Original Motion filed on March 21, 2022. However, for purposes of the record, EMW briefly address them herein.

OPC’s 2nd Motion on the EDR Issue Should Be Denied.

2. In its 2nd Motion, OPC again requested that the Commission issue an order for rehearing or reconsideration with respect to the EDR issue. For the reasons stated herein, OPC’s request for rehearing should be denied.

3. In its decision on the issue concerning the EDR, the Commission’s *Report and Order* stated as follows:

The Commission rejects the late inclusion of the issue proposed by Staff, OPC, and MECG to limit MKT customers from taking service under a separate economic development rider (EDR) tariff, specifically Schedule

PED. The Commission rejects this issue because it was not introduced timely as an issue or in compliance with the procedural order governing this case.

The parties submitted a proposed procedural schedule, filed by Staff on behalf of all parties, requesting a Commission procedural order to include two rounds of prefiled testimony (rebuttal, and surrebuttal and cross-surrebuttal) with an evidentiary hearing, and briefing to follow. The Commission's procedural order adopted the parties' procedural schedule and ordered the parties to submit pre filed testimony, and a list of issues and position statements that referenced the contested issues that needed Commission determination. The Commission's first notice of the EDR issue came in a nonunanimous stipulation and agreement filed the evening prior to the evidentiary hearing. The introduction of the EDR issue came without explanation as one provision of the nonunanimous stipulation and agreement, later marked as Exhibit 203. Other parties objected to the nonunanimous stipulation and agreement. Once there were objections to the nonunanimous stipulation and agreement, it became a position statement of the supporting parties under Commission Rule 20 CSR 4240-2.115(D).

Submitting a position statement on a late-filed issue not raised in compliance with the procedural order or Commission rules does not circumvent those processes and automatically make the issue one that must be decided by the Commission. The Commission's rules regarding the introduction of issues are there to give sufficient notice to the other parties and the Commission about an issue that must be resolved by the Commission.

The Commission was not given sufficient advance notice of this issue, and the resolution of this issue was not essential to the Commission's decision in this case. As the Court of Appeals reasoned in discussing the Commission's rules on testimony, the procedures to set forth the issues are important due to the highly technical nature of the issues presented, and in that it affords other parties a reasonable opportunity to conduct discovery and provide evidence in response.

Furthermore, cross-examination is the opportunity to question and inquire of a witness about the submitting parties' position, even late-filed positions. Cross-examination was allowed at the evidentiary hearing. However, on this issue, OPC, Staff and MECG were the parties submitting a late-filed position in their nonunanimous stipulation and agreement, and were not the parties pursuing cross-examination against a late-filed position. Regardless, OPC, Staff, and MECG were able to cross-examine witnesses for EMW about the EDR issue.

Commission rules set forth a process that is designed for the regulation of utilities. The regulation of utilities generally involves highly technical issues. Commission Rule 20 CSR 4240-2.130(7)(C), requiring issues to be raised in rebuttal testimony, the Commission's Order Setting Procedural Schedule in this case directing that issues not listed are considered not requiring

resolution, and the Commission's same Order Setting Procedural Schedule directing position statements on each issue all require advance notice of an issue. The Commission's rule allowing cross examination is consistent with the need for advance notice of issues in that it allows issues to be developed in an evidentiary hearing. But in the present case, the introduction of an issue the evening prior to the evidentiary hearing foreclosed discovery by other parties. Even though the other parties responded, and even though cross-examination was allowed – the record was not developed enough to permit consideration by the Commission.

4. Contrary to OPC's assertions, OPC did not comply with the Commission's procedural order. (Motion, p. 2) The Commission's *Order Setting Procedural Schedule* issued on December 15, 2021, contained the following procedures that were agreed to by the parties and adopted by the Commission:

“The list of issues should be detailed enough to inform the Commission of each issue that must be resolved. The Commission will view any issue not contained in this list of issues as uncontested and not requiring resolution by the Commission.” (Paragraph 6 E); and

“Each party shall file a simple and concise statement summarizing its position on each disputed issue, including citations to pre-filed testimony supporting its position.” (Paragraph 6 F).

5. The EDR prohibition provision was not raised or even mentioned in any pre-filed testimony of Staff, OPC, or MECG as required by the *Order Setting Procedural Schedule* issued on December 15, 2021 and the requirements of Commission Rule 20 CSR 4240-2.130.¹ OPC filed testimony in this case, but failed to mention the EDR prohibition in any way. OPC's rebuttal testimony therefore does not include “all testimony which explains why a party rejects, disagrees or proposes an alternative to the moving party's direct case” as required by the Commission's rule.

6. The *Joint List of Issues* filed on behalf of all parties, including OPC, failed to specifically identify this matter as an issue to be addressed by the Commission. Under paragraph

¹ 20 CSR 4240-2.130(7)(C) states: For the purpose of filing prepared testimony, direct, rebuttal, and surrebuttal testimony are defined as follows: . . . (C) Where only the moving party files direct testimony, rebuttal testimony shall include all testimony which explains why a party rejects, disagrees or proposes an alternative to the moving party's direct case;

6(E) of the *Order Setting Procedural Schedule*, any issue that has not been identified by the parties is considered uncontested and not requiring resolution by the Commission:

E. Although not all parties may agree upon how each issue should be described or on whether a listed issue is in fact a proper issue in this case, the parties shall agree upon and file a list of the issues to be heard, the witnesses to appear on each day of the hearing, the order in which they will be called, and the order of cross-examination for each witness. The list of issues should be detailed enough to inform the Commission of each issue that must be resolved. The Commission will view any issue not contained in this list of issues as uncontested and not requiring resolution by the Commission. (Emphasis added.)

Instead of complying with Paragraph 6(E) of the procedural order, OPC argues that “The issue regarding EDR was included in the list of issues because the list of issues asked the Commission to rule generally on all proposed changes to the tariff offered by” the Company. (Motion, p. 2) OPC totally ignores the requirement of the procedural order that the “list of issues should be detailed enough to inform the Commission of each issue that must be resolved.” OPC’s List of Issues fails to ask the Commission to resolve whether a Schedule MKT customer should be prohibited from utilizing the EDR of the Company prior to taking service under the Schedule MKT. As the Commission properly recognized, OPC’s approach to compliance with the procedures it agreed to gives the Commission no notice of the fact that the EDR was an issue to be resolved prior to the hearing.

7. OPC does not dispute that the *Position Statement* filed by OPC also failed to address this EDR prohibition issue. Again, OPC’s *Position Statement* fails to argue that the Commission should not allow a Schedule MKT customer to utilize the EDR of the Company prior to taking service under the Schedule MKT. The Commission has correctly and appropriately decided not to allow the insertion of this issue into the hearing at the eleventh hour by OPC in violation of the Commission’s rules of practice and procedure, and the procedures discussed in the *Order Setting Procedural Schedule* which were jointly agreed to by the parties, including Staff, OPC, and MECG.

8. OPC argues that there is no difference distinguishing the proposed EDR modifications from any of the other proposed modifications (including the hold harmless provision, the RES provision, the securitization provision, etc.). (Motion, pp. 2-3) OPC ignores the fact that the other proposed modifications (i.e. Hold Harmless provision, RESRAM exclusion and Securitization provision) were raised in testimony and cross-referenced in position statements filed days before the hearings commenced. (See Ex. 200, Marke Rebuttal, pp. 13-16); Ex. 103, Kliethermes Surrebuttal, Schedule RK-s1, p. 4; OPC Position Statement, p. 2; and Staff Position Statement, pp. 2-3)

9. OPC's interpretation of the procedural order and the PSC's rules of practice and procedure, if adopted by the Commission, would encourage litigation by surprise. Such an interpretation would be particularly problematic in the area of public utility regulation. As the Court of Appeals recognized, and the Commission found persuasive at page 20 of its Order:

These procedures are important due to the highly technical nature of the issues presented at the hearing, in that it affords other parties a reasonable opportunity to provide evidence in response.

10. Although the EDR issue was not properly raised in pre-filed testimony, the list of issues, or position statements, the Commission allowed OPC to conduct whatever cross-examination of the witnesses that it desired to do. The Commission did not rule that the EDR issue was not properly raised until after a record had been developed on the issue by OPC, Staff and MECG. OPC was not precluded from asking its questions, even though the issue was not properly raised in its pre-filed rebuttal testimony, its list of issues or its position statement.

11. OPC complains that the Commission's procedures are flawed because "it would effectively eliminate the ability of parties to properly raise legal issues in their entirety." (Motion, pp. 7-8) This argument misses the mark since the EDR issue was not a legal issue at all. It was a regulatory policy issue which could have been addressed in pre-filed testimony, the list of issues,

and position statements. Instead, OPC chose to leave the issue totally unaddressed until the night before the hearing, and even then, it was inserted as a single sentence in the proposed Schedule MKT tariff proposed by OPC at the eleventh hour.

WHEREFORE, EMW respectfully requests that the Commission deny OPC's Motion.

Respectfully submitted,

/s/ Roger W. Steiner

Roger W. Steiner, MBN 39586
Corporate Counsel
Phone: (816) 556-2314
E-mail: roger.steiner@evergy.com
Evergy, Inc.
1200 Main – 16th Floor
Kansas City, Missouri 64105
Fax: (816) 556-2787

James M. Fischer, MBN 27543
Fischer & Dority, P.C.
101 Madison Street, Suite 400
Jefferson City, MO 65101
(573) 636-6758 (Phone)
(573) 636-0383 (Fax)
jfischerpc@aol.com

**ATTORNEYS FOR EVERGY MISSOURI
WEST**

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 12th day of April 2022, to all counsel of record.

/s/ Roger W. Steiner

Roger W. Steiner