

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

In the Matter of the Second Prudence Review)
of the Missouri Energy Efficiency Investment) File No. EO-2020-0227
Act (MEEIA) Cycle 2 Energy Efficiency)
Programs of Evergy Metro, Inc. d/b/a Evergy)
Missouri Metro)

In the Matter of the Second Prudence Review)
of the Missouri Energy Efficiency Investment) File No. EO-2020-0228
Act (MEEIA) Cycle 2 Energy Efficiency)
Programs of Evergy Missouri West, Inc. d/b/a)
Evergy Missouri West)

**MOTION TO STRIKE PORTIONS OF REBUTTAL TESTIMONY OF
THE OFFICE OF PUBLIC COUNSEL OR, IN THE ALTERNATIVE, TO ALLOW
EVERGY METRO, INC. AND EVERGY MISSOURI WEST, INC.
TO RESPOND IN SURREBUTTAL**

COME NOW, Evergy Metro, Inc. d/b/a Evergy Missouri Metro (“Evergy Missouri Metro”) and Evergy Missouri West, Inc. d/b/a Evergy Missouri West (“Evergy Missouri West”) (herein collectively “Evergy”) and, pursuant to 20 CSR 4240-2.080, for its cause states the following:

1. On August 5, 2020 the Missouri Public Service Commission (“Commission”) issued its “Order Consolidating Cases and Setting Procedural Schedule.” (“Procedural Schedule Order”). The Procedural Schedule Order issued by the Commission was a rational compromise between two competing procedural schedules, one offered by Evergy and the other by Staff for the Commission (“Staff”) and the Office of Public Counsel (“OPC”).

2. Evergy argued that it had the ultimate burden of proof and should be allowed to solely file direct testimony and get the “last word” in surrebuttal under the burden-shifting framework established by *State ex rel. Associated Natural Gas Company v. Public Service*

Commission of the State of Missouri. ¹ Staff and OPC argued that all parties should be allowed to file direct, rebuttal and surrebuttal testimony.

3. The Commission fashioned a compromise with the following:

Staff will file its direct testimony, which shall include, but is not limited to, its report, as is typical in prudence reviews. Public Counsel may also file direct testimony. In rebuttal testimony, Evergy will respond to any *serious doubts raised by Staff and Public Counsel's direct testimonies*. However, *as rebuttal testimony responds to direct*, all parties will be permitted to file rebuttal. Surrebuttal, as defined by rule, must be responsive to another party's rebuttal testimony, which will be Staff and Public Counsel's opportunity to respond to Evergy's rebuttal testimony. The Commission will extend a further round of testimony, only to Evergy, to respond to the surrebuttal testimony of other parties. (Emphasis Added.)

4. The Procedural Schedule Order largely follows the logic and language of 20 C.S.R. 4240-2.130(7(c) which provides:

(B) Where all parties file direct testimony, rebuttal testimony shall include all testimony which is responsive to the testimony and exhibits contained in any other party's direct case. A party need not file direct testimony to be able to file rebuttal testimony;

(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;

5. OPC chose not to file direct testimony in this case. The decision by OPC not to file direct testimony is odd given that OPC and Staff— as “Joining Parties”—filed their Proposed Procedural Schedule on July 22, 2020 that allowed OPC to file direct testimony. The Commission, as part of its compromised in the Procedural Schedule Order, allowed OPC to file direct testimony.

6. On September 11, 2020, OPC filed the rebuttal testimony of its witness Geoff Marke ostensibly in “response” to Staff's direct testimony.

¹ 954 S.W.2d 520, 528-529 (Mo. Ct. App. 1997).

7. Witness Marke's rebuttal testimony—starting on page 3, line 17 and continuing to page 13, line 20—presents a new (and specious) argument under the subheading of “Section II: Inefficient Management.” This section castigates Evergy for OPC-calculated ratios between “incentive and non-incentive costs.”

8. Putting aside the erroneous and uninformed basis of this allegation, the question posed by this motion is whether Section II of witness Marke's rebuttal testimony is, in fact, responsive to Staff's direct testimony or has OPC simply used rebuttal testimony to posit a new argument outside of anything set forth in direct testimony, which it chose not to file.

9. OPC makes no cogent link between its rebuttal testimony and any substantive issue addressed in Staff's direct testimony. OPC witness Marke writes:

My testimony responds with specific observations on the ratio of incentive costs to encourage energy efficiency relative to non-incentive administrative costs, and makes further recommendations to the Commission regarding the Missouri Public Service Commission Staff (“Staff”) reports over the “Second Prudence Review of Cycle 2 Costs related to the Missouri Energy Efficiency Investment Act for Electric Operations of Evergy Metro, Inc. and Evergy Missouri West” filed as attachments in the direct testimony of Brad J. Fortson.

10. Staff's direct testimony never presents the issue of “the ratio of incentive costs to encourage energy efficiency relative to non-incentive administrative costs.” This argument is entirely new to this case and constitutes OPC's case-in-chief.

11. OPC's position seems to be that so long as it declares its rebuttal testimony to be in “response” to direct testimony that it is free to add new arguments and issues which are never addressed in direct testimony.

12. This interpretation of the appropriate scope of rebuttal testimony would eliminate any meaningful scope to rebuttal testimony whatsoever. A party could file

rebuttal testimony containing entirely new and novel arguments so long as it recites the empty preface, “My testimony responds to...”

13. Nor is it sufficient for OPC to simply identify additional disallowances and claim that these “add-on” disallowances are per se responsive because Staff’s direct testimony itself contained recommended disallowances.

14. Common sense, fairness and a respect for the Commission’s own rules and orders dictate that rebuttal testimony be reserved for responding to actual arguments and positions articulated in direct testimony. It should not be used disingenuously to supplement (not respond) to direct testimony.

15. The portions of OPC’s rebuttal testimony regarding “the ratio of incentive costs to encourage energy efficiency relative to non-incentive administrative costs” should be struck. Alternatively, Evergy must be allowed to respond to this erroneous allegation in its surrebuttal testimony in order preserve the burden-shifting paradigm recognized by the Commission in its Procedural Schedule Order.

THEREFORE, Evergy Missouri Metro and Evergy Missouri West respectfully asks the Commission to strike from page 3, line 17 to page 13, line 20 of the rebuttal testimony filed by the OPC or, in the alternative, to allow Evergy to respond to such testimony in its sur-surrebuttal testimony.

Respectfully Submitted,

/s/ Roger W. Steiner

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to counsel of record as reflected on the certified service list maintained by the Commission in its Electronic Filing Information System this 21st day of September 2020.

/s/ Roger W. Steiner

Roger W. Steiner