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

APPLICATION FOR REHEARING,
RECONSIDERATION, AND CLARIFICATION

COMES NOW the Office of the Public Counsel ("OPC") pursuant to § 386.500 RSMo. and respectfully requests the Public Service Commission ("PSC" or "Commission") rehear, reconsider, and clarify its September 27, 2023, *Order Approving Amended Application and Tariff* ("Order"), and further states:

Evergy's studies show that making "***Standard Peak Savers"*** the default rate would reduce peak capacity by 89 megawatts (MW) next year alone.[1] This unprecedented level of savings is equivalent to eliminating the need to build a 400-acre solar farm.[2] The studies also show that under *Standard Peak Savers*, the vast majority of customers (90%) that choose to make no usage changes would see either no change to their electric bills or would see a *decrease* in their electric bill.[3] The rate would also provide most customers (77% are accepting the

[1] Ms. Kayla Messamore, Evergy VP Strategy and Long Term Planning, Evergy Integrated Resource Planning presentation, October 4, 2023 Commission Agenda meeting.

[2] Estimate based on the Morris Solar Project in Adair County, Missouri, a 250 MW facility spanning 1,100 acres. This is equivalent to approximately 4.4 acres of solar panels needed to generate one (1) MW of power. https://www.aes.com/missouri/project/morris-solar-project.

[3] Oracle TOU Rate Change Analysis for Evergy, July 2023.

default rate)[4] a meaningful opportunity to reduce their electric bills further should they choose to shift even the smallest uses of energy away from the four-hour peak usage period during summer months.

Standard Peak Savers is the one rate plan that best balances the goal of not raising rates for customers who choose not to alter their usage, while also providing a valuable tool for customers to achieve meaningful savings on their electric bill should they choose to do so. This rate plan would offer Missouri seniors and low-income households a welcomed opportunity to reduce their bills, freeing up their limited income for other necessities. Further, it is the single rate plan that extracts the greatest value of significant Company investments in Advanced Metering Infrastructure ("AMI") and the Company's One CIS[5].

Standard Peak Savers is also the rate ordered by the Commission in Evergy's recent rate case after months of auditing, detailed analyses by expert witnesses, healthy dialogue and argument, and ultimately a Commission order based on an extensive list of factual findings. This is the established method that allows the Missouri public to participate in the Commission's rate setting determinations, to present data and analysis, and win or lose, to know the process provided the public a meaningful opportunity to be heard on issues that affect them more than any participant in this process.

Now, without explanation or any new evidence, the Commission has reversed course on all of the above, stripped the Missouri public of an

[4] Evergy's October 6, 2023 Weekly Update filed in EW-2023-0199 states that 135,756 customers have opted into a rate plan. Evergy's 2023 Annual Report shows Evergy serves approximately 568,243 residential customers. Accordingly, 23% of customers have opted into a rate plan, leaving 77% of customers to be moved to the default plan.

unprecedented opportunity to reduce peak demand, and introduced an extraordinary level of ***regulatory uncertainty*** into a rate setting process traditionally known for its high level of regulatory certainty. Changing the default rate to ***Peak Reward Saver*, as the Commission now ordered, will "not provide sufficient incentive or opportunities for customers to see savings from TOU rates," according to the Commission's own findings.[6]

The contrast between the two processes employed by the two decisions is significant. The first followed the open rate-setting process based on evidence and fact finding to support the decision, whereas the second followed a process that included private meetings between the Commission and the utility, no evidence, no findings, no conclusions of law, and zero explanation. The OPC strongly urges the Commission to reject this new path of regulatory uncertainty that ignores an established and fair evidence-based rate setting process.

With 77% of Evergy's customers choosing to default into whatever default rate the Commission chooses, the only "winners" from this shift will be Evergy's shareholders that will enjoy the rewards that come from decisions that result in the Company recovering greater revenues from their captive customers.

The Commission, Evergy, and the State of Missouri were poised to provide a successful example of how to easily and effectively achieve significant peak capacity savings, while giving ratepayers greater control over their energy burden through the effective use of smart meter investment and time-of-use (TOU) rates. With appropriate energy education, Evergy's ratepayers were in the

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[5] Case No. ET-2024-0061, September 25, 2023 Office of the Public Counsel Memorandum, pg.6.

[6] Amended Report and Order, ER-2022-0129/ER-2022-0130, December 8, 2022, p. 71.

strategic position to see benefits from Evergy's approximately $270 million smart meter and One CIS software investment. Those same ratepayers paid for that significant investment, along with a healthy profit margin for Evergy's shareholders, for many years based on the Commission's orders.

This all begs the question: Why has the Commission rushed to eliminate these obvious public benefits? The Commission's Order provides no explanation. The OPC requests that the Commission rehear this matter, or at a minimum, explain to Evergy's residential customers why the Commission believes this last-minute reversal of their December 8, 2022 order serves the ratepayers' interests.

The OPC initially advocated in the 2022 rate case for the low differential rate—the Peak Reward Saver—to be the default rate, and raised concerns with customer readiness for a high differential TOU rate.[7] However, at that time the parties and the Commission did not have the July 2023 Oracle study results.[8] Now we know the Commission had it right all along by choosing the default rate that would achieve the most meaningful savings for Evergy's customers and extract the greatest value from Company investments that customers are required to pay for. The Commission has the ability to reverse course on the direction it is taking on this issue and preserve the very significant 89 MW peak capacity reduction Evergy is estimated to experience with *no effort on the part of any customer.*[9]

[7] Rebuttal Testimony of Dr. Geoff Marke, ER-2022-0129/ER-2022-0130, Exhibit 307, pp. 13-15.

[8] Oracle TOU Rate Change Analysis for Evergy, July 2023.

[9] Ms. Kayla Messamore, Evergy VP Strategy and Long Term Planning, Evergy Integrated Resource Planning presentation, October 4, 2023 Commission Agenda meeting.

If the Commission's concern is public perception or awareness, the solution to that problem should be to educate the public, rather than allowing TOU misconceptions to eliminate significant modeled savings. Any meaningful rate impacts for customers will not occur until next summer, which provides more than enough time to ramp up Evergy's education efforts.

Denying ratepayers these savings is unfortunately not the most concerning aspect of the Order. The Commission's Order abandons long held public rate setting processes and public protections. If left unchanged, the Order will introduce an unprecedented level of regulatory uncertainty in the rate setting process that could have wide-reaching implications presently and long into the future. The Commission's Order is a slippery slope.

A. The Order Creates an Environment of Regulatory Uncertainty and Undermines Long-Established Rate Case Processes

In Evergy's 2022 general rate case, which followed the customary statutory process with expert testimony that provided a factual basis for resolving all residential rate issues, the Commission made a final decision. Evergy chose not to appeal that decision. Ten months later, without any evidence, without any change in circumstances and with a recent study that supports its original ordered default rate, the Commission abruptly reversed course a week before those rate case decisions were to take effect, and issued no findings of fact or other rationale for the decision.

The OPC and other parties were denied any meaningful opportunity to challenge this unprecedented request with evidence regarding the Company's proposal. It appears the Commission has essentially granted Evergy an

additional rate increase, without a hearing, and without providing any level of due process for the public left paying for Evergy's windfall. The Order is an egregious break from any notion of fairness, and the OPC strongly urges the Commission to rehear and reconsider its Order and direct Evergy to file a general rate case if it wishes to make rate tariff changes. Otherwise, the public will be left with an order that is unlawful, unjust and unreasonable.

The OPC asks the Commission to consider the bigger picture involved in issuing orders that undermine the long-standing rule of law. The Order will undermine the long-established process where the Commission resolves contested issues regarding general rates based on evidence in general rate cases where all relevant factors are considered. The new process introduced by the Order suggests orders may be challenged outside of the rehearing process established by § 386.500 RSMo. It is unlawful and unreasonable to allow regulated utilities to manufacture unproven "problems" to allow for unprecedented second rehearing requests.

This is a highly concerning setback for Missouri utility regulation, and creates an environment of regulatory uncertainty for all ratepayer and every public utility in Missouri. The Commission will cause this regulatory uncertainty by eliminating the notion that final rate case orders are indeed final.

a. The Order Violates the Prohibition Against Collateral Attack

The OPC seeks rehearing because the Order is an unlawful, unjust, and unreasonable collateral attack on the Commission's prior rate case order. Section 386.550 RSMo, states, "In all collateral actions or proceedings the orders

and decisions of the commission which have become final shall be conclusive." This is a collateral proceeding on an issue decided just ten months ago, and the general rate case order is conclusive on the issue of the default rate plan.

The Order addresses this concern with a single sentence, stating, "*Evergy's amended application is not a collateral attack on the rate cases' Amended Reports and Orders [sic], but simply requesting approval of a tariff filing to modify the default in TOU choices to customer.*"[10] The Commission cites to no legal authority to support this narrow interpretation. Nor does this explanation make sense. Under this rationale, all a utility needs to do to collaterally attack a rate case order is to immediately file a new tariff to implement the exact same tariff change that was just conclusively rejected.

b. The Order Violates Single Issue Ratemaking

In addition, the OPC concurs with the Commission's Staff that the Order constitutes unlawful, unjust and unreasonable single-issue ratemaking. The OPC requests rehearing so that the basis for any changes to the default rate applicable to the vast majority of customers follows an all-relevant factors review.

The Commission dismisses the single-issue ratemaking argument by stating the Order does not change the current rate choices and does not seek to change the price per kWh. The Order provides no citation to authority for this narrow interpretation of the prohibition against single-issue ratemaking. Regardless, the Order *is* changing the price per kWh for the vast majority of customers (77%) that Evergy realized were accepting the default rate. This

[10] Order Approving Amended Application and Tariff, ET-2024-0061, September 27, 2023, p.4.

unfounded flip by the Commission will increase revenues, further implicating the ratepayer protections contemplated by the prohibition against single-issue ratemaking. It may also further confuse customers and lead to dissatisfaction as they seek to reduce their peak consumption but receive no reward in the form of a lower bill.[11] The assumptions that went into the billing determinants used to establish the rate values assumed a default rate that is now an incorrect assumption, and only an all-relevant factor review would avoid over-recovery.

c. The Order Violates the Rehearing Statute

The statute under which the OPC brings this application for rehearing is § 386.500 RSMo, which lays out the *only* process available to a party to challenge a Commission order. The Order in question in this case violates § 386.500 RSMo because it grants a rehearing that does not follow the procedure required by statute. The Order allows Evergy to seek a second rehearing of an issue despite § 386.500 RSMo not providing for a second bite at the apple. The Commission has allowed Evergy to simply re-raise the same argument the Commission rejected in Evergy's prior application for rehearing, without any change in circumstances other than the company seeing an opportunity to do so.

To protect and promote the public interest it is imperative that the Commission continue to support the following important regulatory principles: (1) protecting Commission orders against collateral attacks, (2) protecting the public against prohibited single-issue ratemaking, and (3) protecting the process for

[11] Office of the Public Counsel Memorandum, ET-2024-0061, September 25, 2023, pp. 4 and 16.

seeking rehearing. The Order violates and threatens to erode these protections, and for these reasons, the Commission should grant rehearing.

B. The Order is Not Based on Any Explanation or Findings of Fact to Support the Reversal of a Prior Rate Case Order

The biggest unanswered question is just *why* the Commission altered course after 10-months of customer education on the default plan, and made this change less than a week before the TOU rates were to become effective. This has and will surely create significant customer confusion. Moreover, the public should be entitled to an explanation based on facts.

The original decision in the rate case included sixty-six (66) paragraphs of findings of fact to support the Commission's decisions on TOU, including the determination of the default rate plan. In the present case, however, the Commission issued not a single finding of fact, alleged no change in circumstances, and simply reversed its prior decision after all statutory opportunities for Evergy to seek this change had lapsed.

In the rate case order, the Commission discussed its reasons for not ordering the low-differential TOU rate as the default. Consistent with the eventual analysis and conclusion of the Oracle study, the Commission considered all relevant factors in a full rate review, and stated:

> Staff's low differential rate, even though it would provide protections to some customers, does not provide sufficient incentive or opportunities for customers to see savings from TOU rates. Therefore, the Commission does not agree with Staff's low differential TOU rate being the introductory default TOU rate for residential customers.[12]

[12] Amended Report and Order, Case Nos. ER-2022-0129 & ER-2022-0130, p. 71.

Given the above evidence-based findings that the Peak Reward Saver rate does not provide sufficient incentive or opportunity to see savings from TOU rates, the Commission is now knowingly ordering a rate that the Commission itself acknowledges will not provide savings. In the Company's last rate cases, Case Nos. ER-2022-0129 and 0130, it agreed with the Commission.[13]

This is entirely inconsistent with the Commission's *supported* rate case order, which states in relevant part:

> The Commission finds Evergy's 2-period TOU rate, with a 4-times price differential between on-peak and super off-peak during summer and a 2-times differential between on-peak and off-peak during winter, to be the best introductory high differential TOU rate for residential customers as it has the lowest differential of Evergy's high differential TOU rates while still providing a benefit to those customers seeking substantial savings by altering the time of day of their energy consumption. Therefore, the Commission will order that Evergy's 2-period TOU rate be established as the default residential customer rate with Staff's low differential TOU rate as an opt-in TOU rate.

This determination included a detailed assessment of the reasons for the Commission's choice of a default rate plan. Now, the Commission has simply dismissed these prior findings without ever addressing them and how these findings do not hold true today. Regulatory certainty is best promoted when the Commission explains the basis for its decisions; otherwise, parties are left uncertain as to the reasons for a Commission decision, which will without question lead to an increased level of regulatory uncertainty into the future.

The OPC requests the Commission rehear this case and articulate the basis for reversing its prior decision. The OPC requests the Commission explain why it now prefers to have the vast majority of customers default to a rate that it

[13] ET-2024-0061, September 25, 2023 Office of the Public Counsel Memorandum, pp. 16 and 17.

determined will not provide savings. Lastly, if the Commission is determined to review this issue again, the OPC requests the Commission make its new decision based on a thorough review of all relevant factors. The Order not only fails to consider all relevant factors, there is no basis to conclude it considered *any* factors. Evergy's customers entrust the Commission with issuing decisions that seek to promote savings, not decisions that knowingly reject bill savings without any explanation.

Missouri courts have reversed Commission decisions for failing to provide findings of fact when making similar rate determinations:

> This court has noted that a reviewing court has no basis for determining the lawfulness of a Commission decision when findings of fact and conclusions of law are absent, *Friendship Vill. of South County v. Pub. Serv. Comm'n of Mo.*, 907 S.W.2d 339, 344 (Mo. App. W.D. 1995), and this principle applies with particular force when the question of an order's lawfulness involves a factual determination. *State ex rel. GTE North, Inc. v. Mo. Pub. Serv. Comm'n*, 835 S.W.2d 356, 374 (Mo. App. W.D. 1992). The question of whether discriminatory rates are unlawful and unjust is usually a question of fact, *State ex rel. Mo. Office of Pub. Counsel v. Mo. Pub. Serv. Comm'n*, 782 S.W.2d 822, 825 (Mo. App. W.D. 1990). Accordingly, the inadequacy of the Commission's findings and conclusions precludes meaningful judicial review herein.[14]

The issue in the present case seemingly involves some unstated problem that involves some alleged facts regarding TOU rates, and without any findings to support the Commission's decision to support reversing the prior fact-based rate case order, the Order is unlawful, unjust, and unreasonable.

C. <u>The Commission Fails to Cite to Any Authority for the Order or Issue any Conclusions of Law</u>

[14] State ex rel. City of Joplin v. PSC, 186 S.W.3d 290, 300.

Similar to the reasons argued above, the Order also fails to cite to any law that authorizes the Commission to reverse a litigated rate case order outside of a rate case. Likewise, Evergy's application that started this case fails to cite to any authority for its request. Commission rule 20 CSR 4240-2.080(4) requires: "Each pleading shall include a clear and concise statement of the relief requested, a specific reference to the statutory provision or other authority under which relief is requested, and a concise statement of the facts entitling the party to relief." Evergy's application included no reference to a statutory provision or other authority as required. Accordingly, the Order is unlawful, unjust, and unreasonable, and the case should be reheard.

D. <u>Unintended Consequences for Ratepayers and the Commission</u>

This Order could easily result in more case filings before the Commission by other utilities that also choose to ignore the established rule of law and seek a third "bite at the apple" after losing an issue in a rate case and again losing their request for rehearing. Now Commission orders will carry far less weight, and the workload of the Commission, Staff, and the OPC could increase defending against frequent rate case challenges well outside of the rate case process. The OPC asks the Commission to reconsider the weight and impact of this rushed decision, and the far-reaching negative implications the Commission's Order could have for this Commission, and all future commissions.

In addition, utilities may now be far less likely to settle cases. Why settle when they can simply ask again for the exact same thing just months later without needing an "all relevant factors" rate review? Why settle when they can

make the same request without needing to present *any* evidence or even allege a change in circumstances? Whatever the short-term problem the Commission may believe it is solving with the Order, it is not worth the potential long-term implications of the Commission's departure from established procedures, important ratepayer protections, and regulatory certainty.

E. Are Rate Case Orders No Longer Final for Just the Utilities, or Does this New Concept Apply to Other Parties as Well?

The Order raises a number of additional questions regarding the Commission's processes. Is this new process now available to the OPC, Staff, and other parties or is it available only to the utilities? Can the OPC now request that the Commission revisit the issues the OPC lost before the Commission in the 2022 rate case? If not, why is this process available only to public utilities? The Commission should be prepared to envision numerous other parties in future cases making similar 12th hour requests as Evergy has done in this case to overturn a prior Commission decision they did not like.

The Order threatens to weaken and undermine all future Commission orders, and undermine Missouri utility regulation generally by diminishing the Commission's Staff and the OPC. The ability to regulate utilities relies greatly on the weight of Commission orders, the finality of Commission orders, and the general rate case process that recognizes rate changes should consider all relevant factors. The Order simply disregards these foundational regulatory tenets and consumer protections and provides no explanation of the reasons for the Commission flipping its final and no longer appealable rate case order.

F. The Order's Last Minute Change Creates Regulatory Uncertainty for Half a Million Residential Customers Educated for 10-Months on the Wrong Default Rate Plan

The Order has already caused regulatory uncertainty because Evergy worked to educate customers on a particular default rate for ten months, only for the Commission to change that default rate a week before implementation. It would be hard to find a better example of promoting a significant amount of regulatory uncertainty for ratepayers. The Order will likely also cause far more customer confusion than any alleged initial confusion over the Company's rate offerings. Any customer misperceptions about TOU rates should be remedied with changing those misperceptions, not simply changing the default rate, as that change does nothing to improve ratepayer misunderstandings. If anything, it will only worsen customer confusion while it eliminates savings.

This could also lead to regulatory uncertainty for future rate changes. Customers may now question whether messages on upcoming changes are accurate, or whether the Commission will again pivot last minute as it has here.

G. Concerning Private Meetings Between Evergy and the Commission Regarding Substantive TOU Issues

The public perception of a Commission order that reverses a recently contested and litigated general rate case issue without issuing any findings or basis for the reversal is already troubling. To add unexplained private meetings between Evergy and commissioners and/or advisors to that decision, on substantive TOU issues raised in this case, further erodes public trust in the Commission's decisions. The basis for OPC's concerns stems from the following statements made in Evergy's application:

> 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.**[15]

The OPC takes no issue with open Agenda Meeting discussions or workshop discussions. However, the vague reference to "other more informal discussions concerning TOU implementation" is concerning, and weakens the public trust in the Commission's actions without more explanation.

The intent of the *ex parte* rules and the Commission's 60-day notice requirement is to avoid precisely the situation that happened in this case. By all appearances, the Company met with commissioners and/or the Commission's advisory staff and discussed the merits of this case within the 60-day notice requirement period. These private meetings possibly occurred when Evergy was contemplating the filing of this case, and could be the basis for the Commission's reversal of the rate case order. The OPC was unaware of these private meetings and neither Evergy nor the Commission filed ex parte communication notices to shed light on these meetings.

The Commission's rules prohibit ex parte communication and define such communications as, "Any communication outside of the case process between a member of the office of the commission and any party, or the agent or representative of a party, <u>regarding any substantive issue in, or likely to be in, a</u>

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[15] Application for Approval of Tariff Revisions to Time-of-Use Program, Request for Waiver of 60-Day Notice Requirement, and Motion for Expedited Treatment, ET-2024-0061, September 8,

case or noticed case."[16] Private discussions of substantive TOU issues in the days or weeks leading up to Evergy filing its application in this case constitute prohibited ex parte communication because they admittedly involved substantive issues likely to be in a case.

The Company acknowledges that the meetings involved "substantive issues" regarding TOU. The rule defines "substantive issues" as "[m]erits of specific facts, evidence, claims, or positions specific to a case or noticed case that have been or are likely to be presented or taken in that case."[17]

Evergy's application requested a waiver of the Commission's important 60-day notice requirement. The rule essentially prohibits a utility from filing a case likely to be contested within 60-days of private meetings between commissioners and the utilities regulated by the Commission. The Order's conclusion that "good cause" exists to waive this important consumer protection is unreasonable because it essentially establishes that a company's desire to quickly implement a tariff change is reason alone to ignore the public protections contained in the rule. Evergy saw an opportunity to again raise its opposition to the impact to its earnings from the default rate, and it was the timing of that subjective decision that created a manufactured "time crunch" for the Commission to act. This is just one more reason why the Commission's Order is unlawful, unreasonable, and unjust, and should be reheard, or at a minimum, clarified on this point to maintain the public's trust in the Commission.

2023, p. 15.

[16] 20 CSR 4240-4.015(6).

[17] 20 CSR 4240-4.015(14).

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission grant this application and rehear, reconsider and clarify its Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 7th day of October 2023.

/s/ Marc Poston