

BEFORE THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

In the Matter of the Investigation into the )  
Agreement between Evergy and Elliott )  
Management to Consider a Modified Standalone ) Docket No. 20-EKME-514-GIE  
Plan or Merger Transaction )  
)

**RESPONSE OF EVERGY METRO, INC., EVERGY KANSAS CENTRAL, INC. AND  
EVERGY KANSAS SOUTH, INC. TO PETITION OF COMMISSION STAFF FOR  
ORDER INITIATING A GENERAL INVESTIGATIVE DOCKET**

COME NOW Evergy Metro, Inc. (“Evergy Kansas Metro”), Every Kansas Central, Inc. and Evergy Kansas South, Inc. (together as “Evergy Kansas Central”) (collectively referred to herein as “Evergy”) and file this Response to the Petition of Commission Staff for Order Initiating Investigation (“Petition”). In support of its Response, Evergy states as follows:

1. Late in the day on June 11, 2020, Staff filed its Petition, with an attached Report and Recommendation, requesting that the Commission open a general investigation into an Agreement that was entered into by Evergy’s Board of Directors and Elliott Associates, L.P., Elliott International, L.P., and affiliates (collectively “Elliott Management” or “Elliott”) on February 28, 2020 (the “Agreement”).

2. The Agreement with Elliott resulted in the appointment of two new members to Evergy’s Board and the creation of a Strategic Review & Operations Committee (“SROC”) to consider the possibility of Evergy pursuing either a Modified Standalone Plan or a Merger Transaction and present its recommendation to Evergy’s Board for consideration and vote. As Staff explained in its R&R, currently, the formal recommendation to the Board is due July 30, 2020, and the deadline for the Board to vote on the formal recommendation is August 17, 2020.

Additionally, if Evergy pursues a Modified Standalone Plan, the deadline for publicly presenting the plan to the investor community is October 14, 2020.

3. Staff indicated in its R&R that it has concerns with both (1) the potential for a Modified Standalone Plan and the impact it could have on Evergy's service quality and on Evergy's rates and (2) the potential for a Merger Transaction because of the standards for approval of a merger in Kansas and the expectation that a proposed transaction would benefit both customers and shareholders. Thus, despite the fact that Evergy has not yet actually made a decision to pursue either of these options, Staff recommends that the Commission open a general docket, allow Staff to begin confidentially reviewing SROC and board materials, and require Evergy to submit a report answering a list of questions two weeks after any such decision is made by the Board.

4. Throughout Evergy's engagement with Elliott Management, Evergy's Board and management team have been resolute in their commitment to serving the best interests of all Evergy stakeholders, including customers, employees, shareholders and the communities Evergy serves. Evergy agrees with Staff that it is important to have a robust and transparent process that allows for stakeholder engagement. Thus, any action Evergy might consider that would alter the current strategic plan will balance the interests of stakeholders as noted above, serve the interest of regional rate competitiveness, and fully comply with the terms of the merger agreement that allowed for the creation of Evergy.

5. Staff points to the fact that Evergy recently (in February 2020) revised its five-year capital expenditure forecast to a number different from the capital forecast number that was discussed in the 2018 docket approving the merger between Great Plains Energy, Inc. and Westar

Energy, Inc. to create Evergy, Docket No. 18-KCPE-095-MER (“Merger Docket”).<sup>1</sup> The five-year capital forecast that was discussed in the Merger Docket and referenced by Staff in its R&R is over two years old. It is very common for companies to review and update their financial plans, including capital forecasts, on an annual basis and often even more frequently; thus, it is not unusual that Evergy’s capital expenditure forecast would be updated more than two years after the formation of Evergy through the merger.

6. Evergy realizes all of its expenditures, including capital investments, are subject to the Commission’s review for prudence and always considers the long-term customer benefit/cost relationship when making its business decisions. Evergy has always strived for transparency and has long planned, well before entering the Agreement with Elliott, to bring the major aspects of any strategic capital investment plan to important stakeholders for input before committing to a specific plan. In fact, even if the SROC were to recommend and Evergy’s Board were to adopt the recommendation to pursue a Modified Standalone Plan that impacts Evergy’s capital plan and forecast, Evergy would work through a stakeholder process, making adjustments to the plan as needed, before actually formalizing and implementing the new plan. As is Evergy’s current process, any capital investment plan also receives continual assessment at least annually after it is adopted to address any changes in assumptions or conditions.

7. In the event Evergy’s board decides to pursue either a Merger Transaction or a Modified Standalone Plan, the Commission will have the opportunity to review those plans in detail after the decision is made – for a merger, the Commission would review when the parties filed for approval of the transaction; for a Modified Standalone Plan, the Commission would

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<sup>1</sup> Staff R&R, at pp. 6 and 28.

review as part of the Integrated Resource Plan (“IRP”) and capital plan process that was recently implemented in Docket No. 19-KCPE-096-CPL and in the next general rate case when investments are reviewed for prudence.

8. Additionally, the terms of the Stipulation and Agreement filed in the Merger Docket (“Merger S&A”), developed by Staff, Evergy, and other intervenors and approved by the Commission, address the concerns Staff has about the impact of a Modified Standalone Plan on service quality and the Earnings Review and Sharing Plan (“ERSP”). The Merger S&A sets specific service quality standards Evergy must continue to meet and imposes substantial penalties if Evergy fails to meet the service quality requirements set out in the agreement.<sup>2</sup> Staff also has audit rights for the ERSP and the IRP/capital plan process that was implemented as a result of the Merger S&A and the ability to initiate a complaint proceeding if those audits reveal potentially imprudent capital investments. Staff focuses heavily on the fact that Evergy adjusted its company-wide capital forecast in February 2020 and that the forecast increased from the forecast that was discussed in the Merger Docket. However, as has been discussed publicly, the lions’ share of the increase in the capital expenditures announced in February will occur in Missouri, driven by Missouri legislation which encourages utilities to invest in building and enhancing the electric infrastructure to create a modern and resilient electric grid. Those details will be vetted through the IRP/capital plan process.

9. The Merger S&A requires Evergy to operate in a balanced way and exposes Evergy to penalties or other detrimental financial outcomes if that does not occur. However, Evergy operates in a competitive environment where earnings do matter and earnings relative to peers

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<sup>2</sup> Merger S&A, Attachment 1 - Condition No. 36 and Attachment 4.

matter. Operating in a balanced way does not mean giving no consideration to shareholders; instead, it requires Evergy to do so in a balanced way, which is what the Company has committed to do through this SROC process.

10. Evergy is fully committed to complying with all terms of the Merger S&A and is mindful of those commitments as it proceeds with the SROC process.

11. Evergy understands that the Commission, its Staff and other stakeholders will have a significant interest in decisions made by the Evergy Board as a result of the SROC process. However, as discussed below, given that the SROC process is ongoing and the Evergy Board has yet to make any of the decisions contemplated under that process, Evergy requests that the Commission provide additional time for Evergy to respond to the questions proposed by Staff in order to allow the appropriate time for management and the Board to exercise their discretion in running the business and fulfill their respective responsibilities<sup>3</sup> and requests that the Commission implement increased confidentiality protections for the information to be reviewed by Staff in the docket.

12. Staff's recommendation would result in Staff's review and scrutiny of Evergy's decision-making process as it occurs rather than a review of a decision made by Evergy after the process is complete. Undertaking such a review while the SROC process is ongoing and before the Evergy Board has made any of the decisions contemplated by the SROC process would necessarily be cumbersome and inefficient and require both Staff and Evergy to devote

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<sup>3</sup> *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Com.*, 262 U.S. 276, 289 (1923) (“The commission is not the financial manager of the corporation and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers”); *United Fuel Gas Co. v. Railroad Com. of Kentucky*, 278 U.S. 300, 320 (1929) (“We recognize that a public service commission, under the guise of establishing a fair rate, may not usurp the functions of the company's directors and in every case substitute its judgment for theirs as to the propriety of contracts entered into by the utility”).

considerably more resources to the project than if Staff's review takes place at the customary time – after the Evergy Board has made a decision regarding its strategic plan.

13. Thus, any proceeding implemented that would allow for Staff review of board materials and other documents while the decision-making process is still occurring would need to be strictly limited to Staff and provide for the highest level of confidentiality given commercial sensitivity, especially with the ongoing scope of the SROC work including a strategic market check. This will require confidentiality protections beyond the Commission's standard Protective Order, with provisions requiring Staff to review any SROC or Board materials onsite at the Evergy offices.

14. Additionally, Staff has requested that Evergy be required to respond to their list of questions with respect to either the Modified Standalone Plan or a Merger Transaction within two weeks of a Board decision to pursue a specific option. However, a decision by the Board would not be the final step in the process for either of these options. Either option would require substantial additional work by Evergy (and the other party to the transaction in the event of a merger) before becoming final and before Evergy would be prepared to answer detailed questions like those proposed by Staff. Thus, in the event that the Commission chooses to open the general investigation docket requested by Staff, Evergy requests that it be given two weeks after the deadline for public disclosure required in the Agreement of any Modified Standalone Plan to the investor community, currently contemplated for October 14, 2020, to provide responses to Staff's questions. To the extent the Board approves a merger or other business combination, Evergy requests that it be given two weeks after the announcement of such transaction.

Respectfully submitted,

1st Cathryn J. Dinges

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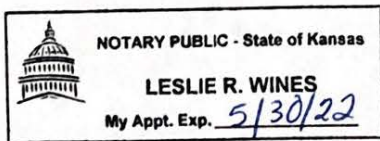
**VERIFICATION**

STATE OF KANSAS            )  
  ) ss  
COUNTY OF SHAWNEE    )

The undersigned, Cathryn Dinges, upon oath first duly sworn, states that she is Corporate Counsel for Evergy Metro, Inc. Evergy Kansas Central, Inc. and Evergy Kansas South, Inc., that she has reviewed the foregoing pleading, that she is familiar with the contents thereof, and that the statements contained therein are true and correct to the best of her knowledge and belief.

Cathryn Dinges  
Cathryn Dinges

Subscribed and sworn to before me this 17<sup>th</sup> day of June 2020.



Leslie R. Wines  
Notary Public

My appointment expires: May 30, 2022

## CERTIFICATE OF SERVICE

I hereby certify that on this 17<sup>th</sup> day of June, 2020, the foregoing Response was electronically served on the following parties of record:

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*/s/ Cathryn J. Dinges*  
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