

**THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS**

Before Commissioners: Susan K. Duffy, Chair  
Dwight D. Keen  
Andrew J. French

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

**ORDER GRANTING JOINT MOTION FOR REVISIONS  
TO PROCEDURE FOR DOCKET**

This matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having reviewed the pleadings and record, the Commission makes the following findings and conclusions:

1. On June 11, 2020, Commission Staff (Staff) filed a Petition for Order Initiating Investigation, to investigate Evergy's Agreement with Elliott Management (Elliott) to explore either a Modified Standalone Plan that would effectively cut operating and maintenance expenses and increase capital expenditures dramatically, or a Merger Transaction.<sup>1</sup> Staff's Petition is made pursuant to the Commission's plenary authority under K.S.A. 66-101 to "supervise and control" electric utilities doing business in Kansas and "and K.S.A. 66-101h to "examine and inspect the condition of each electric public utility" and the "manner of its conduct and its management with reference to the public safety and convenience."<sup>2</sup>

2. Elliott is an asset management firm that manages approximately \$40.2 billion in assets, with a stated goal of generating a consistent return to its investors.<sup>3</sup> Currently, Elliott owns an economic interest equivalent of 11.3 million shares in Evergy or approximately \$760

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<sup>1</sup> Petition of Commission Staff for Order Initiating Investigation (Petition), June 11, 2020, ¶ 5.

<sup>2</sup> *Id.*, ¶ 2.

<sup>3</sup> *Id.*, ¶ 3.

million in current market value.<sup>4</sup> On January 21, 2020, Elliott issued a press release advising it had engaged in private discussions with Evergy management on ways to maximize value for all of Evergy's key stakeholders.<sup>5</sup>

3. On February 28, 2020, Evergy and Elliott entered into an Agreement to: (1) appoint two new members to Evergy's Board, and (2) create a Strategic Review & Operations Committee (SROC) to explore ways to increase Evergy's shareholder value.<sup>6</sup> The SROC is considering either a Modified Standalone Plan that would effectively cut operating and maintenance expenses and increase capital expenditures dramatically, or a Merger Transaction.<sup>7</sup> The SROC's recommendation is scheduled to be presented to Evergy's Board by July 30, 2020, and voted on by August 17, 2020.<sup>8</sup> If Evergy pursues a Modified Standalone Plan, the Agreement imposes an October 14, 2020 deadline to publicly present the plan to the investor community.

4. Based on concerns that Elliott's focus on increasing shareholder value may result in Evergy's customers paying higher rates or receiving lower quality service, and circumvent the merger conditions agreed to by Evergy in the 18-KCPE-095-MER Docket, on June 18, 2020, the Commission opened a general investigation.<sup>9</sup> The purpose of the general investigation is to enable the Commission, stakeholders, and customers to be fully informed of the analysis and rationale behind Evergy's decision.<sup>10</sup>

5. In its Order Opening General Investigation, the Commission directed Evergy to: (1) provide a report to the Commission within two weeks of its Board deciding how to proceed;

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<sup>4</sup> Staff Report and Recommendation, June 11, 2020, p. 1.

<sup>5</sup> Petition, ¶ 4.

<sup>6</sup> *Id.*, ¶ 5.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Order Opening General Investigation, June 18, 2020, ¶ 4.

<sup>10</sup> *Id.*

and (2) submit the SROC's Report to the Board and provide full rationale and explain in detail its proposed course of action. The Order also provided Staff, CURB, and any other intervenors the opportunity to file responsive comments no later than 45 days after Evergy submits its report.<sup>11</sup>

6. On June 22, 2020, Staff and Evergy filed a Joint Motion for Revisions to Procedure for Docket, explaining that because the SROC process is ongoing and the Evergy Board has yet to make any of the decisions contemplated under that process, the Joint Movants seek: (1) an extension of time for Evergy to respond to the questions proposed by Staff to 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, or if the Board approves a merger or other business combination, two weeks after the announcement of such transaction;<sup>12</sup> (2) a Protective Order requiring Staff to review any SROC or Board materials onsite at the Evergy Topeka offices;<sup>13</sup> and (3) limiting the review of Board and SROC materials that is currently ongoing to Staff, until a final decision is made and publicly announced.<sup>14</sup>

7. On June 24, 2020, the Kansas Industrial Consumers Group, Inc. (KIC) filed Petition to Intervene of the Kansas Industrial Consumers Group, Inc., and Response to Commission Staff and Evergy's Joint Motion for Revisions to Procedure for Docket. In relevant part, KIC argues modifying the procedural framework just one week after it was adopted, without input from any other stakeholder, is premature, and should be rejected.<sup>15</sup> KIC also

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<sup>11</sup> *Id.*, ¶ 9.

<sup>12</sup> Joint Motion for Revisions to the Procedure for Docket, June 22, 2020, ¶ 8.

<sup>13</sup> *Id.*, ¶ 11.

<sup>14</sup> *Id.*, ¶ 12.

<sup>15</sup> Petition to Intervene of the Kansas Industrial Consumers Group, Inc., and Response to Commission Staff and Evergy's Joint Motion for Revisions to Procedure for Docket, June 24, 2020, ¶ 11.

contends the heightened confidentiality protections are too narrow, exclusionary, and arbitrary.<sup>16</sup> Specifically, KIC argues limiting the review of relevant material to Staff (until a decision is announced) is arbitrary.<sup>17</sup> Lastly, KIC notes that in the 16-KCPE-593-MER Docket (16-593 Docket), supervised on-site review of sensitive documents, and specific identification of documents wished to be copied was permitted and believes that similar arrangements should be made here.<sup>18</sup>

8. On June 26, 2020, the Kansas Power Pool (KPP) filed its Petition to Intervene, seeking to intervene and fully participate in this docket, including but not limited to the right to conduct discovery, file pleadings and testimony, present oral argument, and fully participate in any scheduled hearings, and for all other relief which the Commission deems just and proper.<sup>19</sup> KPP's Petition is still pending.

9. On June 30, 2020, Evergy filed its Reply to Petition to Intervene of Kansas Industrial Consumers Group, Inc. Evergy does not object to KIC's intervention but does strongly object to KIC's other requests.<sup>20</sup> Evergy believes only Staff should be allowed to review documents before Evergy has actually made a decision and announced it to the public.<sup>21</sup> Evergy contends KIC's claims ignore the unique nature of Staff's investigation in this Docket.<sup>22</sup> Evergy states that, unlike the 16-593 merger docket where Westar and KCP&L presented their merger application to the Commission for approval, here Evergy has not made any decisions on whether to pursue either a Merger Transaction or a Modified Standalone Plan.<sup>23</sup> If Evergy's Board

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<sup>16</sup> *Id.*, ¶ 12.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, ¶ 14.

<sup>19</sup> Petition of the Kansas Power Pool to Intervene, June 26, 2020, p. 3.

<sup>20</sup> Reply of Evergy Metro, Inc., Evergy Kansas Central, Inc. and Evergy Kansas South, Inc. to Petition to Intervene of Kansas Industrial Consumers Group, Inc., June 30, 2020, ¶ 7.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, ¶ 7.

<sup>23</sup> *Id.*, ¶ 9.

decides to pursue either a Merger Transaction or a Modified Standalone Plan, Evergy explains that all interested parties, including KIC, will have the opportunity to participate when the Commission reviews those plans.<sup>24</sup>

10. Evergy claims it would be inappropriate for KIC to have the same access to review documents that Staff is given at this time because the Docket was created at Staff's initiative to allow Staff to conduct an investigation, not for any interested party to investigate Evergy's internal business decisions.<sup>25</sup>

11. On July 6, 2020, Staff filed its Reply to Petition and Response of Kansas Industrial Consumers Group, Inc., and Petition to Intervene of Kansas Power Pool, taking issue with KIC's contentions that KIC will be bound by Commission Orders in this proceeding and that any decision on Elliott's proposals may affect the rates and terms of service available to KIC.<sup>26</sup> Staff reiterates that this Docket is investigatory in nature, and any Modified Standalone Plan or Merger Transaction would be addressed in a separate docket where KIC can intervene in to protect its interests.<sup>27</sup> As it did with KIC, Staff contends that to the extent KPP seeks access to the commercially sensitive information Staff will be reviewing on-site, such access is inappropriate, and that KPP, like KIC, will have the opportunity to file responsive comments to the report filed by Evergy.<sup>28</sup>

12. Staff expresses serious concerns over KIC having unfettered access to Evergy's commercially sensitive information that cannot be appropriately protected under the Commission's standard protective order, therefore, Staff continues to believe KIC should not be

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<sup>24</sup> *Id.*, ¶ 10.

<sup>25</sup> *Id.*, ¶ 11.

<sup>26</sup> Reply of Commission Staff to Petition and Response of Kansas Industrial Consumers Group, Inc., and Petition to Intervene of Kansas Power Pool, July 6, 2020, ¶ 11.

<sup>27</sup> *Id.*, ¶ 12.

<sup>28</sup> *Id.*, ¶ 20.

permitted access to the documents, such as meeting materials and work product of the SROC, Board Minutes and related meeting materials, work product generated by consultants retained to evaluate both the Modified Standalone Plan and a possible Merger Transaction, and the final report submitted to Evergy's Board for vote.<sup>29</sup> Instead, Staff supports its initial recommendation that stakeholders be allowed the opportunity to file comments in response to Evergy's report.<sup>30</sup> Staff requests an explicit statement from the Commission that Staff is the only entity permitted access to the commercially sensitive information, such as meeting materials and work product of the SROC, Board Minutes and related meeting materials, work product generated by consultants retained to evaluate both the Modified Standalone Plan and a possible Merger Transaction, and the final report submitted to Evergy's Board for vote.<sup>31</sup>

13. After the Order Opening General Investigation was issued, Staff and Evergy discussed the practical difficulties the company would have in meeting the adopted timeline, as a result, Staff is amenable to modifying the timeline proposed by Staff and subsequently adopted by the Commission.<sup>32</sup>

14. On July 10, 2020, Unified School District #259, Sedgwick County, Kansas (USD 259) filed its Response to the Joint Motion for Revisions to Procedures for the Docket. USD 259's Petition to Intervene, filed June 30, 2020, has yet to be granted. USD argues that allowing only Staff to view materials from Evergy's Board and the SROC before the Board reaches a decision on what path to pursue is inconsistent with the goal of transparency.<sup>33</sup>

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<sup>29</sup> *Id.*, ¶¶ 3, 15.

<sup>30</sup> *Id.*, ¶ 16.

<sup>31</sup> *Id.*, ¶ 21.

<sup>32</sup> *Id.*, ¶ 18.

<sup>33</sup> Response of Unified School District #259, Sedgwick County, Kansas to the Joint Motion for Revisions to Procedures for the Docket, July 10, 2020, ¶ 4.

15. On July 13, 2020, KIC filed its Reply to Evergy and Commission Staff's Replies, claiming limiting parties to filing responsive comments and excluding them from the investigative portion of this proceeding denies parties access to the critical nuances and context surrounding Staff's questions and potential merger-related discussions.<sup>34</sup>

16. On July 15, 2020, Evergy filed its Reply to Response of Unified School District #259, Sedgwick County, Kansas to the Joint Motion for Revisions to Procedures for the Docket, reiterating its strong opposition to any party other than Staff reviewing documents before Evergy has actually made a decision and announced it to the public.<sup>35</sup>

17. On July 23, 2020, Staff filed its Response to Reply of Kansas Industrial Consumers Group, Inc., noting that as the investigative arm of the Commission, it is afforded greater latitude than non-Staff parties.<sup>36</sup> In acting as the investigative arm of the Commission, Staff reviews information that an intervenor should not be able to see.<sup>37</sup> Staff reminds the Commission that Staff's review is almost contemporaneously with Evergy's management and prior to a board determination on a course of action, which is unprecedented.<sup>38</sup>

18. Despite the excessive back and forth of the parties, very little has been said on the issue of whether an extension of time for Evergy to respond to the questions proposed by Staff is warranted. KIC devotes a single sentence to the issue, labeling the request made so soon after opening the Docket as premature.<sup>39</sup> USD 259 does not discuss the issue of the requested extension. Absent any compelling justification against the proposed extension, the Commission

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<sup>34</sup> Reply of the Kansas Industrial Consumers Group, Inc., to Evergy and Commission Staff's Replies, July 13, 2020, ¶ 8.

<sup>35</sup> Reply of Evergy Metro, Inc., Evergy Kansas Central, Inc. and Evergy Kansas South, Inc. to Response of Unified School District #259, Sedgwick County, Kansas to the Joint Motion for Revisions to Procedures for the Docket, July 15, 2020, ¶ 5.

<sup>36</sup> Response of Commission Staff to Reply of Kansas Industrial Consumers Group, Inc., July 23, 2020, ¶ 7.

<sup>37</sup> *Id.*, ¶ 8.

<sup>38</sup> *Id.*, ¶ 9.

<sup>39</sup> See Petition to Intervene of the Kansas Industrial Consumers Group, Inc., and Response to Commission Staff and Evergy's Joint Motion for Revisions to Procedure for Docket, ¶ 11.

is reluctant to second guess Staff's and Evergy's claims that additional time is necessary for Evergy to respond to the questions proposed by Staff, and to allow for Evergy's management and Board to exercise their discretion in running the business and fulfill their respective responsibilities.<sup>40</sup> Furthermore, since any decision by the Board to proceed with either the Modified Standalone Plan or a merger transaction will require substantial additional work by Evergy before becoming final, Evergy will need time to answer Staff's detailed questions.<sup>41</sup> The Commission believes it will be beneficial to the investigative process for Evergy to have adequate time to provide full and accurate answers to Staff. Therefore, the Commission grants the Joint Movants' request to extend Evergy's deadline to respond to Staff's list of questions until 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, or, to the extent the Board approves a merger or other business combination, two weeks after the announcement of such transaction.

19. The parties' real debate centers on who should be allowed to review Board and SROC materials before Evergy makes a final decision and publicly announces it. The Commission recognizes this is a unique situation. The Commission is investigating Evergy's internal deliberations on its future. Public interest concerns require the Commission to take this unprecedented action. However, Evergy has a legitimate need to protect its highly confidential management discussions and related documents. Limiting review of Evergy's highly confidential internal deliberations to Staff until Evergy publicly announces a decision on its future strikes the proper balance between Evergy's need to safeguard its sensitive and confidential internal deliberations and the Commission's need to protect the public interest by ensuring Elliott's focus

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<sup>40</sup> See Joint Motion for Revisions to the Procedure for Docket, ¶ 5.

<sup>41</sup> *Id.*, ¶ 9.



on increasing shareholder value will not result in Evergy's customers paying higher rates or receiving lower quality service, or circumventing the merger conditions agreed to by Evergy in the 18-KCPE-095-MER Docket. KIC, KPP, and USD 259 fail to demonstrate the public interest would be served by giving them advanced access to Evergy's sensitive internal deliberations at this time. Further, the Commission is concerned that allowing intervenors access to Evergy's highly-confidential ongoing strategic review deliberations could create federal securities law issues. Allowing intervenors to seek information from Evergy once a decision has been publicly announced will eliminate any securities law concerns.

20. The Commission finds Staff should be the only entity permitted access to Evergy's commercially sensitive information, such as meeting materials and work product of the SROC, Board Minutes and related meeting materials, work product generated by consultants retained to evaluate both the Modified Standalone Plan and a possible Merger Transaction, and the final report submitted to Evergy's Board for vote, until Evergy makes a public announcement of its decision on its future. Staff's review of SROC or Board materials will be conducted onsite at the Evergy Topeka offices.

**THEREFORE, THE COMMISSION ORDERS:**

- A. The Joint Motion for Revisions to Procedure for Docket is granted.
- B. Evergy's request to extend its deadline to respond to Staff's list of questions until 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, or, to the extent the Board approves a merger or other business combination, two weeks after the announcement of such transaction is granted.

C. Only Staff will have access to Evergy's Board and SROC materials until Evergy reaches and announces a decision on its future. Staff's review of SROC or Board materials will be conducted onsite at the Evergy Topeka offices.

D. Any party may file a petition for reconsideration pursuant to the requirements and time limits established by K.S.A. 77-529(a)(1).<sup>42</sup>

**BY THE COMMISSION IT IS SO ORDERED.**

Duffy, Chair; Keen, Commissioner; French, Commissioner

Dated: 07/30/2020



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Lynn M. Retz  
Executive Director

BGF

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<sup>42</sup> K.S.A. 77-503(c); K.S.A. 77-531(b).

## CERTIFICATE OF SERVICE

20-EKME-514-GIE

I, the undersigned, certify that a true copy of the attached Order has been served to the following by means of electronic service on 07/30/2020.

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**CERTIFICATE OF SERVICE**

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