

**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 ) Docket No. 20-EKME-514-GIE  
a Modified Stand Alone Plan or Merger Transaction )

**REPLY OF COMMISSION STAFF TO PETITION AND RESPONSE**  
**OF KANSAS INDUSTRIAL CONSUMERS GROUP, INC., AND**  
**PETITION TO INTERVENE OF KANSAS POWER POOL**

The Staff of the State Corporation Commission of the State of Kansas (Staff and Commission, respectively) hereby files its reply to the *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* that was filed in this matter on June 24, 2020 (KIC Petition and Response). Staff also provides a limited response to the *Petition of the Kansas Power Pool to Intervene* that was filed in this matter on June 26, 2020 (KPP Petition).

**I. BACKGROUND**

1. On June 11, 2020, Staff filed its Petition with an attached Report and Recommendation (Report), requesting the Commission open a general investigation into an Agreement that was entered into on February 28, 2020 by the Board of Directors of Evergy Metro, Inc., Evergy Kansas Central, Inc., and Evergy Kansas South, Inc. (together as Evergy) and Elliott Associates, L.P., Elliott International, L.P., and affiliates (collectively Elliott Management or Elliott) (the Agreement). As part of the Report, Staff recommended, *inter alia*, the Commission allow Staff to begin immediately evaluating the process and work product of Evergy's Strategic Review and Operating Committees (SROC).<sup>1</sup> Staff also recommended the Commission direct

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<sup>1</sup> Staff Report, p. 43.

Evergy to provide a report to the Commission no later than two weeks after Evergy's Board makes a decision to pursue either a Modified Standalone Plan or Merger Transaction.<sup>2</sup> Staff further recommended that the Commission allow Staff, CURB, and intervenors the opportunity to file comments responsive to the report no later than forty-five (45) days after Evergy submits its report.<sup>3</sup>

2. On June 18, 2020, the Commission granted Staff's Petition by issuing an *Order Opening General Investigation* (Order). As part of the Order, the Commission adopted Staff's recommendation with respect to the reporting requirements for Evergy and the proposed timelines for the docket.<sup>4</sup>

3. Specifically, the Commission directed Staff to conduct the following activities:
- start reviewing meeting materials and work product of Strategic Review & Operations Committee immediately;
  - start review of Board Minutes and related meeting materials immediately;
  - review all work product generated by consultants retained to evaluate both the Modified Standalone Plan and a possible Merger Transaction; and
  - review the final report submitted to Evergy's Board for vote.<sup>5</sup>

4. The Commission directed Evergy to provide a report to the Commission within two weeks of the Board's decision on how it plans to proceed with respect to either a potential Modified Standalone Plan or Merger Transaction, and to address the issues set forth by Staff in its Report and as identified in paragraph eight (8) of the Order.<sup>6</sup>

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<sup>2</sup> Staff Report, p. 44.

<sup>3</sup> Staff Report, p. 47.

<sup>4</sup> Order, ¶ B.

<sup>5</sup> *Id.* at ¶ 7.

<sup>6</sup> *Id.*

5. The Commission further ordered, that upon receipt of the report, “Staff, CURB, and any other intervenors may file responsive comments within 45 days of Evergy submitting its report.”<sup>7</sup>

6. On June 22, 2020, Staff and Evergy filed a *Joint Motion for Revisions to Procedure for Docket* (Joint Motion, with Staff and Evergy referred to therein as Joint Movants). The Joint Motion requested modifications to the original timelines proposed by Staff in its Report, and for a higher level of confidentiality than normally provided in Commission proceedings, due to the commercially sensitive nature of the information being reviewed.<sup>8</sup>

7. In the Joint Motion, Staff and Evergy explained that after the issuance of the Commission’s Order, Staff and Evergy discussed the practical difficulties with the timelines proposed by Staff, and agreed that a modification to the timeline is appropriate.<sup>9</sup>

8. Also as part of the Joint Motion, Staff and Evergy requested that only Staff be allowed to review the SROC and Board materials because the materials will be reviewed during a time when the decision-making process is still occurring.<sup>10</sup> In its Report, Staff had already noted the highly confidential nature of the information it was seeking to review, and recognized that a higher level of confidential treatment may be warranted.<sup>11</sup>

9. On June 24, 2020, the Kansas Industrial Consumers Group, Inc. (KIC) filed its Petition and Response seeking permission to fully participate in this proceeding, and arguing that a modification to the procedural timeframe in this matter is premature.<sup>12</sup>

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<sup>7</sup> *Id.* at ¶ C.

<sup>8</sup> Joint Motion, ¶¶ 8-10, and 11-12, respectively.

<sup>9</sup> Joint Motion, ¶¶ 7-10.

<sup>10</sup> Joint Motion, ¶¶ 11-12.

<sup>11</sup> Staff Report, p. 44, FN 47.

<sup>12</sup> KIC Petition and Response, ¶11.

10. On June 26, 2020, KPP filed its Petition also seeking permission to fully participate in this proceeding.

## II. REPLY

### *KIC's Petition to Intervene*

11. Staff does not object to KIC's participation in this matter. However, as a point of observation, to support its request for full intervention in this matter, KIC makes comments such as "KIC will be bound by Commission Orders in this proceeding and may be adversely affected" and "[a]ny decision regarding Elliott's proposals has the potential to materially affect KIC – particularly ensuring the rates and terms of service available to KIC remain just and reasonable."<sup>13</sup>

12. First, Staff explicitly noted in its Report that this investigation will not require any affirmative action by the Commission,<sup>14</sup> and as such, there should be no adverse effect to KIC in this proceeding. There will certainly be no immediate effect on rates or terms of service as a result of the report and comments to be filed in this proceeding. In the event Evergy elects either a Modified Standalone Plan or Merger Transaction, those matters will be filed in a separate and subsequent docket where KIC can fully participate and represent its interests.

13. Also in support of its intervention, KIC makes a point to highlight K.S.A. 77-521 and notes that petitions for intervention are to be granted if "(1) it is in the interests of justice, (2) if the intervention will not impair the orderly and prompt conduct of the proceedings, and (3) if the party has stated facts demonstrating its legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding."<sup>15</sup> However, KIC omits K.S.A. 77-521(c), which allows discretion to limit an otherwise qualified intervention. Specifically, the

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<sup>13</sup> KIC Petition and Response, ¶7.

<sup>14</sup> Staff Report, p. 2.

<sup>15</sup> KIC Petition and Response, ¶5.

Commission may limit a participant to discrete issues, and may limit the participant's use of discovery.<sup>16</sup>

14. While Staff has no objection to KIC's participation, Staff has serious concerns if KIC is requesting that it have unfettered access to Evergy's commercially sensitive information that cannot be appropriately protected under the Commission's standard protective order. The data Staff will be reviewing includes non-public information, including data relating to a strategic market check, which is highly sensitive information.

15. Due to the timing of the review that Staff will be conducting as relates to the Evergy Board's decision based on the SROC recommendation, the commercial sensitivity of the information involved, and the fact that Staff explicitly noted in its Report that this investigation will not require any affirmative action by the Commission that will affect the legal rights of the participants, Staff believes it is appropriate to limit KIC's participation accordingly so that it is not permitted access to the documents identified above in paragraph 3 that Staff has been directed to review.

16. Rather, Staff supports its initial recommendation that stakeholders be allowed the opportunity to file comments in response to Evergy's report.

***Response to KIC's Arguments Regarding Modification to Timeline***

17. KIC argues that Staff and Evergy's request to modify the procedural timeline in this docket at this time is premature, and infers that not waiting for interested parties to seek and obtain intervention in this matter before modifying the timeline is somehow improper.<sup>17</sup> What KIC fails to note is that the timeline adopted by the Commission in this matter is the one proposed by Staff to accommodate Staff's investigation into this matter on behalf of the Commission.

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<sup>16</sup> K.S.A. 77-521(c)(1), (c)(2).

<sup>17</sup> KIC Petition and Response, ¶ 11.

18. As noted above, after the issuance of the Commission’s Order in this matter, Staff and Evergy discussed the practical difficulties the company would have in meeting the timeline proposed by Staff in its Report. In light of those discussions, Staff felt that it had new information and a better understanding of the practical limitations faced by the company and was amenable to a modification to the original timeline proposed by Staff and subsequently adopted by the Commission based on Staff’s recommendation.<sup>18</sup> Because the investigation in this matter is being conducted by Staff, there was and is nothing premature or improper about the request to modify the timeline under which Staff will conduct its investigation.

***Response to Kansas Power Pool (KPP)***

19. Staff has no objection to the intervention of KPP in this matter. However, KPP raised similar arguments to KIC with regard to the impact of any Commission Order or activity in this docket on KPP and its customers.<sup>19</sup> Specifically, KPP mentions a contract provision that provides KPP the right to approve the assignment of the contract between KPP and Evergy in the event of a merger or acquisition.<sup>20</sup> As noted above, Staff stated in its Report that this docket will not require any affirmative action by the Commission. Therefore, in the event Evergy determines to pursue a Merger Transaction path, KPP will have the opportunity in that subsequent docket to represent its concerns with regard to contract assignment approval rights.

20. Based on its stated concerns, KPP argued that it be given the right to 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.”<sup>21</sup> As discussed above in the reply to KIC, there is nothing to truly litigate in this matter; rather, the

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<sup>18</sup> Joint Motion, ¶¶ 7-10.

<sup>19</sup> KPP Petition, ¶¶ 4-5.

<sup>20</sup> KPP Petition, ¶ 3.

<sup>21</sup> KPP Petition, p. 3.

docket was initiated to allow the Commission and stakeholders to be apprised of the decision of the Energy Board once those decisions are made. To the extent that KPP is requesting to have access to the commercially sensitive information Staff will be reviewing on-site, such access is inappropriate and should not be permitted. KPP, like KIC, will have the opportunity to file responsive comments to the report filed by Energy.

21. As a final observation on any subsequent interventions sought and granted in this proceeding, it is Staff's position that it would be inappropriate for any participant in this proceeding to have access at this time to the commercially sensitive information identified above in paragraph three (3). As such, Staff requests the Commission explicitly state that Staff is the only entity permitted access to the information discussed herein. This position is consistent with Staff's Report wherein it requested Staff be permitted to conduct its investigation and stakeholders be permitted the opportunity to file a response to the Energy report.<sup>22</sup>

WHEREFORE, Commission Staff respectfully submits this reply for Commission consideration, and renews its request that the Commission grant without modification the *Joint Motion for Revisions to Procedure for Docket* filed by Staff and Energy on June 22, 2020.

Respectfully submitted,

*/s/ Terri J. Pemberton*

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<sup>22</sup> Staff Report, pp. 43-47.

## CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the above *Reply of Commission Staff to Petition and Response of Kansas Industrial Consumers Group, Inc., and Petition to Intervene of Kansas Power Pool* was electronically served or mailed postage prepaid, this 6<sup>th</sup> day of July, 2020 to:

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*/s/ Vicki Jacobsen*

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