

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Investigation into the)
Sustainability Transformation Plan of Evergy)
Metro, Inc., Evergy Kansas Central, Inc., and) Docket No. 21-EKME-088-GIE
Evergy Kansas South, Inc. (collectively Evergy))

**MOTION OF EVERGY METRO, INC., EVERGY KANSAS CENTRAL, INC. AND
EVERGY KANSAS SOUTH, INC. TO ENFORCE KIC’S COMPLIANCE WITH THE
PROTECTIVE ORDER**

COME NOW Evergy Metro, Inc. (“Evergy Kansas Metro”), Evergy Kansas Central, Inc. and Evergy Kansas South, Inc. (together as “Evergy Kansas Central”) (collectively referred to herein as “Evergy” or the “Company”) and file their Motion to Enforce the Kansas Industrial Consumers Group, Inc.’s (“KIC”) Compliance with the Protective Order. In support of its Motion, Evergy states as follows:

1. As Evergy has indicated throughout this docket related to its Sustainability Transformation Plan (“STP”), Evergy’s goal is to have an open, transparent process through which it can share with and gather information from stakeholders as it works to continue to refine and finalize its STP.

2. As the Commission is aware, KIC’s attorneys have continually pressed to make confidential documents produced by Evergy in the STP docket public – through pleadings, emails to Evergy’s counsel, and by pushing and arguing with Evergy’s presenters at the work studies to agree to make certain information public.

3. Evergy has cooperated with these requests to the greatest extent possible while still maintaining appropriate confidentiality designations for non-public financial, business, and

strategy information and forecasts.¹ KIC has been provided with access to all of the material produced in the docket and its clients who are participating in the docket can sign non-disclosure agreements and have access to that same information. Evergy is simply maintaining the confidentiality of certain documents as appropriate under the Commission's rules and under the rules and regulations applicable to public companies' disclosure of material non-public information.

4. All public companies, including Evergy, Inc., are required by law, regulation and corporate policy to carefully manage the types of information that are released to the public and the way that information is released. For example, Regulation "Fair Disclosure" under the federal securities laws prohibits Evergy from selectively disclosing material non-public information. Although this regulation is targeted at selective disclosures to shareholders, investment banks and other financial market participants, because public companies are unable to control what a recipient does with information that the recipient receives from a public company, public companies are effectively required to ensure that any communication of material non-public information is done in accordance with law and company policies – i.e., done on a non-selective basis in accordance with practices that are widely accepted in the financial markets. Forecasted financial information – including the information contained in the document discussed below – could be considered material by an investor, and Evergy considers the information to be

¹ The Commission has made it clear that "a company's non-public financial projections, market value estimates, and strategic plans, which are generated by the company and not available publicly from other sources, should be treated as confidential . . . disclosure of Aquila's strategies relating to future implementation of its financial plan could cause competitive or economic harm by compromising future commercial transactions." Order on Motions Challenging Confidential Designations, Docket No. 02-UTCG-701-GIG, ¶ 32 (July 12, 2005); *see also Southwestern Bell Tel. Co. v. State Corp. Comm'n*, 6 Kan. App. 2d 444, 458 (Kan. Ct. App. 1981) (the Court had "no "difficulty" in "finding 'forecasts or targets' worthy of protection").

material. Indeed, Evergy's own corporate policies clarify that "[f]inancial or operations results or projections" are presumptively material.

5. In addition, federal (and state) securities laws require that, if a public company communicates information to the public, that information must be accurate in all material respects, and cannot omit information that, due to that omission, would make what is otherwise being disclosed misleading in any material respect. Due to this fundamental premise in law and regulation, all public companies, including Evergy, have developed rigorous and robust internal controls and procedures and disclosure controls and procedures to ensure that the information that Evergy transmits to the public can satisfy these requirements. Setting aside the technicalities of the law, Evergy takes very seriously its responsibility to ensure that its investors (and other stakeholders) are provided accurate and relevant information, and mismanagement of information has the potential to do very serious harm to Evergy's reputation and mislead Evergy's investors and other stakeholders. It is important to note that a substantial number of employees, retirees and customers in Evergy's service territories have a direct or indirect interest in Evergy's stock through retirement and pension funds. Information that is shared in violation of law and widely-accepted procedures carries a very high risk that all investors – including individuals in Evergy's service territory – can be substantially harmed.

6. Despite Evergy's attempt to be cooperative while also complying with applicable rules and regulations, KIC's attorneys, through Kansas for Lower Electric Rates, Inc. ("KLER") – a group for which KIC attorney Zakoura is president and for which the KIC attorneys control the Facebook and Twitter accounts – continue to make social media posts misrepresenting the details of the STP and accusing Evergy of "hiding" documents. Attachments A and B to this Motion are examples of the social media posts that have been occurring.

7. The KIC attorneys clearly control the postings for these KLER social media accounts, as can be seen from the email request from the KIC lobbyist Snider to KIC attorney Vincent, asking him to approve the language for a KLER Facebook post, reflected in Attachment C. The requested language was posted verbatim to Facebook the very next day, as shown in Attachment A.

8. In other words, the attorneys representing KIC in the STP docket are the same individuals approving and running social media posts used for political and media purposes on Facebook and Twitter. It appears that the intent of the KIC attorneys is not to have a productive and thoughtful conversation with Evergy and other stakeholders in the STP docket but instead to utilize the information gained in the docket to politicize the issues and try the reasonableness of the STP in the media.

9. Additionally, during the customer enhancement workshop, held on January 20, 2021, KIC attorney Zakoura spent the balance of his time during both the public and non-public sessions not to discuss customer enhancements or plans at all, but instead to continue KIC's effort to focus solely on rates and historical rate increases and to attempt to get public disclosure of information Evergy has clearly indicated is confidential. None of the discussion was relevant to the customer enhancement workshop and no other party participating in the workshop took this type of approach with their questions and comments. It appeared from the approach taken by KIC at the workshop that they did not intend to constructively participate in the workshop and have an open and productive conversation about the topics at issue but instead intended to use the workshop as part of their continued attack in the media, or otherwise, on Evergy and Evergy's STP.

10. Unfortunately, on January 26, 2021, Evergy learned from a discussion with a reporter that KIC attorney Zakoura has gone even further and violated the terms of the Protective Order issued by the Commission in this docket, which provides:

All persons who are afforded access to confidential information under the terms of this Protective Order shall neither use nor disclose such information for purposes of business or competition or any other purpose other than the purpose of preparation for and litigation of this proceeding. During the course of this proceeding, parties shall keep confidential information secure in accordance with the purposes and intent of this order.²

11. Evergy learned from the reporter that Mr. Zakoura had made her aware of the existence of a confidential document produced by Evergy in this docket that contained ** [REDACTED] [REDACTED] ** and the reporter pressed the Evergy representative to provide her access to this confidential information. The only way the reporter would be aware of what this confidential document contains would be if it was described to her by KIC's attorney. Although the reporter did not have the specific numbers contained in the document, she was aware of its existence and of the general description of its content. Mr. Zakoura's description of the existence of a confidential document to the reporter is a violation of the terms of the Protective Order.

12. An important exception to the "Fair Disclosure" rule discussed above is that material non-public information can be shared selectively if the recipient agrees to maintain the confidentiality of the information. Indeed, Evergy shared the information at issue based on a commitment to maintain the confidentiality of the information, and the intentional breach of this

² Order Designating Prehearing Officer; Protective and Discovery Order, ¶ 17 (September 10, 2020).

commitment by others demonstrates exactly why public companies carefully manage the release of information.

13. Evergy has discussed its concerns regarding Mr. Zakoura's disclosure of confidential information with him and he denied discussing confidential documents with the reporter, suggesting that the reporter may have gotten the information from other avenues such as watching the workshop or from pleadings or from CURB or Sierra Club. However, the document at issue was only discussed in confidential session at the workshop when the reporter would not have had access and has not been described in the level of detail she had in any pleadings. And neither CURB nor Sierra Club have been myopically focused on rate impacts or have been attacking Evergy publicly on social media platforms. Mr. Zakoura, while providing a general denial, did state that he had "only made the reporter aware that the document had been provided to the Commission." This comment, together with the information provided by the reporter to Evergy's representative, lead Evergy to believe that it is likely that the discussion of the confidential document did occur between Mr. Zakoura and the reporter. Thus, because Evergy was unable to reach a satisfactory resolution without the Commission's involvement, Evergy is requesting the relief described below from the Commission.

14. The STP process was designed to be non-adversarial, with workshops scheduled to facilitate an open discussion among the parties and Commissioners. However, KIC's tactics discourage the open exchange of information because of the risk that the KIC attorneys will not appropriately keep materials confidential and that they will use materials in discovery for purposes other than the docket pending before the Commission.³ The KIC attorneys' conduct in this docket,

³ The KIC attorneys' conduct in posting information obtained through discovery on KLER's Facebook and Twitter

in social media postings, and with the media is causing the process in the STP docket to become adversarial and disincentivizes Evergy's open and transparent participation. Unless controlled, KIC's conduct has the potential to have a chilling effect on Evergy's and other utilities' willingness to participate in these types of proceedings, including any future work study sessions related to other topics of interest to the Commission.

15. The Protective Order issued in this docket provides that “[u]pon finding that a party has abused the discovery process, the Commission may deny the right to continue discovery” and that “a motion for sanctions for discovery violations may be filed at any time during the proceeding.”⁴ Additionally, as Evergy has explained in prior pleadings in this docket, there is clear precedent establishing that use of discovery to gather information for other proceedings constitutes an abuse of the discovery process.⁵

16. KIC's disclosure of the existence of and summary of a confidential document obtained through discovery constitutes a violation of the Protective Order and an abuse of the

accounts and disclosing confidential information to a reporter confirm the concerns regarding use of materials obtained through discovery in forums other than this docket that Evergy expressed in its Response to KIC Motion to Remove Confidential Designations filed on January 14, 2021, and its Reply to KIC Answer regarding Removal of Confidential Designations filed on January 27, 2021. This conduct reaffirms the need for the Commission to make it clear that the prohibition against using materials obtained through discovery for purposes other than the docket applies to both public and confidential materials, unless Evergy itself has utilized the document publicly in other forums.

⁴ *Id.* at ¶¶ 22 and 23.

⁵ *Blackwell v. Simon*, 2020 U.S. Dist. LEXIS 164882, *35 (D. Mich. 2020) (“The purpose of those inquiries appears to be twofold: (1) to harangue Defendants into exhausted compliance in the form of settlement, and (2) to gather discovery for a future claim (which has now been filed) in state court. Both constitute abuse of the discovery process”); *see also Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352, n. 17 (1978) (“In deciding whether a request comes within the discovery rules, a court is not required to blind itself to the purpose for which a party seeks information. Thus, when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied”); *see also Koch v. Koch Indus., Inc.*, 1992 U.S. Dist. LEXIS 14094, *18-19 (D. Kan. 1992); *Shephard v. Wellman*, 313 F.3d 963, 969 (6th Cir. 2002); *AF Holdings, LLC v. Doe*, 752 F.3d 990, 995 (D.C. Cir. 2014).

discovery process and KIC's conduct has the potential to impact the effectiveness of this proceeding and similar proceedings in the future.

17. Therefore, Evergy requests that the Commission (1) issue an order admonishing KIC and its attorneys to refrain from disclosing the existence of or contents of confidential material obtained through the discovery process to anyone who has not signed a non-disclosure agreement in the docket, including reporters, and reminding KIC and its attorneys of their obligations under the Protective Order; (2) restrict KIC's access going forward to allow them access to only public material and not material designated as confidential; and (3) approve Evergy's request made in prior pleadings to make it clear that the prohibition against using materials obtained through discovery for purposes other than the docket applies to both public and confidential materials, unless Evergy itself has utilized the document publicly in other forums.

Respectfully submitted,

/s/ Cathryn J. Dinges

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Kansans for Lower Electric Rates

December 17, 2020 · 🌐

Evergy's STP capital spending plan proposes to spend 46% more SSS than planned two years -- \$9 billion over five years. The STP is guaranteed to increase rates. Demand hasn't increased. The economy hasn't improved. The legislature, governor and KCC need to say no and endorse plans that will lower rates in Kansas. Learn more at <https://www.kansasenergyproblem.com/current-issues>

UNDERSTANDING UTILITY RATES:

Investor-owned utilities like Evergy make money by investing capital and receiving a return on their investment. If you increase investment, shareholders will receive more profit.

Consumers pay the bill.

Evergy \$TP

Guaranteed rate increases paid by you!

It's the wrong plan at the wrong time for Kansas.





Tweet



Kansans for Lower Electric Rates
@highcostKS



Evergy's \$TP proposes to increase capital spend 46%: \$9B over 5 years. The \$TP is guaranteed to increase rates. Demand hasn't increased. The economy hasn't improved. The legislature, governor and KCC need to say no and endorse plans that will lower rates in Kansas. #ksleg

UNDERSTANDING UTILITY RATES:
Investor-owned utilities like Evergy make money by investing capital and receiving a return on their investment. If you increase investment, shareholders will receive more profit.
Consumers pay the bill.

Evergy \$TP
Guaranteed rate increases paid by you!

It's the wrong plan at the wrong time for Kansas.

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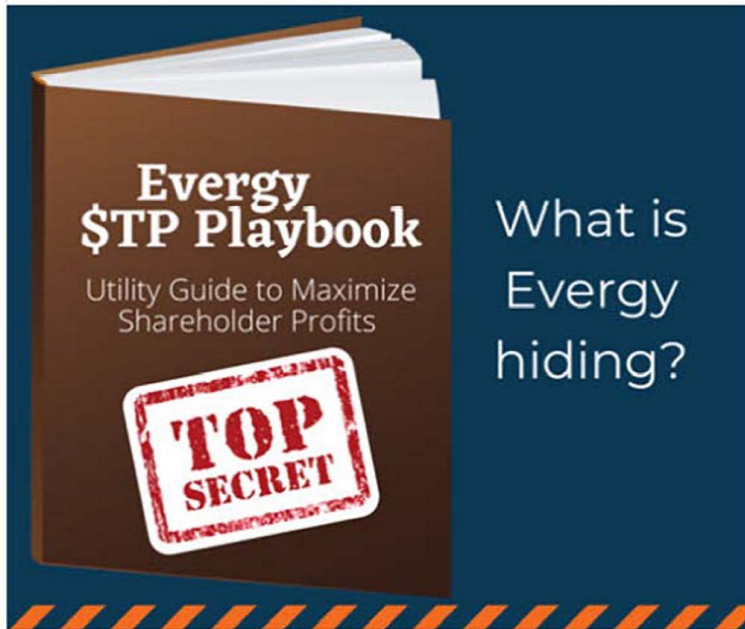
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Kansans for Lower Electric Rates

January 8 at 7:23 AM · 🌐

Evergy is relying on thousands of pages of documents, including a special consultant report, to sell their \$9 billion Sustainability Transformation Plan (STP) to the KCC. But Evergy has labeled the special report and other documents confidential. You can't see them, the media can't see them, and state legislators and the Governor can't see them. Shouldn't everyone be able to see the details of the plan that will guarantee them another rate increase? What are they hiding?



3:10 PM Wed Mar 18

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7 Paul Shider se will

8 proposed FB post Please review: Evergy's STP capital spending plan proposes to spend 46% oced

9 more \$\$\$ than planned two years -- \$9 billion over five years. The STP is g... demand rate. Again, I am not a lawyer and am not offering legal opinions or


10 conclusions, but Staff's position appears consistent with the Court's interpretation of

11 K.S.A. 66-117d's antidiscrimination provision that prohibits utilities from charging

12 DG customers a higher price than non-DG customers for the same service.?

13 Dr. Glass also correctly rejects Evergy's argument that the grid access charge

14 applies to all customers and is therefore nondiscriminatory. As Dr. Glass concludes

A screenshot of a video call interface. On the right side, there is a video feed of a man with a beard and glasses, wearing a dark suit and tie. Below the video feed, the name "Robert Vince" is visible. The background of the video feed is a dimly lit room with a bookshelf. The rest of the screenshot shows a document with text, which is partially obscured by the video call window.