BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Evergy Missouri West, Inc. d/b/a Evergy Missouri for Approval of a Special High Load Factor Market Rate for a Data Center Facility in Kansas City, Missouri	))))	File No. EO-2022-0061

REPLY BRIEF OF VELVET TECH SERVICES, LLC

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I. INTRODUCTION

The Commission should approve the MKT Tariff, as modified by the Evergy Stipulation, for all the reasons in the briefs of Velvet, Evergy and Google. Of significant concern to Velvet is that Evergy has indicated that if the Commission adopts the OPC Nonunanimous Stipulation, that Evergy would not offer to contract with anyone under Schedule MKT, including Velvet. 1 This would deprive Missouri of the economic benefits of new investment and the presence of large customers in the State seeking to procure renewable energy to supply their operations. Approving the MKT Tariff will provide a much-needed tool to attract large high load factor customers like Velvet and Google. Moreover, Schedule MKT is no longer just applicable to data centers, it gives the State and region another tool to attract additional high load factor customers – data centers, manufacturing facilities, and the like.

Schedule MKT is in the public interest because it (1) furthers state and local economic development efforts, (2) can further the state's renewable energy goals, and (3) provides direct and indirect benefits to Missourians, Kansas Citians, and other Evergy customers. The structure of the Schedule MKT and continued oversight by the Commission provides sufficient customer protections. Schedule MKT, as modified by the Evergy Stipulation, is in the public interest, represents a just and reasonable resolution to this proceeding, and Velvet respectfully requests that the Commission approve it.

Velvet is prepared to invest $800 million in the Kansas City area. Velvet is committed to supporting 100% of the new data center load with new renewable energy resources, and supporting the development of new renewable generation facilities within surrounding SPP electric grid. After two years of collaboration, Schedule MKT provided competitive energy pricing that dovetailed with Velvet's independent efforts to meet Velvet's sustainability goals and met a threshold in establishing the Kansas City area as a destination for Velvet's future development. Velvet encourages the Commission to approve Schedule MKT, as modified by the Evergy Stipulation, to allow Velvet to proceed with its project as planned.

[1] Tr. 204:1-4

II. REPLY

The Commission should approve Schedule MKT, as modified by the Evergy Stipulation. No other modifications to the MKT tariff or conditions are warranted. First, it should be noted that the MKT tariff proposed by Evergy and Velvet contain many modifications based on the concerns raised by OPC and Staff.[2] However, the modifications proposed by the Evergy Stipulation differ from the OPC[3] Nonunanimous Stipulation in four major respects, and to the extent the OPC modifications are different, they should be rejected, as discussed below. Instead, the Commission should adopt the modifications proposed in the Evergy Stipulation.

(1) Hold Harmless

OPC dedicates approximately half of its initial brief to its discussion on the hold harmless issue.[4] Given that Evergy and Velvet have agreed to a hold harmless provision, most of OPC's general arguments for why a hold harmless provision is warranted are moot given that both competing tariffs contain hold harmless provisions.

Staff, without citing a single case, complains that the hold harmless language in the Evergy Stipulation is "one-sided."[5] The hold harmless provisions in the OPC stipulation are unlawful and OPC's justifications for the same fall flat. OPC's criticisms of the hold harmless language in the Evergy Stipulation are meritless, and OPC's refusal to consider the upside for customers ignores their statutory charge to "represent and protect the interests of the public[.]"[6]

1. OPC's Hold Harmless Provisions are Unlawful

There is no authority for OPC's position to limit the Commission's inquiry in reviewing the impact of the MKT tariff. The Commission has explained, "[F]ailing to consider all relevant

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[2] *See generally,* Ex. 3, Ives Surrebuttal; Ex. 6, Lutz Surrebuttal; Ex. 300, Brubaker Surrebuttal; Ex. 9.

[3] OPC and Staff generally made the same arguments in their initial briefs. References to OPC throughout should be considered as references to both OPC and Staff.

[4] OPC Brief at 6-28.

[5] Staff Brief at 12.

[6] See 386.710, RSMo.

factors when adjusting a utility's rates…is generally prohibited in Missouri."[7] In 2014, Noranda filed an excess earnings complaint against Ameren.[8] There, complainants sought to use surveillance reports to show overearnings.[9] The Commission criticized this practice noting the "the Complainants merely took the September 2013 surveillance report data, looked at what they believed to be the most significant factors, and proposed fourteen adjustments."[10] In holding that the Commission "must consider all relevant factors," the Commission explained:

> [T]he law requires the Commission to consider all relevant factors… A complainant could adequately support a rate adjustment with a cost of service study less extensive than the audit undertaken by Staff if that adjustment can be shown to take into account all relevant factors. But the [evidence] offered by the Complainants in this case did not meet that standard.[11]

Here, the OPC Stipulation seeks to exclude all relevant factors. Not only is OPC's position unsupported by the law, but also the Commission has stated, exclusion of relevant factors is "generally prohibited in Missouri."

Unlike OPC's provision, the hold harmless provision in Evergy's stipulation is not unlawful retroactive ratemaking. In the only case cited by OPC for support if its proposition, the Court determined the Commission did not engage in prohibited retroactive rate making by requiring that proceeds from a company's sale of one of its facilities be used to reduce customers' rates.[12] Here, the Evergy hold harmless is more akin to a tracking mechanism. The Commission has previously determined a tracking mechanism which defers costs and revenues for

[7] Case No.EC-2014-0223, Report and Order, 17 (October 1, 2014) (citing *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 397 S.W.3d 441, 448 (Mo. App. W.D. 2013)).

[8] *Noranda Aluminum, Inc., et al. v. Union Elec. Co. d/b/a Ameren Mo.*, Case No. EC-2014-0223, Report and Order (October 1, 2014).

[9] *Id.* at 9.

[10] *Id.*

[11] *Id.* at 19-20.

[12] *Spire Mo., Inc. v. Pub. Serv. Comm'n*, 618 S.W.3d 225, 235 (Mo. banc 2021).

consideration in a future case and does not guarantee future recovery is not forbidden retroactive ratemaking.[13]

2. **OPC's Justifications for the OPC Hold Harmless Provisions Fall Flat**

OPC claims that the Commission should adopt the hold harmless provisions from the OPC Nonunanimous Stipulation for two reasons: (1) it is consistent with Evergy's stated intention that MKT customers will cover their costs; (2) it will "ensure that Evergy acts diligently when negotiating [MKT] contracts."

OPC's arguments completely ignore the second-step in the MKT process, which already protects against the harms which OPC fears. Under the MKT tariff as proposed, any customer desiring to seek service under MKT will have to file a contract with the Commission. The contract will contain details about the rate, start date, term, operating parameters, and terms and conditions. With respect to the rate itself – all assumptions, inputs, and calculations used to determine the rate will be filed with the Commission.[14] At that time, parties will have the opportunity to determine the incremental cost to serve and compare the same with the rates proposed. The Commission will have the opportunity to review the parties' determinations. If OPC does not have confidence that the prices reflected in the contract are consistent with *Evergy's intention* that the MKT customer cover its costs, OPC is free to present that evidence to the Commission at that time.

Further, if OPC has evidence of affiliate transactions, less than arms-length negotiations or any other issue such that it does not have confidence that the prices reflected in the contract are sufficient to cover the incremental cost to serve the MKT customer, OPC is free to present that evidence to the Commission at that time.

OPC spends ten pages of its brief engaging in an academic discussion of basic negotiation principles. OPC claims that in a negotiation between a MKT customer and the company, absent a "true and proper" hold-harmless provision, Evergy has no incentive to ensure the MKT contract produces revenue sufficient to cover the cost to serve the MKT customer. Of course, this academic

[13] *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Mo. Service Area*, 2007 WL 1597782 (Mo.P.S.C.) (May 22, 2007).

[14] Ex. 8, Schedule 1, 4.

exercise is purely speculation. The speculation is surprising since an exemplar contract with prices was filed with the Application. Darrin Ives testified at the hearing that Velvet and Evergy "have agreed in principle to the structure that would fit the exemplar contract utilizing best available pricing data at the time we were negotiating[.]"[15]

Did OPC undertake any analysis whatsoever to determine if their academic theory on negotiating incentives bore out in the real world – between two parties who negotiated in good faith in the absence of a hold harmless provision? No.

What do we know about the exemplar contract actually negotiated between the company and a proposed MKT customer in the absence of a hold-harmless provision? Despite OPC's argument that a MKT customer is only motivated to pay the lowest possible price, Velvet voluntarily committed to paying a Renewable Energy Support Charge for the benefit of all customers. Beyond the voluntary contribution by Velvet, there are three components to the rate: (1) an energy charge (the largest component of the rate) (2) a customer service charge and (3) a demand charge. The energy charge would essentially be a pass-through based on the Southwest Power Pool (SPP) hourly day-ahead price. The proposed customer service charge is higher than the current service charge for SIL customers.[16] All that is left is the demand charge. OPC provided no testimony, no facts, and no legal analysis that supports their ill-conceived *theory* that without their hold harmless provisions, parties will agree to a price insufficient to actually cover costs, despite a real-world example in the record.

The only case relied on by OPC to support its hold harmless provision is *Office of Public Counsel v. Missouri Public Service Commission* ("*Atmos*").[17] In that case, the Commission conducted a prudence review of Atmos Energy Corporation's actual cost adjustment (ACA) filings.[18] Staff proposed ACA disallowances with respect to Atmos's transactions with its affiliates.[19] Staff's position was rejected by the Commission based on the Commission's reliance

[15] Tr. 200:6-10.

[16] Tr. 205:8-25

[17] 409 S.W.3d 371, 376 (Mo. banc 2013).

[18] *Id.*

[19] *Id.*

on the presumption of prudence.[20] OPC argued that a presumption of prudence is only appropriately applied in arms length-transactions (not for transactions with affiliates).[21]

The *Atmos* case has no relevance here. This case does not involve affiliate transactions.[22] Evergy and Velvet are not asking for a presumption of prudence to be applied to the contract. Instead, here, both versions of the tariff before the Commission provide that any Market Rate Contract will be filed with the Commission for review, at which time any interested party will have access to the contract as well as all assumptions, inputs, and calculations used to determine the rates to be filed with the Commission.[23] If the prices proposed in the contract are sufficiently low that OPC is not confident that the revenues will exceed costs, it can raise the issue at that time. OPC has not offered any support in the record that there is either an affiliate relationship or lack of an arms-length transaction. There is nothing in the record that supports OPC's specious allegations. Until the contract is presented to the Commission, OPC's arguments are hopelessly premature and purely speculative. The fact that the Commission will review the contract protects other customers from the dangers OPC claims only their hold harmless provisions will prevent.

3. **OPC's Criticisms of the Hold Harmless Provision in the Evergy Stipulation Are Meritless**

OPC attempts to paint the hold harmless provision of the Evergy Stipulation as a "clawback provision," but it does nothing of the sort. A "true and proper" clawback, as defined by Black's Law Dictionary is "a statutory or contractual provision that for specified reasons reverses a distribution or payment."[24] The Evergy Stipulation only allows Evergy and Velvet to present evidence of benefits to offset any deficiency identified. It would only be utilized if (1) the revenues from the MKT customer did not exceed costs to serve for which the rates were designed to recover; (2) if Evergy and Velvet don't agree to cover the deficiency; (3) if substantial and competent evidence of benefits is presented; and (4) if the Commission agrees that benefits should be utilized

[20] *Id.*

[21] *Id.*

[22] Ex. 3, Ives Surrebuttal, 15:9-12.

[23] Ex. 8, Schedule 1, p. 4

[24] CLAWBACK, Black's Law Dictionary (11th ed. 2019).

to offset the deficiency. It is not a clawback provision, but a delegation to the Commission to examine all relevant factors when making its determination.[25]

In adhering to the only lawful form of review - "all relevant factors" - the Commission regularly approves "offsets" or "netting" of benefits against costs. For example, in EM-2018-0012, the Commission understood that a Westar and GPE merger would result in benefits in the form of efficiencies and savings. The Commission noted merger savings would benefit customers in the form of lower revenue requirements and lower future rates. Still, the merger would involve certain "transition costs," such as voluntary severance, integration planning, network connectivity etc.[26] The Commission approved an agreement where transition costs would be offset by savings.[27] The parties agreed that transition costs would be offset by the benefits of the merger, stipulating that transitions costs (*in excess of the benefits that the transition costs are intended to attain)* would not be recovered in rates.[28]

As part of that condition, the parties agreed:

> KCP&L and GMO shall be required to attest in all future rate proceedings before the Commission that no transition costs in excess of their corresponding benefits are included in cost of service and rates, and to provide a complete explanation of the procedures used to ensure that transition costs, in excess of their corresponding benefits, are not included in cost of service or rates. This commitment shall be required until all transition costs are fully amortized.[29]

In this instance KCP&L and GMO are allowed to offset merger savings against transition costs. The same request is being made by Evergy in this case. Evergy simply requests that other consumer

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[25] As described above, the exclusion of all relevant factors would be unlawful. See *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 397 S.W.3d 441, 448 (Mo. App. W.D. 2013).

[26] *In the Matter of the Application of Great Plains Energy Incorporated for Approval of its Merger with Westar Energy, Inc.*, Case No. EM-2018-0012, Report and Order (May 24, 2018), 16.

[27] *In the Matter of the Application of Great Plains Energy Incorporated for Approval of its Merger with Westar Energy, Inc.*, Case No. EM-2018-0012, Report and Order (May 24, 2018).

[28] *Id. at* Attachment 1 (Exhibit A to Stipulation and Agreement filed on January 12, 2018, 7 (Condition 19)).

[29] *Id.*

benefits be allowed to be considered by the Commission as a means to offset any deficiency – and show, in fact, there is no harm to non-MKT customers as a result of service under MKT.

Next, OPC criticizes the Evergy hold harmless provisions because OPC claims it relies on "intangible benefits."[30] The addition of new residential and commercial customers as a result of a massive economic development project are not "intangible benefits" and indeed can be measured.

Even if the Commission were to consider economic development benefits "intangible," the Commission has not previously rejected the consideration of benefits simply because they are difficult to quantify. In Case No. EA-2015-0256, the Commission addressed the intangible benefits gained from the experience of constructing and operating the facility and the results that will lead to increased use of solar power in the future.[31] When deciding whether the project was economically feasible, the Commission concluded:

> GMO readily agrees that construction of the proposed pilot solar plant is not the least-cost alternative for obtaining an additional three megawatts of electric power it is not even the least cost alternative for obtaining that three megawatts of electric power from a renewable resource – wind power would be cheaper. But the purpose of this pilot solar plant is not solely to provide the cheapest power possible to GMO's customers. Rather, its purpose is to help GMO to develop more and cheaper solar power in the future. The benefits GMO and its ratepayers will ultimately receive from the lessons learned from this pilot project are not easily quantifiable since there is no way to measure the amounts saved by avoiding mistakes that might otherwise be made. But it is likely that future savings will be substantial. The Commission concludes that as a pilot project, GMO's solar power plant is economically feasible.[32]

OPC's claim that the Commission should decline to adopt Evergy's hold harmless provision because "intangible benefits" are hard to quantify should be rejected. Regardless of whether the benefits are "tangible" or "intangible," if the Commission determines the evidence of benefits offered by Evergy or an MKT customer is not supported by substantial or competent evidence, it has the opportunity to disallow the purported benefits.

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[30] OPC Brief at 22.

[31] *In the Matter of the Application of KCP&L GMO Co. for...a CCN Authorizing it to Construct, Install, Own, Operate, Maintain and Otherwise Control and Manage Solar Generation Facilities*, Case No. EA-2015-0256 (Mar. 2, 2016), 15.

[32] *Id.*

Next OPC claims for the first time that Evergy's hold-harmless provision is discriminatory.[33] OPC claims there are other large power service customers who could claim providing economic benefits may justify a different cost allocation, but under the tariffs are not permitted. OPC ignores that large industrial customers regularly present evidence of economic benefits to the Commission in relation to revenue requirement allocation and rate design.[34] Velvet is unique based solely on size and load factor. Further, Evergy has already made a commitment that puts Velvet in a class by itself by agreeing to identify the costs and revenue impacts from Schedule MKT customer's operations separately. Requesting an all relevant factors test does not make Schedule MKT discriminatory.

Finally, OPC asks the Commission to reject the "all relevant factors" hold harmless provision in Evergy's stipulation because it would make reviews of contract more contentious.[35] But Missouri courts have repeatedly held that, while it may be inconvenient to abide by statutory mandates like the "all relevant factors" requirement, "neither convenience, expediency or necessity" justify the Commission taking procedural shortcuts.[36] Here, none of OPC's criticisms of the Evergy Stipulation hold harmless language are grounds for the Commission to reject the only lawful all relevant factors test.

4. **OPC's Focus on Only Downside is Short-Sighted**

OPC and Staff have purposely failed to discuss what happens if the costs assigned to a Schedule MKT customer are less than the revenues generated by that customer. The excess revenues flow to the benefit of all customers. OPC's refusal to consider the upside for customers ignores their statutory charge to "represent and protect the interests of the public[.]"[37]

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[33] OPC Brief at 23.

[34] See, e.g., Case No. ER-2019-0374, Maini Direct, on behalf of MECG ("Not only do large companies provide jobs in the Empire service area, but the existence of a competitive industrial base helps to keep all rates lower than they otherwise would be.").

[35] OPC Brief at 26.

[36] *State ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. Banc 1979) (citing to *State ex rel. Kansas City v. Pub. Serv. Comm'n*, 301 Mo. 179, 257 S.W. 462 (Mo. banc 1923)).

[37] See 386.710, RSMo.

If the addition of Velvet causes the addition of new customers to the Evergy system, which causes an existing Company serving Velvet to increase its energy usage, or causes the addition of new commercial or industrial customers to the Evergy system, those increased revenues are relevant factors in an all relevant factors examination of the impact of a MKT customer.

All Evergy and Velvet are requesting is the ability to present evidence to the Commission of the increased benefits from all customers as a result of the addition of Velvet.

(2) RES and RESRAM

The Commission should grant the variances requested in the Evergy Stipulation and adopt the RESRAM language proposed therein. No party denies the Commission has the authority to exempt an MKT Customer from the RESRAM. As a matter of law, the Commission has the authority to grant the variances requested. The solution in the Evergy Stipulation is fully consistent with the legislative intent of the RES statute. Even the signatories to the OPC proposal disagree on its effect and further, it appears to be targeted at a single customer rather than broadly applicable. Furthermore, OPC has indicated it does not intend to challenge a Commission decision to grant a RES variance to Velvet.[38]

1. **The Commission has the Authority to Grant the Variances Requested**

OPC believes that "the grant of…a variance would exceed the scope of the Commission's authority."[39] Similarly, Staff claims the Evergy Stipulation's provisions as to RES and RESRAM are unlawful.[40] As Velvet explained in its initial brief, these arguments ignore the broad authority and discretion granted to the Commission by the General Assembly.

The provisions of Section 393.1030, RSMo., expressly provide that the Commission not only has the authority, but the mandate to "prescribe by rule" the implementation of the provisions of Section 393.1030, RSMo. This mandate is also bootstrapped by the more recent addition of

[38] Tr. 93:11-4.

[39] OPC Brief at 35. Still, counsel OPC indicated that it is not sure it would pursue a legal challenge should the Commission approve the variances as requested by Evergy and Velvet. Tr. 93:11-4.

[40] Staff Brief at 2.

express rulemaking authority in Section 393.1030.6, RSMo, which was added by the General Assembly in 2013.

This Commission followed the legislative diktat and has promulgated regulations to implement Section 393.1030, RSMo. Those regulations expressly provide that the Commission may grant variances to the provisions of the regulation on a showing of good cause. Because Section 393.1030 does not expressly define all terms or detail the portfolio requirement, those items are defaulted to the Commission. In the current case, granting the RES and RESRAM variances in the Evergy Stipulation would be consistent with the intent of Section 393.1030 – increasing the use of renewable energy. The exclusion of the clean energy purchased by Velvet, placed onto the grid, and then sold by Evergy to Velvet aids in more renewable energy being utilized in Missouri. In the end, 100% of the energy to support Velvet's load will be added in the form of renewable energy to the SPP grid, and Evergy will be sourcing the energy from SPP to serve Velvet. This is compliant with Section 393.1030 and the variances should be approved.

Staff and OPC's arguments are also inconsistent with their positions in previous cases – specifically, Staff's previous recommendation on a RES rule waiver and agreements by Staff and OPC that the Commission has the authority to grant waivers from the definitions in the RES rule. As OPC Witness Lena Mantle admitted, the Commission has previously granted electric utilities variances under 20 CSR 4240-20.100(11).[41]

In Case No. EO-2019-0316, KPC&L Greater Missouri Operations (GMO) submitted its 2018 Renewable Energy Standard Compliance Report. In reviewing the report, Staff noted the Company was "short" on the RES requirements for the 2018 compliance year due to retirement of RECs which were expired.[42] Staff's proposed solution was to allow the Company to retire additional RECs (in 2019) to make up for the "short" the year before.[43] GMO then requested a waiver of the rule consistent with Staff's recommendation, and the Commission granted the waiver.[44]

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[41] Tr. 566:13-14.

[42] *In the Matter of KCP&L GMO Company's Submission of the 2018 Renewable Energy Standard Compliance Report*, Case No. EO-2019-0316 Order (Sept. 4, 2019).

[43] *Id.*

[44] *Id.*

The same argument that OPC and Staff makes here could be made with respect to EO-2019-0316.[45] The statute requires a certain percentage of electricity from renewable energy resources "in each calendar year." See Section 393.130.1, RSMo. In 2022, that percentage is 15%. There is nothing in the statute that expressly permits the Commission, if it finds a company short say at 14% to simply change the percentage in the next year to 16%. Further, there is nothing in the statute that expressly allows the Commission to average two calendar years together in determining whether a Company meets the RES.

So what does the statute expressly allow? It expressly permits the Commission to "prescribe by rule a [RES] portfolio requirement] and also expressly permits the Commission to "promulgate rules for the implementation of this section...to the extent such rules are consistent with…[the statute]."[46] The legislature's intent is clear – to encourage the expanded use of renewable energy in Missouri – or said differently, to "green" Missouri's electric utilities portfolios. Allowing a company to "make up" a short from one calendar year in the next calendar year is consistent with the statute's purpose of greening Missouri's electric utilities portfolios. Similarly, Velvet and Evergy's request for variances here is consistent with the statute's purpose. The statute's express delegation to the Commission allows the Commission to lawfully consider the request for variances. Because good cause exists, here, such variances should be granted.

Similarly, in EO-2014-0151, in which GMO filed its application to establish a RESRAM, the Commission approved a Non-Unanimous Partial Stipulation and Agreement[47] which was joined by Staff, OPC and Renew Missouri.[48] The Signatories agreed the Commission should authorize (and the Commission did authorize) variances to the RES rule - specifically as to the definitions in the rule (the definition of RES Compliance Costs).[49] The Signatories also agreed (and the Commission approved) variances to the provisions regarding the (a) pass-through of

[45] *Id.*

[46] *See* Sections 393.130.1 and 393.130.6, RSMo.

[47] Ex. 307.

[48] *In the Matter of KCP&L GMO Company's Application for Authority to Establish a Renewable Energy Standard Rate Adjustment Mechanism*, Case No. EO-2014-0151 (Nov. 5, 2014).

[49] Ex. 307, 2.

benefits of savings achieved in meeting RES requirements, (b) landfill gas costs, and (c) per kWh billing.[50] The Commission lawfully granted the variances requested, and it should grant the same here because good cause exists. The Commission is charged with making determinations that are just and reasonable. Applying additional charges for renewable energy not acquired to serve this customer would not be cost-based or equitable.[51] And as OPC agreed at the hearing, the variance proposal in the Evergy Stipulation "would solve the problem in as far as it would mean that there was not increased RES compliance costs passed onto other customers."[52]

The arguments above cannot be negated by attempting to distinguish Schedule SSP. They stand on their own. However, the SSP adds additional support as an example of how the Evergy/Velvet solution works in practice. There is no question that Schedule SSP customers whose solar energy production exceeds consumption will not pay RESRAM.

> **MONTHLY BILLING:**
>
> **…**
>
> 2. The Participants share of the solar resource energy production will be subtracted from the metered energy consumed by the Participant for the billing month. Should the solar resource energy production amount for a given month be larger than the Participant's metered energy consumption, the net energy will be zero for that month.[53].

The RESRAM charge is a kwh charge.[54] Anything times zero is zero.

In addition, there is no question that the rule exempts the solar energy production from the RES portfolio requirement. The SSP tariff cannot be read in isolation. It must be read in the context of the RES Regulation. That rule, 20 CSR 4240-20.100, provides: "The RES portfolio requirements are based on total retail electric sales of the electric utility." Total retail electric sales" is defined by 20 CSR 4240-20.100(W) as "the megawatt-hours (MWh) of electricity delivered in a specified time period by an electric utility to its Missouri retail customers as reflected in the retail customers' monthly billing statements[.]" The monthly billing statement for an SSP

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[50] Ex. 307, 2-4.

[51] See Ex. 300, Brubaker Surrebuttal, 19:4-6; *see also* Ex. 6, Lutz Surrebuttal, 9:22-28.

[52] Tr. 93:7-10.

[53] Ex. 104.

[54] Tr:447:24-448:2.

customer whose solar production matches consumption at 100% will reflect "zero" for net energy. The definition of total retail electric sales excludes the amount of solar energy production for SSP customers from the RES portfolio requirements. Further, despite not paying the RESRAM, RECs are retired "on behalf of Participants." The Commission not only has the authority to grant the variances requested here, but it has also exercised that authority before – and good cause exists to do the same here.

2. **The Variances Requested are Consistent with the Legislative Intent of the Statute**

OPC is also wrong that the Evergy and Velvet RES and RESRAM solution would "thwart the clear and plain intent of the legislature."[55] Voters approved the statute adopting the RES standard in November 2008 more than ten years ago. The statute itself only required 2% renewables by 2013. At that time, no one contemplated that a customer would require 100% of its energy to be supplied by renewable energy. It simply was not contemplated. But today, Evergy is being approached by several corporations seeking to have 100% of their energy produced by renewable energy.[56]

This new self-imposed standard by companies has put a strain on utilities that have generation in place for years and its ability to serve its captive load reliably. Simply stated, many utilities cannot meet the renewable energy requests of these companies.[57] For SIL customers desiring renewables, Evergy has to find the generation. Schedule MKT customers are likely to have monthly demands three times that of Schedule SIL customers.[58]

In the case of Velvet, the Customer has committed to invest in and procure enough renewable resources in the SPP footprint to support 100% of its load with renewable resources. In other words, it will commit to expand renewable generation in the SPP footprint (which will also

[55] See OPC Brief at 36.

[56] Ex. 1, Ives Direct, 16.

[57] See Tr. 243:11-244:16 (Evergy is not currently in a position to source and provide renewable generation to meet the 100% renewable needs of customers at the size and potential scale of an MKT customer).

[58] *Compare* Exhibit 301 (SIL Tariff) to Exhibit 8 (MKT Tariff, as attached to Evergy Stipulation).

result in economic development for the region) to offset 100% of its energy load that Evergy supplies to it from SPP. No customer of this size (that would require a "utility scale" addition of renewables to SPP)[59] in Missouri has previously made such a commitment.[60] Velvet is doing this on their own. In exchange for this commitment, Velvet seeks to be released from the RESRAM charges. Evergy and Velvet seek variances to recognize the uniqueness of this situation, the commitment made by Velvet, and to ensure that no other customer pays for the addition of duplicate renewable resources.

3. **The OPC Proposal is Unworkable**

Not even the signatories to the OPC Nonunanimous Stipulation agree as to the effect of its RESRAM provision. OPC claims that its RESRAM provisions "mean that if Evergy already has sufficient renewable resources to serve the customer under the RES statute, there will not be any incremental costs and hence the MKT customer will not have had to pay anything."[61] However, Staff and MECG appear to disagree, suggesting excess RECs could be monetized and have value on the secondary market.[62,63] In addition, Staff asks the Commission to keep in mind that Schedule MKT "will apply not only to Velvet but to all future customers taking service under schedule

[59] Evergy explained this would be a "utility scale purchase power type agreement" in the SPP footprint. Tr. 143:10-11.

[60] During the hearing, OPC pointed out that a hypothetical customer (Ford) could choose to also support is load with 100% renewables and if taking service under LPS would also pay RESRAM. Tr. 346-347. Schedule MKT is no longer limited to data centers. Under either of the competing tariffs at issue in the case, as long as the hypothetical customer could meet the availability requirements of Schedule MKT (which would likely require a utility scale addition of renewables to reach 100% renewables) it would likewise be eligible for an exemption.

[61] OPC Brief at 33.

[62] Tr. 501:6-16.

[63] Perhaps OPC does not agree with Staff and MECG because then it would have to also agree that the solution in the Evergy stipulation would result in Evergy retaining existing excess RECs, which if Staff is correct, could be made available for sale into the open market and further reduce costs of Evergy's captive customers.

MKT"[64] and acknowledges the Renewable Energy Support Charge is unique to Velvet. It is surprising then to see a reference to the "a renewable energy contribution" (something unique to Velvet) in the tariff itself. OPC's RESRAM provision is impractical, not generally applicable and not just or reasonable.

4. **RES and RESRAM Ramifications**

Again, all parties agree MKT Customers should be exempt from the RESRAM and the Commission has the authority to exempt MKT Customers from RESRAM. However, the OPC approach risks Evergy not offering a contract to Velvet, as explained by Evergy witness Mr. Ives. This decision by the Commission is even more critical to the overall benefits of the region since Velvet has committed to obtain enough energy to meet 100% of its energy requirements from renewable generation in the SPP footprint. The decision by the Commission to accept the RES and RESRAM variances under these facts will send a clear message to entities desiring to have all of their load supported by renewable generation and considering Missouri as a suitable location.

(3) Schedule PED (and Section 393.1640, RSMo)

The issue of Schedule PED and the Economic Development Discount Rider ("EDR") is almost entirely ignored by the Staff with less than a page and a half devoted to it. (The EDR in question is found in Evergy's current tariff at Schedule PED). OPC has briefed this issue, but in its opening statement stated that this issue was a matter of concern to MECG and that MECG would handle this matter.[65] MECG, which was so concerned with this issue has not filed a single word on this issue. MECG failed to raise the issue in testimony, failed to include it in the Joint List of Issues, and the issue was absent from their position statement. Finally, MECG did not file a brief in this case.[66]

[64] Staff Brief at 1-2.

[65] Tr. 94, 13-21.

[66] MECG has therefore abandoned the issue. "Any proposal by the public counsel was apparently abandoned by his failure to brief such issue." See *In Re Kansas City Power & Light Co.*, 28 P.U.R.4th 398,1979 WL 465082 (Mo.P.S.C.), 23 Mo.P.S.C. (N.S.) 1, Case No. Er-78-252 (Mar. 5, 1979).

Now OPC carries the cudgel (after they expressly noted that MECG's counsel is the expert on this issue), perhaps by default. A review of OPC's brief reflects that OPC should have deferred to MECG on the EDR. This Commission should question if OPC even has a position and if it should be allowed to go forward on the EDR issue.[67]

A review of the Statements of Position by OPC, Staff and MECG, demonstrate that there is no reference, either directly or by implication, to a concern with the EDR (Schedule PED) or any restrictions on the usage of Schedule PED by a MKT customer. MECG's Statement of Position is entirely silent on the "Availability" section of Schedule MKT. OPC and Staff's respective Statements of Position are equally silent. Even the references in OPC and Staff's Statement of Position to various testimony is similarly devoid of any objection to the ability of a customer to use Schedule MKT if they had previously used the EDR. Both OPC Witness Geoff Marke and Staff Witness Robin Kliethermes proposed sample tariffs.[68] In each case, there is no restriction in the "Availability" section of the proposed tariff with respect to the EDR.

OPC Witness Marke's testimony reflects only three (3) items with respect to the "Availability" section and none of those have any reference to restricting EDR.[69] Quite simply, there was no filed opposition to a Schedule MKT customer having previously taken the EDR (Schedule PED) until the night before the hearing in this matter. That night the OPC, Staff and MECG entered into a Nonunanimous Stipulation which added the EDR issue for the very first time. Such an issue is not properly before this Commission and should be rejected entirely. This Commission's Order Setting Procedural Schedule expressly referenced that issues must be raised in the Statements of Position or "[T]he Commission will view any issue not contained in this list of issues as uncontested and not requiring resolution by the Commission."[70] This Commission should reject the proposed changes to Schedule MKT relating to the availability of the same by

[67] In one of the most amazing and unprecedented statements undersigned counsel has ever seen, OPC actually expressly states that OPC might walk away from its current position and take some other position. "The OPC may choose to adopt a different position in its reply brief depending on the position taken by other parties on this issue." OPC Brief, page 41, n.12.

[68] Schedules GM-7 and RK-1, respectively.

[69] Rebuttal Testimony of Geoff Marke 12, 6-22.

[70] Order Setting Procedural Schedule, Dec. 15, 2021, Section 6.E.

any customer who has utilized the EDR as not having been properly raised, preserved or before the Commission.

OPC now dedicates just six pages in its Brief to the issue. Amazingly, OPC never even cites the statute which authorizes the EDR, Section 393.1640, RSMo. This avoidance actually makes some sense, since the Evergy Stipulation comports with the plain language of Section 393.1640, RSMo, and the OPC Nonunanimous Stipulation is in direct contravention to the statute.

Section 393.1640.1, RSMo, states as follows: "The discount shall be applied to such incremental load from the date when the meter has been permanently set until the date that such incremental load no longer meets the criteria required to qualify for the discount[.]"[71] The intent of the statute is clear from a reading of its plain language: to attract new customers (and new electricity load) to locate in Missouri. This intent is also amplified by the following subsection 2, which provides that the cost of the EDR is to be uniformly assessed on all classes.[72] The critical importance of economic development is such that the General Assembly has stated that all persons should aid in the growth of our economy…not just the new businesses themselves. The General Assembly fully understood that some projects would fail without the EDR.

The testimony in this case is quite clear that that the ability of Evergy to offer Schedule MKT and for Velvet to utilize it relies on the access to the EDR, Schedule PED of Evergy's tariffs. As Witness Lutz testified:

> **Q. Okay. And without the ability to have an EDR, do you believe that it would be more difficult or less difficult to attract customers to the Kansas City area region?**
>
> **…**
>
> THE WITNESS: Yes. Mr. Fischer, I've worked on a few of these large customer related things and -- and yes, that price sensitivity is a significant issue. And I think that the lack of an EDR would be problematic
>
> BY M. FISCHER:
>
> **Q. In the case of Velvet, which we're talking about in this case, is the EDR being used as any kind of transition to the new tariff?**

[71] Section 393.1640, RSMo.

[72] Section 393.1640.2, RSMo.

A. I believe it is, yes.

Q. And would you explain why that's necessary is your understanding?

A. Right. Under my understanding and -- and -- and exhibited in our testimony and -- and -- and -- both written and oral -- is that there is a ramp up period associated with these customers. That unlike many where they could, you know, flip a switch and be at full load, this will take a period of time, potentially five years, for us to get to that steady state load.

And so allowing the EDR and the – and the large power rate to be that introductory rate schedule, it allows for that ramping. It allows us to keep the high-- the higher thresholds that we desire for the special rate and allow the customer to kind of grow into it as opposed to, you know, some other approach.[73]

The effect of the proposed restriction is to kill the usefulness of Schedule MKT for large customers, like data centers, with extended load ramp periods, that want to bring and build large scale projects in Missouri. This proposed restriction would deny economic growth and development in the Kansas City area, if not across the entire State of Missouri. OPC, Staff and MECG simply invent this new requirement and then assert an intent by the legislature that is unsupported by the statute itself.

Both OPC and Staff appear to argue that they are not taking any action on the EDR but instead only on Schedule MKT. This argument is plainly subterfuge on their part. Since OPC and Staff are not the General Assembly and they cannot change the wording of Section 393.1640, RSMo, they instead attempt to frustrate the goals of this statute in the OPC Nonunanimous Stipulation. They do this by imposing a going forward restriction on anyone who has used the statutorily mandated relief under Section 393.1640. The following shows the blatant attempt to frustrate the statute:

Barred by statute: To get EDR, you cannot take Schedule MKT.

Barred by OPC/Staff/MECG: To get Schedule MKT, you cannot take EDR.

This is a distinction without a difference. In either case the result is limiting those who can use the EDR, which is not authorized by statute and is the sole province of the General Assembly.

[73] Tr. 193:9-12, 24-25; 194:1-25.

As noted in Velvet's Initial Brief, there is nothing in Section 393.1640 that indicates the legislature had any intention of limiting the use of other lawfully applicable tariffs once a customer had taken advantage of the statute's provisions. The General Assembly is well aware of how to restrict access to economic development benefits and it has chosen not to limit Section 393.1640 in the manner which OPC, Staff and MECG have agreed upon. This brazen attempt to usurp the power of the General Assembly must be rejected.

The Commission should reject the PED prohibition proposed in the OPC Nonunanimous Stipulation. As previously noted, and without waiving its arguments above and in its initial brief, Velvet does not object to the compromise language offered during the hearing by Mr. Ives.[74] Velvet does not support the language offered OPC on the second day of the hearing (Exhibit 904) that would limit Schedule MKT "to the lesser of three (3) customers or 500MW." As a matter of public policy, and given the comments from parties on expediting this docket, the Commission should reject OPC's invitation to create a "race" to qualify for Schedule MKT.

(4) Securitization

OPC argues that the Commission should include the securitization provision from the OPC Nonunanimous stipulation now because it means "less work" during the securitization case.[75] It's not always "less work" to act piecemeal. OPC's position invites the Commission to add securitization provisions to tariffs as they come before the Commission in whatever timing the Company decides, in dockets that may include dozens of other issues beyond securitization. Even if this Commission were to accept OPC's position, a comprehensive and methodical review of Evergy's tariffs will be required if and when Evergy files an Application for Financing Order. Acting now will not eliminate that work. A comprehensive and methodical review in a docket focused solely on the securitization issue is likely to produce a more just and reasonable result than OPC's piecemeal approach.

[74] Ex. 7. Note, this argument is being made in the alternative. Velvet maintains that the EDR solution proposed in the OPC Stipulation is prohibited by statute. *In the alternative and without waiving that argument*, Velvet has stated its non-objection to Exhibit 7.

[75] OPC Brief at 40

Further, OPC's position is wholly inconsistent with Commission practice. Currently, Evergy has the authority to file an application with the Commission to establish a Renewable Energy Standard Rate Adjustment Mechanism (RESRAM). As to Evergy *Metro*, Evergy has not filed an application for RESRAM and the same has not been approved. Undoubtedly, many of Evergy Metro customers would be subject to the RESRAM if sought by Evergy and approved by the Commission. Still, Evergy Metro's existing tariffs make no mention of RESRAM, because while authorized, the same has not yet been approved by the Commission. Bizarrely, Staff argues that failure to include a reference to a statutorily authorized, but not yet approved, charge (securitization) in the tariff is unlawful.[76] They have not raised the same argument as to the failure of Evergy Metro's tariffs to reference RESRAM.

Evergy has not yet filed an Application for a Financing Order. Evergy has only filed notice of intended case filing.[77] OPC speculates that Evergy will file an application and that Commission would, at some later date, approve a financing order. OPC asks the Commission to make a determination in this case regarding hypothetical questions and future events. However, it is well settled that the Commission "should not be issuing decisions…'that are only advisory as to future, hypothetical situations.' "[78]

III. CONCLUSION

This Commission has before it the unique opportunity to unlock a massive economic development project in the Kansas City area. Moreover, this opportunity comes with the imprimatur of the General Assembly and its expressed desire to bring data centers to Missouri. But, as an added bonus, the entire project is supported by 100% renewable energy - and existing ratepayers will not pay for these renewable resources, the new data center operators will pay for those renewables. All this is accomplished by this Commission approving Schedule MKT as provided in the Evergy Stipulation.

[76] Staff Brief at 8-9.

[77] See EF-2022-0155.

[78] *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n of State*, 392 S.W.3d 24, 38 (Mo. App. W.D. 2012) (citing *State ex rel. Mo. Parks Assoc. v. Mo. Dept. of Natural Res.*, 316 S.W.3d 375, 384 (Mo. App. W.D. 2010)).

However, for some unknown and even less explained reason, Staff and OPC seek to jeopardize these opportunities. Their objections should be rejected by this Commission as outlined in this Reply Brief. MECG has not filed any briefing and has thus waived its positions.[79] In the end, this Commission should approve the Evergy Stipulation and the related Schedule MKT.

The differences between the Evergy Stipulation and the Stipulation supported by OPC and Staff are few but crucial. The hold harmless language proposed in the Evergy Stipulation preserves this Commission's authority and discretion to evaluate all relevant factors in the event that there are costs to be allocated. OPC and Staff wish to strip that authority and discretion; their proposal goes against the spirit and letter of the law and this Commission's prior decisions. Their position should be rejected.

Under the Evergy Stipulation, Velvet is committed to supporting 100% of its operations in the Kansas City area with new renewable resources on the SPP grid. To unlock this commitment, a variance in relation to the existing RES/RESRAM regulation is necessary. This Commission has the express authority to grant variances from the provisions of the RES/RESRAM regulation and there is good cause in this matter for it to do so. OPC recognized that this variance would benefit all customers, yet they simply argue that the Commission can't grant a variance from the regulation. That is the sum total of their argument. However, they are incorrect. In their haste to stop economic growth and development, they have ignored the language in Section 393.1030, RSMo, and the provisions of the regulation. This Commission should approve the Evergy Stipulation for Schedule MKT as to the RESRAM and support the development of new renewable resources in the region while protecting all customers from unnecessary cost.

The newly raised objections to the economic development discount rider by OPC and Staff must also be rejected. The intent of the General Assembly is to foster economic development and the EDR cannot be curtailed as OPC and Staff seek. Further, OPC and Staff's position goes against the intent of the General Assembly to foster the development of data centers. If they wish to limit the EDR, their recourse should be to the General Assembly, not to this Commission.

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[79] "Any proposal by the public counsel was apparently abandoned by his failure to brief such issue." See *In Re Kansas City Power & Light Co.*, 28 P.U.R.4th 398,1979 WL 465082 (Mo.P.S.C.), 23 Mo.P.S.C. (N.S.) 1, Case No. Er-78-252 (Mar. 5, 1979).

OPC and Staff also have raised another premature issue: securitization. This Commission should address this issue at the time it becomes an issue, if that ever occurs. A premature advisory opinion is uncalled for and this Commission should reject this argument by OPC and Staff.

The opportunity for data center growth and development is before this Commission. The Evergy Stipulation and related Schedule MKT will unlock that opportunity while safeguarding all customers. This Commission should approve the Evergy Stipulation to secure a massive economic development project for Missouri, a "long-term customer [for Evergy] and community partner [for Kansas City]."[80]

WHEREFORE, Velvet Tech Services appreciates the Commission's consideration of this new tariff and respectfully urges the Commission to grant the relief requested in Evergy's Application, and approve Schedule MKT, as modified by the Evergy Stipulation, and for such other and further relief that is just and proper under the circumstances.

Respectfully submitted,

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[80] Tr. 215:18-19.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was serve upon all of the parties of record or their counsel, pursuant to the Service List maintained by the Data Center of the Missouri Public Service Commission, on this 18th day of February, 2022.

/s/ Stephanie S. Bell
Stephanie S. Bell