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 West for Approval of a Special High Load Factor Market Rate for a Data Center Facility in Kansas City, Missouri	)))))))	Case No. EO-2022-0061

INITIAL BRIEF OF THE MISSOURI OFFICE OF THE PUBLIC COUNSEL

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February 8, 2022

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Introduction

To echo the sentiment expressed in the OPC's opening arguments, this is an odd case given how aligned the parties appear to be. *See* Tr. Vol. 2 pg. 86 lns. 1 – 14. For example, all parties to this case have put forward and agreed to some version of an MKT tariff sheet that they would be willing to accept. *See* Ex. 8 and Ex. 203. As such, the dispute in this case is not over whether the Commission should approve the schedule MKT tariff sheet, but rather, *which* schedule MKT tariff sheet the Commission should approve. This simplifies the case considerably and relieves the need to discuss several points including the merits of the MKT tariff sheet as a whole. However, the case is, unfortunately, still not completely without disagreement.

Despite how close the parties are, there remains a handful of issues that form what now appears to be an impassable divide. These disputed points exist primarily as differences between competing tariff sheet proposals. The first tariff sheet was offered as an attachment to a non-unanimous stipulation and agreement entered into between the OPC, the Staff of the Commission ("Staff"), and the Midwest Energy Consumers Group ("MECG"), and the second was an attachment to a non-unanimous stipulation and agreement between Evergy Missouri West, Inc. d/b/a Evergy Missouri West ("Evergy" or "the Company") and Velvet Tech Services, LLC ("Velvet Tech"). *See* Ex. 8 and Ex. 203. Because of the high degree of similarity between these two tariff sheets, the OPC will focus on discussing just the major differences to explain why the language found in the tariff sheet supplied by the OPC, Staff, and MECG should prevail.

Hold-harmless

Of all the major points of disagreement between the parties, the issue regarding the inclusion of a true and proper hold-harmless provision is perhaps most important to the OPC. To explain why, the OPC will first provide a justification of why a true and proper hold-harmless provision is necessary. Next, the OPC will closely examine the claimed hold-harmless provision that has been offered by the Company and Velvet Tech to show why it fails and what ramifications that failure will bring. Finally, the OPC will review the counter-offer provided by the OPC, Staff, and MECG to explain where it comes from and why it is unquestionably superior to the alternative.

Why a true and proper hold-harmless provision is necessary

There are several fundamental arguments for why a true and proper hold-harmless provision should necessarily be included in any tariff sheet approved by the Commission in this case. The first is quite simple. Evergy has requested Commission authorization to implement a new tariff provision that will allow Evergy to enter into specific contacts to provide utility service to specific entities. *See generally* Ex 2 pgs. 5 – 6. Evergy has expressly stated that it is **not** the intent of the Company to force its other customers to cover the cost of supplying energy to the customers who take service under this new tariff provision. Tr. Vol. 2 pg. 184 lns. 5 – 8 ("Q. And you -- you agreed. Right? It is Evergy's intention that MKT customers are going to be responsible for their own costs. Correct? A. Correct. Correct." (Bradley Lutz Cross-examination)). Stated differently, the Company's expressly stated goal is to ensure

that customers on the proposed MKT tariff are not being subsidized by those customers not on the MKT tariff. Tr. Vol. 2 pg. 184 lns. 9 – 13 ("Q. I mean it is accurate to say that Evergy is not seeking to have non-MKT customers subsidizing the MKT customers. Right? A. Right. Not by design. I mean that's not the intent, no." (Bradley Lutz Cross-examination)).

There are many fundamental reasons why this is a just and reasonable goal for Evergy to have (such as an appeal to basic fairness or the application of cost-causation principles), but those rationales do not need to be explored because the Company has already acknowledged that its intent is to prevent subsidization. Tr. Vol. 2 pg. 184 lns. 5 – 13. The Commission should focus instead on the fact that a true and proper hold-harmless provision will ensure this intended outcome becomes reality. On this basis alone, a true and proper hold-harmless provision should be included in any tariff sheet approved by the Commission in this case.

To reiterate, the first reason for why a true and proper hold harmless provision should be included in any ordered tariff sheet is simply to hold Evergy to the letter of its expressed intent. If Evergy truly intends that non-MKT customers will not be asked to subsidize MKT customers, then the Company should be willing to reduce that expressed intent to writing. The easiest means to reduce the intent that non-MKT customers will not be asked to subsidize MKT customers to writing is a tariff provision that simply states as much. This is exactly what a true and proper hold-harmless provision would accomplish, which is why one should necessarily be

included in any tariff sheet ordered by the Commission. *See* Tr. Vol. 3 pg. 476 ln. 5 – pg. 477 ln. 5.

The second reason for why a true and proper hold-harmless provision is necessary is comparatively more complex. Essentially, a true and proper hold-harmless provision is needed to ensure that Evergy acts diligently when negotiating contracts pursuant to this tariff. To understand this point fully, we will first consider what type of negotiations will result in the absence of a hold-harmless provision and then determine how the introduction of a true and proper hold-harmless provision cures any problems.

Negotiations in the absence of a true and proper hold-harmless provision

Assume, for the sake of argument, that there is no hold-harmless provision of any kind in the proposed MKT tariff. That is to say, assume there is no provision that would prevent Evergy from recovering any revenue deficiency (between the cost to Serve MKT customers and the revenue generated via the special MKT contract) from non-MKT customers. Given this scenario, let us consider the negotiation mindset for each of the two parties to the MKT contract: Evergy and the MKT customer.[1] Of these two, the MKT customer is by far the easier to evaluate. The MKT customer is seeking electric utility service. The MKT customer will obviously wish to pay the least amount

[1] The only parties involved in the negotiation of the MKT contract will be Evergy and the proposed MKT customer. Tr. Vol 3 pg. 480 lns. 4 – 11. None of the other customers who receive electrical service from Evergy will be a party to this contract or have any negotiating power with regard to its drafting. *Id*. This is one of the larger reasons for why it is so essential that the Commission ensure that these customers, who otherwise have no ability under the MKT tariff to protect their own interests, are not harmed by this tariff proposal.

possible for electric service all other factors being held constant.[2] One would expect this perfectly rational behavior from every utility customer. After all, no purchaser wishes to pay more than is necessary for a good or service. The MKT customer therefore has an incentive to minimize their costs under the MKT contract. But what of Evergy?

One would be forgiven for having the initial thought that Evergy's goal in negotiations would be the opposite of the MKT customers; that is, Evergy would want to maximize the amount paid to them (*i.e.* the revenue Evergy would earn) under the contract. Again, this would be the rational behavior of any other seller of goods or services engaged in typical arms-length negotiations in a competitive environment. Evergy, however, is not an ordinary seller of goods and services in a competitive environment. Evergy is a regulated monopoly that has its rates set by an administrative body using what is commonly known as "Rate of Return Regulation." This will necessarily alter Evergy's negotiation motivation and position.

Under Rate of Return Regulation, "[t]he revenue allowed a utility is the total of approved operating expenses plus a reasonable rate of return on the rate base." *State ex rel. Mo. Office of the Pub. Counsel v. PSC of Mo.*, 293 S.W.3d 63, 75 (Mo. App. S.D. 2009). Let us display this concept as a mathematical equation:

$$Revenue = Expenses + (Rate\ of\ Return * Rate\ Base)$$

Subtract expenses from both sides of the equation and we arrive here:

[2] So, for example, assuming no loss in quality or interruptions of service, *etc.*

$$Revenue - Expenses = Rate\ of\ Return * Rate\ Base$$

Now, consider that "profit" is defined as "[t]he excess of revenues over expenditures in a business transaction." Black's law dictionary 1463 (11th ed. 2019). We can thus write a new mathematical equation based on this definition:

$$Profit = Revenue - Expenses$$

Based on this, we can substitute the word "profit" for the phrase "revenue – expense" from our previous equation to yield the final result:

$$Profit = Rate\ of\ Return * Rate\ Base$$

This is a basic concept that the Commission should be intimately familiar with: a regulated utility's profits are the product of the rate of return it earns on its rate base, **not its revenue**.

Because Evergy's rates are set using the Rate of Return Regulation method, any increase to its revenue can only benefit the Company in the short period between when the increase occurs and when it is recognized in rates.[3] Once the Company comes before the Commission as part of a general rate review case, the revenue earned from these contracts will be included in the overall revenue calculation described by the Southern District above. *State ex rel. Mo. Office of the Pub. Counsel v. PSC of Mo.*, 293 S.W.3d at 75. As such, the revenue gained through the MKT tariff does not serve to benefit Evergy over the long run. Instead, the MKT contract

[3] This timing difference is commonly known as "regulatory lag." In this case, the regulatory lag inures to the Company's benefit as any revenue gained in the period between when the contract goes into effect and when new rate are set will flow through directly to Evergy's bottom line.

provides Evergy a benefit (that is an opportunity to earn a profit) by providing an opportunity to increase the company's rate base, which occurs regardless of the revenue the MKT contract generates.

"A utility's rate base is the capital investment devoted to, and necessary for, providing reasonable adequate service to customers." *State ex rel. Mo. Office of the Pub. Counsel v. PSC of Mo.*, 293 S.W.3d at 76 (quoting *PUBLIC INTEREST LAW: A SYMPOSIUM; ARTICLE: Excess Capacity: Who Gets the Charge From the Power Plant?*, 34 Hastings L.J. 1133, 1134). In this case, the tariff sheet proposed would allow Evergy to increase its rate base by making capital investments necessary to serve the MKT customer. Specifically, the tariff sheet states as follows:

> The Company will use good utility practice to identify lowest cost capacity options available at the time each customer requests service under this schedule. The approach to identify these options may include, but is not limited to, pricing **for construction of physical resources to serve capacity** or a distinct, request for proposal for firm capacity offered in the SPP market.

See, *e.g.*, Ex. 8 schedule 1 pg. 3. This is of particular importance because Evergy West is currently the only regulated electric utility in the State that is short (*i.e.* lacking sufficient generating capabilities) of meeting its capacity requirements. Tr. Vol 3 pg. 530 lns. 13 – 21. As such, Evergy stands to benefit from this contract in that it provides an opportunity for the Company to earn a profit because it provides a justification for increasing rate base to meet the capacity needs of the new MKT customers, which is all perfectly fine.

The OPC wants to make clear that it has no problem with Evergy earning a profit on the investments it makes to serve MKT customers. The point of this digression is just to establish that Evergy has an incentive to execute contracts pursuant to the MKT tariff (because the new capacity requirement brought on by MKT customers will justify further rate base expansion and thereby increase the Company's profits) but the Company does not have a similar incentive to maximize the revenue gained from the MKT contract (because the capital investments made to serve the MKT customers will be included in rate base and any revenue deficiency between the cost of those investments and the revenue earned through the MKT will be recovered from all other ratepayers).[4] This presents a significant problem.

To review, the MKT customer wants electric service at the lowest cost possible, all other factors being held constant. Evergy has an incentive to agree to the MKT customer joining its system, to justify rate base expansion, but does not have an incentive to maximize the revenue gained from the MKT contract. If the MKT contract produces sufficient revenue to cover the cost of Evergy's capital investments made to serve the MKT customer, then Evergy is made whole and earns its profit. On the other hand, if the MKT contract does not produce sufficient revenue to cover the cost of Evergy's capital investments made to serve the MKT customers, then Evergy can still be made whole and earn its profit by recovering the deficiency from its other customers through general rates. Therefore, in the absence of a hold-harmless

[4] Please recall that we are currently operating under the assumption that there is no hold-harmless provision in place.

provision, Evergy has no actual incentive to ensure that the MKT contract actually produces revenue sufficient to cover the cost to serving the MKT customers because Evergy will be made whole and earn a profit on its capital investments in either scenario.

If Evergy has an incentive to enter into the MKT contract but does not have an incentive to ensure that that the MKT contract fully covers the cost of serving MKT customers and the MKT customer has an incentive to keep the rates in the MKT contract as low as possible, then the most likely outcome will be that the rates included in the contract are less than what are needed to fully cover the cost to serve the MKT customers. Put simply, if one party to the negotiation wants the rates to be low and the other party does not necessarily care, then the rates are going to turn out too low. One can even easily draw a comparison between this problem and the one considered by the Missouri Supreme Court in the case of *Office of the Pub. Counsel v. Mo. PSC* ("*Atmos*"). *Office of the Pub. Counsel v. Mo. PSC*, 409 S.W.3d 371 (Mo. banc 2013). The question before the *Atmos* Court was whether the Commission's traditional presumption of prudence should apply in the case of a transaction between a utility and its affiliate. *Id*. at 376. The *Atmos* Court ultimately decided the answer was no because there was not an "arms-length" transaction between the affiliate and the utility and hence the transaction lacked the "diminished probability of collusion and the pressures of a competitive market" that created "an assumption of legitimacy." *Id*. at 376 – 77. Of particular interest was the reliance the *Atmos* Court placed on the following excerpt from a Congressional staff investigation report into

the affiliate dealings between Enron and its pipeline subsidies made in the wake of Enron's collapse:

> [W]henever a company conducts transactions among its own affiliates there are inherent issues about the fairness and motivations of such transactions. ... **One concern is that where one affiliate in a transaction has captive customers, a one-sided deal between affiliates can saddle those customers with additional financial burdens**.

Id. (quoting Staff of Senate Comm. on Gov't Affairs, 107th Cong., *Committee Staff Investigation of the Federal Energy Regulatory Commission's Oversight of Enron 26*, n.75 (Nov. 12, 2002) (emphasis added)). Nearly the same can be said of this case.

While there may not be an affiliate relationship between Evergy and any prospective MKT customer,[5] the lack of a direct competitive interest between the parties when negotiating the contract still nullifies the "diminished probability of collusion and the pressures of a competitive market" that would normally exist between parties negotiating at arms-length. *Id.* at 376. In other words, the negotiations between Evergy and an MKT customer would lack the competing and mutually exclusive self-interests that define arms-length negotiations occurring on the open market between, for example, a buyer and seller of goods. Further, there clearly still exists the real threat that Evergy can engage in an effectively one-sided deal that will saddle its captive customers "with additional financial burdens" as

[5] It should be made clear that the OPC is not certain there is no affiliate relationship between Evergy and Velvet Tech because Velvet Tech never disclosed the full nature of its identity or its affiliates' identities. *See generally*, Ex 200 pgs. 3 – 11.

identified in the Enron excerpt upon which the Missouri Supreme Court relied. *Id*. at 377. This is exactly what will occur if Evergy enters into a contract with an MKT customer that fails to produce sufficient revenue to cover the cost of serving that MKT customer and then seeks to recover the revenue deficiency from its other captive customers through general rates. Thus, the concerns that lay at the heart of the Missouri Supreme Court's decision in *Atmos* are clearly just as relevant to the present issue, which just serves to reiterate just how problematic it is if Evergy does not have a clear incentive to negotiate the MKT contract in a manner that ensures revenue sufficient to cover the cost of serving the MKT customer. This problem can be solved, fortunately, with the very simple addition of a true and proper hold-harmless provision.

Introducing a true and proper hold-harmless provision cures the problem

Let us take the situation just described and introduce a true and proper hold-harmless provision into the equation. In this case, a true and proper hold-harmless provision is one that simply states by fiat that Evergy will not be permitted to recover any part of the cost of serving MKT customers from non-MKT customers. The effect of such a provision should be self-evident. Evergy still has an incentive to enter into the MKT contract (because the Company can still make new capital investments to serve the MKT customer and thereby earn a profit) but now Evergy's ability to earn its profit is directly dependent on the Company's ability to recover the cost of serving the MKT customer under the MKT contract. Stated differently, Evergy now has a **strong** incentive to ensure that the MKT contract actually does fully cover the cost

to serve the MKT customer because, if it fails, the Company can no longer recover the deficiency from its other captive customers.

The exact concept just expressed was described by several witnesses during the evidentiary hearing. Consider, for example, the following dialogue between Staff witness Jim Busch and the counsel for OPC:

> Q. [. . .] If you were a utility and you were operating [under] a tariff that did not have this language, so it was just the hold harmless, would you agree that you would be slightly more cautious about entering into a contract with a prospective customer?
>
> A. Yes.
>
> Q. You would put more effort into making sure that the contract you signed recovered all costs. Correct?
>
> A. Yes.
>
> Q. And that's because if it doesn't, it is you who are on the line for making up the deficiency?
>
> A. Depending on how a subsequent contract was written with a customer, but for the most part, yes.

Tr. Vol3 3 pg. 478 ln. 13 – pg. 479 ln. 1. Dr. Geoff Marke, witness for the OPC, expressed a similar sentiment during his redirect examination:

> Q. Why exactly do you think it's so important for that hold harmless that the OPC, MECG and Staff proposed? Why is it important to have that in there?
>
> A. I can't stress this enough. But customers are effectively already being exposed on the front end of this. Nonparticipants are already ponying up and going to be contributing that 40 percent discount for a period of time. The hold harmless language really is designed to go ahead and ensure that nonparticipants -- that rates aren't raised just randomly. That we're [not] just throwing around money to attract clientele that may or may not be stable. We don't necessarily know the terms behind them.

> Q. Do you believe that kind of hold harmless language would be important to making sure that Evergy negotiates its contract in a manner that would ensure all costs are recovered?
>
> A. Absolutely.

Tr. Vol. 3 pg. 558 ln. 11 – pg. 559 ln. 4. The testimony of both of these witnesses makes clear the point previously stated: a true and proper hold-harmless provision is necessary to ensure that Evergy negotiates the MKT contracts in a manner that ensures all costs are recovered from MKT customers.

We have now seen two of the major reasons for why a true and proper hold-harmless provision should necessarily be included in any tariff sheet approved by the Commission in this case. As a reminder, the first reason is simply because Evergy has explicitly stated that it does not intend for non-MKT customers to subsidize MKT customers and the Commission should hold Evergy to its expressly stated intent. The second is that having such a provision ensures that Evergy diligently negotiates the MKT contracts by ensuring the Company will only be able to earn a profit if it fully recovers the cost to serve MKT customers from the MKT customers. This will properly incentivize Evergy who, in the absence of such a provision, will not have a reason to carefully negotiate its contracts because Evergy can just recover any cost deficiency from other customers. With these two reasons laid out, let us now turn to the supposed hold-harmless provision offered by Evergy and Velvet Tech to see why it is not really a true and proper hold-harmless provision and what failures that fact brings.

The Evergy and Velvet Tech proposed tariff does not contain a true and proper hold-harmless provision

If one were to carelessly glance over the non-unanimous stipulation and agreement entered into between Evergy and Velvet Tech and look at the attached tariff language, one would probably be confused on this point. This is because the Evergy and Velvet Tech tariff sheet does contain a single line that, on its face, purports to be a hold-harmless provision. That line reads as follows: "Non-Participating customers shall be held harmless for any deficiency in revenues from the cost to serve for which the rates were designed to recover by any customer served under this tariff." Ex. 8 schedule 1 pg. 5. Given that line, one might justifiably wonder why so much ink has been spilled by the OPC regarding the need for a true and proper hold-harmless provision. The answer to such a quandary lies in the fact that what Evergy and Velvet Tech have offered is **not** a true and proper hold-harmless provision because the provision is immediately nullified by the next sentence in the tariff.

The sentence immediately following the supposed hold-harmless provision reads as follows: "It is expressly recognized that the Company and the Schedule MKT customer shall have the right to present evidence for the Commission's consideration of other economic benefits as a result of Schedule MKT customers taking service from the Company" Ex. 8 schedule 1 pg. 5. Now, remembering that the sole purpose of a hold-harmless provision is to ensure that non-MKT customers do **not** pay any part of any revenue deficiency that might arise due to the difference between the cost to serve MKT customers and the amount collected under the MKT contract, consider what the

purpose of this second sentence is. The answer is simple. The purpose of this second sentence is to allow Evergy, in the event of revenue deficiency, to present evidence to argue why non-MKT customers should pay to cover that revenue deficiency on the basis of some claimed "economic benefit" the MKT customer supplied to non-MKT customers. In other words, the purpose of this sentence is to directly nullify the preceding "hold-harmless" sentence by allowing Evergy a mechanism to harm non-participating customers even though the Company claimed they would be held harmless, which is exactly what the witnesses for Staff and the OPC explained during the hearing.

During the hearing, the counsel for the OPC asked Mr. Jim Busch, witness for Staff, as series of questions regarding these two sentences in the Evergy and Velvet Tech tariff. This is the conversation that occurred:

> Q. Okay. All right. I'm going to ask you a couple of questions related to this paragraph. I just want to [read] that first sentence to make sure that it is accurate. Nonparticipating customers shall be held harmless for any deficiency in revenues from the cost to serve for which the rates were designed to recover by any customer served under this tariff. Did I read that substantially correct?
>
> A. You did.
>
> Q. All right. Now, let's just take sentence alone in isolation. In your opinion, as a regulator, if there is a deficiency in revenue between the cost to serve a customer who takes under this tariff and what is recovered in rates -- or rather through the contract under this tariff, that deficiency cannot be recovered from nonparticipating customers. Is that how you would interpret that?
>
> A. I'm sorry. Could you repeat that one more time?
>
> Q. Sure thing. In your opinion, as a regulator, if there is a deficiency between the cost to [serve] a customer who takes under this rate and the

contract revenues provided under this rate, that deficiency cannot be passed on to nonparticipating customers?

A. That's how I read that sentence, yes.

Q. Okay. Now, we [add] in the next sentence, which reads, it is expressly recognized that the Company and Schedule MKT customers shall have the right to present evidence for the Commission's consideration of other economic benefits as a result of MKT customers taking service from the Company. Would you agree with me that that sentence modifies the prior one and changes the answer slightly?

A. Yes, it is -- the way I read that sentence it is allowing further evidence to be put forward by the Company, in this case Evergy, to explain why other customers may not be held harmless.

Q. So you would agree with me if that sentence is included, it is possible that nonparticipants may be required to pay for part of the cost of serving MKT customers in the result of a revenue deficiency?

A. That is my understanding, yes.

Tr. Vol. 3 pg. 475 ln. 5 – pg. 477 ln. 22. Nearly the exact same assessment was given by the OPC's own witness Dr. Geoff Marke:

Q. What is our problem -- as you see it, what is the problem with the Company's proposed hold harmless language?

A. The Company has, effectively, a clause of the end of their hold harmless language that they -- it's the all relevant factors related to economic development. The problem that I have with it is twofold. **One, that's is not really hold harmless if there's a clause immediately saying that, well, by the way we can go ahead and argue it that we are not being held harmless, that customers can still bear all these costs.** The second part is the nature of the specific item that the Company wants to argue which is economic development benefits, which can be -- I mean, arbitrarily it can be just about anything. We could -- That, you know -- Mr. Busch was asked this before whether or not this would be a contentious hearing. It would be a contentious hearing. The modeling that would go into something like that, the assumptions behind that, the double counting that could exist out of it. It would be a regulatory nightmare.

Tr. Vol. 3 pg. 557 ln. 15 – pg. 558 ln. 10 (emphasis added). Both these experts have outlined the very same problem with the proposed tariff language offered by Evergy and Velvet Tech: the inclusion of the second sentence invalidates the hold-harmless language that precedes it. As such, the Evergy and Velvet Tech tariff sheet does **not** contain what can be considered a "true and proper" hold-harmless provision; hence the OPC's issue.

Because the second sentence following the supposed hold-harmless provision in the Evergy and Velvet Tech tariff sheet is designed to allow Evergy to clawback the ability to harm non-participants by forcing them to pay part of the cost of serving the MKT customers, the OPC will refer to it as the "clawback provision" moving forward. The problems with the clawback provision are many and varied, but they are all serious. Starting with the obvious, the clawback provision undermines both major rationales for even having a hold-harmless provision that the OPC has previously outlined. If the hold-harmless provision can no longer be relied upon to mean that Evergy cannot force non-MKT customers to pay for the cost to serve MKT customers, then it is not really a hold-harmless provision at all. *See* Tr. Vol. 3 pg. 557 lns. 22 – 25 ("[I]t is not really hold harmless if there's a clause immediately saying that, well, by the way we can go ahead and argue . . . that customers can still bear all these costs."). This point should be so self-explanatory that the OPC will not even bother discussing it further.

Another major problem arises from the way the clawback provision works, in that, it relies on intangible economic benefits. As Dr. Marke explained in the previous excerpt, these kind of benefits are extremely difficult to quantify in a standard manner. Tr. Vol. 3 558 lns. 1 – 10. They are, at best, highly subjective and, at worst, completely arbitrary. *Id.*

It is extremely easy to predict what will occur in the event that Evergy and Velvet Tech's clawback provision is put into place and a revenue deficiency occurs. Evergy will hire a consultant (or use in-house employees) to develop a "study" that will purport to show (no matter what the circumstances may actually be) that the MKT customers produced or speculatively will produce intangible economic benefits greater than the revenue deficiency. This will prompt counter analysis by other parties to refute the "study" resulting in a back and forth between experts attempting to quantify intangible economic benefits that lack any clear definition or demarcation.[6] The end result will be, as Dr. Marke predicts, "a regulatory nightmare." Tr. Vol. 3 558 lns. 9 – 10. Moreover, the whole affair will be geared toward the very thing Evergy has ostensibly claimed that it has no intention of doing: forcing non-MKT customers to subsidize MKT customers. It is often said that actions speak louder than words and, in this case, Evergy's adamant demand for the ability to argue

[6] The Evergy and Velvet Tech tariff includes the following provision: "In the event that any Commission ordered deficiency adjustment is required, the Schedule MKT customer for which there is Commission determined deficiency of revenues to cover the incremental costs to serve will receive a Special High-Load Factor Market Rate Contract rate adjustment sufficient to pay for half the determined cost to serve, with the remainder of the deficiency being borne by the Company." Ex. 8, schedule 1 pg. 5. Because Velvet Tech has effectively already committed to paying half of any deficiency, they will naturally feel compelled to intervene in any case where such a deficiency is addressed, thus further adding to the cacophony that will result from this tariff.

for why non-MKT customers should subsidize MKT customers speaks volumes about the sincerity of the Company's professed intent to the contrary.

Yet more problems with Evergy's clawback provision need to be addressed. In addition to undermining the entire point of even having a hold-harmless provision, the clawback provision also introduces a new legal issue regarding discrimination into the equation. This is because the subsidization that the clawback provision makes available to an MKT customer (like Velvet Tech) will not be available to any other large-scale industrial customers that could make the same economic benefits argument.

Nearly all customers who take power under Evergy's large power rate are going to be industrial customers who are typically going to employ as many if not more employees than Velvet Tech. These same large power customers are therefore going to have just as much of a claim to providing intangible economic benefits as Velvet Tech does. Yet none of these other large power customers have special tariff provisions that allow them to argue for why part of the cost of serving their needs should be paid by other customers because of those claimed intangible economic benefits. The clawback provision would therefore provide companies like Velvet Tech and others who take under the proposed MKT tariff an unjustified and illegally discriminatory benefit.

Let us consider Nucor as a specific example. Nucor is a large steel smelter that operates in Evergy West's service territory. Tr. Vol. 3 pg. 352 lns. 2 – 21; pg. 359 lns. 2 – 8. Evergy's own witness acknowledged that Nucor provides many if not more of

the same benefits that Velvet Tech is proposing. Tr. Vol 2 pg. 185 lns. 21 – 23. Nucor currently takes service under Evergy's Schedule SIL. Tr. Vol 2 pg. 185 lns. 17 – 20. Schedule SIL does not contain the specific clawback provision that Evergy is requesting in this case. *see* Ex. 301 pg. 4. Instead, Schedule SIL states this:

> The Special Incremental Load Rate will be designed to recover no less than the incremental cost to serve the Customer over the term of the Special Incremental Load Rate Contract. **Non-participating customers shall be held harmless from any deficit in revenues provided by any customer served under this tariff.**
>
> [. . .]
>
> If the Customer's rate revenues do not exceed the incremental cost to serve the Customer as reflected in the revenue requirement calculation, the Company shall make an additional revenue adjustment covering the shortfall to the revenue requirement calculation through the true-up period, **to ensure that non-Schedule SIL customers will be held harmless from such effects from the service under Schedule SIL**. **In no event shall any revenue deficiency (that is, a greater amount of the Customer's incremental costs compared to the Customer's revenues) be reflected in the Company's cost of service** in each general rate proceeding for the duration of service to the Customer(s) during the terms of the contract between Company and Customer served under this tariff.

Ex. 301 pg. 4 (emphasis added). If there is a revenue deficiency between the cost to serve Nucor and the amount collected under the SIL contract, Evergy's only recourse is to recover that difference from Nucor or take it as a loss. Nucor does not get the benefit of trying to argue that other customers should pay that difference based on intangible economic benefits. Tr. Vol 2 pg. 185 lns. 7 – 11. To allow Velvet Tech or another MKT customer to argue for a subsidy when Nucor cannot despite Nucor having the same theoretical basis is discriminatory. "Section 393.130, RSMo 1978

expressly forbids rate discrimination among customers of gas, electrical, water or sewer corporations for like and contemporaneous service under the same or substantially similar circumstances or conditions." *State ex rel. Ashcroft v. Pub. Serv. Com.*, 674 S.W.2d 660, 664 (Mo. App. W.D. 1984). Evergy's proposed clawback condition is thus unlawful and should not be allowed.

In addition to the legal issues the clawback provision introduces, there are other practical problems that arise if the hold-harmless provision is removed or nullified in the manner that Evergy and Velvet Tech propose. Specifically, Evergy's claw-back provision will ensure that the contract reviews that will take place under this tariff will require significant more examination and scrutiny than would otherwise be required in the presence of a true and proper hold-harmless provision. This will, in turn, lead to the reviews being much more contentious and more likely to lead to objections and hearings:

> Q. All right. Would you agree with me that the inclusion of [the clawback provision] will make it marginally more likely that contract reviews under this tariff would become more contentious?
>
> A. Yes. I would imagine that that would include further review and further discovery and further -- yeah. It would make it much more difficult, yes.

Tr. Vol 3 pg. 477 ln. 23 – pg. 478 ln. 4 (Jim Busch cross); *see also* Tr. Vol 3 pg. 558 lns. 6 - 7 ("It would be a contentious hearing." (Geoff Marke redirect)). The reason for this should be clear.

In the presence of a true and proper hold-harmless provision (like the one found in the OPC, Staff, and MECG tariff), there is significantly less reasons for interveners to challenge the contracts that are entered into between Evergy and a prospective MKT customer because those contracts will have resulted from real arms-length negotiations where the "diminished probability of collusion and the pressures of a competitive market create an assumption of legitimacy" *Office of the Pub. Counsel v. Mo. PSC* ("*Atmos*"). *Office of the Pub. Counsel v. Mo. PSC*, 409 S.W.3d 371, 376 (Mo. banc 2013). Moreover, the possibility of a failure on the part of Evergy to properly cover the costs of serving the MKT customer will be of substantially less concern to interveners like the OPC because such a failure cannot be foisted upon non-MKT customers. Instead, the only parties who can be negatively affected by those revenue deficiencies will be the same two parties (Evergy and the MKT customer) that were already fully represented during the contract negotiation and are thus readily capable of protecting their own interests.

The necessity of including a true hold-harmless provision (or conversely of omitting the proposed clawback provision) to ensuring the orderly operation of the tariff cannot be understated. Every aspect of the OPC's case regarding the acceptance of the tariff terms, including the acceptance of the short-term contract review provisions, was premised on the assumption that non-MKT customers were not going to be used to subsidize the operation of MKT customers. For example, the OPC's witness Dr. Geoff Marke originally suggested the Commission include a provision in the tariff that would require the MKT contracts to expire (and thus be renegotiated)

after each rate case. This was offered "to ensure that the contracts do not become vehicles used to avoid cost of service increases established in general rate cases." Ex. 200, pg. 15 lns. 10 – 11. The OPC later dropped this suggestion when it entered into the non-unanimous stipulation and agreement with Staff and MECG after it recognized that the hold-harmless language that identified how MKT customers were to be treated in a general rate case – which was adopted from Evergy's existing Schedule SIL and presented by OPC witness Ms. Lena Mantle – better resolved the problem. Ex. 201 pg. 4 ln. 17 – pg. 6 ln. 25. If the Commission were to reject the OPC, Staff, and MECG tariff, however, then the OPC's position would revert to Dr. Marke's recommendation (as outlined in the OPC's position statement). To put it another way, the inclusion of a true and proper hold-harmless provision (or the exclusion of Evergy and Velvet Tech's proposed clawback provision) has been a fundamental defining aspect of the OPC's willingness to reach agreement on this entire issue for all the reasons now addressed.

OPC, Staff, and MECG counter proposal

The tariff sheet attached to the non-unanimous stipulation and agreement entered into between the OPC, Staff, and MECG contained its own hold-harmless provision. Ex. 203, schedule 1 pg. 4. That hold-harmless provision, which the OPC considers to be a "true and proper" hold-harmless provision, was largely adopted from the existing language found in Evergy's current schedule SIL tariff sheet. Ex. 201 pg. 4 ln. 17 – pg. 6 ln. 25. There are, however, several changes that have been made. For example, the phrase "or from any stranded investment or cost associated with serving

customers under this rate schedule" has been amended to the end of what was paragraph 2 in schedule SIL to form paragraph 3 in the OPC, Staff, and MECG tariff. *Compare* Ex. 301 pg. 4, *and* Ex. 203, schedule 1 pg. 4. This was added, as OPC witness Dr. Marke explained, to "cover[] capacity cost concerns." Tr. Vol 3 pg. 548 lns. 13 – 16. There were also a handful of smaller changes made to what was schedule SIL paragraph 4 to produce the first paragraph under the OPC, Staff, and MECG paragraph 4, which are related to expanding the available number of rate proceedings wherein the impact of the schedule could be examined. Tr. Vol. 3 pg. 548 lns. 17 – 23. Finally, the OPC, Staff, and MECG tariff contains a second paragraph under subsection 4 of "additional provisions" that is not found in the equivalent subsection in schedule SIL which was added, as Dr. Marke explained, as "double down language on the hold harmless" language. Tr. Vol 3 pg. 549 ln. 6. None of these changes represent a significant material departure from the language found in schedule SIL and, when taken together, form a true and proper hold-harmless provision that is capable of meeting the goals set forth in the beginning of the discussion on this issue. The OPC, Staff, and MECG tariff provisions are thus clearly superior to the version offered by Evergy and Velvet Tech and should be included in any tariff ordered by the Commission.

Summation

The OPC adopted its proposed hold-harmless language directly from Evergy's existing SIL tariff. Ex. 201 pg. 4 ln. 17 – pg. 6 ln. 25. This language serves an important purpose by requiring Evergy to internalize the risk that is presented by a

MKT contract failing to cover the cost of serving the MKT customers and thereby forces the Company to negotiate competitively at arms-length to protect its own financial interest. Failure to include this language (or the inclusion of the clawback provision that Evergy and Velvet Tech has proposed) will have several negative implications. First, it will allow Evergy to negotiate without concern for covering all the costs incurred to serve the MKT customers, which will introduce a degree of moral hazard into the equation and eliminate the pseudo-competitive nature that underlies true arms-length negotiations. Stated differently, by allowing Evergy to shift costs onto non-MKT customers if there is a revenue deficiency using vague "intangible benefits," the Company will have substantially less incentive to negotiate strenuously and make sure that all costs to serve MKT customers are actually covered by the MKT contract. Second, by allowing the potential for subsidization of MKT customers by non-MKT customers through its clawback provision, Evergy has given MKT customers an unfair and unwarranted advantage over its other large power customers using unlawful discriminatory ratemaking. For no other customer is Evergy seeking the unrestricted right to argue for a cross-customer-class subsidy due to perceived economic benefits and Velvet Tech has no justification for why it alone should receive this preferential treatment over any competing large power user. Third and finally, the exclusion of the OPC, Staff, and MECG hold-harmless provision (or the inclusion of the clawback provision) will necessitate a much greater degree of scrutiny be applied to contract review cases which will, in turn, lead to those cases becoming much more likely to be contested. This is a situation where the Commission

can save itself, and everyone else, a large amount of time, effort, and resources by simply adopting the same hold harmless language that Evergy has already demonstrated is acceptable for other special contract customers. For all these reasons, it should be extremely easy to see why the Commission should reject Evergy and Velvet Tech's clawback provision and instead use the true and proper hold-harmless language provided in the draft tariff sheet offered by the OPC, Staff, and MECG.

Renewable Energy Standard Compliance Costs

The Issue in this case surrounding the renewable energy standard ("RES") costs is very peculiar in that both "sides" appear to agree in principle on the underlying goal but dispute how best to get there. More particularly, from the OPC's perspective, the language offered by Evergy and Velvet Tech is largely agreeable with regard to its outcome but is made problematic due to the OPC's belief that the solution is legally unworkable. Because of this, the OPC does not intend to argue significantly about the differences between the proposed tariff sheets. Instead, the OPC will just use this brief to (1) outline the problem in general, (2) explain the two offered solutions, and (3) tell the Commission why it considered the Evergy and Velvet Tech offering legally unsound.

Understanding the Issue

As will be examined in greater detail shortly, section 393.1030 ("the RES statute") requires that a certain percentage of a regulated utility's electric sales come from renewable resources. Ex. 201, pg. 3 lns. 9 – 10. If an MKT customer is added to Evergy's system, that will increase the overall amount of energy sales being made by Evergy and thus increase the amount that will need to come from renewable resources.[7] *Id*. at lns. 10 – 12. If Evergy needs to increase the amount of energy it is selling that comes from renewable resources, then the Company may incur a cost to

[7] Witness for the OPC, Ms. Lena Mantle, explained that a single average sized MKT customer being added to Evergy's system could result in Evergy's load increasing by over 13% resulting in needing to increase its renewables requirement by over 13%. Tr. Vol 3 pg. 569 ln. 12 – pg. 570 ln. 8.

do so that it would not have been incurred had the MKT customer not been added to Evergy's system. *Id*. That cost would normally be recovered through the Company's Renewable Energy Standard Rate Adjustment Mechanism ("RESRAM"). *Id* at lns. 12 – 14. The RESRAM is normally collected from **all** customers, but Evergy does not want the MKT customers to have to pay the RESRAM. *Id*. If MKT customers do not have to pay the RESRAM, then the MKT customers will not be paying for the costs Evergy incurred to meet the RES statute requirements because of those same MKT customers. *Id*. Those costs will be paid by non-MKT customers through the RESRAM instead. *Id*. Thus, the problem that needs to be solved is simply this: how do we ensure that MKT customer pay for any RES compliance costs that those same customers cause Evergy to incur if the MKT customers are not going to be subject to the RESRAM.

If there is still any confusion, then the Commission should consider the hypothetical examples that was developed on the stand a first time through a discussion between Evergy witness Mr. Brad Lutz and counsel for OPC and then a second time through a discussion between Staff witness Ms. Claire Eubanks and counsel for OPC. Tr. Vol. 2 pg. 176 ln. 25 – 180 ln. 24; Tr. Vol 3 pg. 438 ln. 25 – pg. 441 ln. 2. These discussions achieve nearly identical outcomes, which shows again that there is no real disagreement about the nature of the problem. Evergy has a RES requirement, an MKT customer may require Evergy to incur costs to meet that requirement, and Velvet Tech or any other MKT customer deciding to retire Renewable Energy Credits ("RECs") on their own behalf will not solve the problem

absent some other action by the Commission. *Id*. How then do we ensure that any RES compliance costs that an MKT customer might cause Evergy to incur are not imposed upon non-MKT customers? Two solutions have been presented.

OPC, Staff, and MECG solution

The solution to the RESRAM issue that was proposed in the OPC, Staff, and MECG tariff sheet is effectively this: require any MKT customer to pay a charge in the MKT contract and, if that charge is sufficient to cover any incremental RES compliance costs incurred by Evergy to serve that MKT customer, the MKT customer does not need to pay the RESRAM. Tr. Vol 3 pg. 440 ln. 15 – pg. 441 ln. 2. It is important to understand that this provision only requires the MKT customer to meet its **incremental** RES compliance costs. This means that if Evergy already has sufficient renewable resources to serve the customer under the RES statue, there will not be any incremental costs and hence the MKT customer will not have had to pay anything. Tr. Vol. 3 pg. 441 lns. 3 – 11. In short, this proposal effectively works by taking what would normally be a separate RESRAM bill component for a regular Evergy customer and incorporating it into the MKT contract at a fixed rate in the same manner as the other MKT contract fixed rates. That is all there is to it.

Evergy and Velvet Tech solution

The solution offered by Evergy and Velvet Tech seeks to solve this problem by effectively removing the need for Evergy to incur any additional RES compliance costs at all, thus leaving nothing to pass on to either MKT or other customers. To do this,

Evergy and Velvet Tech propose subtracting the same amount of energy that Velvet Tech claims as renewable energy (through the retirement of RECs Velvet Tech owns) from the amount of Evergy's electric sales considered for RES compliance purposes. Tr. Vol 2 pg. 180 lns. 13 – 24. Because Velvet Tech has proffered that it intends to procure from renewable resources energy equal to 100% of the energy it purchases from Evergy (which it will then sell into an energy market), this effectively means that Evergy would just report its electric sales for RES compliance purposes as if it did not sell any energy to Velvet Tech (even though it did). This novel idea would certainly seem to solve the problem, but it runs into a new issue with the fact that Evergy cannot just ignore electric sales for purpose of meeting the RES statute. That would be violating the RES statute. Evergy and Velvet Tech propose to work around this dilemma by requesting the Commission grant a variance to the regulations promulgated pursuant to the RES statute. The OPC, however, does not believe that granting a variance to the RES regulations will cure the problem.

Legal issues with the Evergy and Velvet Tech solution

The relevant statute sub-section at issue here is 393.1030.1, which reads in part as follows:

> The commission shall, in consultation with the department, prescribe by rule a portfolio requirement for all electric utilities to generate or purchase electricity generated from renewable energy resources. Such portfolio requirement shall provide that electricity from renewable energy resources shall constitute the following portions of each electric utility's sales: [. . .] [n]o less than fifteen percent in each calendar year beginning in 2021.

Evergy and Velvet Tech's proposal is to have the Commission grant a variance from the regulation (*i.e.* "rule") that prescribes the portfolio requirement as set forth in the statute. In particular, Evergy and Velvet Tech would have the Commission determine that electricity sold by Evergy to Velvet Tech would not qualify as part of the electric utility's "sales" for purpose of the regulation if the proper circumstances are met. *See* Tr. Vol 2 pg. 180 lns. 13 – 24. The OPC believes that the grant of such a variance would exceed the scope of the Commission's authority and would therefore be illegal.

To begin, it is necessary to remember that "[a]n administrative agency enjoys no more authority than that granted by statute." *Melkowski v. Bd. of Police Comm'rs of Kan. City*, 463 S.W.3d 400, 407 (Mo. App. W.D. 2015) (citing *Termini v. Missouri Gaming Comm'n*, 921 S.W.2d 159, 161 (Mo. App. W.D. 1996)). As such, it is a "well established rule [] that [a] regulation[] may be promulgated only to the extent of and within the delegated authority of the statute involved." *Gasconade Cty. Counseling Servs. v. Mo. Dep't of Mental Health*, 314 S.W.3d 368, 377 (Mo. App. E.D. 2010) (Citing *Parmley v. Mo. Dental Bd.*, 719 S.W.2d 745, 755 (Mo. banc 1986)). "When there is a direct conflict or inconsistency between a statute and a regulation, the statute which represents the true legislative intent must necessarily prevail." *Id.* (Citing *Parmley*, 719 S.W.2d at 755). Therefore, the legal question is quite simply this: would a variance that removed certain electricity sold by Evergy from what the RES regulation defined as the "electric utility's sales" for purposes of applying section 393.1030 create a violation with the statue itself? The OPC thinks the answer is quite obviously yes. If either a new regulation promulgation or the granting of a variance

to an existing regulation would remove from the definition of an "electric utility's sales" some portion of the electricity that the utility sold, then the regulation or variance is in conflict with the statute and must fail.

When interpreting statutes courts seek to "'ascertain the intent of the legislature from the language used, . . . give effect to that intent if possible, and . . . consider the words in their plain and ordinary meaning.'" *Fugate v. Jackson Hewitt, Inc.*, 347 S.W.3d 81, 85 (Mo. App. W.D. 2011) (citing *S. Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009)). In the case of section 393.1030, the legislative intent would appear quite obvious.[8] The goal of the statute is to ensure that all utilities subject to the Commission's jurisdiction operate such that no less than fifteen percent of the electricity they sell comes from renewable energy sources after the year 2021. The promulgation of a regulation that allowed the utility to not count certain energy sold as part of its "sales" would consequently directly thwart the clear and plain intent of the legislature as it would contradict the plain and ordinary meaning of the word "sales." A variance granted to an existing regulation that accomplishes the same end would be just as much as an affront to the legislative intent and therefore fairs no better. Moreover, there is no argument that can be raised on the basis that the statute fails to define what an "electric utility's sales" are because it is well established that "[i]f statutory language is not defined expressly, it is given its plain and ordinary meaning, as typically found in the

[8] 393.1030 was actually passed by voter referendum, so there technically is no legislative intent. However, the OPC could find no legal authority that would suggest that this materially alters the analysis, so the OPC will continue as if this statute was passed by the legislature.

dictionary." *Fugate*, 347 S.W.3d at 85 (citing *Derousse v. State Farm Mut. Auto. Ins. Co.*, 298 S.W.3d 891, 895 (Mo. banc 2009)). In this case, one does not even need to open the dictionary to know that the energy an electric utility sells is part of the "electric utility's sales" based on the plain and ordinary meaning of those words.

At the end of the day, one cannot get around this very simple problem: any attempt to use the existing regulation (or a variance therefrom) to define Evergy's "sales" in a manner that does not include the energy sold by Evergy to Velvet Tech will create a conflict between the definition of "sales" found in the regulation (or variance) and the plain and ordinary meaning of the word "sales" found in 393.1030.1. That is why the OPC did not believe that it could join in any proposed stipulation that offered such a resolution. At the same time, though, the OPC does not see any reason for it currently to argue this point beyond what has already been laid out. Therefore, the OPC will leave this discussion were it currently stands.

Summation

Customers who do not take service under the MKT tariff should not pay to cover RES compliance costs that Evergy incurred exclusively because of customers who do take service under the MKT tariff. Both of the competing solutions that have been offered would ostensibly reach this goal. Of the two, the Commission should adopt the proposal offered by the OPC, Staff, and MECG because the alternative solution would constitute an illegal overreach of the Commission's authority.

Securitization

The tariff proposed by the OPC, Staff, and MECG includes the following provision "Customer will be subject to any other charge or surcharge including without limitation, any charge related to the securitization of Company assets." Ex. 203 schedule 1 pg. 4. This was obviously included to deal with any future potential charges or surcharges, most especially surcharges related to securitization. With regard to securitization in particular, the statute creating the securitization schema includes the following language:

> A financing order issued by the commission, after a hearing, to an electrical corporation shall include all of the following elements: [. . .] A requirement that, for so long as the securitized utility tariff bonds are outstanding and until all financing costs have been paid in full, **the imposition and collection of securitized utility tariff charges authorized under a financing order shall be nonbypassable and paid by all existing and future retail customers receiving electrical service from the electrical corporation** or its successors or assignees under commission-approved rate schedules except for customers receiving electrical service under special contracts on August 28, 2021, even if a retail customer elects to purchase electricity from an alternative electric supplier following a fundamental change in regulation of public utilities in this state;

RSMo. Section 393.1700.2(C)d (emphasis added). This provision simply means that any securitization charges created as a result of a securitization case must be paid by **all** retail customers and cannot be bypassed in any way.[9] Because Velvet Tech and any other prospective MKT customer will be a "retail customer" of Evergy, they will

[9] There is an exception in the statute for "customers receiving electrical service under special contracts on August 28, 2021," but this will obviously not apply to any future prospective MKT customers.

be legally required to pay the securitization charge just like every other customer. *Id*. So why is this provision in dispute?

Evergy and Velvet Tech do not have a good reason to oppose this provision. The best they can do is claim the provision is premature because there are no securitization charges in place yet. Ex. 300 pg. 20 lns. 1 – 5. While Evergy may be correct that there is currently not a securitization charge in effect in its service territory, the Company has filed a securitization case with the Commission. *See* Commission case EF-2022-0155 (styled "In the Matter of the Application of Evergy Missouri West, Inc. d/b/a Evergy Missouri West for a Financing Order Authorizing the Financing of Extraordinary Storm Costs Through an Issuance of Securitized Utility Tariff Bonds"). As such, there is no question that the securitization charge is coming, and MKT customers are going to have to pay it. All this issue boils down to then is whether the Commission wants to deal with the problem now or later.

There are effectively two worlds in which the Commission can choose to live. In the first world, the securitization provision is included, and, in the second, the provision is not included. If the Commission chooses to live in the first world, the MKT tariff sheet and any subsequent contracts will not need to be changed once the securitization charge is put into place because it has already been dealt with. If the Commission chooses to live in the second world, the MKT tariff sheet will need to be updated and any contracts that had previously been entered into under that tariff sheet may need to be renegotiated to include the securitization charge once Evergy's

first securitization case is complete.[10] It should thus be obvious that including the securitization provision now means less work later once Evergy completes its first securitization case. Therefore, the Commission should include the provision now.[11]

[10] It may even become necessary for parties to bring a complaint case if Evergy and any MKT customer attempts to skirt the legal requirements of the securitization law.

[11] To quote the old proverb "an ounce of prevention is worth a pound of cure."

Economic Development Rider

The issue concerning the implications of Evergy's Economic Development Rider ("EDR") on the proposed MKT tariff became a little confused in the course of the evidentiary hearing. The initial tariff sheets filed by Evergy and Velvet Tech and the OPC, Staff, and MECG both took what would be the comparatively more extreme position in relation to this issue prior to the hearing, and then both "sides" introduced new proposed language that was much closer to an apparent middle ground during the hearing. Because of the highly unorthodox nature of the record and positions that resulted from this, the OPC will approach this issue by primarily focusing on the new proposed language offered by both "sides" during the hearing as this appears to be the most recent and current position taken by the respective parties.[12] To that end, the OPC will proceed to (1) examine the problem at a high level, (2) explain the original positions offered by both parties briefly, and then (3) explore the differences between the two proposals made during the hearing.

Understanding the problem

Customers who take service under Evergy's EDR tariff sheet ("Schedule PED") receive a discount to their bills (on average 40%) for five years. Evergy West tariff sheet, *Schedule PED*, P.S.C. No. 1 Original Sheet 155A – 155B. All costs to provide service to the Schedule PED customer – including a return on any necessary capital

[12] The OPC may choose to adopt a different position in its reply brief depending on the position taken by other parties on this issue.

investments – are then covered by all other customers, thereby making Evergy whole. This results in a direct subsidy of the Schedule PED customer, although other customers may still be made whole in the end because, once the five years are up, the EDR customer pays its full costs which shifts the overall cost-burden away from the other customers. Tr. Vol. 3 pg. 502 lns. 8 – 12. If the Schedule PED customer jumps to the MKT tariff after five years instead, however, then all other customers have just provided the Schedule PED customer with a subsidy without receiving any potential corresponding benefit in return. Tr. Vol. 3 pg. 502 lns. 13 – 17. That is the basic problem; let us now consider how the problem may be solved.

Initial Solutions

The initial solutions to the problem surrounding the EDR are very easy to explain. The tariff sheet offered by Evergy and Velvet Tech provides no solution to the problem and just ignores it. *See generally* Ex. 8. The tariff sheet offered by the OPC, Staff, and MECG simply prohibits a customer from switching to the MKT tariff for five years after having been on Schedule PED, which directly removes the problem. Ex. 203 (second bullet point under availability that requires the prospective customer "[h]as not accepted a discount under section 393.1640 in the past five years."). Of these two options, only the OPC's solution makes sense because it is the only option that is actually a solution. There are, however, two other options that the Commission should consider, which are the two EDR language exhibits that were entered into the record at the evidentiary hearing.

The two middle ground solutions

Both Evergy and Velvet Tech and the OPC, Staff, and MECG introduced competing exhibits that could effectively be treated as amendments to the corresponding tariff sheets attached to the two competing non-unanimous stipulations. *See* Ex. 7 and Ex. 904. The Evergy and Velvet Tech language consisted of a single paragraph. Ex. 7. The OPC, Staff, and MECG language made changes to the first paragraph offered by Evergy and Velvet Tech and then added a second paragraph. Ex. 904. To make things easier, we shall discuss the two paragraphs separately.

Because the only differences between the first paragraph offered by Evergy and Velvet Tech and the one offered by the OPC, Staff, and MECG are edits to the language used, it will be easiest for the Commission to just review the explanation for those edits that was offered by the OPC's witness Dr. Geoff Marke:

> Q. Let's walk through change by change. First line it scratches out "economic development rider" and several other places and replaces it with "Schedule PED." Can you tell me what the rationale is for that?
>
> A. For clarity.
>
> Q. And by clarity?
>
> A. That we're specifically talking about the Schedule PED, the economic development offering, the tariff offering.
>
> Q. Okay. Then it scratches out the word "make such requests" and replaces it to "migrate to Schedule MKT." Can you tell me what the reasoning is for that? And I believe it probably has something to do with the two years, but go ahead?
>
> A. Sure. Sure. So as it was drafted yesterday make such a request within two years. The request can take, you know, considerably a long time.

Whether or not you file something with the Commission it could be, you know, dormant for quite a while. This provides some real clarity in terms of as soon as certain thresholds are met they mitigate into that MKT schedule.

Q. Okay. So let me just run a hypothetical and see if I'm tracking the language right. You have ABC Company come in that wants to be served eventually off of MKT. And for a period of time they start taking service off of the large power tariff with the PED discount; is that correct?

A. That's correct.

Q. And what this says is that within two years they must be migrated to Schedule MKT?

A. Yes, it does.

Q. Okay. And two years is the maximum. It could be earlier depending on whether they meet this 50 megawatt average monthly peak load threshold as well?

A. That's correct.

Q. It's the lesser of the two?

A. That's correct.

Q. And that is consistent with the Company's Exhibit 7?

A. Yes, it is.

Q. Then we get down to line -- is that six? Yes, Line 6. It replaces "allowed to request service under" and changes it to "migrated to." Is that consistent with your previous change to the word "migrate?"

A. Yes, it is.

Q. Okay. I believe that takes us out of that first paragraph. Did you have anything else on that that you wish to note?

A. No.

Q. Okay. Otherwise, the 50 megawatt threshold is the same that the Company offered; is that correct?

A. That's correct.

Q. The two years is the same as the Company offered except for it is made more definitive by they must be migrated in two years?

A. That is correct.

Tr. Vol 3 pg. 523 ln. 24 – pg. 526 ln. 6. The OPC has nothing more to say as it relates to the changes made to the first paragraph of the mutually offered middle ground solution. If the Commission adopts one of the two first paragraphs from one of the two middle ground proposals to be included in any tariff sheet, the Commission should use the version supplied by the OPC, Staff, and MECG for the reasons explained by the OPC's witness in the above excerpt.

The Second paragraph in the middle ground proposal offered by the OPC, Staff, and MECG is entirely new compared the exhibit offered by Evergy and Velvet Tech. The purpose of this paragraph is to place parameters on the application of the tariff sheet in order to provide time for data about the operation of the tariff sheet to be gathered and its effects on non-MKT customers to be analyzed. Tr. Vol 3 pg. 526 ln. 6 – pg. 529 ln. 4. This would effectively turn the MKT tariff into a closed or limited participant pilot program for the first five years after which it would be allowed to open up and become more readily available. *Id.*; Ex. 904. This is an ideal middle ground, as it would allow both Velvet Tech and potentially Google (and even a third possible party) to make use of the MKT tariff without exposing non-MKT customers to too much risk. It would also serve to provide the Commission with a safer means of evaluating the risk and impacts this tariff will have on Evergy's system as a whole. By treating this program effectively as a pilot for the first five years, the Commission can proceed forward in a calm but deliberate manner without causing undue hardship to any party in the case. The inclusion of this second paragraph proposed by the OPC,

Staff, and MECG is therefore the wisest course of action should the Commission adopt either of the two proposed middle ground solutions.

Summation

Allowing a prospective MKT customer unrestricted freedom to switch from schedule PED directly to the MKT rate will deny non-MKT customer the *quid pro quo* rationale for providing the EDR subsidy in the first place. Tr. Vol. 3 pg. 502 lns. 8 – 17. Therefore, the Commission should put some restraint on this form of subsidization by limiting the ability of a potential MKT customer (like Velvet Tech) to move from Schedule PED to Schedule MKT. That restraint should come either in the form of the availability provision included in the tariff sheet attached to the non-unanimous stipulation filed by the OPC, Staff, and MECG or in the adoption of the language proposed by the OPC, Staff, and MECG found in exhibit 904.

Other Changes

To aid the Commission in making its decision, the OPC prepared a comparison between the two competing tariffs that was entered into the record during the evidentiary hearing. *See* Ex. 202. Tr. Vol. 3 pg. 114 ln. 17 – pg. 118 ln. 7. In addition to the four issues that have already been addressed, there were a number of other differences between the two tariffs that were identified in this exhibit but not heavily examined during the hearing. For the most part, these differences appear to be uncontroversial. The OPC will quickly run through these differences and provide a brief explanation for their purpose.

Availability section, first bullet point change 1: addition of the phrases "that is either (1)" and "(2) that"

This was added for purposes of clarity to make it readily available what the two options under the first bullet point were. This change has no substantive difference.

Availability section, first bullet point change 2: addition of the phrase "provided the new customer's current load reaches a monthly demand minimum of fifty thousand kilowatts."

This was added to ensure that customers who take under the second option were big enough to qualify for taking service. Tr. Vol 3 pg. 556 ln. 22 – pg. 557 ln. 4. Evergy did not object to this change. Tr. Vol 2 pg. 188 ln. 24 – pg. 189 ln. 5.

Availability section, third bullet point change 1: "~~At~~Can, at full load, ~~Customer must be able to~~"

This change was made so that all three bullet points under the availability section flow directly from the introductory sentence that ends in a colon. This was added solely to allow the sentence to grammatically flow through as a bulleted list and has no substantive effect.

Availability section: elimination of the substation voltage level provision

This change was made so as to require customers who take under this tariff to own their own substation thereby eliminating the need to assign the plant cost on Evergy's books. Tr. Vol. 3 pg. 495 ln. 10 – pg. 496 ln. 11.

Availability section: elimination of the phrase "unless otherwise ordered by the Commission when approving a contract for service under this tariff."

This was offered to prevent customers from making use of competing Evergy tariff provisions simultaneously with the MKT rate. The Company did not have a problem with this change. Tr. Vol. 2 pg. 189 lns. 6 – 14.

Availability section: elimination of the phrase "or the Commission" and addition of the phrase "Availability is subject to Commission review."

This was added to give customers who believed they had been unfairly denied access to this tariff an avenue to have that decision reconsidered by the Commission. The elimination and addition are meant to be taken together to clarify the intent.

When consider together, the Company has no objection to this change. Tr. Vol. 2 pg. 189 ln. 15 – pg. 190 ln 6.

Contract Documentation section change 1: elimination of the phrase "and all assumptions, inputs, and calculations used to determine that rate"

This was eliminated because it already exists in subsection b of this same provision making its placement here redundant.

Contract Documentation section change 2: elimination of the phrase "filed with the Commission and" and addition of the phrase "and filed with the Commission."

This just moved the phrase's placement in the sentence and offers no substantive difference.

Contract Documentation section change 3: addition of the "ninety (__)" around the number 90

This was just a product of the principle of contract drafting that would have numbers spelled out and offers no substantive edit.

Contract Documentation section change 4: addition of the word "proposed"

This is to make the phrasing more accurate as the Special High-Load Factor Market Rate Contract will not have an effective date if the Commission does not approve it so, as it is being used in the context of this sentence, any effective date would only be proposed.

Term section change 1: elimination of the phrase "review"

This change was made to correct any potential ambiguity that might arise when comparing a "review" filing to any other form of filing.

Term section change 2: change from ninety to sixty days

This appears to have been an inadvertent change made due to working with an older draft the tariff. The OPC's witness argued for all times to be consistent in the tariff. Ex. 200 pg. 15 lns. 19 – 21. The OPC is indifferent to this change.

Additional Provision change 1: addition of the phrase "identified in the Company Rules & Regulations. As applicable, SPP settlements will be applied at the time received to the active billing period."

This was added to clarify the timing of the SPP settlements. The Company did not oppose this change. Tr. Vol 2 pg. 190 lns. 7 – 17.

Additional provision change 2: change from "riders" to "rider"

This was made for grammatical reasons as the provision is only referring to Rider FAC singular not plural

Additional provision change 3: elimination of ".1075.7, RSMo."

This corrected a typo that unnecessarily duplicated the statute number.

All other difference between the two documents are reflected in the four issues that have already been addressed in this brief. For the sake of references, those changes are as follows: (1) addition of the second bullet point which reads "Has not accepted a discount under section 393.1640 in the past five years" to the availability

section, which is addressed in the EDR discussion; (2) all changes made to paragraphs three and four under the additional provisions section (which begin "The Special High-Load Factor Market Rate will be designed . . ." and "The Company will make provisions to uniquely identify . . ." respectively), which are related to the issue regarding the hold-harmless provision; (3) the addition of the line "Customer will be subject to any other charge or surcharge including without limitation, any charge related to the securitization of Company assets" to paragraph 5 under additional provisions (which begins "Service under this tariff shall be excluded from . . ."), which relates to the securitization issue; and (4) all changes made to paragraph 7 under additional provisions (which begins "Any provisions of ~~the Company's~~Evergy Missouri West's RESRAM . . ."), which relates to the RES compliance issue.

In addition, it should be noted that there appears to be an addition of a paragraph 2 (beginning with "Customers who fail to maintain the Availability provisions . . .") in the additional provisions section, but this is not accurate. The same provision also appears as an elimination on the immediate preceding page. In other words, the paragraph appears as if it has been removed and then immediately re-added. This was an inadvertent accident that resulted from the application of Microsoft Word's comparison tool. *See* Tr. Vol. 3 pg. 114 ln. 17 – pg. 118 ln. 7. Examination of the two competing tariff sheets will show that they both contain the same version of this paragraph so, again, this does not represent an actual difference between the two. *Compare* Ex. 8 *and* Ex. 203.

Conclusion

The tariff sheets proposed by, and attached to, the non-unanimous stipulation and agreement entered into between the OPC, Staff, and MECG are superior to the competing tariff sheets offered by Evergy and Velvet Tech for all the reasons addressed herein. Therefore, if the Commission orders one of these two proposed set of tariff sheets, it should order the OPC, Staff, and MECG version.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission accept this *Initial Brief* and rule in the Office of the Public Counsel's favor on all matters addressed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this eighth day of February, 2022.

/s/ John Clizer