## 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 Authority to Implement Rate Adjustments Required by 20 CSR 4240-20.090(8) and the Company's Approved Fuel and Purchased Power Cost Recovery Mechanism | ) ) ) ) ) ) ) ) ) | Case No. ER-2023-0011 |
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# INITIAL BRIEF OF THE MISSOURI OFFICE OF THE PUBLIC COUNSEL


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October 14, 2022

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# **Introduction**

At its heart, this case is really nothing more than a simple question of statutory interpretation. The question squarely before the Commission is this: what change in rates should be considered when determining if a change in the rates charged under the FAC currently in effect for Evergy Missouri West, Inc. d/b/a Evergy Missouri West ("Evergy West" or "the Company") will cause Evergy West's average overall rate to exceed a statutory compound annual growth cap? The OPC's position is that only the change in the rates charged under Evergy West's FAC should be considered when determining whether a change in the rates charged under Evergy West's FAC will cause Evergy West's average overall rate to exceed a statutory compound annual growth cap. This is based on the plain and ordinary language of the statute, read as written, and is self-evidently correct. Evergy West's position is that the Commission needs to consider both the change in rates charged under the FAC **and** the change in base rates to be applied in a future rate case when deciding if a change in the rates charged under Evergy West's FAC will cause Evergy West's average overall rate to exceed a statutory compound annual growth cap. This is a nonsensical position that has no legal support beyond Evergy West's wishful thinking and is quite obviously wrong.

Beyond this question of statutory interpretation, there is no other real question to be decided. The material facts of the case are all indisputable, as was evidenced in the OPC's motion for summary determination and the Company's response that failed

to contradict even one of the eight enumerated facts essential to this case.[1] Moreover, further evidence adduced in this case has only served to solidify and verify the undisputed facts presented by the OPC in its original motion to the point where the Company openly acknowledges their accuracy. Between this and the perceptibly flawed legal argument that the Company is relying upon, the Commission should have granted the OPC's request for summary determination. Fortunately, the fact that summary determination has not been granted has not resulted in irreversible harm to Evergy West's ratepayers, yet.

As the OPC laid out in its motion for summary determination and will reiterate in this brief, it is essential that the Commission determine this case prior to the operation of law date for Evergy West's current general rate increase or risk irreversibly harming Evergy West's customers. Evergy West's initial response to the OPC's motion suggested that the Company sought to avoid this outcome. (Response to in Opposition to OPC Motion for Summary Determination, pg. 7, ER-2023-0011, EFIS Item No. 10)[2] ("The Company is no more interested in causing irreversible damage to its customers than it is to suffer irreversible damage itself."). However, statements made during the evidentiary hearing suggest that Evergy West is now

[1] The Company's response claims that it "disputes" facts but, in reality, it does not actually contradict even one of the eight separately listed and clearly labeled undisputed facts. (Response to in Opposition to OPC Motion for Summary Determination, pgs. 3 – 6, ER-2023-0011, EFIS Item No. 10). Instead, the response cites dispute with statements that were made later in the OPC's motion while requesting a rule variance and then makes various legal arguments on statutory interpretation. *Id.*

[2] For the sake of clarity, all pagination identified in citations are to the page on which the referenced material appears in the PDF file as uploaded on EFIS. In the event that the PDF pagination does not match the internal pagination of a referenced document, the OPC will endeavor to provide citations to both, with the PDF pagination appearing first.

requesting the Commission delay deciding this case in order to ensure that the Company can harm its customers despite the plain language of the statute. Therefore, the OPC will conclude this brief by once again asking the Commission to move with great urgency in order to protect Evergy West's captive ratepayers from the Company's abuse of the regulatory process.

## **Guide to the Brief**

The Commission's *Order Amending Procedural Schedule* filed on September 20, 2022, included a requirement that "[b]riefs shall follow the same list of issues as filed in the case and must set forth and cite the proper portions of the record concerning the remaining unresolved issues that are to be decided by the Commission." (Order Amending Procedural Schedule, pg. 2 ¶ 5, ER-2023-0011, EFIS Item No. 16). The OPC intends to follow this order. However, the list of issues filed by the parties does not put the remaining issues in this case in an order that is conducive to sound legal analysis. Therefore, the OPC will address each issue presented in the list of issues filed in this case, but not in the same order as they are presented in that list of issues. Instead, the OPC will break down this initial brief into five parts. First, the OPC will review the applicable statutory law. This will not directly address any one given issues but will provide the necessary background for the rest of the brief. Second, the OPC will apply the statutory law to the facts in the case to answer issues one, three, four, and five. Third, the OPC will directly respond to Evergy West's flawed legal arguments to address issue two. Fourth, the OPC will discuss whether the costs incurred in the accumulation period under review were extraordinary and what, if any, effect that should have on this case. This will address issue six. Fifth and finally, the OPC will reiterate its position on why the Commission needs to decide the present case before the effective date of new rates in Evergy West's general rate case.

## Interpretation of Relevant Statutory Law

Evergy West elected to make deferrals through Plant-In-Service Accounting (commonly known as "PISA") provided for under RSMo. section 393.1400 on December 31, 2018. (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 7 (PDF) pg. 4 (internal) n. 1, ER-2023-0011, EFIS Item No. 43); *see also* (Notice pg. 1, EO-2019-0045, EFIS Item No. 4). As such, Evergy West is subject to the provisions of RSMo. section 393.1655, which "applies to an electrical corporation that has elected to exercise any option under section 393.1400 and that has more than two hundred thousand Missouri retail customers in 2018."[3] Of particular importance to this case is subsection 5 of section 393.1655. The full text of section 393.1655.5 reads as follows:

> If a change in any rates charged under a rate adjustment mechanism approved by the commission under sections 386.266 and 393.1030 would cause an electrical corporation's average overall rate to exceed the compound annual growth rate limitation set forth in subsection 3 or 4 of this section, the electrical corporation shall reduce the rates charged under that rate adjustment mechanism in an amount sufficient to ensure that the compound annual growth rate limitation set forth in subsection 3 or 4 of this section is not exceeded due to the application of the rate charged under such mechanism and the performance penalties under such subsections are not triggered. Sums not recovered under any such mechanism because of any reduction in rates under such a mechanism pursuant to this subsection shall be deferred to and included in the regulatory asset arising under section 393.1400 or, if applicable, under the regulatory and ratemaking treatment ordered by the commission under section 393.1400, and recovered through an amortization in base rates in the same manner as deferrals under that section or order are recovered in base rates.

[3] Evergy West, then doing business as KCP&L Greater Missouri Operations Company, indicated that it had 286,741 residential customers and 39,886 "other" customers in its annual report for the calendar year 2018 as filed with the Commission. (2018 KCP&L GMO Annual Report, pg. 2).

This provision begin with an "if . . ." statement that forms a triggering mechanism for the application of the subsection. This means that the statute provision is written such that **if** a certain condition (a change in rates causes the electrical corporation's average overall rate to exceed its statutory rate growth limit) is met, a resulting action (a reduction in rates and a deferral of the excess) is taken. The central dispute in this case is simply and solely whether the triggering condition for this statute has been met.

As stated, the triggering mechanism for the application of section 393.1655.5 is the conditional clause that begins with the word "If" and continues until the clause is ended with a comma after the word "section." The full triggering mechanism is thus:

> If a change in any rates charged under a rate adjustment mechanism approved by the commission under sections 386.266 and 393.1030 would cause an electrical corporation's average overall rate to exceed the compound annual growth rate limitation set forth in subsection 3 or 4 of this section, . . .

RSMo. § 393.1030.5; *see also* (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 9 (PDF) pg. 6 (internal) lns. 22 – 25, ER-2023-0011, EFIS Item No. 43). The "rate adjustment mechanism[s]" referenced in this clause correspond to RSMo. sections 386.266 and 393.1030. The first of these allows the Commission to "to approve rate schedules authorizing an interim energy charge, or periodic rate adjustments outside of general rate proceedings to reflect increases and

decreases in its prudently incurred fuel and purchased-power costs, including transportation." RSMo. § 386.266. Evergy West has requested and received Commission approval of a rate adjustment mechanism under this provision, which is found in the form of Evergy West's Fuel Adjustment Clause ("FAC") rider. (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 9 (PDF) pg. 6 (internal) lns. 29 – 32, ER-2023-0011, EFIS Item No. 43); *see also* (Evergy Missouri West, Inc. d/b/a Evergy Missouri West Commission Approved Tariff, P.S.C. Mo. No. 1 Sheet No. 127.13 through 6th Revised Sheet 127.23).

The second provision referenced in the triggering clause requires the Commission to "prescribe by rule a portfolio requirement for all electric utilities to generate or purchase electricity generated from renewable energy resources." RSMo. § 393.1030.1. Subsection 2(4) further requires the Commission to promulgate rules to allow for "recovery outside the context of a regular rate case of prudently incurred costs and the pass-through of benefits to customers of any savings achieved by an electrical corporation in meeting the requirements of this section." RSMo. § 393.1030.2(4). Evergy West has requested and received Commission approval of a rate adjustment mechanism pursuant to the rules promulgated by the Commission in response to this statutory requirement in the form of a Renewable Energy Standard Rate Adjustment Mechanism ("RESRAM") rider. (*See* Evergy Missouri West, Inc. d/b/a Evergy Missouri West Commission Approved Tariff, P.S.C. Mo. No. 1 2nd Revised Sheet No. 137 through 9th Revised Sheet 137.3).

Given the analysis of sections 386.266 and 393.1030, it is now possible to translate the statutory provision to more directly apply to Evergy West. Specifically, the phrase “a rate adjustment mechanism approved by the commission under sections 386.266 and 393.1030” can be translated to “Evergy West’s FAC or RESRAM riders” when discussing Evergy West. After making this substitution, the full triggering mechanism would look like this:

> If a change in any rates charged under [Evergy West’s FAC or RESRAM riders] would cause an electrical corporation's average overall rate to exceed the compound annual growth rate limitation set forth in subsection 3 or 4 of this section, . . .

At the same time, we can further simplify the statutory provision by including the name of the electric corporation in question for this case, Evergy West, in place of the phrase “an electric corporation.” Making this adjustment as well transforms the statutory triggering mechanism as such:

> If a change in any rates charged under [Evergy West’s FAC or RESRAM riders] would cause [Evergy West]'s average overall rate to exceed the compound annual growth rate limitation set forth in subsection 3 or 4 of this section, . . .

The next point to consider is whether the compound annual growth rate (“CAGR”) limitation set forth in subsection 3 or 4 of section 393.1655 would apply.

Section 393.1655.3 applies only “to electrical corporations that have a general rate proceeding pending before the commission as of the later of February 1, 2018, or August 28, 2018.” RSMo. § 393.1030.3. By contrast, Section 393.1655.4 applies only

"to electrical corporations that do **not** have a general rate proceeding pending before the commission as of the later of February 1, 2018, or August 28, 2018." RSMo. § 393.1030.4 (emphasis added). Evergy West filed notice for a general rate increase on November 22, 2017. (Notice of Intended Case Filing, ER-2018-0146, EFIS Item No. 1). The Commission issued its *Order Approving Tariffs* in that same case on November 26, 2018.[4] (Order Approving Tariffs, ER-2018-0146, EFIS Item No. 487). Evergy West therefore had a rate case pending before the Commission on both February 1, 2018, and August 28, 2018. Thus, it is the CAGR limitation imposed by Section 393.1655.3 that applies for Evergy West.

Subsection 3 of section 393.1655 imposes a CAGR limitation of 3%. RSMo. § 393.1030.3; *see also* (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 8 (PDF) pg. 5 (internal) lns. 21 – 24, ER-2023-0011, EFIS Item No. 43). The rates Evergy West charges thus cannot exceed 3% compound annual growth over "the electrical corporation's average overall rate as of the date new base rates are set in the electrical corporation's most recent general rate proceeding concluded prior to the date the electrical corporation gave notice under section 393.1400[.]" *Id.*

It is now possible to complete the translation of the triggering mechanism of section 393.1655.5 to be Evergy West specific. Continuing with the previous

[4] The Order became effective December 6, 2018. (Order Approving Tariffs, ER-2018-0146, EFIS Item No. 487).

substitutions and replacing the phrase “set forth in subsection 3 or 4 of this section” with the phrase “of 3%” results in a final version of the triggering mechanism:

> If a change in any rates charged under [Evergy West’s FAC or RESRAM riders] would cause [Evergy West]'s average overall rate to exceed the compound annual growth rate limitation [of 3%], . . .

This is the triggering mechanism that determines whether Evergy West should defer any part of its FAC as outlined in the remainder of section 393.1655.5. Now it is necessary to apply the facts of this case to the provision to see if the triggering mechanism has been met.

## **Application of Relevant Law**

The applicable law has now been carefully laid out and examined. The question before the Commission is simply and solely whether the triggering mechanism of section 393.1655.5 has been triggered. That provision will be triggered "If a change in any rates charged under [Evergy West's FAC or RESRAM riders] would cause [Evergy West]'s average overall rate to exceed the compound annual growth rate limitation [of 3%], . . . ." Because this case does not concern **any** change to Evergy West's RESAM rider, that part of the question can be completely disregarded. That leaves the following to be decided: will the change to the rates charged under Evergy West's FAC related to this accumulation period cause Evergy West's average overall rate to exceed the compound annual growth rate limitation of 3%? The answer to that question requires logical analysis in four steps:

(1) Determine what the change in the rate charged under Evergy West's FAC will be;
(2) Determine what effect that change will have on Evergy West's average overall rates;
(3) Determine what the 3% CAGR limit in effect is; and finally
(4) Determine whether the change in the rate charged under Evergy West's FAC (step 1) would cause Evergy West's average overall rate (step 2) to exceed the 3% CAGR limit in effect (step 3).

The OPC will now walk thorough each of these four steps in order.

Determining what the change in the rate charged under Evergy West's FAC will be

To determine what the change in the rate charged under Evergy West's FAC will be, it is first necessary to ask what the phrase "the rate charged under Evergy West's FAC" means. This is made very easy because "the rate charged under Evergy

West's FAC" is a defined term in the Commission's rules. Specifically, the Commission's rules define a term called the "FAC charge" to mean "the positive or negative dollar amount on each utility customer's bill, which in the aggregate is to recover from or return to customers the fuel and purchased power adjustment (FPA) amount[.]" 20 CSR 4240-20.090(1)(H). The rules then go on to define a term coined the "Fuel adjustment rate (FAR)" to mean "the rate used to determine the FAC charge on each utility customer's bill during a recovery period of a FAC." 20 CSR 4240-20.090(1)(J). The rules further state "[t]he FAR shall be designed to recover from or return to customers the recovery period FPA." *Id*. Based on this definition, the "rate charged under Evergy West's FAC" means simply the FAR "designed to recover from or return to customers the recovery period FPA." *Id*. This obviously necessitates a new question: what is the FPA amount for this accumulation period?

The question "what is the FPA amount for this (the 30th) accumulation period" just happens to be the same question posed in issue number 3. The answer to that question can be found in the work papers of Evergy West that were attached to the testimony of OPC witness Ms. Lena Mantle. The FPA amount for the 30th accumulation period is $44,604,020. (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), LMM-R-4 pg. 63, ER-2023-0011, EFIS Item No. 18). Evergy West completely agrees with this assessment. (Statement of Position (filed by Evergy West), pg. 3, ER-2023-0011, EFIS Item No. 24). Therefore, the answer to issue number 3 is settled; the FPA for the 30th accumulation period is

$44,604,020. The OPC will round this number down to $44.6 million for simplicity throughout the remainder of this brief.

Having determined that the FPA for this accumulation period is $44.6 million, it is safe to say that the change in Evergy West's FAR for this case is, by definition, the change in the FAR "designed to recover from . . . customers the [$44.6 million FPA amount]." 20 CSR 4240-20.090(1)(J). Because the "FAR" defined in the Commission's rules is unmistakably "the rate charged under Evergy West's FAC" implicitly referenced in section 393.1655.5, the change in the rate charged under Evergy West's FAC for this case is whatever change is necessary to recover from customers the $44.6 million FPA amount. *Id.* The first question in the four-step analysis is thus answered. The change in the rate charged under Evergy West's FAC is the change in the FAR necessary to recover from customers the full $44.6 million FPA amount for this accumulation period.

Determining what effect that change will have on Evergy West's average overall rates

To determine what effect changing the rate charged under Evergy West's FAC will have on the Company's average overall rates, it is clearly necessary to determine what the resulting average overall rate would be if Evergy West were to change the rate charged under its FAC. Further, because the change in the rate charged under Evergy West's FAC is the change in Evergy West's FAR necessary to recover from customers the full $44.6 million FPA amount for the 30th accumulation period, the question at issue thus becomes: what would Evergy West's average overall rate be if

the Company's FAC rate was changed to allow full recovery of the $44.6 million FPA amount for this accumulation period? Lo and behold, this is the same question posed in issue number 4 of the list of issues. The answer to this question is, again, beyond dispute. "Evergy West's workpapers show that the average rate on September 1, 2022 as calculated by Evergy West with the entire $44.6 million would have been $0.10223/kWh[.]" (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 12 (PDF) pg. 9 (internal) lns. 16 – 18, LMM-R-4 pg. 4, ER-2023-0011, EFIS Item No. 18). Once again, Evergy West agrees with this assessment. (Statement of Position (filed by Evergy West), pg. 3, ER-2023-0011, EFIS Item No. 24). There is thus no dispute that, if the Company is permitted to fully recover the FPA for the 30th accumulation period through its FAC rate, Evergy West's average overall rate will be $0.10223/kWh. That does not, however, end the inquiry.

In order to determine if Evergy West's average overall rate exceeds the CAGR limit, it is necessary to consider that rate as a percentage increase.[5] The nature of that percentage increase is defined by law. Specifically, it is defined by subsection 3 of 393.1655, the pertinent part of which reads:

> If the difference between (a) the electrical corporation's average overall rate at any point in time while this section applies to the electrical corporation, and (b) the electrical corporation's average overall rate as of the date new base rates are set in the electrical corporation's most recent general rate proceeding concluded prior to the date the electrical corporation gave notice under section 393.1400, reflects a compound annual growth rate of more than three percent, . . . .

[5] This is due to the simple fact that the CAGR limit is calculated as a percentage. *See* (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 10 (PDF) pg. 7 (internal) lns. 5 – 10, ER-2023-0011, EFIS Item No. 18).

RSMo. § 393.1655.3. Thus the question to be answered is this: what is the difference between the average overall rate of $0.10223/kWh and "the electrical corporation's average overall rate as of the date new base rate [were] set in the electrical corporation's most recent general rate proceeding concluded prior to the date the electrical corporation gave notice under section 393.1400" rendered as a percentage. *Id*. To no surprise, this is the same question posed in sub-part a of listed issue number 4.

In order to determine what the percentage difference between the average overall rate of $0.10223/kWh (which is what will result if Evergy West is permitted to change the rate charged under its FAC to fully recover the $44.6 million FPA for the 30th accumulation period) and the average overall rates for Evergy West as of the date new base rates were set in the electrical corporation's most recent general rate proceeding concluded prior to the date the electrical corporation gave notice under section 393.1400, it is obviously necessary to first determine what the average overall rates for Evergy West were as of the date new base rates were set in the electrical corporation's most recent general rate proceeding concluded prior to the date the electrical corporation gave notice under section 393.1400. "Evergy West calculates the Average Overall Rate at the date base rates were set in the last general rate proceeding concluded prior to when Evergy elected PISA under section 393.1400 (ER-2018-0146) to be $0.09367/kWh." (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 11 (PDF) pg. 8 (internal) ln. 22 – pg. 12 (PDF) pg. 9 (internal) ln 3, ER-2023-0011, EFIS Item No. 18). We consequently need only

calculate the difference between the average overall rate of $0.10223/kWh and the average overall rate of $0.09367/kWh to answer the second step.

As described in the testimony of OPC witness Ms. Lena Mantle, Evergy West's own workpapers show that the average overall rate of $0.10223/kWh is "an increase of 9.14% over the base Average Overall Rate of $0.09367/kWh." (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 12 (PDF) pg. 9 (internal) lns. 18 – 19, ER-2023-0011, EFIS Item No. 18). As with all the previous points, Evergy West again admits the truth of this statement. Statement of Position (filed by Evergy West), pg. 3, ER-2023-0011, EFIS Item No. 24). It should be stated, however, that Evergy West attempts to claim that this 9.14% is for **only** the 30th accumulation period. *Id.* ("When considering only the FPA for this 30th accumulation period, the percentage difference in the resulting average overall rate of $0.10223/kWh and the average overall rate as of the date new base rates were set in EMWs most recent general rate case of $0.09367/kWh, is 9.14%.") That is a blatant attempt to deceive the Commission. The Company's **own** workpapers show that the 9.14% is the projected rate change when considering (1) Base Revenue, (2) the currently effective RESRAM rider, (3) the 29th FAC accumulation period, and (4) the 30th accumulation period. (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 12 (PDF) pg. 9 (internal) lns. 4 - 10, LMM-R-4 pg. 4, ER-2023-0011, EFIS Item No. 18). The answer to the second step of the four-step analysis is thus set in stone. The effect of changing the rates charged under Evergy West's FAC will result in an increase to Evergy West's average overall rates of 9.14%

over Evergy West's average overall rates as of the date new base rates were set in the Company's most recent general rate proceeding concluded prior to the date it gave notice under section 393.1400.

Determining the 3% CAGR limit in effect

Before delving too deep into this question, let us first consider what the CAGR limit is. As explained by the OPC's witness Ms. Lena Mantle:

> A compound annual growth rate ("CAGR") is the annualized average rate of growth across time taking into account the growth that has already occurred. At the end of the first year, the CAGR is 3%. At the end of the second year, the CAGR cap is an increase of 6.09%. At the end of the third year, the rate cap CAGR is 9.2727% and at the end of the fourth year the cap is 12.5509%.

(Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 10 (PDF) pg. 7 (internal) lns. 6 - 10, ER-2023-0011, EFIS Item No. 18). The important consideration here is that the CAGR changes over time. To determine what the CAGR in effect is for purpose of testing the legal application of the §393.1655.5 triggering mechanism would therefore require careful consideration of when the CAGR should be measured. Fortunately, that question becomes irrelevant in this case, as will quickly be shown.

The CAGR in effect can be measured for any date, not just the end of a year. *Id*. at lns. 11 – 12. Evergy West has even provided a daily calculation of the CAGR in its workpapers for each FAC rate increase case. *Id*. at lns. 12 – 15. The OPC's witness highlighted several important dates to consider in testimony. *Id*. at pg. 10 (PDF) pg. 7 (internal) ln. 19 – pg. 11 (PDF) pg. 8 (internal) ln. 4. For example, "[t]he CAGR was

11.69% on September 1, 2022, the effective date of the proposed FAC tariff sheet filed by Evergy West." *Id.* at pg. 10 (PDF) pg. 7 (internal) lns. 19 – 20. While, "[o]n September 21, 2022, the date that [rebuttal] testimony [was] filed, the CAGR [was] 11.87%." *Id.* at lns. 20 – 21. On December 1, 2022, meanwhile, "the CAGR will be 12.51%." *Id.* at pg. 11 (PDF) pg. 8 (internal) lns. 1 – 2. Finally, the CAGR will be 12.55% on December 6, 2022. *Id.* at lns. 3 – 4. As previously stated, the fact that there are multiple possible answer to this question is fortunately irrelevant because in no event does the 9.14% determined in the last step rise above **any** of these CAGR limits. Let us then move on to the last step.

Determine whether the change in the rate charged under Evergy West's FAC would cause Evergy West's average overall rate to exceed the 3% CAGR limit in effect

The last and final step in the four-step analysis is to bring all the pieces previously decided together. We have already seen how the change in rates charged under the FAC is defined by rule as the change in the FAR necessary to recover the FPA of $44.6 million. We have further already seen how if the rate charged under the FAC is changed to allow the full recovery of the $44.6 million FPA, the average overall rate will be $0.10223/kWh, which represents a 9.14% increase over Evergy West's average overall rates as of the date new base rates were set in the Company's most recent general rate proceeding concluded prior to the date it gave notice under section 393.1400. Finally, we have seen several examples of what the 3% CAGR limit in effect could be based on when the Commission decides to measure it. All that is left is to ask: does allowing for the full recovery of the $44.6 million FPA, thus resulting in a

9.14% change in Evergy West's average overall rates, cause the Company's average overall rate to exceed the 3% CAGR? In sticking with the pattern thus developed, this is effectively the same question posed as issue number 5 in the list of issues. The answer should already be known. As set forth in the rebuttal testimony of the OPC's witness Ms. Lena Mantle:

> If the total FPA costs are included for AP 30, Evergy West's workpapers show that the average rate on September 1, 2022 as calculated by Evergy West with the entire $44.6 million would have been $0.10223/kWh; an increase of 9.14% over the base Average Overall Rate of $0.09367/kWh. This 9.14% CAGR is considerably below the September 1, 2022, PISA 3% CAGR of 11.69%; the September 21, 2022, PISA 3% CAGR of 11.87%; and the December 1, 2022, PISA 3% CAGR of 12.51%. **Under no circumstances does including the total cost of the FPA in Evergy West's FAC rate result in a percentage increase in Evergy West's current average overall rate that would be greater than the CAGR allowed under the PISA statute**.

(Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 12 (PDF) pg. 9 (internal) lns. 16 – 25, LMM-R-4 pg. 4 of 63, ER-2023-0011, EFIS Item No. 18) (emphasis added).

The facts of the case having now properly been applied to the law and answers provided for issues three, four, and five from the list of issues, it is easy to see the final result. A change in the rates charged under the FAC for this accumulation period does not result in Evergy West's average overall rates exceeding the 3% compound annual growth rate limit set in RSMo. section 393.1655.5. This in turn brings us back to issue one. The question posed by issue one is whether the Commission should grant Evergy West's request to defer $31 million in FAC fuel and

purchase power costs. As has already been outlined, the legal question before the Commission is whether the statutory triggering mechanism of section 393.1655.5, upon which Evergy West relies for its request, has been met. That triggering mechanism is, once again, paraphrased thus:

> If a change in any rates charged under [Evergy West's FAC or RESRAM riders] would cause [Evergy West]'s average overall rate to exceed the compound annual growth rate limitation [of 3%], . . .

The extensive legal review so far concluded shows conclusively that this provision has **not** been met. To review, that analysis is as follows:

(1) The rate charged under the FAC is the FAR defined by Commission rule
(2) The FAR is defined by Commission rule as the amount designed to recover the FPA
(3) The change in the rate charged under the FAC is therefore the change in the FAR needed to recover the FPA
(4) The FPA is $44.6 million for this accumulation period
(5) If the rate charged under the FAC is changed to allow the full recovery of the $44.6 million FPA, the average overall rate will be $0.10223/kWh.
(6) An average overall rate of $0.10223/kWh represents a 9.14% increase over Evergy West's average overall rates as of the date new base rates were set in the Company's most recent general rate proceeding concluded prior to the date it gave notice under section 393.1400.
(7) A 9.14% increase is considerably below the September 1, 2022, PISA 3% CAGR of 11.69%; the September 21, 2022, PISA 3% CAGR of 11.87%; the December 1, 2022, PISA 3% CAGR of 12.51%; and the December 6, 2022, PISA 3% CAGR of 12.55%.
(8) Therefore a change in rates charged under the FAC for this accumulation period will not cause Evergy West's average overall rate to exceed the 3% compound annual growth rate limitation set in 393.1655.3 and thus the triggering mechanism of 393.1655.5 has not been met.

Because the triggering mechanism of section 393.1655.5 has not been met, the Commission lacks the legal authority to defer costs under section 393.1655.5. *Amendment of the Comm'ns Rule Regarding Applications for Certificates of Convenience & Necessity v. Mo. Pub. Serv. Comm'n*, 618 S.W.3d 520, 524 (Mo. banc 2021) ("[The PSC's] powers are limited to those conferred by statutes, either expressly or by clear implication as necessary to carry out the powers specifically granted." (citing *State ex rel. Mogas Pipeline LLC v. Mo. PSC*, 366 S.W.3d 493, 496 (Mo. banc 2012)). Therefore the answer to issue one is unquestionably no. The Commission should not grant Evergy West's requested deferral under section 393.1655.5 because the triggering mechanism of section 393.1655.5 has not been met and thus the statute does not apply.

## **Responding to Evergy West's Flawed Legal Argument**

Despite the overwhelming and undisputed evidence discussed in the foregoing section, Evergy West nevertheless attempts to argue that it is permitted to defer fuel and purchase power costs for this accumulation period under section 393.1655.5. Evergy West's argument is based on a very clearly incorrect reading of the statute. Specifically, Evergy West argues that the change in rates to be charged under its FAC will exceed the 3% CAGR limit *if you include fuel and purchase power costs to be recovered in base rates as part of a future general rate proceeding*. The simple and obvious problem is that fuel and purchase power costs are not included in the rates "charged under" the FAC and therefore cannot be included in this calculation under the plain language of the statute. Let us review.

To start, consider the actual language of section 393.1655.5 again. The first sentence begins "If a change in any rates charged under a rate adjustment mechanism approved by the commission under sections 386.266 and 393.1030 would cause . . . ." The critical component here is the phrase "charged under[.]" The statute clearly does not allow the Commission to consider whether a change in **any** rate would trigger the clause. Instead, the statute very clearly and simply states that it has to be a change in a rate "**charged under**" a rate adjustment mechanism approved by the Commission under sections 386.266 and 393.1030. The problem for Evergy West is that the costs it is seeking to include in its calculations are charged under its **base retail rates** and are not "charged under" a rate adjustment mechanism approved by the Commission under sections 386.266 and 393.1030.

As has already been examined, Evergy West's FAC rider is a rate adjustment mechanism under section 386.266. (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 9 (PDF) pg. 6 (internal) lns. 29 – 32, ER-2023-0011, EFIS Item No. 43). As has already been discussed, the rate "charged under" the FAC is defined in the Commission's rules as the "FAR" and is the amount designed to collect the FPA from customers. 20 CSR 4040-20.090(1)(J). As we have yet further already considered, the FPA for this accumulation period was $44.6 million **and nothing more**. (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), LMM-R-4 pg. 63, ER-2023-0011, EFIS Item No. 18). Evergy West has already agreed on this point. (Statement of Position (filed by Evergy West), pg. 3, ER-2023-0011, EFIS Item No. 24). Therefore, based on the definitions found in the Commission's own rules, the sole and entire amount to be considered when determining what the change in the rates "**charged under**" the FAC for this accumulation period would be is the $44.6 million FPA. To consider any other costs would, by the Commission's own definitions, require considering costs recovered thorough rates that are not "charged under" the FAC and would therefore violate the plain language of section 393.1655.5.

The point should have now been fully made, but to take the analysis one-step further, let us consider why the *specific* costs that Evergy West wants the Commission to consider are not "charged under" the FAC. To that end, it is important to understand how the FAC works. As explained by the OPC's witness Ms. Lena Mantle:

> The FAC rate adjustment mechanism approved by the Commission for Evergy West recovers *the difference* between the normalized FAC costs and revenues that were used to determine revenue requirement in the last general rate case and the fuel and purchased power costs and revenues actually incurred in the accumulation period. The FPA is 95% of this difference plus an amount to true up the recovery period that ends with the filing, interest, and, in this FAC rate change filing, an imprudence amount as ordered in case no. EO-2020-0262.

(Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 13 (PDF) pg. 10 (internal) lns. 2 – 8, ER-2023-0011, EFIS Item No. 43) (emphasis in original). This can be verified against the Commission's own definition of the FPA. 20 CSR 4240-20.090(1)(K). What is really important here is to understand that the FPA is **not** the entire amount of fuel and purchase power costs incurred during an accumulation period. (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 13 (PDF) pg. 10 (internal) lns. 9 – 11, ER-2023-0011, EFIS Item No. 43). "It is *the difference* between what was already collected from customers in permanent rates (sometimes referred to as base rates) and what was actually incurred in that accumulation period." *Id.* at lns. 11 – 13 (emphasis in original). This is important because the amount that Evergy West wants the Commission to consider is exactly those same fuel and purchase power costs that would be collected in base rates and are therefore **not** collected under the FAC. *Id.* at pg. 14 (PDF) pg. 11 (internal) lns. 10 – 14. As the OPC's witness explained:

> The fuel costs included *in* Evergy West's permanent rates as a part of fuel re-basing in a general rate case are not recovered through Evergy West's FAC and therefore should not be considered when determining whether a change in its FAC would cause Evergy West to exceed the rate caps imposed by section 393.1655.5 of the PISA statute.

*Id*. at pg. 15 (PDF) pg. 12 (internal) ln. 25 – pg. 16 (PDF) pg. 13 (internal) ln 2 (emphasis in original). If there is even the slightest bit of confusion about this just consider the Company's own exhibit where the amount it claims will push it over the CAGR is literally labeled "Base Retail Rates – Fuel[.]" (Exhibit No. 3 - Mo West Fuel Impact on Overall Rates, pg. 2, ER-2023-0011, EFIS Item No. 39). The Company has made it extremely clear that these costs are **not** being collected in rates "charged under" the FAC.

There can be no serious debate that including rates not "charged under" the FAC when determining whether the rates "charged under" the FAC would cause Evergy West to exceed its statutory cap would be a gross misconstruction of the relevant statute. So what does Evergy West argue to defend it faulty claim? The answer is that the Company clings to FAC rule 20 CSR 4240-20.090(2) which states, in relevant part, "[a]n electric utility . . . must rebase base energy costs in each general rate proceeding in which the FAC is continued or modified." (Statement of Position (filed by Evergy West), pg. 2, ER-2023-0011, EFIS Item No. 24). This of course begs the question: should the Commission consider the FAC rate adjustment mechanism's requirement that fuel and purchased power costs be rebased in EMW's general rate case (No. ER-2022-0130) in determining the amount of EMW's requested deferral in this FAC proceeding? This question, which is issue number 2 on the list of issues, must be answered with a resounding no. There is nothing in section 393.1655.5 that remotely suggests that this is the case and, as already shown, attempting to include

fuel re-basing in general rates as part of the calculation of the effect of changing the rates charged under the FAC is contrary to the plain language of the statute.

Evergy West's position statement contains the line "[b]oth the base fuel costs and the difference from the base fuel costs are charged under the FAC, a rate adjustment mechanism adopted by the Commission." (Statement of Position (filed by Evergy West), pg. 2, ER-2023-0011, EFIS Item No. 24). This claim, offered with no citation of any kind, is an excellent summation of the Company's legal position as a whole and is also unmistakably and unapologetically wrong. The amount charged under the FAC is literally defined by the Commission's rules as the amount, "which in the aggregate is to recover from . . . customers the [FPA] amount[.]" 20 CSR 4040-20.090(1)(H). The FPA amount includes, in part, "The difference between the ANEC and NBEC of the corresponding accumulation period taking into account any incentive ordered by the commission[.]" 20 CSR 4040-20.090(1)(K)1. In this context, ANEC, actual net energy costs, "means prudently incurred fuel and purchased power costs net of fuel-related revenues of a rate adjustment mechanism (RAM) during the accumulation period" while NBEC, net base energy costs, means "the fuel and purchased power costs net of fuel-related revenues billed during the accumulated period in base rates[.]" 20 CSR 4040-20.090(1)(B),(U). Based on these definitions, the FPA is **the difference** between the fuel and purchase power costs included in base rates "and the fuel and purchased power costs and revenues actually incurred in the accumulation period[,]" as explained by the OPC's witness. (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 13 (PDF) pg. 10

(internal) lns. 2 – 8, ER-2023-0011, EFIS Item No. 43). Because the FAC charge collects the FPA and the FPA is the **difference** between fuel and purchase power costs in base rates and those actually incurred, the fuel and purchase power costs collected in base rates is, by definition, **not** included in the FAC charge and hence not "charged under the FAC." The fact that Evergy West fails to understand this exceedingly simple idea is the entire reason this case is before the Commission.

Notwithstanding anything said in this section up to this point, there is a second and equally important problem with Evergy West's argument. That is the issue related to the timing. Evergy West "is attempting to use changes in revenue requirement associated with a rate case that has not yet concluded and for which rates are not currently in effect." *Id.* at pg. 14 (PDF) pg. 11 (internal) lns. 5 – 7. There is nothing in section 393.1655 "that allows the use of future costs in the calculation of the percentage increase due to FAC costs nor anything that states the change in the average overall rate only applies to the fuel and purchased power costs." *Id.* at lns. 8 – 9. There is no legal or logical support for allowing a utility to point to future rates that have not yet gone into effect as part of the calculation of an overall average rate increase related to a current change in rates. Moreover, no other utility has ever included a future re-basing of fuel and purchase power costs in its calculation of an overall average rate increase. Tr. Vol. 1 pg. 78 lns. 11 – 15. To take such an action would therefore be arbitrary and capricious. *Sarcoxie Nursery Cultivation Ctr., LLC v. Williams*, 649 S.W.3d 127, 136 (Mo. App. W.D. 2022) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which [the

legislature] has not intended it to consider . . . ." (quoting *Beverly Enterps.-Mo. Inc. v. Dep't of Soc. Servs.*, 349 S.W.3d 337, 345 (Mo. App. W.D. 2008)). Such a decision would be unreasonable. *Amendment of the Comm'ns Rule Regarding Applications for Certificates of Convenience & Necessity v. Mo. Pub. Serv. Comm'n*, 618 S.W.3d 520, 523 (Mo. banc 2021).

There can be no dispute that the cost for fuel and purchase power incurred by a utility that are already being recovered through base rates are not subsequently recovered through the FAC as well. (<u>Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential)</u>, pg. 15 (PDF) pg. 12 (internal) ln. 25 – pg. 16 (PDF) pg. 13 (internal) ln 2, ER-2023-0011, EFIS Item No. 43). Because the cost for fuel and purchase power already included in base rates are not recovered **<u>through</u>** the FAC, a change in those rates is not a change in the rates "**<u>charged under</u>**" the FAC. *Id* at pg. 14 (PDF) pg. 11 (internal) lns. 8 – 10. Because the change in base rates is not a change in the rates "charged under" the FAC, it is inappropriate and unlawful to consider the change in base rates when considering if the change in rates "charged under" the FAC has triggered section 393.1655.5. *Id.* at lns. 14 – 20; RSMo. § 393.1655.5. There is no question that the costs that Evergy West asks the Commission to consider when arguing that it has exceeded the statutory CAGR are costs that will be recovered in base rates. *See*, *e.g.*, (Exhibit No. 3 - Mo West Fuel Impact on Overall Rates, pg. 2, ER-2023-0011, EFIS Item No. 39)(which labels the relevant costs "Base Retail Rates – Fuel" and the column "Settled Effective Dec. 6, 2022). There can thus be no question that Evergy West's argument is inappropriate

and unlawful. The Commission should therefore disregard Evergy West's faulty legal argument.

## Responding to Evergy West's Argument Regarding Extraordinary Costs

Evergy West's witness Mr. Darin Ives stated in testimony that the deferral of the fuel and purchase power costs that Evergy West sought was "consistent with paragraph XI of the Commission's FAC rule." It is unclear to what extent the Company's position rests on this claim. Commission rule 20 CSR 4240-20.090(8)(A) sets forth what an electric utility must file when it seeks to change its fuel adjustment rates. Rule 20 CSR 4240-20.090(8)(A)2.A.(XI) states that this filing must include, in electronic format and for the period of historical costs which are being used to propose the fuel adjustment rates, a list of the "Extraordinary costs not to be passed through, if any, due to such costs being an insured loss, or subject to reduction due to litigation or for any other reason[.]" Evergy West did not mention the $31 million that it seeks to defer let alone identify them as extraordinary in its minimum filing requirements for this case. (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 28 (PDF) pg. 25 (internal) ln. 5 – 25, ER-2023-0011, EFIS Item No. 43); Tr. Vol. 1 pg. 105 lns. 5 – 12).[6] On that basis alone, the Commission should not order any deferral of costs related to the 30th accumulation period based on the Company's claim that those costs were extraordinary. This, coincidently, answers Issue number 6 in the list of issues. Moreover, because Issue 6 is answered in the negative, sub-issue a. to issue 6 is rendered unnecessary to answer.

[6] Evergy West was aware of this filing requirement because it did detail the adjustments it made in costs in AP 30 for Storm Uri resettlement costs in response to this filing requirement (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 28 (PDF) pg. 25 (internal) ln. 24 – pg. 29 (PDF) pg. 26 (internal) ln 1, ER-2023-0011).

Notwithstanding the foregoing, out of an abundance of caution, the OPC will quickly summarize why the costs incurred by Evergy West during the 30th accumulation period were not extraordinary. "The reason for the vast difference between the normalized fuel and purchased power costs included in the last rate case and what actually occurred, rests squarely on Evergy West's lack of generation resources to earn revenues to offset the high market prices paid for its load." (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 21 (PDF) pg. 18 (internal) lns. 4 – 7, ER-2023-0011, EFIS Item No. 43). As OPC Witness Ms. Mantle explained:

> First, the FPA or difference between what Evergy West included in revenue requirement and actual FAC costs incurred in this accumulation period, AP 30, is $2.9 million (6.1%) less than the FPA in Evergy West's last accumulation period, AP 29. Evergy West did not claim in its testimony in its FAC rate change case for AP 29, that the costs incurred in AP 29 were extraordinary. AP 29 was June 1, 2021 through November 31, 2022 - the six months immediately preceding AP 30. Evergy West faced many of the same external factors in AP 29 that it did in AP 30 and yet it did not claim that the FPA for AP 29 was "extraordinary." It did not consider the costs that it incurred "extraordinary" until it discovered that including the total FPA in AP 30, while not hitting the cap for deferral provided in the PISA statute, *would limit the amount of revenue requirement increase that it could get in the general rate case.*
>
> [. . .]
>
> Finally, and perhaps most persuasively, Every Metro, Inc. ("Evergy Metro"), a sister company of Evergy West, did not ask for a deferral of costs due to extraordinary circumstances for costs it incurred over nearly the same six month time period *despite incurring the same high fuel and purchase power costs*. This is because, in its FAC rate change case currently before this Commission, case no. ER-2023-0031, Evergy Metro's filed FAC actual net energy costs is nearly the same amount as its FAC costs included in its permanent rates. The difference is only $1.7 million. This means, despite the recent increase and volatility in fuel and market prices that is out of its control, Evergy Metro's FAC costs

> nearly matched what was included in its revenue requirement set nearly four years ago.

pg. 21 (PDF) pg. 18 (internal) ln. 19 – pg. 22 (PDF) pg. 19 (internal) ln. 23 (emphasis in original). A detailed explanation of this second part of the excerpt can be found in Ms. Mantle's testimony from pages 23 through 25 (internal pagination pgs. 20 through 22). However, the key piece of the evidence is this:

> From December 1, 2021 through May 31, 2022, Evergy Metro and Evergy West faced the same fuel prices. Evergy Metro and Evergy West faced the same market prices. Evergy Metro and Evergy West faced the same weather. Evergy West and Evergy Metro had the same management – their parent company Evergy, Inc. ("Evergy"). The drastic difference in fuel costs and market revenue is due to Evergy West's management decisions regarding the generation assets of the two utilities.

*Id* at pg. 24 (PDF) pg. 21 (internal) lns. 10 – 16. Ms. Mantle further summarized her position quite succinctly in the following question and answer:

> **Q. To summarize your position, is Evergy West's FPA costs for AP 30 due to external extraordinary factors as Mr. Ives contends?**
>
> A. No. All of the electric utilities in Missouri are facing the same external factors and yet Evergy West is the only electric utility that is claiming that its fuel and purchased power costs are extraordinary. In fact, the FAC costs of Evergy Metro, Evergy West's sister company, have been nearly the same as the costs that were included in its permanent rates. This signifies that the increase in FAC costs is not due to external factors but due to the resource acquisition decisions of Evergy West.
>
> In addition, Evergy West's FPA costs in AP 30 were lower than the FPA costs in AP 29 and Evergy West did not claim, at the time of the last FAC rate change case, that these costs were extraordinary.

*Id* at pg. 26 (PDF) pg. 23 (internal) lns. 1 – 11. It is also important to note that there are **<u>no</u>** costs related to winter storm Uri included in the FPA for this accumulation period. *Id*. at pg. 26 (PDF) pg. 23 (internal) lns. 14 – 15. Because the OPC is unsure

to what extent the issue of extraordinary costs matters given the clearly unlawful nature of Evergy West's request to defer under section 393.1655.5, the OPC will refrain from any further discussion of this point until its reply brief.

## Importance of Timing to this Case

The OPC went to great lengths in its motion for summary determination to outline the issues related to the timing of this case. (Motion for Summary Determination and Rule Variance or, in the Alternative, Request for Expedited Procedural Schedule and Memorandum, Motion pg. 7 ¶27 – pg. 13 ¶36, ER-2023-0011, EFIS Item No. 9). Evergy West's initial response to the OPC's motion suggested that the Company respected the OPC's request and would work to help expedite the schedule. (Response to in Opposition to OPC Motion for Summary Determination, pg. 7, ER-2023-0011, EFIS Item No. 10). Evergy West even joined with the OPC in filing a proposed procedural schedule that would allow rates for this case to become effective before December 6th, the operation of law date for the currently ongoing Evergy West general rate case. (*See* Proposed Procedural Schedule, ER-2023-0011, EFIS Item No. 13). However the Company has now made an about face and is asking the Commission to delay its decision in this case until after the operation of law date for the Evergy West's general rate case. (Statement of Position (filed by Evergy West), pg. 3, ER-2023-0011, EFIS Item No. 24 ("the Commission should decide the rate case and then ask the parties to quantify the amount of the deferral necessary to comply with section 393.1655.")). In other words, the Company is asking the Commission to pre-determine that a deferral should be made and then wait until after it is too late to apply the law properly. This is Evergy's attempt to abuse the regulatory process in a manner that would harm its customers by depriving them of the statutory protections they were promised, which Evergy agreed to when it elected PISA.

The most important date for the present case "is December 6, 2022, the date that new rates become effective in Evergy West's general rate increase case." (<u>Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential)</u>, pg. 29 (PDF) pg. 26 (internal) lns. 5 – 7, ER-2023-0011, EFIS Item No. 43). "If new FAC rates become effective prior to the date of new rates in the general rate increase case, then, because it has elected PISA, Evergy West has to absorb a performance penalty." Evergy West obviously wishes to avoid this outcome, so it is purposefully seeking to delay the Commission's order in this case until **<u>after</u>** rates in the general rate case become effective. (<u>Statement of Position</u> (filed by Evergy West), pg. 3, ER-2023-0011, EFIS Item No. 24). As the OPC's witness explained:

> In the past, in FAC rate filings that Staff or OPC opposed, the Commission has ordered that substitute FAC tariff sheets be filed with costs that were not in dispute. For the disputed amounts, procedural schedules were developed that would put off a resolution for months. Evergy is aware of this process for it has had FAC rate changes filings that contained such disputes.
>
> If Evergy West could get this filing to proceed at the same pace, with a resolution after December 6, 2022, then the revenue requirement requested by Evergy West would go into effect because the average rate would remain below the 3% CAGR of the PISA [statute]. At that time, there would be a deferral because the rate adjustment mechanism increase that would drive the average rate above the 3% CAGR would be due to a change in rates charged under a rate adjustment mechanism. Exactly how much would be deferred would be dependent upon the timing of the order in Evergy West's FAC rate change case. Ultimately, regardless of whether or not the deferral met the statute when it was requested, by the time the Commission made a decision, it would meet the deferral requirements of PISA. Evergy West would be able to get around the customer protection of the performance penalty provided by the 3% CAGR of the PISA statute that it elected.

(Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 29 (PDF) pg. 26 (internal) ln. 21 – pg. 30 (PDF) pg. 27 (internal) ln. 10, ER-2023-0011, EFIS Item No. 43). In order to prevent the irreversible harm to customers that will occur if the Commission delays deciding this case until after the rate case, "the Commission should immediately order that Evergy West file a substitute tariff that includes all of Evergy Wests FPA to assure that Evergy West's FAC rate change takes effect before the effective dates of new rates in Evergy West's current general rate case, ER-2022-0130." *Id.* at pg. 30 (PDF) pg. 27 (internal) lns. 13 – 16.

A little over three years ago, Chairman Silvey had a discussion with the Public Utility Fortnightly magazine about the PISA legislation. During that interview, the Chairman told the magazine:

> [I]n order for them to take advantage of Plant-in-Service Accounting, there are certain things that they have to meet and certain rate caps that they have to stay below. Then there are investment benchmarks that they have to meet. We'll make sure that they're doing those and that they're doing them in a way that makes sense for the ratepayers.

*Id.* at pg. 31 (PDF) pg. 28 (internal) lns. 16 – 21. The OPC is asking the Commission do what is in the best interest of ratepayers. To quote the OPC's witness:

> We are asking the Commission to see through Evergy West's thinly veiled attempt to manipulate the FAC rate change filings by actively seeking to circumvent statutory PISA rate caps devised to provide ratepayer protection. Should the Commission choose to approve Evergy West's deferral request, the statutory PISA rate caps shall be rendered meaningless.

*Id.* at lns. 23 – 27. There is an easy and simple way to achieve this. As already stated, "the Commission should immediately order that Evergy West file a substitute tariff

that includes all of Evergy Wests FPA to assure that Evergy West's FAC rate change takes effect before the effective dates of new rates in Evergy West's current general rate case, ER-2022-0130." *Id*. at pg. 30 (PDF) pg. 27 (internal) lns. 13 – 16.

## Conclusion

The undisputed facts remain the same as they were from the OPC's original motion for summary determination. The full amount to be collected through this FAC rate change is the $44.6 million FPA amount agreed on by all parties. The result of changing the FAC rate to allow for the full recovery of that amount is an increase of 9.14%. That increase is far below the 3% CAGR set by statute in section 393.1655.3. As such, the triggering mechanism of section 393.1655.5 is not met and no deferral should be made. Evergy West's argument to the contrary has been shown to be flawed as the Company has included in its calculations costs that will be recovered through base rates and which are thus not reflected in the change to rates "charged under" the FAC. The Company's position would require the legal language of section 393.1655.5 to be twisted 180º and would effectively constitute a direct re-writing of the statute. Of course, Evergy West has offered no support for its flawed legal analysis nor explained why it is including rates that are not even yet in effect in its calculations.

Beyond the mere legal error, Evergy West's argument demonstrates an effort to circumvent customer protections and harm ratepayers through an abuse of the regulatory process. The Company has made allusions to costs being extraordinary even though it failed to follow the requirements in the Commission's rules for claiming those costs as extraordinary. It has backtracked on previous statements about seeking speedy resolution and now asks the Commission to delay so that it can ensure success despite its clearly flawed legal argument. These attempts to game the regulatory system should not be rewarded.

The OPC asks the Commission for very little in this case. We do not seek a disallowance. We do not ask to change policy or practice. All the OPC requests is to do by right by ratepayers by denying Evergy West's request to defer costs and to ensure the Company is made whole as quickly as possible.

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 fourteenth day of October, 2022.

/s/ John Clizer