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 a Financing Order Authorizing the Financing of Extraordinary Storm Costs	))))	File No. EF-2022-0155

REPLY BRIEF OF VELVET TECH SERVICES, LLC

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I. Introduction

Velvet supports MECG's position on Issue 4 as to allocation. Staff's allocation proposal will significantly impact hyperscale projects and is inconsistent with the principles of cost-causation. Moreover, placing the burden of securitization on the state's largest customers is inconsistent with the public policy of the state and the securitization statute. Velvet respectfully urges the Commission to adopt a class (and cost-) based allocation method for any securitization charges.

The PSC's "powers are limited to those conferred by...statute[ ], either expressly, or by clear implication as necessary to carry out the powers specifically granted." *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n of State*, 399 S.W.3d 467, 481 (Mo. App. W.D. 2013) (quoting *State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 48 (Mo. banc 1979)). Here, the Commission's power is limited by the plain language of the securitization statute which requires the charge be allocated among retail customer classes.

II. The Commission should reject the Loss-Adjusted Energy Approach

A. OPC misinterprets the securitization statute

The language of the securitization statute is of particular importance. "Since it is purely a creature of statute, the Public Service Commission's powers are limited to those conferred by the above statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted.).[1]

[1] *State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979) (citing *State ex rel. City of West Plains v. Pub. Serv. Comm'n*, 310 S.W.2d 925, 928 (Mo. banc 1958)).

Section 393.1700.2(c) states:

(c) A financing order issued by the commission, after a hearing, to an electrical corporation shall include all of the following elements:

a. The amount of securitized utility tariff costs to be financed using securitized utility tariff bonds and a finding that recovery of such costs is just and reasonable and in the public interest.
…

h. How securitized utility tariff charges will be allocated among retail customer classes…

The elements described in subsection (c) are mandatory given the legislature's use of the word "shall." Just as the Commission cannot lawfully approve a financing order without such order stating "the amount of securitized utility costs to be financed" it cannot approve a financing order that does not state how such charges "will be allocated among retail customer classes."

OPC claims the securitization statute does not require allocation. More specifically, OPC claims "The statute does not specify the method the Commission must use in allocating the charge to an electrical corporation's customers." *See* OPC Brief at 59.[2] This interpretation ignores the plain language of the statute. What does the statute require to be in the financing order? How the securitization charges "will be allocated." § 393.1700.2(c)h, RSMo. How must they be allocated? Among the retail customer classes. §393.1700.2(c)h, RSMo.

[2] Evergy makes a similar argument. See Evergy Brief, p. 46 ("Section 393.1700 does not mandate that the Commission allocate the SUTC on the basis of customer classes, but it gives the Commission discretion on how it should be allocated.").

Evergy at least admits that allocation is required. "The statute merely states that the securitized utility tariff charges will be allocated among retail customer classes, but it does not state that the **existing** customer classes must be the basis for the allocation." Evergy Brief, p. 46 (emphasis added). But neither Staff nor Evergy is proposing to allocate among retail customer classes at all. Rather, both now propose a loss-adjusted energy approach with no allocation whatsoever. This is inconsistent with the securitization statute; the Commission a creature of statute is bound by its plain language.

B. The argument that the loss-adjusted energy approach "mirrors" the FAC is further support for allocation

OPC argues that the loss-adjusted energy approach is "appropriate" because "it mirrors the allocation method used for costs recovered through the FAC." OPC Brief, p. 60. This would be a good reason to use an energy charge if the securitization statute (Section 393.1700, RSMo) also "mirrored" the FAC statute (Section 386.266, RSMo). When two separate statutes do not "mirror" one another and each contains very specific language, the Commission must assume that the legislature used that different language for a reason.[3]

Here, that is exactly what the General Assembly did. The General Assembly used very different language when adopting the securitization

[3] "The legislature is presumed to have intended every word, provision, sentence, and clause in a statute to be given effect." *Rasmussen v. Illinois Cas. Co.*, 628 S.W.3d 166, 175 (Mo. App. W.D. 2021) (quoting *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018)). "Courts never presume that our legislature acted uselessly and should not construe a statute to render any provision meaningless." *Rasmussen v. Illinois Cas. Co.*, 628 S.W.3d 166, 175 (Mo. App. W.D. 2021) (quoting *T.V.N. v. Mo. State Highway Patrol Crim. Just. Info. Servs.*, 592 S.W.3d 74, 81 (Mo. App. W.D. 2019)).

statute, having full knowledge of the existing language of the FAC statute.[4] The FAC statutes reads as follows:

> 1. Subject to the requirements of this section, any electrical corporation may make an application to the commission to approve rate schedules authorizing an interim **energy charge**…

Section 386.266, RSMo. This would be why an energy-based approach for the FAC is lawful. You will not find the word allocate, allocated or allocation anywhere in the FAC statute. Had the General Assembly intended to require that the FAC be allocated among customer classes, it would have so stated – just as it did in the securitization statute.

Importantly, the securitization statute requires the financing order to state:

> "How securitized utility tariff charges **will be allocated among retail customer classes**."

§ 393.1700.2(3)(c)h, RSMo. This language is wholly different than the FAC statute and therefore requires a **different** approach. The securitization statute continues:

> "[t]he **initial allocation** shall remain in effect until the electrical corporation completes a general rate proceeding[.]"

§ 393.1700.2(3)(c)h, RSMo. The provisions of the securitization statute require that there **must** be an "initial allocation." The loss-adjusted energy approach fails to accomplish any allocation at all. OPC and Staff's

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[4] The "legislature is presumed to have acted with a full awareness and complete knowledge of the present state of the law[.]" *Rasmussen v. Illinois Cas. Co.*, 628 S.W.3d 166, 176 (Mo. App. W.D. 2021) (quoting *Exec. Bd. of Mo. Baptist Convention v. Mo. Baptist Univ.*, 569 S.W.3d 1, 18 (Mo. App. W.D. 2019)).

interpretation of the statute renders the General Assembly's use of the word allocated and allocation, and the entire subsection (h) meaningless.[5]

III. OPC's Other Reasons for Supporting the Loss-Adjusted Energy Approach Fail

OPC offers three other reasons why the "loss-adjusted energy approach" is "appropriate." OPC Brief, p. 60. Even if "appropriate" the approach must first be "lawful" – that is, it must be consistent with the securitization statute. Even if the Loss-Adjusted Energy Approach was consistent with the statute, OPC's reasons fail to justify the approach and the Commission should reject the same.

A. "It complies with the statutory requirement that all customers pay the SUTC except those explicitly exempted by the definition of qualified extraordinary costs in the securitization statute"

OPC argues the loss-adjusted energy approach is appropriate because the statute states that the charge is nonbypassable and the loss-adjusted energy approach ensures every customer pays. This is the same argument Velvet makes above – that the approach the Commission adopts must follow the plain language of the statute.[6] This argument is not a reason to adopt the loss-adjusted energy approach because no party has argued that any customer

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[5] Courts "should never construe a statute in a manner that would moot the legislative changes, because the legislature is never presumed to have committed a useless act." *Rasmussen v. Illinois Cas. Co.*, 628 S.W.3d 166, 176 (Mo. App. W.D. 2021) (quoting *Rinehart v. Laclede Gas Co.*, 607 S.W.3d 220, 227 (Mo. App. W.D. 2020)); see also *State ex rel. Springfield Warehouse & Transfer Co. v. Pub. Serv. Comm'n*, 225 S.W.2d 792, 794 (Mo. App. 1949) ("[The PSC] has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature.").

[6] Indeed, a reason to adopt the position of MECG and Velvet is "It complies with the statutory requirement that" securitized utility tariff charges be allocated among retail customer classes**.**

except those explicitly exempted by the definition of qualified extraordinary costs in the securitization statute be exempt. *See* Velvet Brief at 4 ("Applying the LPS or some lower (non-zero) rate to MKT would be lawful and satisfy the nonbypassable issue raised by Staff"). Both MECG and Velvet agree the charge is nonbypassble and allocating the charge among retail customer classes also complies with the statutory requirement that all customers, except those explicitly exempt, pay.

B. "It reduces the possibility of rate switching"

Rate switching is nothing new and the loss-adjusted energy approach will not eliminate the practice. As Staff has explained before: "Rate switching is the term given to a situation in which a customer changes their rate classification, which can occur for a number of reasons. For example, the nature of a customer's operations may have changed and another customer class may become more appropriate. Or the customer may find it to be more economical to switch to another customer class[.]"[7] The Commission should not prioritize ease-of-administration over cost-of-service ratemaking.

The Commission should be less concerned with rate switching and more concerned with **state** switching. Staff's loss-adjusted energy charge puts the burden of securitization on Evergy's largest customers – potentially disincentivizing large customers from locating in Missouri.

The loss-adjusted energy approach puts the burden of securitization disproportionally on Evergy's largest customers – potentially disincentivizing large customers from locating in Missouri and is contrary to the way this Commission has traditionally and consistently approached and facilitated economic development. From approving special economic contracts to

[7] See Staff Cost of Service Report, File No. GR-2017-0215.

approving economic development tariffs, the Commission has worked to foster growth. Staff's approach would frustrate this work.

C. "It mirrors the Commission's recent decision in Liberty's securitization request in Case Number EO-2022-0040."

OPC argues the loss-adjusted energy approach should be adopted because it is consistent with the Commission's decision in EO-2022-0040. As discussed above, the loss-adjusted energy approach is inconsistent with the securitization statute and adopting it a second time does not change that. In addition, that decision is not final – it is currently the subject of three motions for rehearing and may well be the subject of an appeal.

Moreover, the Commission must decide this case based on the evidentiary record for this case. Liberty and Evergy are two different utilities, with two different customer bases. Liberty does not have any hyperscale energy users and there was no evidence in that case similar to the evidence presented here: that Staff's loss-adjusted energy approach would cause a single customer to pay $2.8 million annually.[8] The Commission should adopt a different approach – consistent with the statute – in this case.

IV. Conclusion

The loss-adjusted energy approach is inconsistent with the Section 393.1700, RSMo. It should also be rejected because saddling future MKT customers with the bulk of the costs from Winter Storm Uri is inconsistent with the Commission's decision in EO-2022-0061, inconsistent with cost causation principles, and directly in conflict with the public policy of the state as evidenced by state statutes.

WHEREFORE, Velvet Tech Services respectfully urges the Commission to adopt the cost-based allocation as required by Section

[8] *See* Ex. 504, Calculation; Tr. 173:23-174:1.

393.1700, RSMo, and as generally set forth in the direct testimony of Evergy Witness Lutz, or in the alternative, consistent with the public policy of the state, limit the impact of the securitization charge on hyperscale projects, and for such other and further relief just and proper under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was serve upon all of the parties of record or their counsel, pursuant to the Service List maintained by the Data Center of the Missouri Public Service Commission, on this 12th day of September, 2022.

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