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

SECOND MOTION FOR REHEARING AND RECONSIDERATION

COMES NOW the Office of the Public Counsel ("OPC") and for its *Second Motion for Rehearing and Reconsideration*, states as follows:

Background

The Commission issued its initial *Report and Order* in this case on March 2, 2022. The OPC filed a *Motion for Clarification, Rehearing, and Reconsideration* on March 11, 2022, that addressed two issues: the Renewable Energy Standard ("RES") issue, and the Economic Development Rider ("EDR") issue. On March 24, 2022, the Commission issued an *Amended Report and Order* addressing the OPC's concerns on both.

The OPC thanks the Commission for the efforts taken to address the issues raised in the OPC's initial *Motion for Clarification, Rehearing, and Reconsideration*. In particular, the Commission has effectively eliminated the OPC's concern on the RES issue. Unfortunately, the Commission's decision regarding the EDR issue has introduced several new errors of law and fact. To that end, the OPC requests the

Commission reconsider its *Amended Report and Order* or order a new hearing in this case related solely to resolving the EDR issue pursuant to Commission rule 20 CSR 4240-2.160 for the reasons set forth herein.

The OPC complied with the Commission's procedural order

The Commission states that the issue regarding the EDR was not "timely introduced" in compliance with the procedural order governing the case. *Amended Report and Order*, pg. 25. This is not true. There is nothing in the procedural schedule that dictates when an issue will be considered "timely" save for the requirement that all issues be included in the list of issues or be deemed uncontested. *Order Setting Procedural Schedule*, pg. 3. ("The Commission will view any issue not contained in this list of issues as uncontested and not requiring resolution by the Commission."). The issue regarding the EDR was included in the list of issues because the list of issues asked the Commission to rule generally on all proposed changes to the tariff offered by Evergy Missouri West, Inc. ("Evergy"). Specifically, the list of issues states: "If yes [to the question of whether the Commission should approve the Schedule MKT tariff], what if any modifications to the Schedule MKT tariff proposed by EMW or other conditions should the Commission order?" *List of Issues and Order of Witnesses, Order of Opening Statements, and Order of Cross-Examination*, pg. 1.

None of the four other tariff change proposals that the Commission addressed in its *Amended Report and Order* (the hold harmless provision, securitization, renewable energy standard, and substation voltage) was specifically or individually addressed in the list of issues, yet the Commission nevertheless found them all to be

timely, contested issues included in the broadly stated list of issues. Because the list of issues was stated in broad and general terms, there is no legal basis for the Commission to claim that only some of the proposed tariff changes are included and others are not. Stated differently, once the broadly stated list of issues was accepted by the Commission, any proposed change offered by any party was a timely, contested issue that had been properly included in the list of issues.

The Commission attempts to circumvent this problem by stating that the issue was not included in the pre-filed testimony ordered by the Commission. *Amended Report and Order*, pg. 26. It is not accurate to state that the Commission ordered pre-filed testimony by any party and there is no legal basis for denying consideration of an issue because it has not been included in pre-filed testimony. First, nothing in the Commission's procedural schedule actually orders or otherwise requires any party to file testimony (rebuttal or otherwise). The procedural order instead simply sets the deadline for when such testimony must be filed *if* parties choose to file. *See generally*, *Order Setting Procedural Schedule*, pg. 2. Moreover, there is nothing in the procedural schedule that orders any party to file testimony as to any one particular issue or explicitly limit the issues for Commission determination to only those filed in testimony (rebuttal or otherwise). Because not one of the seven enumerated items ordered by the Commission in the December 15, 2021, *Order Setting Procedural Schedule* actually states that the OPC (or any other party) is required to file rebuttal testimony (or any other testimony) on any matter, It is inaccurate for the Commission to claim that any party violated the procedural schedule order by failing to file (or

include any particular issue in) pre-filed testimony. *See Order Setting Procedural Schedule*, pgs. 2 – 4. In fact, two of the parties to this case (the Midwest Energy Consumers Group and Google LLC) did not file any testimony at all during the hearing, yet the Commission has not deemed this failure to be a violation of the procedural order governing the case.

Despite this, the Commission goes on to claim Rule 20 CSR 4240-2.130(7)(C) requires that **all** issues brought by non-moving parties to a case (who do not also file direct testimony) must be raised in rebuttal testimony to allow for Commission consideration. *Amended Report and Order*, pg. 26. This completely new and unsupported interpretation of the Commission's rule is legally flawed for several reasons. First, rule 20 CSR 4240-2.130(7)(C) provides nothing more than a definition of direct, rebuttal, and surrebuttal testimony. This is irrefutably demonstrated by the fact that the rule begins by stating that "[f]or the purpose of filing prepared testimony, direct, rebuttal, and surrebuttal testimony **are defined as follow** . . . ." 20 CSR 4240-2.130(7)(C) (emphasis added). The provision under subsection C therefore does not create a legal mandate that issues must be raised in rebuttal testimony, but rather, only states that "all testimony which explains why a party rejects, disagrees or proposes an alternative to the moving party's direct case" shall be considered rebuttal testimony.

Of particular importance to understanding the Commission's error is the parsing of the exact language employed by the rule. Specifically, the rule states "rebuttal testimony shall include all **testimony**" that explains the non-applicant's

position. 20 CSR 4240-2.130(7)(C) (emphasis added). "Testimony" is not the same as an "issue." An issue represents a question in controversy between parties that must be resolved. *See material issue*, BLACK'S LAW DICTIONARY 995 (11th ed. 2019). Testimony is just a type of evidence that is provided by a witness. *testimony*, BLACK'S LAW DICTIONARY 1778 (11th ed. 2019). Issues (of both law and fact) are often raised outside of testimony. For example, issues of fact can be raised through the cross-examination of a witnesses testifying on behalf of the party bearing the burden of proof to demonstrate why that burden has not been met. Issues of law can be raised by a party through briefing without the need to file testimony at all.[1]

At no point does rule 20 CSR 4240-2.130(7) use or even suggest the word "issue." As stated before, all the rule does is require that rebuttal testimony contain all testimony that supports the non-applicant's opposition to the applicant's direct case. If this seems redundant, it is because, again, the rule exists solely to define what direct, rebuttal, and surrebuttal testimony is. The Commission's claim that rule 20 CSR 4240-2.130(7)(C) requires "issues to be raised in rebuttal testimony" is entirely inconsistent with the written language of the rule and is therefore simply wrong.

The second reason the Commission's novel interpretation of rule 20 CSR 4240-2.130(7) is incorrect is because it would have the practical effect of precluding any party who failed to file rebuttal testimony from raising **any** issue in a case

[1] As explained later in this motion, expert witness opinion on legal matter is generally considered inadmissible. *Hill v. City of St. Louis*, 371 S.W.3d 66, 77 (Mo. App. E.D. 2012). It is therefore not only likely that a legal issue may be raised by a party who offers no rebuttal testimony to support it, but also arguably more appropriate.

whatsoever. This is not only a massive departure from prior Commission practice, it also creates a potential for a due process violation.

For example, a utility seeking to increase its rates has the burden of proving the new rates are just and reasonable. Mo. Rev. Stat. § 393.150.2. Any party to a general rate case should therefore be entitled to raise an issue challenging the reasonableness of the utilities rates through cross-examination without needing to file rebuttal testimony. However, the Commission's new legal theory now dictates that any party who fails to file rebuttal testimony is necessarily excluded from raising any issues in the case. As such, any party who fails to file rebuttal testimony under the Commission's new theory would forfeit their ability to challenge any portion of the utility's case through cross-examination, thus depriving that party of their right to due process. *State ex rel. Util. Consumers Council v. Pub. Serv. Com.*, 562 S.W.2d 688, 693-94 (Mo. App. E.D. 1978) ("The hearings of administrative agencies must be conducted consistently with fundamental principles of due process which include the right of cross-examination.").

The Commission's *Amended Report and Order* attempts to address the issue of cross-examination but the analysis fails for two critical reasons. First, the Commission incorrectly suggests that the OPC, Staff, and MECG were not entitled to cross-examination because they were the parties who had "raised" the EDR issue. *Amended Report and Order*, pg. 25. This represent an illegal shifting of burdens. Evergy is the applicant in this case and is requesting the Commission grant it authority to implement a new tariff provision. Evergy therefore has the burden of

proof to establish that its proposed tariff is just and reasonable because "the burden of proof properly rests on the party asserting the affirmative of an issue." *Ag Processing Inc. v. KCP&L Greater Mo. Operations Co.*, 385 S.W.3d 511, 514 (Mo. App. WD 2012) (citing *State ex rel. Associated Nat. Gas Co. v. PSC*, 954 S.W.2d 520, 528 (Mo. App. W.D. 1997)). The right of cross-examination to which OPC, Staff, and MECG were entitled was thus the right to **challenge** Evergy's request by demonstrating the tariff, as proposed, would not result in rates that were just and reasonable owing to the interplay between the EDR and the MKT tariffs. The Commission has effectively deprived the OPC (and Staff and MECG) of this right by denying meaningful cross-examination.

This brings us to the second flaw, which is the Commission's insistence that "OPC, Staff, and MECG were able to cross-examine witnesses for EMW about the EDR issue." *Amended Report and Order*, pg. 25. What the Commission fails to grasp is that for due process to occur, the right to cross-examination must be **meaningful**. In this case, the Commission's decision to not even **consider** the EDR issue means that the Commission is declining to consider **any** of the evidence regarding the EDR elicited during cross-examination. The complete refusal to even consider the evidence related to the EDR issue renders all cross-examination on the issue meaningless, and has thereby deprived the OPC of its due process right to challenge the reasonableness of the proposed tariff.

The third reason that the Commission's legal interpretation of rule 20 CSR 4240-2.130(7) is flawed is because it would effectively eliminate the ability of parties

to properly raise legal issues in their entirety. As a general matter, an expert witness' opinion as to questions of law are inadmissible. *J.J.'s Bar & Grill, Inc. v. Time Warner Cable Midwest, LLC*, 539 S.W.3d 849, 873-74 (Mo. App. W.D. 2017) ("Although an expert witness is permitted to opine on 'ultimate facts' that will be submitted to a jury for determination, [an expert's] opinions about the meaning of statutes or regulations, about whether those statutes or regulations impose legal duties on public utilities or contractors, and about the legal effect of those duties, did not involve 'facts,' ultimate or otherwise. Rather, those opinions involved pure issues of law. 'Generally, expert testimony on issues of law is inadmissible because this testimony 'encroaches upon the duty of the court to instruct on the law.'" (quoiting *Hill v. City of St. Louis*, 371 S.W.3d 66, 77 (Mo. App. E.D. 2012)). It would therefore actually be inappropriate for a party to attempt to raise a legal issue in the rebuttal testimony offered by an expert witness. Such legal issues should instead be raised through filings and addressed in briefing. However, the Commission's new interpretation of rule 20 CSR 4240-2.130(7)(C) would eliminate the ability of parties to raise legal issues outside of rebuttal testimony as the Commission has determined that rule requires "issues to be raised in rebuttal testimony." *Amended Report and Order*, pg. 26. This is again inconsistent with the Commission's past practice and raises further concerns regarding due process.

For all three of the reasons laid out here, the Commission's newly expanded interpretation of rule 20 CSR 4240-2.130(7)(C) that would require non-applicants to raise all issues in a case in rebuttal testimony is legally unsound and contrary to the

plain language of the rule itself. There is thus nothing in the Commission's *Order Setting Procedural Schedule* or rules that required the EDR issue to be presented to the Commission prior to the filing of the non-unanimous stipulation and agreement by the OPC, Staff, and MECG. The Commission is therefore wrong when its states that the EDR issue was "not raised in compliance with the procedural order or Commission rules." On the contrary, the EDR issue and all other proposed changes to the original specimen tariff proposed by Evergy were properly included in the general and broad list of issues submitted to – and accepted by – the Commission.

The Commission and all other parties to the case were clearly on notice that there were proposed changes to the original specimen tariff presented by Evergy in its application. In fact, Evergy and Velvet Tech together proposed their own last-minute changes to the original proffered tariff (including, for the first time, a request for certain variances to Commission rules) nearly two hours **after** the OPC, Staff, and MECG submitted their *Non-Unanimous Stipulation and Agreement*. Yet, despite the fact that the changes proposed by both Evergy and Velvet Tech were submitted **after** those offered by the OPC, Staff, and MECG, The Commission still chose to consider all the new changes that Evergy and Velvet Tech were proposing or requesting. The fact that the Commission chose to consider and rule on issues raised for the first time **after** the introduction of the EDR issue demonstrates that the Commission's decision not to consider the EDR issue is arbitrary.

The Commission's decision is unreasonable as the Commission has acted arbitrarily regarding what tariff change proposals and other matters it would consider

According to the Commission's Electronic Filing Information System ("EFIS"), the OPC, Staff, and MECG filed their *Non-Unanimous Stipulation and Agreement* on January 24, 2022 at 4:49:53 PM. EFIS further shows that Evergy and Velvet Tech filed their own *Non-Unanimous Stipulation and Agreement* on the same date at 6:54:59 PM, a little over two hours later. The *Non-Unanimous Stipulation and Agreement* filed by Evergy and Velvet Tech proposed substantial changes to the Special High Load Factor Market Rate ("MKT") tariff attached to the Direct testimony of Darrin Ives as DRI-2. Ex 8, *Non-Unanimous Stipulation and Agreement and Attached Schedule 1 of Evergy/Velvet*, pgs. 1, 9 – 15. Included in these changes was the introduction of a purported hold-harmless provision that included a line regarding the ability of Evergy and the MKT customer to present evidence designed to nullify the hold-harmless provision. *Id*. at pg. 13. The inclusion of this single line became a point of major contention in the case. *See*, *e.g.*, OPC, *Initial Brief*, pgs. 18 – 27. In other words, Evergy and Velvet Tech introduced a major new issue regarding the ability of the Utility to engage in retroactive ratemaking under certain conditions two hours **after** the OPC, Staff, and MECG raised the EDR issue. This proposed language (and the entire issue related to it) had not been offered in any of the pre-filed testimony nor had it been filed anywhere else prior to Evergy and Velvet Tech's *Non-Unanimous Stipulation and Agreement*. Under the Commission's own theory, the introduction of this proposed tariff language by Evergy and Velvet Tech on "the

evening prior to the evidentiary hearing foreclosed discovery by other parties." *Amended Report and Order*, pg. 26. Yet, instead of adopting the same position that it took with regard to the EDR issue and declining to consider the question of whether Evergy and Velvet Tech should have a clawback provision, the Commission decided to rule on it. *Id*. at 22. Not only that, the Commission ruled in favor of Evergy and Velvet Tech and ordered the inclusion of language that had never been offered prior to the evening before the hearing. *Id*. The fact that the Commission took the exact opposite approach to two different tariff language proposals that were both offered for the first time the day before the hearing started and a mere two hours apart shows that the Commission's decision is arbitrary. Nor is this the only example.

In addition to the large number of changes to the original tariff proposal made in Evergy and Velvet Tech's *Non-Unanimous Stipulation and Agreement*, the two parties also requested – for the first time – that the Commission grant variances to 20 CSR 4240.20.100 (1)(W) and 20 CSR 4 4240-20.100(1)(S)(1). Ex 8, *Non-Unanimous Stipulation and Agreement and Attached Schedule 1 of Evergy/Velvet*, pgs. 3 – 4. There is no discussion of these variance requests anywhere in the pre-filed testimony and no discussion of the proffered RESRAM language (to which these variances relate) prior to surrebuttal testimony. Again, the variance request was made for the first time on "the evening prior to the evidentiary hearing" and, applying the logic found the Commission's discussion of the EDR issue, would have foreclosed the OPC's ability to perform discovery related to these variance requests. *Amended Report and Order*, pg. 26. Consequently, if the Commission consistently applied the logic it used

in the EDR discussion to these variance requests, then the Commission should have declined to consider the issue on the same basis. Once again, however, the Commission not only decided to consider an issue raised for the first time on the evening prior to the hearing, but actually went on to approve the variances. *Amended Report and Order*, pgs. 23 – 24. The Commission's inconsistent positions as to which of the matters raised for the first time the day before a hearing it decided to consider demonstrates that it is acting in an arbitrary and capricious manner. As such, the PSC's decision is manifestly 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. 2021) ("An order of the PSC is reasonable when 'the order is supported by substantial, competent evidence on the whole record; the decision is not arbitrary or capricious; [and] where the PSC has not abused its discretion.' (quoting *In the Matter of Verified Application & Petition of Liberty Energy (Midstates) Corp.*, 464 S.W.3d 520, 524 (Mo. banc 2015)).

These are the two most egregious out of the plethora of other changes made by Evergy and Velvet Tech on the evening before the hearing that the Commission nevertheless considered. However, the OPC is not arguing that the Commission improperly considered these changes. The OPC is instead simply asking the Commission to be **consistent** by reviewing and ruling on **all** the tariff language changes proposed in the dueling non-unanimous stipulations filed on January 24th. To do as the Commission has currently done and rule on all but one of the newly offered tariff provisions is patently arbitrary, capricious, and unreasonable.

The Commission cannot avoid making a decision on the EDR issue if it authorizes Evergy to implement any version of the MKT tariff, which makes the issue essential to the case

In its *Amended Report and Order*, the Commission states that "the resolution of [the EDR] issue was not essential to the Commission's decision in this case." *Amended Report and Order*, pg. 25. This is demonstrably wrong. It is an inescapable and self-evident truth that any tariff placed into effect as a result of this case must either have an EDR applicability provision or must not have such a provision.[2] It is therefore necessarily essential, as a matter of basic logic, that the Commission determine whether an EDR applicability provision is or is not included in any tariff that the Commission approves. If the Commission issues an order approving an MKT tariff that does not include an EDR applicability provision (as it is presently set to do), then the Commission **has** resolved the EDR issue in favor of the Company and against the OPC.

This must be stressed: it is logically impossible for the Commission to approve an MKT tariff and allow it to go into effect without resolving the EDR issue in favor of one party or another because the tariff the Commission approves will **necessarily** either include an EDR applicability provision or it will not. The Commission thus cannot just ignore this issue. To approve a tariff means the Commission has made a decision that resolves this issue one way or another. Yet, if the Commission renders

[2] There are only two possible options regarding the existence of the EDR applicability provision: either it does exist in the tariff or it does not exist in the tariff.

a decision without considering the evidence (as it is presently set to do) then the Commission has clearly acted unreasonably. This is a totally unnecessary position for the Commission to take.

During the evidentiary hearing, the Commission accepted onto the record proposed tariff language meant to address the EDR issue that was offered by Evergy in the form of exhibit 7. Both Evergy and Velvet Tech indicated that the proposed language of exhibit 7 would be acceptable to resolve this issue. Evergy, *Initial Brief*, pg. 13 ("As stated by Mr. Ives, this provision would be acceptable to EMW if the Commission included it in the final version of Schedule MKT."); Velvet Tech LLC, *Initial Brief*, pg. 26 ("Without waiving its arguments above, Velvet does not object to the compromise language offered during the hearing by Mr. Ives." . . . "This would essentially eliminate three years of eligibility of the discount under PED for future MKT customers, **but would balance a customer's existing statutory right to the discounted rate and other customers' interests raised during the hearing**." (emphasis added)). There is no reason for the Commission to not just accept the proposed tariff provision being offered by the applicant party as a means of ending this dispute. Neither Evergy nor Velvet Tech can claim that they were in any way prejudiced if the Commission accepts the language that they offered and that they have clearly indicated is acceptable. Moreover, the OPC would not object to the adoption of this language given the alternative being the complete re-litigation of this issue in the near future.

The Commission decision not to consider an issue that is essential to the full resolution of this case constitutes reversible error for all the reasons laid out in this motion. Even if one excludes the potential for judicial review of this decision, however, the EDR issue is now effectively guaranteed to become a point of contention in Evergy's ongoing general rate case (ER-2022-0130). Regardless of the route taken, this decision ensures that significantly more administrative resources must be expended by all parties to reach a conclusion that could otherwise be achieved right now given that Evergy and Velvet tech have already proposed language that they would find acceptable. The Commission should just decide this issue in the present case and let the tariff go into effect without subjecting it to greater debate and uncertainty.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission issue an order for rehearing or reconsideration of its *Amended Report and Order* with respect to the EDR issue.

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 first day of April, 2022.

/s/ John Clizer