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

MOTION FOR CLARIFICATION, REHEARING, AND RECONSIDERATION

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

1. The Commission issued its *Report and Order* in this case on March 2, 2022.

2. The *Report and Order* includes several statements and decisions that are unclear and several others that are unlawful, unjust, or unreasonable.

3. The OPC therefore requests the Commission to issue an order for clarification and separately issue an order for rehearing or reconsideration pursuant to Commission rule 20 CSR 4240-2.160.

Issue for Clarification and possible Rehearing

4. In the portion of the *Report and Order* titled "decision regarding the renewable energy standard," the Commission states in part as follows:

> However, granting the variances would encourage those customers with the largest loads and high load factors to increase the renewable energy being generated and consumed to cover the RES requirement themselves. However, the MKT tariff does not have a requirement for a

> minimum renewable component. In that case, the variance would not apply to the MKT customer. By restricting the exclusion to only apply when the MKT customer meets or exceeds the minimum RES requirement ensures that the purposes of the RES statute are still being met, even in the face of a variance which excludes the counting of what would be EMW's largest customers.

5. This passage is unclear, in that, it refers to an MKT customer "meeting or exceeding" the minimum RES requirement. However, it is not legally possible for an MKT customer to "meet or exceed" the minimum RES requirement because the RES statute (RSMo. § 393.1030) does not impose **any** requirement on a utility customer (whether they be an MKT customer or otherwise). Instead, the RES statute imposes a requirement on the **utility** to ensure that 15% of the energy that the **utility** sells is procured from renewable sources. *See* RSMo. § 393.1030.1.

6. Based on the Commission's discussion of the variances requested by Evergy Missouri West ("Evergy") and Velvet Tech, LLC ("Velvet Tech") at paragraph 38 of the *Report and Order*, the OPC presumes that the Commission is referring to a situation where the "MKT customer demonstrates it has retired, or had retired on its behalf, Renewable Energy Credits greater than or equal to the then existing RES requirement **that would have been applied to the MKT customer load**." In other words, the OPC presumes that the Commission meant to say that the proposed exclusion only applies when the MKT customer retires Renewable Energy Credits in an amount equal to or greater than the volume of energy (*i.e.* "load") the MKT customer purchased from Evergy that the RES statute would otherwise require Evergy to ensure was procured through renewable sources. This is an important

distinction as it governs how many Renewable Energy Credits ("RECs") the MKT customer would need to procure to qualify for the exclusion.

7. Under the time periods set forth in the most current version of the RES statute, Evergy would currently need to procure 15% of its energy sales from renewable sources. As the Commission has currently written it, the *Report and Order* could be interpreted to mean that, in order for the exclusion to apply, each MKT customer would independently need to meet this requirement by collecting and retiring RECs equal to 15% of Evergy's total electric sales. *See Report and Order* pg. 21 ("However, granting the variances would encourage those customers with the largest loads and high load factors to increase the renewable energy being generated and consumed **to cover the RES requirement themselves**."). Again, the problem here lies with distinguishing between whether the MKT customer is "covering the RES requirement" or are instead procuring only enough RECs as necessary to match the incremental amount of renewable resources that Evergy would have otherwise needed to acquire under the RES statute due to the addition of the MKT customer's load to Evergy's system. The OPC strongly suspects the latter, but considers the Commission's wording sufficiently ambiguous as to require clarification.

8. In addition to the foregoing, there is another point that requires clarification on this issue. That is the question of whether the MKT customer is required to only procure RECs sufficient to cover 15% (the current RES statute minimum) of its own load or the *entirety* of its own load for the RES exclusion to apply. The point of confusion here lies with the disparity between how the Commission has

framed the RES exclusion and how it was described during the hearing. For example, counsel for the OPC engaged in a protracted discussion with an Evergy witness during the evidentiary hearing to explain how the Evergy/Velvet Tech RES proposal was meant to work. See Tr. Vol 2. Pg. 176 ln. 17 – pg. 181 ln. 1. This is the pertinent part of the conversation:

> Q. Right. Okay. Let's get to that part. So this is the critical part. If I understand Evergy's proposal, the 100 megawatts of renewable energy that I have retired, you're going to subtract that from the amounts of retail sales that Evergy has provided to me for the purposes of the renewable energy standard statute. Is that fair and accurate?
>
> A. That is correct.

Tr. Vol 2. Pg. 180 lns. 13 – 20. As explained by Evergy's witness, the idea behind the Evergy/Velvet Tech proposal was that the amount of energy being subtracted (or excluded) from the calculation of Evergy's electric sales for purposes of the RES statute compliance was **directly** equal to the amount of energy that the MKT customer intended to "cover" through the purchase and retention of RECs. In the case of Velvet Tech, that was meant to be 100% of the energy it expected to consume. *Report an Order*, pg. 11 ¶ 35 ("Velvet has committed to having 100% of its load supported by new renewable energy resources located in the Southwest Power Pool (SPP) footprint."). This 100% is clearly not the same as the 15% minimum that the Commission's *Report and Order* now suggests is the triggering amount for the RES exclusion.

9. The distinction between the two possible exclusion provision triggers is very important because of how the proposed language surrounding the RES provision

found in Evergy and Velvet Tech's proposed tariff is drafted. *See* Exhibit 8, Schedule 1 pg. 5. The exact language at issue is this:

> Notwithstanding any provisions of the Company's RESRAM tariff to the contrary, a Schedule MKT Customer shall not be subject to RESRAM charges unless a Schedule MKT customer does not have has renewable attributes supporting its load greater than or equal to the then existing Renewable Energy Standard. For Schedule MKT customers with such renewable attributes, the kWh supported by Schedule MKT customer's "renewable attributes" will be subtracted from the calculation of total retail electric sales in in 20 CSR 4240-20.100. Renewable attributes means Renewable Energy Credits that the MKT Customer has retired, or had retired on its behalf, documented annually from an established renewable registry.

Id. The first sentence sets up the exclusion trigger, albeit with an improper double negative.[1] The second sentence then operates to reduce Evergy's "electric sales" for purpose of the RESRAM. However, *and this is critical*, the reduction calculated in the tariff is a **direct** subtraction of the volume of the renewable attributes retained by the MKT customer.[2] *Id.* ("For Schedule MKT customers with such renewable attributes, the kWh supported by Schedule MKT customer's "renewable attributes" will be subtracted from the calculation of total retail electric sales in in 20 CSR 4240-20.100."). Thus, if the exclusion triggers even if the MKT customer only covers 15% of their own load with RECs (which is again what the OPC believes the Commission's current *Report and Order* suggests), then only 15% of the MKT customer's load will

[1] The sentence as drafted reads that the RESRAM does "not" apply unless the MKT customer does "not" do X. The two "not" phrases hence form a double negative that should be omitted. The first sentence should therefore instead read that the RESRAM does apply unless the MKT customer does X.

[2] Please note that this is consistent with how Evergy's witness described the operation of the proposal as discussed above. *See* Tr. Vol 2. Pg. 180 lns. 13 – 20.

be subtracted from Evergy's electric sales. As a result, the remaining 85% of the MKT customer's load will still count as part of Evergy's electric sales and Evergy would consequently still need to make additional investments to ensure that 15% of this **remaining** 85% is procured from renewable resources to meet the requirements of section 393.1030.1.

10. The obvious solution to the above problem is found in the first variance that Evergy and Velvet Tech requested in their non-unanimous stipulation.[3] That variance, as the Commission correctly points out, "would exclude an MKT customer's load from the definition of 'total retail electric sales' under 20 CSR 4240-20.100(1)(W), when the MKT customer demonstrates it has retired, or had retired on its behalf, Renewable Energy Credits greater than or equal to the then existing RES requirement that would have been applied to the MKT customer load." *Report and Order*, pg. 12 ¶ 38. This resolves the problem because it changes the calculation of the reduction to Evergy's "electric sales."

11. In the draft tariff language, the reduction of Evergy's electric sales is directly equal to "the kWh supported by Schedule MKT customer's 'renewable attributes.'" In the requested variance, the reduction of Evergy's electric sales is equal

[3] In addition to the other issues addressed herein, the OPC notes that it does not appear that the Commission ever directly approved the variance requested by Evergy and Velvet Tech. The Commission clearly found that there was good cause for the variance, but the Commission never actually ordered the variance to be in effect.

to the MKT customer's **entire** load. This is the critical difference and the Commission needs to clarify which option it is ordering.[4]

12. To simplify and reiterate, there are effectively two good options for the Commission to implement what the OPC believes to be its intended objective:

> Option 1: order that an MKT customer will not be subject to the RESRAM if it can demonstrate that it possess renewable attributes greater than or equal to its exiting load, and then order a variance to allow those renewable attributes to be directly subtracted from the calculation of Evergy's total retail electric sales in 20 CSR 4240-20.100.
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> Option 2: order that an MKT customer will not be subject to the RESRAM if it can demonstrate that it possesses renewable attributes greater than or equal to the minimum amount of energy that Evergy would otherwise need to procure from renewable sources under the RES statute when serving that MKT customer, and then order a variance to allow the MKT customer's **total** load to be subtracted from the calculation of Evergy's total retail electric sales in 20 CSR 4240-20.100 if it meets the first condition.

The first of these two options represent how Evergy and Velvet Tech described the RES provision would work during the hearing and the second is consistent with the variance that Evergy and Velvet Tech requested from the Commission. The OPC asks that the Commission clarify which of these two options it has ordered or, if not one of these options, to explain exactly what it has ordered with regard to the RES related variance requested by Evergy and Velvet Tech.

[4] In the case of Velvet Tech, this difference may not be as important if the Company actually does manage to cover 100% of its load with "renewable attributes." In that circumstance, the two different ways of calculating the reduction of Evergy's electric sales would give the same result. **However**, this is a tariff of **general applicability** and the Commission should not approach this case under the assumption that any other MKT customer will operate in the exact same manner as Velvet Tech.

13. For its own part, the OPC finds either of the two proposals laid out above agreeable, which is why the OPC is only seeking clarification. Should the Commission reject both proposals, then the OPC further seeks rehearing or reconsideration on this issue for the reasons addressed herein. Moreover, the OPC notes that if the intent of the Commission is to **maximize** renewable generation buildout in the SPP footprint (as its *Report and Order* seems to suggest) the Commission should adopt the first option. *See Report and Order* pg. 21 – 22 ("The Commission finds good cause to grant the variances as the attraction of high load factor customers would minimize the need for added generation, and that the granted variance is consistent with the goals of the RES to increase generation and consumption of renewable energy.").[5]

Issue for Rehearing or Reconsideration

14. In its decision on the issue concerning the Economic Development Rider, the Commission's *Report and Orde*r states in its entirety as follows:

> The Commission rejects the late inclusion of the issue of a proposal to limit MKT customers from taking service under an economic development rider (EDR) tariff, specifically Schedule PED. The Commission's rules and procedural order clearly direct the parties to submit a list of issues, testimony, and position statements that reference the contested issues that need Commission determination.

[5] While not necessary to clarify the underlying issue explained in this pleading, the OPC notes that this sentence in the Commission's report and order is self-contradictory in at least two different ways. First, the Commission states that the attraction of high load factor customers would minimize the need for added generation. However, adding customer to a system, especially high load customers, will not "minimize" the need for generation in any way because it will necessarily increase the need for generation as more electricity will be consumed. More importantly, the Commission's statement that the variance will "minimize" the need for generation in a manner that is consistent with the goals of the RES to "increase" generation is self-contradictory. Minimizing generation and increasing generation are the exact opposite. Therefore, if the variance does result in a minimization of new generation as the Commission suggests, it cannot possibly meet the goals of the RES to also increase renewable generation.

Report and Order, pg. 22. This conclusion is unlawful, unjust, and unreasonable and the Commission therefore needs to reconsider it.

15. The list of issues filed in this case contained only two top-level issues and one sub issue. The second top-level issue simply states: "If yes [to the first issue], what if any modifications to the Schedule MKT tariff proposed by EMW or other conditions should the Commission order?" Because the proposed modification to address concerns regarding the application of Evergy's Economic Development Rider ("EDR") is a proposed modification to the Schedule MKT tariff, it is unambiguously included in this second issue.

16. There is absolutely no legal, logical, or practical rationale for distinguishing the proposed EDR modification from any of the **other** proposed modifications (including the hold harmless provision, the RES provision, the securitization provision, *etc.*) that the Commission did address when it comes to interpreting or applying this second issue from the list of issues. The Commission's claim that this modification is not included in the list of issues despite considering every other modification as included is therefore completely arbitrary. Such an arbitrary decision constitutes an abuse of the Commission discretion. *Amendment of the Comm'ns Rule Regarding Applications for Certificates of Convenience & Necessity v. Mo. Pub. Serv. Comm'n*, 618 S.W.3d 520, 528 (Mo. banc 2021) (holding that the public service Commission ruling constitutes an abuse of discretion when it is made arbitrarily).

17. The list of issues submitted to the Commission requested the Commission to address **all** proposed modifications to the draft MKT tariff offered by Evergy. The Commission cannot simply consider some modifications and ignore others on a whim without acting arbitrarily and thereby abusing its discretion.

18. In addition, the EDR provision offered by the OPC, Staff, and MECG was included as part of the joint non-unanimous stipulation filed by those three parties **before** the hearing began. *See* Exhibit 203, Attachment 1. This stipulation was objected to by Velvet Tech. *See Objection to Stipulation and Agreement* filed Jan 31, 2022. Commission rule 20 CSR 4240-2.115 states, "A nonunanimous stipulation and agreement to which a timely objection has been filed **shall be considered to be merely a position of the signatory parties to the stipulated position**, except that no party shall be bound by it. **All issues shall remain for determination after hearing**." (emphasis added). Therefore, the EDR provision became a position of the OPC, Staff, ad MECG by virtue of the filing of and objection to the non-unanimous stipulation and agreement pursuant to 20 CSR 4240-2.115. Consequently, the EDR provision was not only included in the list of issues, but was also included in the position taken by three of the six parties to this case by virtue of the Commission's own rules. For the Commission to simply ignore this provision is not only unlawful (as it violates the plain language of 20 CSR 4240-2.115 that states "All issues shall remain for determination after hearing"), but also continues to be arbitrary.

19. Finally, there is absolutely no denying that there was **substantial** evidence adduced regarding this issue during the hearing. *See, e.g.*, Tr. Vol 3 pg. 501 ln. 24 – pg. 502 ln. 17; 3 pg. 523 ln. 24 – pg. 529 ln. 4; Exhibit 7; Exhibit 904. There is no legal requirement that the Commission consider only the evidence produced in pre-filed testimony, nor can the Commission legally just dismiss issues based exclusively on the fact that they were not addressed in pre-filed testimony.

20. The Commission appears to be incorrectly citing to Rule 20 CSR 4240-2.130(7)(C) to suggest that all issues to be addressed in a case must be included in pre-filed testimony. *see Report and Order*, pg.18 ¶ T. This is incorrect for three reasons.

21. First, it ignores and directly contradicts the plain language of rule 20 CSR 4240-2.130(10), which states:

> No party shall be permitted to supplement prefiled prepared direct, rebuttal, or surrebuttal testimony unless ordered by the presiding officer or the commission. **A party shall not be precluded from having a reasonable opportunity to address matters not previously disclosed which arise at the hearing**. This provision does not forbid the filing of supplemental direct testimony for the purpose of replacing projected financial information with actual results.

(emphasis added). This provision expressly states that any party may address matters not previously disclosed in pre-filed testimony. The Commission has violated this rule by denying the ability of Staff, MECG, and OPC the ability to effectively address the EDR matter because the Commission has unilaterally made the decision to not even consider the issue. The Commission's decision to unilaterally preclude

parties from addressing a matter because it was not previously disclosed in pre-filed testimony is a straightforward violation of 20 CSR 4240-2.130(10).

22. Second, the rule on which the Commission relies does not **require** that parties prepare pre-filed testimony. Instead, the rule only sets forth the definition of what pre-filed testimony is: "[f]or the purpose of filing prepared testimony, direct, rebuttal, and surrebuttal testimony are defined as follows . . . ." 20 CSR 4240-2.130(7). The rule on which the Commission relies is therefore nothing more than a definition of what rebuttal testimony is ("rebuttal testimony shall include all testimony which is . . ."). The Commission cannot rely on the *definition* of rebuttal testimony to impose a legal *requirement* to file rebuttal testimony either in general or as to a specific issue.

23. Third, the Commission's interpretation is legally unsound, as it would lead to a violation of a party's ability to effectively cross-examine witnesses. According to the Commission's interpretation, if no party to a case files rebuttal testimony in response to a utility's direct testimony, then there would be no "issues" in the case and all other parties would therefore be denied the ability to challenge the direct testimony filed by the utility. This is self-evident in the present case. The Commission has effectively ruled that because the OPC did not file rebuttal testimony that directly addressed the EDR issue, the inclusion of an EDR provision was not an issue in the case. As such, the Commission has *de facto* precluded the OPC from effectively challenging the direct testimony of Evergy in support of the proposed MKT as it relates to the interplay between the MKT tariff and Evergy's EDR. Stated differently, the Commission has effectively foreclosed the ability of the OPC to cross-examine

Evergy's testimony on the issue of the EDR and/or otherwise present evidence on this issue by simply declaring that no such evidence will be considered. This is an abuse of discretion. *Black v. State*, 151 S.W.3d 49, 55 (Mo. banc 2004) ("the right to cross-examination is essential and indispensable," and "the right to cross-examine a witness who has testified for the adverse party is absolute and not a mere privilege." For this reason, a trial judge "has no discretion to prevent any cross-examination at all on a proper subject," nor may that judge "exclude relevant and material facts simply because counsel seeks to elicit such facts on cross-examination." (internal citations omitted)).

24. Once Evergy presented direct testimony in support of its proposed MKT tariff, the OPC, as a party to the case, was vested with an immutable right to cross-examine Evergy's witness and present evidence demonstrating the problems surrounding that proposed tariff. *Id*. This includes cross-examining and presenting evidence to address and ameliorate the problematic interplay between the MKT tariff and Evergy's EDR. The Commission's *Report and Order* establishes a *de facto* denial of this right by rejecting all such cross-examination or other evidence adduced during the hearing solely on the basis that this issue was not addressed in pre-filed testimony. In doing so, the Commission has clearly abused its discretion. *Id*.

25. For all the reason thus put forth, the Commission should reconsider its decision to not address the EDR issue because that decision is unlawful, unjust, and unreasonable.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission issue an order clarifying its position with regard to the RES issue and issue an order for rehearing or reconsideration with respect to the EDR issue.

Respectfully submitted,

By: /s/ John Clizer
John Clizer (#69043)
Senior Counsel
Missouri Office of the Public Counsel
P.O. Box 2230
Jefferson City, MO 65102
Telephone: (573) 751-5324
Facsimile: (573) 751-5562
E-mail: john.clizer@opc.mo.gov

CERTIFICATE OF SERVICE

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

/s/ John Clizer