BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Ninth Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of Evergy Missouri West, Inc. d/b/a Evergy Missouri West	))))))	Case No. EO-2020-0262
In the Matter of the Third Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of Evergy Metro, Inc. d/b/a Evergy Missouri Metro	))))))	Case No. EO-2020-0263

REPLY BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

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Response to Evergy

The OPC will respond to Evergy's *Brief* in the same order that Evergy's *Brief* was itself organized. To that end, the OPC will begin with a general overview of, and response to, the position taken by Evergy, followed by a much more detailed discussion of the four primary arguments raised by the Company in its combined response to issues four and five and a much shorter discussion of Evergy's response to issue six.

The Company opens its discussion of the issues with a broad statement that the OPC has failed to raise a serious doubt as to the prudence of Evergy's management of its demand response programs. This is incorrect. As explained at length in the OPC's *Initial Brief*, Evergy was clearly imprudent in the management of its demand response programs because the Company **made no effort whatsoever** to call demand response program events when doing so would have reduced energy costs despite the explicit authority to call such events that is granted by Evergy's Tariff. Tr. pg. 143 lns. 13 – 22; Exhibit 204, pgs. 3, 5, 13, 15, 19, and 22. If Evergy had called such events, its FAC costs would have been lower and its customers would have avoided paying unnecessary costs. Mantle, *Surrebuttal*, pg. 12 lns. 7 – 9. Because Evergy had the means to reduce its FAC cost and made no effort whatsoever to employ those means, the Company acted imprudently. In other words, the decision to incur additional costs that could have been easily avoided not only raises serious doubt as to the prudence of the Company's management of its demand

response programs; it also represents a flagrant and unapologetic disregard for the wellbeing of Evergy's customers.

Evergy describes the OPC's position that the Company should have called demand response events for economic reasons as a "deviation" from the design of the demand response programs and claims the OPC is "moving the goal-posts." This claim it refuted, however, by the plain and simple fact that the OPC's argument in this case is dependent on the language of the Company's own tariffs and the limits of the program design as explained by the Company itself. *See* Mantle, *Surrebuttal*, pg. 14 lns. 3 – 12; Exhibit 204, pgs. 3, 5, 13, 15, 19, and 22. The OPC is only asking that Evergy be found imprudent for not using the program as it was **designed** to be used to the full extent that it **could** have been used. *Id*. Evergy's claim that the OPC is somehow "moving the goal-posts" is thus incorrect and highly misleading. Evergy is the party that defined the goal-posts when it designed the program and wrote the tariffs. The OPC merely wants Evergy to exercise the options that it wrote into those tariffs – and which its captive ratepayers have already sunk costs into – to avoid paying additional costs on the SPP market.

Regardless of the clearly mistaken representation of its argument, the OPC will still respond to the four points that Evergy raises for the fourth and fifth issues. For ease of reference, the OPC has broken those four arguments down as thus:

1. Evergy's claim that its actions were not imprudent because of a stipulation;
2. Evergy's claim that the OPC's disallowance is based on hindsight analysis;

3. Evergy's claim that the OPC's proposal to call demand response events for economic reasons would have a negative impact on its customers and its MEEIA program; and
4. Evergy's claim that the OPC's proposal to call demand response events for economic reasons poses an economic risk to customers.

The OPC will now proceed to demonstrate the legal, evidentiary, and logical flaws that inundate these baseless and unreasonable arguments.

First argument: The Stipulation

Evergy's first argument is that it cannot be found imprudent because of a *Stipulation and Agreement* ("the *Agreement*") signed in cases EO-2019-0132 and EO-2019-0133 that was approved by the Commission. This argument is wrong for a host of reasons beginning with the fact that the terms of the *Agreement* itself prevent it from being raised as a defense by the Company in this proceeding.

A. Evergy is violating the terms of the *Agreement* by raising this argument

The *Stipulation and Agreement* on which Evergy relies was exclusive to the settlement of the two case dockets in which it was filed. By its own terms, the *Agreement* cannot be utilized in the manner that Evergy now wishes. Evergy has therefore violated the plain terms of the *Agreement* by raising the argument presented in its initial brief. To fully understand why, we must review the *Agreement*.

Our analysis begins at paragraph three, in the "Background" section of the document, where the purpose of the *Agreement* is first spelled out:

> This Stipulation reflects the results of settlement discussions, and presents the Commission with a joint recommendation with regard to the Company's MEEIA Cycle 2 programs that will allow the Company to continue to promote and deliver demand-side programs, including energy efficiency and demand response programs, while the Signatory Parties conduct additional discussions regarding a potential MEEIA Cycle 3. The Signatory Parties recommend that the Commission approve the following MEEIA Cycle 2 Extension Plan to allow MEEIA Cycle 2 to continue beyond the scheduled expiration date of March 31, 2019, and the procedures for a path forward for further discussions and resolution of the MEEIA Cycle 3 Program as described below.

Exhibit 15, pg. 2. The purpose is reiterated only a short while later in the first paragraph under the heading "Agreements," which reads:

> The primary objective of the Company and DE, for this MEEIA Cycle 2 extension is to provide continuity (no gap) for customers of demand side programs while Signatories continue to evaluate how to best proceed for MEEIA Cycle 3. KCP&L and GMO MEEIA Cycle 2 will be extended for up to nine months with a new end date of not later than 12/31/2019 and the extended period will be deemed Program Year 4 (PY4). All current tariff dates will be extended to remain in effect through no later than 12/31/2019, which includes the throughput disincentive ("TD") language in DSIM Rider. Exhibit A contains the tariffs that will be changed as a result of this Stipulation.

Id. Based on the plain and unambiguous language of these two provisions, it is clear that the express and sole purpose of this *Agreement* was to serve as a continuation of Evergy's MEEIA cycle two programs while the Company worked with stakeholders on its MEEIA cycle three program. This purpose, as we will shortly see, defined the **entirety** of the bargain struck by the parties.

There exists a very real concern when negotiating settlements that some party to the agreement might later try to extend the written terms beyond the issue being settled and instead use them to resolve other cases that were not pertinent to the original negotiations or which had yet to even arise. To combat this problem, specific language is inserted into almost every settlement agreement that restricts the settlement to only resolving the immediate issue and prevents it from being used in other, unrelated cases. The *Agreement* is no exception. Paragraph eighteen, under the title "General Provisions" reads thus:

> **This Stipulation is being entered into solely for the purpose of settling the issues/adjustments in this case explicitly set forth above**. Unless otherwise explicitly provided herein, none of the Signatories to this Stipulation shall be deemed to have approved or acquiesced in any ratemaking or procedural principle, including, without limitation, any cost of service methodology or determination, method of cost determination or cost allocation or revenue-related methodology.

Ex. 15, pg. 6 (emphasis added). As can plainly be read, the *Agreement*, by its very terms, was **exclusive** to the issue of the continuation of Evergy's MEEIA cycle two program. The question of the proper use of Evergy's demand response program events to mitigate energy costs being passed through the Company's FAC (which is not part of the MEEIA program) is not included or referenced **anywhere** in this *Agreement*. Tr. pg. 288 ln. 20 – pg. 289 ln. 1.

When the OPC was negotiating this *Agreement*, its sole focus was resolving the MEEIA issue. The OPC did not envision that Evergy would consider this agreement

to extend **outside** of the MEEIA framework by absolving the Company of any duty to prudently use its demand response programs to mitigate energy costs. This was reasonable because the issue of using the demand response program events to mitigate energy costs was never an issue discussed in the MEEIA case. Thus, the OPC relied on the specific terms of paragraph eighteen of the *Agreement* to dictate the full extent of this transaction. Evergy now argues that the Commission should radically depart from the plain language of the *Agreement* in order to resolve issues that were not even contemplated at the time it was drafted. To do this would be unlawful and unreasonable.

If paragraph eighteen was not enough to demonstrate the essential fallacy of Evergy's argument, paragraph nineteen should easily resolve the issue. Paragraph nineteen of the *Agreement* reads, in its entirety, as follows:

> This Stipulation is a negotiated settlement. Except as specified herein, **the Signatories to this Stipulation shall not be prejudiced, bound by, or in any way affected by the terms of this Stipulation: (a) in any future proceeding**; (b) in any proceeding currently pending under a separate docket; and/or (c) in this proceeding should the Commission decide not to approve this Stipulation, or in any way condition its approval of same. **No Signatory shall assert the terms of this agreement as a precedent in any future proceeding**.

Ex. 15, pg. 6 (emphasis added). This language makes explicit what was expressed implicitly in paragraph eighteen. This settlement was meant to be **exclusive** to the cases in which it was filed and was not to be used in **any future proceeding**. *Id.* (emphasis added). Moreover, the language then doubles down to state that **no**

signatory is to attempt to assert the terms of the agreement as precedent in **any future proceeding**. *Id*. (emphasis added). Evergy is violating both of these terms by arguing that the *Agreement* controls in this FAC case.

The EO-2019-0132 and EO2019-0133 cases in which the *Agreement* was filed concerned only the continuation of Evergy's MEEIA cycle two program. The OPC never agreed to any terms in those two cases that would resolve allegations raised in a future Evergy FAC prudence review case. This fact is formally recognized in the *Agreement* itself at paragraphs eighteen and nineteen. Evergy now seeks to violate the terms of the *Agreement* by asserting that it resolved issues that were never contemplated, negotiated, or even addressed as part of EO-2019-0132 and EO2019-0133. The Commission should have little trouble dismissing this obviously flawed argument.[1]

B. The *Agreement* addressed concerns specific to the MEEIA program, it did not address the FAC

As the OPC stressed in its *Initial Brief*, the ability and rationale for calling demand response events for the "economic reasons" outlined in Evergy's tariffs is wholly separate and distinct from calling the "operational curtailments" necessary to meet the MEEIA objective. *See* Exhibit 204, pgs. 3, 5, 13, 15, 19, and 22. The Company

[1] Should the Commission accept Evergy's argument on this point, it may have a chilling effect on future settlement opportunities. Faced with the restriction that any settlement can have an impact on other cases regardless of the language agreed to, parties may have a much harder time reaching the common ground necessary to end their disputes amicably. This may well lead to a far more litigious and contentious environment before the Commission and result in a far greater number of issues requiring a full hearing to resolve. This, in turn, will almost certainly result in a significant drain on the Commission's time and resources.

should therefore be considered to have two distinct prudence requirements. The first was to act prudently when deciding when to call the operational curtailments necessary to meet MEEIA objectives. The second was the duty to prudently use all tools at its disposal, including the demand response programs, to reduce its energy costs. This case concerns only the latter of these two issues.

As previously discussed, the *Agreement* never mentioned the FAC. Tr. pg. 288 ln. 20 – pg. 289 ln. 1. Nor does it address the dispatch of demand response program events for economic reasons. *See* Exhibit 15. This, as we have already established, is because the *Agreement* was only entered into for the purpose of continuing (and thereby resolving issues related to) Evergy's MEEIA cycle two program. *Id*., pg. 2. The *Agreement* provisions related to calling programmable thermostat events (on which Evergy relies) should therefore be read narrowly – in accordance with paragraphs 18 and 19 of the *Agreement* – as referring exclusively to calling "operational curtailments" as defined in Evergy's tariffs. *See* Exhibit 204, pgs. 3, 5, 13, 15, 19, and 22. These operational curtailments represent the curtailments necessary for meeting the Company's MEEIA objectives and are therefore clearly the only type that are meant to be addressed in the *Agreement* to resolve the MEEIA case.

Evergy's duty to act prudently when incurring its fuel costs existed independent of the *Agreement* and nothing in the *Agreement* absolved the Company of that duty. Tr. pg. 289 lns. 6 – 15. Evergy simply had no rational basis for assuming that its settlement of a MEEIA case meant that it was no longer required to act prudently with respect to its FAC costs. To really drive this point home, just consider

what would have happened if the OPC (and all other stakeholders besides Staff) had not been signatories to the *Agreement* or even a party to the MEEIA case. The *Agreement* still exists under this scenario, but it now has only Staff and the Company as signatories. No party in this hypothetical situation could reasonably argue that the OPC was barred from alleging imprudence on the part of Evergy for failing to call more demand response events in a FAC prudence review case due to the existence of the *Agreement* filed in the entirely distinct MEEIA case. This is because it is illogical to say that an agreement reached between the Company and Staff in a MEEIA docket would bind parties in an unrelated FAC prudence review. The OPC's position as a signatory to the *Agreement* in the MEEIA docket should not change this outcome given that the FAC case is still a separate docket with a distinct purpose.

Because the *Agreement* never mentioned or discussed the FAC, it did not absolve Evergy of its duty to act prudently when managing its fuel costs. Tr. pg. 288 ln. 20 – pg. 289 ln. 15. The fact that the *Agreement* specifically required the Company to call a certain number of events for its programmable thermostat programs as part of the settlement reached to extend Evergy's MEEIA cycle two did not preclude the Company from calling additional events outside of the MEEIA context for the economic reasons spelled out in its tariff. *See* Exhibit 204, pgs. 3, 5, 13, 15, 19, and 22. Evergy's argument to the contrary is dependent on conflating the MEEIA and FAC cases in the hopes that it can confuse the Commission into applying a stipulation beyond its stated terms.

C. The *Agreement* addressed only the minimum number of events that had to be called and it did not prohibit calling more events

Evergy's argument is dependent on the Commission believing that the terms of the *Agreement* required the Company to call exactly five programmable thermostat events, no more no less. That is not what the *Agreement* actually states. In reality, the Agreement only states that Evergy "will call five demand response events per jurisdiction during the summer of 2019." Ex. 15. Pg. 3. Nothing in the *Agreement* prohibits Evergy from calling more than five events. Tr. pg. 288 lns. 17 – 19. If the Company had called six events or more, for example, then they would still have met the terms of the *Agreement* because calling six events necessarily means one has also called five. Tr. pg. 288 lns. 10 – 16. Thus, at no point did the *Agreement* **prohibit** Evergy from calling the number of events recommended by the OPC in this case. This is the critical distinction that demonstrates why Evergy's reliance on Case No. GR-2014-0152 is flawed.

The question at issue in GR-2014-0152 was "What rate should the Commission use to calculate Liberty's revenues from Noranda and General Mills for purposes of this rate case?" *In the Matter of Liberty Utilities (Midstates Natural Gas) Corp. d/b/a Liberty Utilities' Tariff Revisions Designed to Implement a General Rate Increase for Natural Gas Service in the Missouri Service Areas of the Company*, GR-2014-0152, 2014 Mo. PSC LEXIS 1054, *51 (Mo. P.S.C. December 3, 2014). Staff took the position in that case that the Commission should calculate "Liberty's revenues from Noranda and General Mills by imputing the Commission-approved tariff rate, rather than the

discounted rate established in the special contracts with these customers." *Id*. However, the Commission determined that this would contradict the language in a previous rate case where Staff had agreed "that revenues associated with special contracts shall not be imputed in this case." *Id*. at 52. The Commission therefore concluded that "had Liberty charged the rates Staff suggests in this case, Liberty would have violated the stipulation from [the prior rate case]." *Id*. at 53. That is not the situation currently before the Commission.

As we have already seen, Evergy would have still been in compliance with the terms of the *Agreement* if it called more than five events because calling more than five events necessarily means that one has called at least five events. Tr. pg. 288 lns. 10 – 16. Thus, Evergy calling more than five events would not have "violated the stipulation" as was the case in GR-2014-0152. 2014 Mo. PSC LEXIS 1054 at *54. Consequently, the rationale employed by the Commission in GR-2014-0152 simply does not apply to the present case. If the parties to the *Agreement* had intended for it to be read in a manner that specifically restricted Evergy from calling more than five events, they would have indicated this using language such as "Evergy will call no more than five demand response events . . ." or "Evergy will only call five demand response events . . . ." This kind of language was not used, however, because it was clearly not the intent of the signatories.

The primary rule of contract interpretation is that courts seek to determine the parties' intent and give effect to it. *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 226 (Mo. banc 2013) (citing *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d

772, 776 (Mo. banc 2005)); *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003) ("The cardinal principle of contract interpretation is to ascertain the intention of the parties and to give effect to that intent."). The portion of the *Agreement* upon which Evergy relies was actually a sub-section of paragraph 7. Exhibit 15. Pg. 3. The paragraph itself states, "With the following exceptions, the total MEEIA 2 Plan Energy (kWh) and Demand (kW) savings targets will **increase** 25%." *Id*. (emphasis added). Three sub-points follow this paragraph. *Id*. The first and last (points (a) and (c)) expressly state that specific energy target will **not** increase. *Id*. The second (point (b)), which is where the crucial language is contained, says nothing of increasing or decreasing the number of events called. *Id*. However, we know that this *Agreement* was entered into in February of 2019. *Id*. at pg. 10. We further know that Evergy called only two programmable thermostat events in 2018. Tr. pg. 107 lns. 1 – 6. Therefore, we can easily determine that the intent of the language at issue was meant to cause a significant **increase** over the existing number of events being called (from two to five). Evergy's interpretation of this language runs directly contrary to this intent.

Again, the pertinent language was a listed "exception" to the requirement that Evergy's MEEIA cycle two program targets would increase 25%. Exhibit 15. Pg. 3. The move from calling two events to calling five events was more than a 25% increase.[2] This sub-section was therefore an "exception" to the 25% increase to the program targets in that it was meant to result in an even **greater** target increase.

[2] Specifically it is a 150% increase.

The clear intent of the parties signing the *Agreement* was thus to increase the number of demand response events Evergy was calling, not curtail or limit them. This becomes obvious when one considers the context of the *Agreement*. Evergy called just two events in 2018. *See* Tr. pg. 107 lns. 1 – 6. This language was consequently introduced in the *Agreement* to force Evergy to increase the number of events so that more data could be generated and provided to the DSM advisory group. Exhibit 15 pg. 3. Under these circumstances, the language that Evergy "will call five demand response events per jurisdiction during the summer of 2019" must be read as a **minimum** if one truly wishes to give effect to the parties intent. Evergy's attempt to argue that this language thus prohibited the Company from calling more than five events is obviously fallacious.

Because the language upon which Evergy relies only establishes a minimum when read in proper context, it does not protect Evergy's imprudent behavior from proper scrutiny. Evergy met the terms of the *Agreement* when it called five programmable thermostat events in 2019. However, the Company was still under an obligation to act prudently by continuing to call programmable thermostat events for the "economic reasons" stated in its tariff. This would in no way have violated the *Agreement* as written.

D. Even if Evergy did believe that it was limited to calling only five events, it could have approached Staff or OPC and sought clarification or revision. It was imprudent for the Company not to do so

Given the context and language of the *Agreement*, Evergy should have understood that the requirement that it "call five demand response events per jurisdiction during the summer of 2019" was a minimum and not a maximum. Even if Evergy did believe that the language in the *Agreement* limited them to only calling five events, though, it was still impudent of the Company to not work with the OPC, Staff, and other stakeholders on correcting this assumption. Consider the following testimony provided by OPC witness Lena Mantle during the evidentiary hearing:

> A. . . . Mr. File, in his response or in his testimony yesterday, stated that, well, he thought that if they had -- it was his opinion, if they had to have more than – if they wanted to do more than five, they would have to go to the other party and get permission to not follow this stip. A prudent person knowing that it can achieve more benefits for the customers would have come and asked, can we -- if they thought they were constrained to this Stip and Agreement, a prudent person would say, I can save more money if I increase that number and would have come and asked to increase that number. And I am not aware that that -- I'm pretty sure that would have been brought up if Evergy had done that, had tried to have more than five events that the other parties told them no.
>
> Q. Do you still have it open in front of you, the Stipulation, I mean?
>
> A. Yes.
>
> Q. If you went to Page 7 and say Paragraph Number 21?
>
> A. That is -- it's just that it may be modified by the signatories only by written -- amendment executed by all the signatories.
>
> Q. So is that reinforcing your position that they could have asked for more events?

A. Definitely. And I have a hard time believing Staff or OPC would've said no.

Q. To your knowledge, did they approach us?

A. Not to my knowledge.

Tr. pg. 289 ln. 21 – pg. 290 ln. 22; Exhibit 15 pg. 7. This discussion highlights the perfidious nature of Evergy's argument. The Company wants the Commission to conclude that it was bound to only calling five events in 2019 and thus that it was Staff and OPC that are to blame for Evergy's imprudent decision not to call as many events as their program was designed to call. Nothing could be farther from the truth.

Evergy's behavior in 2018 showed that the Company had no real intention of calling demand response events beyond the bare minimum necessary to protect the earning opportunity it achieved through the MEEIA. Tr. pg. 107 lns. 1 – 6. The language from the *Agreement* requiring five events was plainly designed to **force** Evergy to call more events than it had been calling when left to its own devices. Exhibit 15, pg. 3. If Evergy had told stakeholders that it believed the language was preventing them from calling more events, the language would have been amended to rectify this obvious mistake. Tr. pg. 290 ln. 19 – 20. Evergy knew or should have known this. The Company's attempt to shield its behavior using this language despite never having even approached Staff or OPC to clarify or rectify the situation represents significant imprudence at best and intentional misinterpretation of the *Agreement* at worst.

E. The *Agreement* only concerned the "Programmable Thermostat" programs. Evergy was still imprudent for failing to call more events under the "Demand Response Incentive" programs

There are technically six different demand response programs at issue in this case. Evergy Metro and Evergy West both independently have (1) a business programmable thermostat program, (2) a residential programmable thermostat program, and (3) a demand response incentive program. Exhibit 204 pgs. 4, 6, 12, 14, 16, and 21. The language in the *Agreement* referenced only the programmable thermostat programs; it did not address the demand response incentive programs. Exhibit 15 pg. 3 ("For the Programmable Thermostat Program, The Company will call five demand response events . . ."). Therefore, even if the Commission should find that Evergy was not imprudent for failing to call as many programmable thermostat events as it could have in 2019 because of the *Agreement*, the Commission should still find the Company was imprudent for failing to call as many demand response incentive program events as it could have during the summer of 2019 for all the reasons laid out in the OPC's *Initial Brief*.

F. The *Agreement* only pertained to the 2019 curtailment period. Evergy was still imprudent for failing to call more events during the 2018 curtailment period

Energy's own brief acknowledges that the *Agreement* only covered the 2019 curtailment period. Therefore, the *Agreement* cannot possibly justify the Company's imprudent decision not to call demand response events for economic reasons during the 2018 curtailment period. It is worth remembering that the only reason the

language requiring Evergy to call five events in 2019 was inserted into the *Agreement* at all is because Evergy has previously shown that it will not make adequate use of its demand response programs without someone forcing the issue. *See* Tr. pg. 107 lns. 1 – 6 (showing how Evergy called only two programmable thermostat events in 2018). Evergy's desperate attempt to shield its imprudent behavior in 2019 using the *Agreement* thus throws the imprudence of its actions in 2018 into even sharper relief.

G. Conclusion

Evergy's first argument represents a true perversion of the *Agreement* it relies on. Evergy negotiated with OPC, Staff, and other stakeholders in 2019 to extend its lingering MEEIA cycle two program while MEEIA cycle three was negotiated. Exhibit 15, pg. 2. As part of this negotiation, the Company agreed to increase the number of programmable thermostat events it was calling from a dismal two to a paltry five. *Id*. at 3. Evergy literally had to be **forced** to call more of these events because it otherwise would not do so.[3] Evergy now seeks to use this *Agreement* to defend its imprudent decisions – raised in a completely separate docket no less – by arguing that the *Agreement* actually prevented the Company from calling more events. Not only does this argument contradict the obvious intent of the *Agreement*, it also directly violates the terms of the *Agreement* that are meant to prevent its use in this very fashion. The Commission should therefore dismiss this first argument raised by

[3] This is proven by the fact that for all events **other** than the ones Evergy agreed to increase, no additional events were called in 2019 as compared to 2018. Tr. pg. 106 ln. 20 – pg. 107 ln. 14.

the Company and find them imprudent for the reasons laid out in the OPC's *Initial Brief*.

Second Argument: Hindsight

The second argument Evergy makes is easily one of the most used and abused arguments in the Company's stable. It is the claim that the OPC's position is dependent on "hindsight analysis" and is therefore prohibited. Once again, there are many faults with this line of reasoning that we must address. Before plunging right to the heart of the issue, however, it is necessary that we first come to terms with what the prohibition against so-called "hindsight analysis" truly means.

A. All prudence review disallowances must necessarily involve retrospective analysis

This case is a prudence *review*. It is important to remember what the word *review* actually means. "Re-" is a prefix meaning either again, anew or back, backward. Webster's Third New International Dictionary 1888 (1976). View, meanwhile, can be defined as the act of seeing or beholding or a formal examination (see *inspection*). *Id*. at 2551. Therefore, when "re-" is affixed to the word "view" it literally means a backwards looking examination or inspection. *See Id*. at 1944. A prudence review is therefore necessarily a retrospective analysis of past actions. It requires the Commission to look *backwards* at what a utility has done and determine whether that utility acted prudently. It is essential that the Commission acknowledge this basic concept.

Many of this State's regulated utilities, including Evergy, have taken to relying heavily on the recognized prohibitions against "hindsight analysis" as the ultimate defense against charges of imprudence. *See PSC v. Office of Pub. Counsel (In re Atmos Energy Corporation's 2008-2009 Purchased Gas Adjustment & Actual Cost Adjustment)*, 389 S.W.3d 224, 228 (Mo. App. WD 2012) ("The utility's conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the utility had to solve its problem prospectively rather than in reliance on hindsight.") (internal citations omitted)). These utilities tend to throw out the charge of "hindsight analysis" when confronted with examples of their own carelessness in much the same way as one might hold up a clove of garlic to ward off a vampire. However, the reflexive use of "hindsight analysis" as a defense against imprudence by Missouri utilities has become so ubiquitous and overdrawn that it threatens the very nature of prudence reviews as a whole.

Evergy, and other Missouri utilities, would have this Commission believe that **any** prudence review that involves retrospective analysis must necessarily be a hindsight-based review.[4] As we have already determined, however, all prudence reviews require retrospective analysis by definition. Thus, if the Commission accepts what Evergy and other Missouri utilities argue, it would effectively mean that all prudence reviews require hindsight analysis. From there it is easy to see how we

[4] Hindsight is defined as the "perception of the nature and demands of an event after it has happened." Webster's Third New International Dictionary 1070 (1976). Given that to "view" is to "perceive" and that "re-" is a prefix meaning backwards, it is easy to see how one can make the logical leap to saying that all "backwards looking perceptions" (*i.e.* "reviews") either involve or result in hindsight. However, this analysis does not reflect how the terms "hindsight" has been used by Missouri courts, as this brief will discuss.

arrive at a point where a utility can no longer be found imprudent for any action, no matter how foolish, because to do so would involve using "hindsight." This is obviously not what the Courts of Missouri intended.

In reality, the Missouri Court's prohibition against so-called "hindsight analysis" is actually quite narrow. All it means, and all it has ever meant, is that the Commission must determine prudence while "considering that the utility had to solve its problem **prospectively** . . . ." *Id*. Stated differently, the determination of whether the utility acted prudently must be made based on what a reasonable and prudent person would have done had they been in the same place, with all the same knowledge, **at the same time** as the utility. *Id*. Determining what the utility knew (or should have known) at the time the decision was made and calculating what the cost of the utilities imprudence was, on the other hand, will ineludibly require the Commission to examine data and evidence retroactively. This additional analysis, which relies on backward-looking data, does not constitute the form of hindsight prohibited by Missouri Courts. With this framework in mind, let us move on to disproving Evergy's claims regarding "hindsight analysis."

B. Evergy's imprudence is established without resorting to hindsight analysis

The first and most important thing that the Commission must understand is that the decision resulting in Evergy's imprudence can be clearly and easily found imprudent without even needing to approach the subject of hindsight. As stated in the OPC's *Initial Brief*, Evergy was imprudent because it never called any demand

response program events for economic reasons despite having the clear opportunity to do so. *See* Tr. pg. 143 lns. 13 – 22. (where Evergy witness Mr. Brian File openly admits the company never called any events for economic reasons). Evergy's argument regarding hindsight, by contrast, has nothing to do with the **decision** to call events and instead focuses entirely on the **amount** of the OPC's proposed disallowance. In other words, the Company is claiming that the OPC employed hindsight when calculating the amount of its disallowance, but does not and cannot argue that the OPC employed hindsight as to the basic argument that Evergy should have called more demand response events. This is where the analysis of the previous section comes into play.

Evergy is attempting to conflate the retrospective analysis necessary to determine the amount of damages caused by its imprudence with the OPC's argument as to why the decision not to call demand response events was imprudent. Let us tie this argument down by looking at the very first line of this section of Evergy's brief:

> OPC used historical DA LMP data and historical Schedule 11 fees that was not available to the Company at the time it was implementing this demand response program to draw the conclusion that Evergy could have achieved more energy-saving for its customers by utilizing demand response events to arbitrage DA LMP prices and Schedule 11 SPP fees.

Evergy, *Initial Brief*, pg. 14. The basis of Evergy's argument is apparent from the first few words; the supposed sin that the OPC committed was to have used "historical data." The first problem with this charge, as already discussed, is that because this a

prudence *review* and therefore is occurring *after the events in question have transpired*, **all data related to the prudence period is historical**. *See* historical, Webster's Third New International Dictionary 1073 (1976). It is literally impossible to perform a prudence review without relying on historical data because a prudence review is by definition going to be retrospective in nature. Evergy does not care about this point, however, because it is determined to get the Commission to believe that **any** determination that relies on historical data must be prohibited retrospective review. *Id.* This argument, if taken seriously, would thus eliminate the prudence review process in its entirety. Such an outcome would clearly undermine the express purpose of Mo. Rev. Stat. section 386.266.5(4), and must therefore be wrong. *Verified Application & in re Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520, 525 (Mo. 2015) (Missouri Court's "presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language." (citing *Wehrenberg, Inc. v. Dir. of Revenue*, 352 S.W.3d 366, 367 (Mo. banc 2011)).

The second and even more compelling response to Evergy's assertion is that it is simply wrong. The OPC did not rely on historical data to reach the conclusion that Evergy could have achieved more energy related cost-savings for its customers if it called more demand response events. This was explained directly by OPC witness Ms. Lena Mantle during the evidentiary hearing:

> Q. Let's start with the recross from Evergy. First of all, Evergy was asking a lot of questions regarding hindsight as to the calculated amount. Now, without actually determining whether or not you employed hindsight calculating the amount, was there any hindsight involved in determining whether or not they acted imprudently?

A. No. There's no question to that.

Q. And why is that?

A. Because as I said to Mr. Fischer, anytime the cost of energy is above the cost of the demand response program, calling that demand response program will save the customers money, it will save energy that the customers do not have to pay for.

Q. So because they save money any day that the cost factor is positive, do you actually need to know exactly which days are the highest in order to be prudent?

A. No. To maximize prudence, you would have to know that. But prudent people don't know that and prudent people would do the best that they could.

Tr. pg. 278 ln. 16 – pg. 279 ln. 9. This is a critical point that the OPC tried to make clear in its *Initial Brief*. It simply does not matter what days Evergy called demand response events. As long as the cost of energy is above the cost of calling the demand response event, calling that demand response program will save the customers money *Id*; Tr. pg. 191 lns. 4 – 14 ("Q. So any time where the cost of that energy that they're buying is positive and it costs them money to purchase it, would you agree that a reduction in the amount of energy they're buying is going to reduce their cost? A. To the extent that the cost of an incremental demand response call does not exceed that, I would say that is true."); Mantle, *Surrebuttal*, pg. 14 lns. 18 – 23 ("It would be unreasonable to expect anyone to be able to time events so accurately they achieve the absolute minimization of energy costs. However, given the potential gain, **a reasonable person would at least call all the available events and try to maximize savings**. If an event is not called, then there is no gain. If an event is

called energy is saved and cost is reduced regardless of whether or not it ends up being a peak pricing period." (emphasis added)).

Despite what Evergy's brief says, the OPC did not and does not need to rely on historical data to show that Evergy was imprudent. This is because Evergy was imprudent simply by virtue of the fact **that it did not call any demand response events for economic reasons whatsoever**. Tr. pg. 143 lns. 13 – 22. A reasonable person would have known **at the time that Evergy was making its decision** that calling an event when the cost of energy was above the incremental cost of the event itself would have saved customers money and so would at least call "all the available events and try to maximize savings." Tr. pg. 278 ln. 16 – pg. 279 ln. 9; Tr. pg. 191 lns. 4 – 14; Mantle, *Surrebuttal*, pg. 14 lns. 18 – 23. Because Evergy did not act as a reasonable and prudent person would have done at the same time and under the same circumstances, it did not act prudently. That is all that there is to the story.

Technically, the OPC should be able to end its analysis here. However, because the Company has seen fit to confuse the issue, and acting out of an abundance of caution, the OPC will continue to demonstrate why its calculation of the disallowance did not constitute impermissible hindsight analysis. Before doing so, though, the OPC wants to reiterate its central point. The fact that Evergy acted imprudently when it decided not to call any demand response events for economic reasons requires no historical review. Determining the **amount** of the disallowance that should be made to Evergy's FAC because of this imprudence decision does require examination of historical data, but this fact does not in any way impede the underlying argument as

to why the Company was imprudent. Even if the Commission should therefore find that the OPC did engage in hindsight analysis in determining the **amount** of its disallowance, which it did not, the Commission should still find that Evergy acted imprudently when it failed to call any demand response events for economic reasons. The OPC will return to this issue again, but, for now, let us consider the calculation of the disallowance amount.

C. Establishing the methodology by which Evergy should have acted

The basic standard for a prudence review is already well established under Missouri law. *PSC v. Office of Pub. Counsel (In re Atmos Energy Corporation's 2008-2009 Purchased Gas Adjustment & Actual Cost Adjustment)*, 389 S.W.3d 224, 228 (Mo. App. WD 2012) ("The utility's conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the utility had to solve its problem prospectively rather than in reliance on hindsight."). How, though, should this standard be applied in practical terms? The answer is through four simple steps. The first step is to determine what "circumstances" were present at the time the utility made its decision. Another way of addressing this is to ask: "what did the utility know or should have known at the time it made its decision." The second step is simply to ask: "what would a reasonable utility have done with the knowledge determined in the first step." The third step is then to calculate what costs would have been incurred had the reasonable utility acted in the manner determined in the second step. The fourth and final step is to then compare the cost determined in the third step to the cost *actually* incurred by the utility under review. The

difference between the costs that the "reasonable utility" would have incurred and the cost the utility actually incurred should be the amount that is disallowed. Our steps are thus:

1. Determine what the utility knew or should have known at the time it made its decision.
2. Determine what a reasonable utility would have done with the knowledge determined in step one.
3. Determine the costs the reasonable utility would have incurred had they taken the action determined in step two.
4. Compare the costs determined in step three to the costs actually incurred to determine the amount of the disallowance, if any, that should be applied.

Having developed our method, let us apply it to the facts of this case.

The first step is to place ourselves in the shoes of the utility at the time that it needed to make its decision. So let us assume that we are in charge of making decision for Evergy and it is May 31, 2019. We are therefore looking **ahead** to the beginning of the curtailment period for 2019. At this exact moment, we should know several things. First, we know that calling a demand response event when the cost of energy on the SPP market is above the incremental cost of the event itself will save our customers money. Tr. pg. 278 ln. 16 – pg. 279 ln. 9; Tr. pg. 191 lns. 4 – 14; Mantle, *Surrebuttal*, pg. 14 lns. 18 – 23. Based on this alone, we know that the only prudent course of action is to call all of our available events and thus seek to maximize savings. Tr. pg. 279 lns. 8 – 9; Mantle, *Surrebuttal*, pg. 14 lns. 20 – 21. We further know that the curtailment period lasts four months from June 1 through September 30. Exhibit 204, pgs. 2, 4, 12, 14, 17, and 21. Finally, we know that we can call fifteen

residential programmable thermostat program events over the course of this season. Tr. pg. 105 lns. 16 – 23; pg. 115 ln. 23 – pg. 116 ln. 3; pg. 138 lns. 3 – 10. Now let us stop here and consider what conclusions might be drawn.

Given there is a four-month window over which to call curtailment events and only fifteen curtailment events to call, the prudent person would stretch the available curtailment events over the whole of the curtailment season. *See* Tr. pg. 249 lns. 10 – 12. ("Q. Are you suggesting that they call all 15 events on the first day of the curtailment period? A. That would be imprudent."). Applying some basic math, we can determine that the prudent person would probably call four curtailment periods in June, four in July, four in August, and three in September. So far, so easy. The next piece of the puzzle comes with determining on what days in each month to call an event. This is obviously more complicated because one cannot predict with perfect accuracy what days in a month will have the highest prices. However, one can still make predictions and call events even without perfect accuracy. Tr. pg. 280 lns. 17 – 20. Let us consider how to go about doing so.

Let us begin by again considering what information would be available to the hypothetical prudent utility. Initially, the prudent utility could look at historical price data (meaning data that existed **before** June 1, 2019) to see what the highest prices were during the same time-period for previous years. Tr. pg. 279 ln. 25 – pg. 280 ln. 6; Exhibit 13 (showing that Evergy has access to this information); Tr. pg. 120 lns. 15 – 24. Based on this information alone, the prudent utility could begin establishing "threshold" values for when to call an event. For example, if the highest price for

energy in June the year before was $83.54 a MWh, then the utility might set a threshold value of $80 per MWh and say "I will call an event the first four times in June that the SPP day-ahead prices are more than $80." In addition to the historical price data, the prudent utility would also look at weather forecasting data. Tr. pg. 279 ln. 25 – pg. 280 ln. 6; Tr. pg. 82 lns. 8 – 23 (showing that Evergy already considers this information when attempting to predict load peaks). If the temperature the year before (again we are imaging that it is May 31, 2019, so the year before would be 2018) was much higher than what was being predicted for June of 2019, then the threshold value would need to be adjusted down to compensate. If the weather forecast for June 2019 showed that it was likely to be substantially hotter than it was in 2018, on the other hand, the threshold would need to be adjusted up to compensate. Finally, the prudent utility would also look at the overall trends in market prices and use these trends to adjust accordingly just as with the weather forecasting. *Id*.

By using the data available on May 31, 2019, a prudent utility could easily establish the threshold values at which it would call an event. After that, it is just a matter of reviewing the SPP day-ahead market to see when prices rise above that threshold. *See* Tr. pg. 90 lns. 13 – 25 (showing that Evergy already uses the SPP day-ahead market when predicting load peaks). For example, if Evergy had set a threshold value of $50.00 for June of 2019, then it would most likely have seen the day ahead prices for June fourth and fifth were above that threshold for the 14, 15 and 16 hours. *See* Ex. 13, pg. 6. If the Company had subsequently decided to call an event beginning at hour 14 and lasting four hours on both days, the Company would

have captured the five highest hours in June of 2019 plus three hours more. *Id.* In this manner, Evergy could easily have established a system to initiate the calling of events that would likely capture the highest hours of each month of the curtailment season **using only the information available to the company at the time it made its decision**.

There are two additional factors that should be considered for the method just identified. The first is that the threshold values are not static. This means that if Evergy gets to the middle of June without calling any events and it sees that the weather forecast does not predict a major temperature increase, then the Company should respond by lowering its threshold values to compensate. Mantle, *Surrebuttal*, pg. 15 lns. 11 – 12. Likewise, if the Company calls two events in the first few weeks of June and the weather only appears to be getting hotter, then the thresholds should be increased to compensate. *Id.* The second issue is what happens if the Company misses the mark for the highest prices in a month. This can happen one of two ways. The first is if Evergy were to undervalue its thresholds meaning it called its four events for June before the highest prices occurred. In that case, while the Company did not recognize the maximum possible savings, it did at least achieve *some* savings so it would be very hard to find the Company was imprudent. *See* Tr. pg. 279 lns. 4 – 9. The alternative is if Evergy valued its threshold too high, meaning that it never hit them even with mid-month adjustments. There is not a major loss in this scenario because the un-called events can just be transferred to the remaining months. So, for example, if the Company only managed to call two events in June, it could

compensate by calling five in July, four in August, and four in September. Any missed events could be pushed back in this manner until September, at which point the utility should be calling events any time the SPP day-ahead market shows the cost of energy is going to be higher than the incremental cost of the event itself. Tr. pg. 278 ln. 16 – pg. 279 ln. 9; Tr. pg. 191 lns. 4 – 14; Mantle, *Surrebuttal*, pg. 14 lns. 18 – 23.

We have now covered the first two steps of our prudency evaluation. Evergy was aware that it needed to call events and had access to information regarding historical SPP prices, forecasted weather data, and market trends. Based on this information, the Company should have been able to set threshold values that would trigger events being called based on the SPP day-ahead market. Using this method (or something similar), buttressed by mid-stream adjustments where necessary, Evergy could have known when to call demand response events that would have captured most, if not all, of the highest priced energy hours for each month of the curtailment period. Moreover, even if Evergy failed to capture each and every single one of the highest priced hours, as long as it called events is would have almost certainly saved customers money. Tr. pg. 278 ln. 16 – pg. 279 ln. 9; Tr. pg. 191 lns. 4 – 14; Mantle, *Surrebuttal*, pg. 14 lns. 18 – 23. To not do so was unjustifiably imprudent.

Before moving on to the next two steps, the OPC wishes to pause and address directly one point in Evergy's *Brief* wherein the Company states as follows:

> Analyzing historical monthly peak-load data does not equal an "impact analysis" without a predictive methodology that would have resulted in such an impact. It is absurdly easy to find an "impact" when using

> historical data to justify a disallowance based on predictions. We can all calculate the impact of not betting on the winner of yesterday's horse-race. But this is totally meaningless without offering a methodology by which we could have selected the winning horse.

Evergy, *Initial Brief*, pg. 16. To begin with, it should be clear that what the OPC just described **is** the "methodology" that Evergy is complaining the OPC did not supply. Moreover, this methodology (meaning all of the preceding six or so paragraphs) was outlined by the OPC in **both** filed testimony and on the stand:

> Q. What would a reasonable person do to increase their odds of maximizing energy savings and reducing monthly peaks?
>
> A. A reasonable person would look at the pattern of when the highest market prices occur for each of the utilities and, recognizing the limitations of the programs, would set some parameters. For example, system peaks typically occur late July or early August when the weather is the hottest. Therefore, a reasonable person would not call all events before then. Prior to the summer curtailment season, a reasonable person would evaluate the historical hourly prices to determine a minimum price under which no events would be called. However, this reasonable person would be watching the prices in the summer to see if that minimum needs to be changed. Because a little savings is better than none at all, if there were still a number of events available after mid-September, a reasonable person would maximize the events in the time that remained to obtain some savings.

Mantle, *Surrebuttal*, pg. 15 lns. 3 – 15.

> Q. What would a prudent person do?
>
> A. A prudent person would have -- would know what the load characteristics of the Evergy utilities were, and they would know response to the weather. They would use few events, two or three, to get the peak in June and then trying to get the peak in July and knowing that the hot weather is typically in July and August, that's when you would try to use – maximize your events. And then in addition, you'd save a few events for before September trying to get that peak. · But even if you didn't get that actual peak in September, you only have two events left and you missed the peak, you would still call those events because you are saving the customers money.

Q. Would a reasonable person review information like the day-ahead market, weather reports, et cetera, the same way you're trying to predict a peak when trying to predict when to the call for economic reasons?

A. Definitely. · To have a good feel not only for the load of the utility, but also the SPP market and what drives those market prices.

Q. So when you were asked, you know, how you predict what time -- what peaks or -- when you were asked what a reasonable person would know, and you said no one could know, what did you mean by that exactly?

A. No one can pick a specific date, and you can know it's going to be Monday through Friday, you can know it's likely to be about 4:00 p.m. in the summer months. But as to whether it's August 6th or August 12th or July 27th, there is no way you can know, because you don't know the weather on most days.

Q. But you can make reasonable predictions based on the information that's available and act prudently by choosing to call events at all?

A. That's correct. You can.

[. . .]

Q. I think we've kind of touched on this, but some of the earlier questions you received from the Commission were describing peaks, you know, what factors you need to consider when trying to select peaks. · Is reducing peaks the only consideration that Evergy needs to be making when it's considering whether to call a demand response program?

A. No. It should be -- market price should also be reviewed. Especially if you know you've already gotten the peak for that month, and reduced peaks. But even if you haven't and you're running out of month, and running out of the curtailment season getting to the end of September and you've got available events. And, again, any time the market price is above zero, you will save the customers money if you call these events.

Tr. pg. 279 ln. 13 – pg. 280 ln. 20; pg. 283 lns 10 – 22. For Evergy to claim that the OPC has not been perfectly transparent as to the methodology that the Company should employ to call events is exceptionally misleading.

Having now walked through the first two steps of the prudence review, we turn to the third step. This, recall, requires a determination of what costs would have been incurred (or avoided) if the prudent utility had acted as it should. It is here where things admittedly become more difficult. The best course of action to answer the question posed would be to actually build the threshold model just described for each of the curtailment seasons under review using the data available to the Company prior to the curtailment season in question and then apply the historical data for that test year to determine when events would have been called using the model and what costs would have been avoided. However, because Evergy made literally no attempt to build such a model itself (because it had no interest in calling **any** events for economic reasons) the reviewer would effectively have to start from scratch and build the model entirely themselves. This, coupled with the need to incorporate the mid-stream adjustments and the lack of access to the same data Evergy possesses, results in a truly herculean task, which brings us directly into the next point.

D. Evergy is demanding the OPC preform all of the Company's work for it despite the OPC lacking the resources to do so and access to Evergy's data

To recap: we have now established how Evergy could have acted prudently by using the data available to it prior to each curtailment season to set threshold limits that would indicate when it should call events during that season based on the SPP day-ahead market. Mantle, *Surrebuttal*, pg. 15 lns. 3 – 15. The next step is to determine how much costs subject to the FAC would have been saved if Evergy called events using this method. However, because Evergy never even made the attempt to

call events for economic reasons, it becomes necessary to build and run the model for this method from the ground up. The OPC cannot readily accomplish this task for two major reasons. First, the OPC simply lacks the resources to do so. Evergy has entire departments of people devoted to managing its demand response programs. *See* Carlson, *Rebuttal*, pg. 2 lns. 13 – 14 ("My responsibilities include leading the demand-side management group (including energy efficiency and demand response) at Evergy for all jurisdictions."). These people work year after year to develop and operate methods designed for picking when to call events. The OPC only had one witness and less than a year to litigate this case. It would be unreasonable for the OPC to perform the utility's entire job in less time with less people. Tr. Pg. 247 ln. 14 – 248 ln. 1.

The second reason is that the OPC lacks access to the same kinds of information that the Company possesses. Prior year market prices, estimated load, weather forecasts (both past and future), all of these are things that Evergy has access to but which the OPC lacks. *See* Tr. pg. 246 ln. 23 – pg. 247 ln. 2; Mantle, *Surrebuttal*, pg. 18 lns. 7 – 10. Without this kind of information, it would be near to impossible to successfully build the model that the OPC has outlined. It is for these two reasons that the OPC was not able to determine on exactly what dates Evergy would have called demand response events had it acted prudently. *Id*. However, that did not prevent the OPC from developing the best possible alternative to determine, in a highly conservative manner, what kind of disallowance could be expected had Evergy acted prudently.

E. In the absence of available data, the OPC calculated its disallowance using the best method at its disposal

If Evergy had acted prudently, it would have established thresholds for when to call demand response events based on the information available to it prior to the beginning of each curtailment season. Mantle, *Surrebuttal*, pg. 15 lns. 3 – 15. If Evergy had acted prudently, it would have further monitored its threshold values during the course of the curtailment season to know if they needed to be changed. *Id*. Assuming that Evergy had done a good job setting and monitoring its threshold values, the Company would have been reasonably expected to have called events during the periods of each month that corresponded to the times with the highest price for energy. Given that each residential curtailment event could last up to four hours and each month could have expected three to four curtailment events, Evergy should have reasonably expected to call events during the twelve to sixteen most expensive hours in each month of the curtailment period. *See Id*. Tr. pg. 281 lns. 21 – 22. The OPC recognized all this, but did not want to just cherry-pick the twelve to sixteen most expensive hours in each month as this would be unfair. Tr. pg. 247 lns. 1 – 6. The OPC therefore adopted the conservative position that if Evergy had acted prudently, it would have been able to get at least a *portion* of the highest priced hours in each month. *Id*. The OPC therefore used only the five highest hours of each month, which represented one-half to one-third of the number of hours that the Company *could* have called. Thus, while the OPC could not determine exactly what hours would have been called if Evergy had prudently managed its program in the way suggested,

it did calculate what was the most reasonable estimate of cost savings if one assumes that a prudent application of the threshold method described above would have resulted in calling events that covered at least some (less than half) of the most expensive hours each month. Tr. pg. 247 ln. 14 – pg. 248 ln. 6.

Before moving on, the OPC wishes to address briefly the issue of "peaks." Up to this point, the OPC has not focused on the issue of peaks because it was not essential to establishing Evergy's imprudence. The Company's *Brief*, however, places undue emphasis on this topic, so the OPC feels that it must at least be addressed. Specifically, Evergy's brief makes three arguments that must be rebutted:

1. The OPC's recommended disallowance is based on the belief that Evergy should have attempted to predict four monthly peaks;
2. It is too difficult for Evergy to predict monthly peak loads; and
3. Even if Evergy was successful in predicting the monthly peak loads, it would not necessarily result in the reduction of SPP Schedule 11 fees.

See Evergy, *Initial Brief*, pgs. 15 – 16. The OPC will address each of these in turn.

To begin with, let the OPC make this clear: the OPC's recommended disallowance is **not exclusively** based on the belief that Evergy should have attempted to predict four monthly peaks. As has been stated many times in this brief, calling a demand response event when the cost of energy on the SPP market is above the incremental cost of the event itself would have saved customers money. Tr. pg. 278 ln. 16 – pg. 279 ln. 9; Tr. pg. 191 lns. 4 – 14; Mantle, *Surrebuttal*, pg. 14 lns. 18 – 23. As such, it is not necessary to predict monthly peaks in order for customs to see a

benefit from calling demand response events for economic reasons. *Id*. The statement by Evergy Witness Mr. File that Evergy would have needed to "predict the monthly peak load perfectly or the demand response event is pointless, if not worse" is simply false. *See* Evergy, *Initial Brief*, pg. 15. Even if the Company had failed to predict when monthly peaks occurred, Evergy's customers would still have seen over $300,000 in savings just from the cost of energy that customers would no longer need to cover so long as the demand response events were called. Mantle, *Surrebuttal*, pg. 12 lns. 7 – 9. Evergy's claim that the OPC's case is dependent on the Company correctly predicting when monthly peaks will occur is therefore just false.

The second argument raised by the Company is slightly harder to pin down. Evergy's *Brief* relies on this quote taken form the testimony of its witness Mr. Brian File:

> Predicting the day of the annual system peak is somewhat challenging, but attainable. Predicting the peak for any other month, however, is considerably harder, even harder is accurately predicting the peak day for multiple months.

Evergy, *Initial Brief*, pg. 15. Based on this language, it appears that the Company is arguing that predict monthly peaks it is too difficult a task for it to be expected to perform. The problem for the Company, however, is that Mr. File has taken what is effectively the **exact opposite** position in other cases. Consider the testimony Mr. File provided in the *Surrebuttal Report* presented by Evergy in case number EO-2019-0132:

> The Company has the ability to alter its approach to event calling such that an objective is to minimize monthly peaks. While forecasting peaks (because it is weather driven) is not an exact science, a focus on timely system reporting for loads for the month can improve the potential for better accuracy of reducing the monthly peak.

Mantle, *Surrebuttal*, pg. 20 ln. 23 – pg. 21 ln. 9; pg. 55 lns. 10 – 15.[5] As Ms. Mantle points out, "[t]he Commission relied on this testimony in its Amended Report and Order in" EO-2019-0132. Mantle, *Surrebuttal*, pg. 21 lns. 8 – 9. Given that Evergy had no problem telling the Commission that it was possible for the Company to seek monthly peak minimization as a goal for the demand response program in EO-2019-0132, it is strikingly duplicitous for the Company to now assert the opposite. The Commission should thus dismiss this argument out of hand.

The third and final argument that bears addressing is the Company's assertion that even if it was successful in predicting the monthly peak loads, it would not necessarily result in the reduction of SPP Schedule 11 fees. Evergy, *Initial Brief*, pg. 16. Evergy makes this claim based on the testimony of its witness Mr. John Carlson who testified that, because Schedule 11 fees are allocated based on a load-share ratio, if other market participants' loads are reduced equal to or great than Evergy's load reduction from demand response events then there would be no benefit. *Id*. This is a very bizarre statement. Evergy's demand response events are permitted though its tariffs and are thus exclusive to its own service territory. Exhibit 204, pgs. 4, 6, 12,

[5] Note that the second pagination set of this citation refers to page 23 of the *Surrebuttal Report* presented by Evergy in case EO-2019-0132, which is attached to the end of Ms. Mantel's *Surrebuttal*. The reference to page 55 is to the page of the combined PDF uploaded to the Commission's EFIS. The *Surrebuttal Report* itself begins on page 30 of the combined PDF.

14, 16, and 21. Evergy calling demand response events to reduce its **own** load thus cannot reduce the load of **other** market participants. The only way to understand Evergy's argument is therefore to read it as such: "if other participants unilaterally reduced their own load through the reasonable exercise of their own demand response programs to an extent greater than what Evergy managed to achieve, Evergy would see no benefit from reducing its peaks" This is a bad rationale for two reasons.

First, no Missouri utility should ever be permitted to take the position that, because other utilities might be more prudent then it, it should not have to act prudently. This is exactly what Evergy is arguing here though. The Company wants the Commission to believe that it is prudent behavior for Evergy to not even **try** to reduce monthly peaks because other utilities **might** do a better job than Evergy and thereby eliminate the benefit Evergy would see from reduced SPP Schedule 11 fees. Again, arguing that it is prudent to not even try to achieve cost savings for customers on the basis that other utilities might do a better job is not a stance any Missouri utility should be allowed to take. The second reason that this is a bad rationale is because SPP fees are assessed using a load-share **ratio**. Evergy, *Initial Brief*, pg. 16. This means that if every utility in SPP other than Evergy does manage to reduce its load but Evergy does not, the Company will end up with a large percentage of the overall load ratio and thus have a larger proportion of the total amount of Schedule 11 fees that get assessed. It is therefore **always** in a company's best interest to reduce its load when it comes to avoiding or reducing SPP Schedule 11 fees.

Finally, as one last point, the OPC reiterates the statement made in footnote five of its *Initial Brief*:

> Because the SPP Schedule 11 fee is dependent upon the average of the twelve monthly peaks, each monthly peak that is reduced subsequently reduces the SPP Schedule 11 fees. Evergy has managed to reduce one peak while only utilizing a few of the DR events available to it. A reduction in two or more monthly peaks would reduce the SPP Schedule 11 fees even further.

Mantle, S*urrebuttal*, pg. 21 lns. 11 – 15. Therefore, the more events Evergy called, the more likely it would have been to hit the system peak for any given month and save SPP fees. Tr. pg. 87 ln. 25 – pg. 88 ln. 2. For all the reasons thus addressed, the OPC's proposed disallowance (which includes both the cost of avoided energy and reduced SPP Schedule 11 fees) represents the most just and reasonable calculation of the disallowance that should be applied to Evergy based on the information available.

F. Evergy has the burden to prove that its rates were just and reasonable, but the Company is demanding to pass along all imprudently incurred costs due to a lack of evidence

As set forth extensively in the OPC's *Initial Brief*, Evergy bears the ultimate burden of proof in this case to show that its rates are just and reasonable. *See Office of the Pub. Counsel v. Mo. PSC*, 409 S.W.3d 371, 376 (Mo. banc 2013). The OPC has met its own burden of production, necessary due to the presumption of prudence, by showing how it was imprudent for Every to not call any demand response events for economic reasons despite having the ability to do so. *See*, *e.g.*, Tr. pg. 143 lns. 13 – 22; Exhibit 204, pgs. 3, 5, 13, 15, 19, and 22. Despite this, Evergy is now taking the

position that because the OPC failed to engage in the best possible method for calculating the **amount** of the disallowance that should be imposed because of this imprudence, it should be permitted to pass along all imprudently incurred costs through the FAC. This outcome results in rates that are neither just nor reasonable.

The celebrated French philosopher François-Marie Arouet, better known under the name Voltaire, set down in *Dictionnaire philosophique* the phrase "*Il meglio è l'inimico del bene*," literally "the best is the enemy of the good." OPC witness Ms. Mantle recalled this 250-year-old phrase during the evidentiary hearing when explaining why the OPC had taken the position that it did:

> . . . I mean, you often hear don't let perfection be the enemy of good enough. There could be so [many] adjustments made to each one of those hours and so forth. I picked something that I thought would be conservative and something that's reasonable.

Tr. pg. 248. Lns. 2 – 6. Her rationale is as strong now as it was when Voltaire first penned the phrase. The Commission cannot allow Evergy to escape reprimand for its imprudent decision not to call every demand response event it could based solely on the fact that a more perfect method of calculating the damage the Company caused could have been employed. Instead, the Commission should apply the conservative calculation of damages provided by the OPC as the disallowance because it represents the only good method for determining what costs could have been avoided had Evergy acted prudently. *Id*.

Finally, even if the Commission finds that it cannot properly quantify the exact amount of damage caused by Evergy's imprudence without resorting to proscribed "hindsight analysis," the Commission should still find the Company imprudent on the whole because the evidence clearly shows that *some* damage was caused. To this last point, it is important to remember that Evergy could have called all remaining demand response events in September, and thereby reduced expenses, for each of the curtailment seasons at issue in this case. Tr. pg. 279 lns. 21 – 24 ("But even if you didn't get that actual peak in September, you only have two events left and you missed the peak, you would still call those events because you are saving the customers money."). No matter how one looks at it, Evergy could have unquestionably saved its customer's money by calling more demand response events but simply chose not to. The imprudence of this decision must be recognized as such.

G. The Commission is an investigatory body, it has the power to request greater evidence if so chooses

As one final point, the OPC wishes to remind this Commission that it has the power to call any of the parties to this case (Staff, Evergy, or the OPC) to provide additional evidence if it feels it is necessary. *See In the Matter of the Application of Confluence Rivers Utility Operating Company, Inc., for Authority to Acquire Certain Water and Sewer Assets and for a Certificate of Convenience and Necessity*, Order Setting Procedural Conference, WA-2019-0299 (February 13, 2020) (Wherein the Commission ordered a second evidentiary hearing in a case to address a specific evidentiary issue left unresolved from the initial evidentiary hearing). Should the

Commission truly believe the Company's claim that the OPC's disallowance requires a proscribed hindsight analysis, then the Commission should order the parties to provide additional evidence as to this and only this point. The Commission has taken this very action in past cases. *Id*. Moreover, this action would be more than warranted in this case as the proof of Evergy's imprudence is laid bare by the Company's simple admission that it did not call any demand response events for economic reasons. Tr. pg. 143 lns. 13 – 22.

Third Argument: Impact on Customers

Evergy's third argument attempts to present the Commission with a false dilemma by suggesting that if the Company called demand response events for economic reasons, as the OPC argues it should, it would sacrifice **all benefits** gained by calling curtailment events. This is a baseless claim. Calling demand response events for economic reasons within the parameters of Evergy's tariffs and the demand response program's design will not affect Evergy's MEEIA or otherwise adversely impact customers. There are four reasons why.

A. No additional compensation for customers would be necessary because the OPC is only asking the programs be used as designed

The OPC addressed this point in its initial brief, but the OPC will nonetheless reiterate its argument here. Evergy witnesses testified how this program was only designed to allow for 15 residential and small commercial events and 10 large commercial and industrial events to be called. Tr. pg. 105 lns. 16 – 23; pg. 115 ln. 23

– pg. 116 ln. 3; pg. 138 lns. 3 – 10; *see also* pg. 133 lns. 9 – 21; pg. 31 lns. 3 – 6. The OPC's position in this case is simply and solely that Evergy call as many events as the program was designed to call:

> **Q. What is your position on how many events should be called?**
>
> A. Given the design of the DR programs as described by Mr. File of 15 events for the residential and commercial and 10 for the large customer, I suggest that 14 and 9 events should have been called for residential and commercial customers and large customers respectively for economic reasons during the summers of 2018 through 2019. This is because one event would be for operational reasons – the other reason stated in the tariff sheets for the calling of events.
>
> OPC's position in this case is that every resource, demand- or supply-side, should be used to minimize FAC costs. To do anything less is imprudent; increasing costs for Evergy's customers and increases their bills unnecessarily.

Mantle, *Surrebuttal*, pg. 14 lns. 3 – 12. If the Commission operates under the assumption that the **design** of the demand response program was prudent, then the Commission cannot also accept the argument that it would have been imprudent for Evergy to have used the demand response program to the full extent of that **design**. If the design of the programs were prudent, then using the programs to the extent allowed under that design would also have been prudent.

Much of the Evergy's argument on this point turns on the idea that customers would have needed additional compensation if more events were called. Evergy, *Initial Brief*, pg. 17 ("For the Company to use its demand response programs in the fashion desired OPC, the design of those programs would need to be changed in terms of customer compensation and expectations."). This is absurd. At the hearing,

Evergy's witness explicitly testified that customers are already aware that they could expect between ten and fifteen demand response events based on the contracts that were executed when they signed up for the program. Tr. pg. 131 ln. 22 – pg. 132 ln. 12. Because Evergy has already contracted with its residential customers to call fifteen events, there is no basis whatsoever for suggesting that it would need to provide those same customers **additional** compensation to call fifteen events. Stated differently, the OPC is just asking that Evergy use what the Company already paid for.

Sensing the absurdity of the Company's position, the same witness who acknowledged that customers knew that they could expect up to fifteen events attempted to modify his answer by suggesting that customers will have a different expectation of how many events will actually be called based on the "intent" of the program. Tr. pg. 132 lns. 12 – 25. His argument is fundamentally flawed for a singularly obvious reason: customers do not know **why** an event is called. When Evergy calls an event, all that the customer sees is that an event is being called and that his or her thermostat is about to be adjusted remotely. *See* Tr. pg. 117 ln. 24 – pg. 118 ln 16. A customer would not be able to see that the event is being called for "operational curtailment" versus "economic reasons" (or *vice versa*) unless Evergy purposefully went out of its way to tell the customer. Because the customer cannot see why the event is being called, it is fundamentally impossible to subvert the customer's expectations as the intent of the program. Mr. File's attempt to back-pedal his answer is simply wrong.

Apart from being just wrong, there is another issue with Evergy's attempt to use "intent" as a grounds for setting customer expectations that is worth addressing. As the OPC has explained at length, Evergy's tariffs clearly and unambiguously permit calling events for economic reasons. Exhibit 204, pgs. 3, 5, 13, 15, 19, and 22. If Evergy is telling its prospective program participants that they can expect no events called for economic reasons despite the fact that Evergy *can* call them, then the Company is purposefully misleading its customers about the parameters of the program. Needless to say, Evergy should not be shielded from scrutiny (and so rewarded for imprudence) because it misled its customers regarding what they could expect from these programs.

Any miscommunication between Evergy and its customers about the parameters of the demand response program is not and cannot be considered good reason for failing to call more demand response events. Should the Commission accept this argument, it will only encourage further duplicity on the part of the Company and only lead to more erosion of trust between company and customer:

> Contrary to what Mr. File argues, it is actually Evergy that is eroding the trust of the participants when it tells them there could be ten or more events in a summer and yet only calls two. After several years with only a limited number of events called, customers begin to believe that this is normal. If Evergy in subsequent years decides to call even just four or five events in one year, customers will get frustrated because they had come to trust that they would only be inconvenienced two times a year despite what they were told when they accepted a thermostat from Evergy.

Mantle, *Surrebuttal*, pg. 11 lns. 5 – 12. The Company told the customers who volunteered to participate in these demand response programs that they could expect to have up to fifteen events called per season. Tr. pg. 131 ln. 22 – pg. 132 ln. 12. The Customers accepted this as a reasonable exchange for the compensation they received. There is absolutely no rational basis to support the Company's claim that the design of the demand response programs (in terms of customer compensation and expectations) would need to be changed if Evergy called as many events as the programs are currently designed to allow.

B. Evergy's concern regarding opt-outs is effectively an admission that its MEEIA program design is fatally flawed

The other half of Evergy's third argument centers on the idea that if more events are called, more people will choose not to participate (*i.e.* "opt-out") of the program and thereby hurt the chances of the program meeting its MEEIA goals. The OPC will address the faulty evidence and logic underlying the Company's position in the next two segments. Before reaching that point, however, it is necessary to address at a high level just how audaciously hypocritical and disingenuous Evergy's argument is. In plain terms, Evergy has taken the position that the MEEIA program that **it** designed, developed, and presented to the Commission for approval cannot actually be used as it was designed and still work properly. This is nothing but a rank admission by Evergy that the MEEIA program design is flawed and the Company never intended for it to be fully implemented as proposed to the Commission and detailed in its tariff.

Evergy's *Brief* takes the position that if more demand response events were called, more people would opt-out and Evergy will not be able to reduce system wide peak load. Evergy, *Initial Brief*, pg. 18 ("The problem is that a substantial increase in the number of demand response events will result in customers opting-out or not participating in those programs as they are currently designed and will impact Evergy's ability to achieve its primary objective of reducing annual system-wide peak load."). However, to reiterate once more, the OPC's position in this case is only that Evergy should have called as many program events as **Evergy** claims the program was designed to allow. Mantle, *Surrebuttal*, pg. 14 lns. 3 – 12. This means that Evergy is arguing that: **if the Company called as many program events as the Company designed the program to allow, the program would not meet its goals**. Stated differently, the Company is admitting that the program will not work as designed. The Commission should recognize this as a major problem.

If Evergy is legitimately arguing that it could not call as many demand response events as the program was designed to allow without hurting the underlying program, then the Company is admitting that the design of the program is inherently flawed. However, the Commission must remember that it was **Evergy** who proposed and promoted the design of the program in the first place when it requested the Commission approve its MEEIA portfolio. The hypocrisy is obvious. The Company literally asked the Commission to sign off on the design of the demand response programs in the MEEIA case, where it stands to earn a substantial return on the program, and then turned around and argued that there is no way that the program

could be used as it was originally designed in the present FAC case when faced with the prospect of losing money. The Company clearly just wants to procure the earnings opportunity for this program permitted under the MEEIA while putting in as little effort as humanly possible. This has unfortunately led Evergy to ignore **any** other means by which the program could be used to help customers. The Commission should not allow this compete focus on earnings with no regard for customers by any utility.

Finally, as one last point before moving on, it is important to note that this **entire** opt-out issue is one of the Company's own making. The previous versions of Evergy's programmable thermostat program, which were ironically still in effect during this prudence review period (albeit frozen), specifically limited the number of available opt-outs to one per month per participant. Ex. 204 pg. 3 (" A Participant may opt out of one air conditioning cycling curtailment event each month during the Curtailment Season by notifying KCP&L at any time prior to or during a curtailment event."). This limit on the number of opt-outs available to residential customers has since been removed from the MEEIA program. As such, this design flaw that Evergy claims in its own design is one that exists because Evergy chose to change its tariffs, thereby weakening its own programs. This is not the behavior of a prudent utility.

C. Evergy's "evidence" is unsound, which is poignantly a product of their own imprudence

Evergy's *Brief* states that it "has provided evidence showing a correlation between the number of events called and customer[s] utilizing their opt-out option on

demand response events." To say that Evergy provided "evidence" is *generous* at best. All that Evergy relied on is this single line: "The total amount of participation (length of time in events) was lower by 6% in PY2016 when 8 events were called as compared to PY2017 and PY2018 when 3 and 2 events, respectively were called." File, *Rebuttal*, pg. 9 lns. 16 – 19. The OPC's witness Ms. Lena Mantle explained why this line means nothing:

> **Q. According to Mr. File, there will be a negative impact to peak load reduction efforts by calling an increased number of events. Do you agree with Mr. File?**
>
> A. No. The three data points provided by Mr. File do not conclusively demonstrate that calling more events results in more customers opting out. A definitive trend cannot be simply determined with three data points. There could be many things that impact the number of customers opting out. In Evergy's MEEIA Cycle 2 2016-2018 filing in EO-2015-0250, Evergy stated in its description of the residential and commercial DR programs "For each participant, the Company will combine pre-cooling, temperature setbacks, and cycling to achieve the maximum load reduction possible while still maintaining an outstanding customer experience." The negative impacts could have arisen because the participants did not like how cold their homes got prior to the event. It could have been the number of free riders, people that just wanted the thermostat, was a greater percentage of total participants in 2016. It is unlikely that it was as simple as the number of events that Evergy called.

Mantle, *Surrebuttal*, pg. 10 lns. 1 – 16. As Ms. Mantle explained, the reason for the 6% difference between these three years is unknown. There is simply not enough data to generate an actual trend, and there are a number of other potential influencing factors that could easily have skewed the results. *Id*. The humor in this situation is of course the fact that the lack of information is a direct result of the Company calling so few events in the first place. Perhaps if, one day, Evergy actually calls a demand

response event for economic reasons the Commission might actually know whether it has any effect on customer behavior. Until then, all the Commission has is speculation and conjecture on the part of Evergy.

D. Calling more events does not pose a risk to Evergy's MEEIA programs because there is no evidence that opt-outs will be universal

We have just discussed how Evergy's "evidence" that calling more events will result in more opt-outs does little to actually prove that point. Nevertheless, let us now assume, for the sake of argument, that Evergy might just be right. Even assuming that more events called equates to more opt-outs, however, does not mean that calling more events will hurt Evergy's ability to meet its MEEIA goals.

Evergy's position is that calling more events would lead to more op-outs, but the Company is also maintaining that only two or fewer events are necessary to meet MEEIA goals. Evergy's argument that more opt-outs will result in damage to MEEIA program must therefore **assume** that any participant who opts-out of one event will also opt-out of **all** events. After all, if a participant opts-out of one event but still participates in the one or two Evergy needs to meet its MEEIA goals, then no harm has befallen the MEEIA program. In fact, the more events called, the more each individual participant has to opt-out before risking damage to the MEEIA. If Evergy calls just two events, for example, then any person opting out of any one event damages the program. If Evergy calls five events, by contrast, then a participant can choose to opt-out of three of them and Evergy will still have the two events it needs to meet the MEEIA goals. Calling ten events, meanwhile, means the participant has

to opt-out of more than eight to damage the MEEIA program, and calling fifteen events pushes the number of opt-outs to thirteen.

Take away Evergy's implied assumption that not participating in one event means not participating in all events and the Company's concern regarding opt-outs quickly becomes a non-issue. Even if it is true that calling more events results in a slightly higher number of people not participating, it is actually far more likely to **increase** the overall level of participation as it will require people to proactively choose not to participate more often. Evergy's basic assumption that calling more events will necessarily hurt the program overall is therefore completely unfounded.

E. Conclusion

The response to Evergy's third argument is effectively two pronged. First, the Company is simply wrong. There is no reason at all that they would need to change the design of the program in order to call more events and there is effectively no evidence that calling more events would hurt the overall success of the MEEIA program. The false dilemma the company presents by claiming that it is being asked to "chase 6% at the risk of 94%" is simply untrue. The second response has less to do with this case and more to do with these demand response programs overall. The OPC cannot overstress the fact that its **entire** case is dependent on Evergy calling the number of events that the Company claimed its program was designed to allow. Evergy's repeated insistence that it cannot call this many events without jeopardizing the program demonstrates that **Evergy itself believes the design of the demand**

response programs is flawed. Whatever else comes of this case, it is essential that the Commission consider Evergy's position in this case in all future MEEIA cases the Company files.

Fourth Argument: Risk to Customers

Evergy's fourth argument asserts that the OPC is wrong to claim that there was no cost to calling demand response events because the OPC did not take into consideration the "risk" calling an event could prove uneconomic. This is a fallacious argument. There is no evidence of any real risk posed to Evergy's customers if the Company called demand response events for economic reasons. Moreover, it is incredibly hypocritical for Evergy to even make this argument given how willing the Company has been to expose its customers to risk in other situations.

A. There is no substantial risk posed by calling more demand response events

Evergy's argument as to why calling events for economic reasons will pose a risk to customers is effectively this: if there is a significant difference between the price of energy in the day-ahead market and the actual price of energy when the event is called, the Company might lose money by calling the event. Evergy*, Initial Brief*, pg. 19. The Company supports this position with a **single** hour example (3:00 pm to 4:00 pm on August 6, 2019) as outlined in the Rebuttal testimony of Company Witness John Carlson. Carlson, *Rebuttal*, pgs. 18 – 20. The significant problem with Evergy's argument is simply that **there is no evidence in the record as to how likely this**

event is to actually occur. The OPC's witness Ms. Lena Mantle explained the problem with Mr. Carlson's example at length in her surrebuttal testimony:

> **Q. In his rebuttal testimony, Evergy witness John R. Carlson provides an example of where calling an event would have resulted in an increase in energy cost. How do you respond to this testimony?**
>
> A. The negative benefits included in Mr. Carlson's example occur for two reasons. First, the real time locational marginal price ("RT LMP") included in his example is much higher than the day ahead locational marginal price ("DA LMP"). **Mr. Carlson did not provide information on how often there is this extreme difference in the DA LMP and RT LMP.** These types of differences between the day ahead and real time market creates problems in the energy market **and, in a mature market like SPP, should be rare**.
>
> The second reason that there is a negative benefit is because whoever bid the load into the market did not have a realistic understanding of the reductions achievable through the DR programs or how to best achieve benefits. Below is a table where instead of bidding in the 57.41 MW of DR, 45.93 MW were bid into the market. In this case the result is very different.

Example 1			
Requested Reduction			57.41
Actual Reduction			45.93
HE	DA LMP ($/MWh)	RT LMP ($/MWh)	Benefit
15	58.41	1125.22	$ (9,564.21)
16	72.99	118.07	$ 2,834.91
17	65.44	25.34	$ 3,466.01
	Total Benefit/(Cost)		$ (3,263.29)

Example 2			
Requested Reduction			45.93
Actual Reduction			57.41
HE	DA LMP ($/MWh)	RT LMP ($/MWh)	Benefit
15	58.41	1125.22	$15,600.30
16	72.99	118.07	$ 4,707.87
17	65.44	25.34	$ 3,296.56
	Total Benefit/(Cost)		$ 23,604.73

Example 1 was provided in Mr. Carlson's testimony. In his example, Evergy made a bid in the market expecting a 57.41 MW reduction in load but only achieved 45.93 MW. Using the formulas in Mr. Carlson testimony, Evergy would have achieved savings for the requested reduction in the day ahead market but would have paid a penalty because the actual reduction was less than the requested reduction. Because of the large difference in hour 15 between the day ahead and

real time price, there would be a negative benefit, i.e. calling an event for the full estimated amount in this hour would have cost the customer, for this hour, $9,564. In example 2, the same formulas were applied but the requested and actual reductions were inverted such that the actual reduction was greater than the requested reduction resulting in a benefit in that hour of $15,600. The decision maker in the second example had a better understanding of the market.

Q. Should Mr. Carlson's example of an hour when the RT LMP was much greater than the DA LMP cause concern?

A. Only if it happens frequently. Mr. Carlson provides no testimony that indicates this is a common occurrence.

Mantle, *Surrebuttal*, pg. 15 ln. 16 – pg. 17 ln. 4 (emphasis added). The problems were again addressed by Ms. Mantle during the evidentiary hearing.

Q. [. . .] One of the last things you were kind of asked about was this concept of arbitrage. Do you recall that?

A. Yes.

Q. All right. And you were asked, you know, isn't it possible, the day-ahead markets might be wrong. Do you recall being asked a question similar to that, at least?

A. The day-ahead market will always be wrong. The real-time market is the one that -- but you have to plan on the day-ahead.

Q. Let's make sure we're clear here. When you say wrong, you just mean that it's not the actual number?

A. It's not the day-ahead price. Sometimes it's more, sometimes it's less.

Q. How often are you going to expect a wild or a significant difference between the day-ahead and the actual market price?

A. While I do not have a number, I do know that if that happens a lot, the market isn't working like it should. The participants cannot plan very well and they cannot offer into the market. That's an unstable market. And SPP will work to reduce that amount so that it has a stable market.

> Q. So is it reasonable that to say that it's highly likely the day ahead market will be close to the actual market price, that one should expect it, at least?
>
> A. I believe participants expect it to be close. That's how they make their bids, that's how they know what cost they're going to incur.

Tr. pg. 283 ln. 24 – pg. 285 ln. 1. The point being made through both of these excerpts is simple: the "risk" Evergy claims is not likely to ever be an actual issue because Evergy's proposed "risk" is dependent on massive difference between the day-ahead and real-time SPP market, which is not something that Evergy (or anyone really) should actually expect to occur frequently.

To reinforce this point, let us consider a hypothetical situation from the opposite perspective. For example, assume that Evergy is attempting to argue that the building of some new generating facility was prudent. The OPC responds by claiming that building the generating facility was not prudent because there is a "risk" that the facility might be destroyed by an earthquake before its cost can be fully recovered. The Commission would almost certainly dismiss the OPC's argument in this hypothetical situation. The evidence that there is a "risk" of an earthquake means nothing in the absence of any evidence showing how likely that risk actually is to occur. This is true even if the OPC cites to examples of Missouri based generating facilities being destroyed in the past by earthquakes. Evergy's argument in this case is no different than the OPC's hypothetical earthquake argument just presented.

Evergy wants the Commission to believe that there is a significant risk to calling demand response events for economic reasons based on one, cherry-picked

example from 2019. Evergy offered no testimony as to how often this kind of event could be expected to occur, and the OPC's witness testified that it should not occur frequently. Mantle, *Surrebuttal*, pg. 15 lns. 21 – 25. Consequently, there is no evidence of any real "risk" posed by calling demand response events for economic reasons. Evergy's claim that it did not call events due to this possibility is nothing but a last-minute excuse the Company spawned in an attempt to defend the massively imprudent decision not to call and demand response events for economic reasons. Moreover, it is an incredibly hypocritical argument for the Company to make.

B. Evergy's position is immensely hypocritical

Evergy's effort to paint the OPC's position as akin to gambling on the market (thereby exposing customers to unnecessary risk) is impressively disingenuous to say the least. Evergy itself already engaged in behavior that has exposed its customers to significantly higher risk – and, in fact, significant losses – which the Company has claimed were prudent bets. As explained by Ms. Mantle:

> **Q. Mr. Carlson characterizes what OPC has recommended similar to placing bets on the day ahead market saying that customers may not see a benefit and may instead see a cost. Do you see this as a risk for the customers?**
>
> A. Only if the decision to call events was made without information on the market and DR programs. However, Evergy has taken bigger risks – ones that have resulted in hundreds of millions of increased costs in its customers' bills – with much less concern. Mr. Carlson's concern seems insincere knowing that Evergy lost almost $140 million in 2018 and 2019 in wind purchase power agreements that it entered into because Evergy was betting these purchased power agreements would

> provide "economic benefits" to its customers based on market prices. In contrast, Mr. Carlson seems to be reluctant to take a risk that could possibly increase costs by $3,320 while forgoing the potential for benefits of well over $600,000.

Mantle, *Surrebuttal*, pg. 17 lns. 5 – 16.

> Q. You know, part of that discussion was focused on the idea that, you know, if Evergy get these wrong, these costs are going to flow to the FAC. Does Evergy engage in any other kind of speculative ventures that also flow through the FAC?
>
> A. All the time. And the biggest that comes to my mind right now, are the wind PPAs that Evergy has entered into to make money for the customers of which they've lost hundreds of millions of dollars that customers have had to pay for. So in that case, Evergy is perfectly fine with gambling with hundreds of millions of the customers dollars, because that flows directly through the FAC. And here, they're willing to do -- take these risks for a very small amount of money.

Tr. pg. 285 lns. 2 – 13. One can easily see just how amazingly hypocritical Evergy is when it argues that the sole example it presented (which shows the potential to lose less than $4,000) is too great a risk for customers to bear while simultaneously losing hundreds of millions in ratepayer dollars on purchase power agreements meant to provide "economic benefits." Mantle, *Surrebuttal*, pg. 17 lns. 5 – 16. This level of insincerity should not be acceptable to the Commission. Evergy should not now be permitted to hide behind the supposed "risk" posed to customers when it has previously demanded those same customers cover all the losses Evergy racked up through its unfettered gambling on the SPP energy market.

Response to Issue Six

The OPC has little to say with regard to the Company's position on issue six. Evergy is of course wrong to suggest that it was not imprudent to have not called any demand response events for economic reasons. The reasons for why the Company is wrong have been addressed at length in this brief and the OPC's *Initial Brief*. Other than that, the only point on which the OPC wishes to directly comment is the line where the brief states: "On the other hand, it is not possible to manage the MEEIA programs one way for the purpose of the FAC and another way for MEEIA purposes as they are the same programs." Evergy, *Initial Brief*, pg. 20. This is false. It is entirely possible to manage the demand response programs differently between the FAC and MEEIA because the tariffs are specifically designed to allow this. The Company would call "operational curtailments" as necessary to manage the MEEIA, and then call additional curtailments for "economic reasons" to ensure prudency under the FAC. *See* Exhibit 204, pgs. 3, 5, 13, 15, 19, and 22. Because Evergy's tariffs explicitly define two separate rationales for calling demand response events, the Company can easily manage the demand response program for two distinct purposes.

Response to Staff

The Commission's Staff has taken an odd and unfortunate position in this case. However, for reasons that will shortly be elaborated upon, the OPC does not contest much of what Staff has to say. The OPC will therefore not engage in an issue-by-issue or argument-by-argument refutation of Staff's brief in the same manner as it did with

the Company. Instead, the OPC will address broadly the primary point of contention between it and Staff's and position. On that note, let us begin by defining what the differences between the positions adopted by Staff and the OPC actually are.

a. There are two separate theories of impudence at play in this case

Staff initially raised concerns regarding the prudency of the manner by which Evergy was operating its demand response programs in the MEEIA prudence review cases: EO-2020-0227 and EO-2020-0228. Staff's position in those cases rested on the legal argument that recovery for MEEIA programs is permitted only if the programs "result in energy or demand savings and are beneficial to all customers in the customer class in which the programs are proposed, regardless of whether the programs are utilized by all customers." Staff, *Initial Brief*, pg. 6 (quoting Mo. Rev. Stat. § 393.1075.4). Staff is effectively arguing that Evergy failed to achieve demand savings that are beneficial to all customer classes and thus recovery of the costs of operating the MEEIA program should not be permitted. *See generally*, *Id*. at pgs. 6 – 9. The OPC wholeheartedly agrees with Staff's positon, **which is why the OPC has joined Staff in recommending a disallowance in the MEEIA case**.[6] However, the OPC has also raised a **separate and distinct** legal argument for why Evergy acted imprudently with regard to the FAC, which is what has been presented in this case.

[6] The OPC has also raised its own concerns related to the prudency of Evergy's MEEIA program in the course of the MEEIA prudence review case, but this is neither the time nor the place to discuss those issues.

To reiterate *once again*, the OPC's argument is this: Evergy has a standing obligation to prudently use all tools available to reduce costs subject to the FAC. Mantle, *Surrebuttal*, pg. 14 lns. 10 – 12. This includes utilizing both demand and supply side investments. *Id*. Evergy failed to prudently use the tools available to it, because the company **made no effort whatsoever** to call the demand response program events in a manner designed to reduce energy costs as set forth in Evergy's Tariff. Tr. pg. 143 lns. 13 – 22; Exhibit 204, pgs. 3, 5, 13, 15, 19, and 22. If Evergy had called such events, its FAC costs would have been lower and its customers would have avoided paying unnecessary costs. Mantle, *Surrebuttal*, pg. 12 lns. 7 – 9. Evergy's decision not to call demand response events for economic reasons was thus imprudent.

Please note, as this is the crucial point that Staff misses, **the OPC's argument exists independent of the MEEIA statute or the MEEIA program**. Even if Evergy did "achieve demand savings that are beneficial to all customer classes" in its MEEIA program it **still** acted imprudently by not calling demand response events in a manner that would have reduced FAC costs. This is very important to understand because it is the single biggest point of confusion in this case. The OPC's argument in this FAC case is entirely **independent from and unrelated to** the MEEIA statute. The Commission can literally jettison the MEEIA statute from consideration for purposes of this case and **still** find Evergy imprudent because (1) it had a tool that it could have used to lower FAC costs, and (2) it did not

attempt to use the tool to lower FAC costs. Tr. pg. 143 lns. 13 – 22; Exhibit 204, pgs. 3, 5, 13, 15, 19, and 22. This is all the Commission needs to consider.

The OPC has hopefully made its point by now, but just in case, let us examine one last idea: the recommended disallowance amounts. Understanding the difference between what these two arguments require the Commission to disallow will, with any luck, further clarify the difference in the arguments themselves. Staff is arguing that Evergy should not legally be permitted to recover the cost of its MEEIA program due to the operation of language within the MEEIA statute. These program costs, as Staff identifies them, include incentives, administrative costs, and employee salaries that are recovered through Evergy's DSIM. Staff, *Initial Brief*, pg. 11. Staff appears to be further arguing that Evergy be denied its approved earnings opportunity, which also flows from the MEEIA statute. *Id*. The OPC's argument, by contrast, does not and cannot argue for the disallowance of any of these costs because the OPC's argument is independent of the MEEIA statute and its application. Instead, all that the OPC is arguing for is a disallowance of the foregone savings that would otherwise have reduced FAC costs if Evergy had prudently used all available tools at its disposal. However, these **disallowances are not mutually exclusive**.

There is a discrete difference between what it costs to run a program and what costs a company incurs by failing to call an event. The former is a **sunk** cost, meaning that it is going to be incurred regardless of how the Company acts. The latter is not a sunk cost and is entirely dependent on how the Company acts. Compare this to the situation where an individual hires an attorney on retainer only to have the attorney

miss an important deadline and thereby forego recovery on a case. In that situation, the attorney has caused the individual to suffer two different costs: (1) the retainer fee paid to the attorney and (2) the money they could have made had the attorney acted properly. The same situation applies here. Evergy has caused its customers to suffer two distinct costs: (1) the cost of running the MEEIA program, and (2) the money customers could have made had demand response events been called for economic reasons. Mantle, *Direct*, pg. 20 lns. 18 – 21. Staff's position in the MEEIA case argues for both of these costs to be disallowed, the OPC's position in this case is exclusively concerned with the latter. This means that the Commission can agree with the OPC on the legal argument raised exclusively in this case, disallow the foregone savings that could have been achieved had the Company properly utilized its demand response events to mitigate FAC costs, and then still go on to disallow the program costs in the MEEIA prudence review case if it agrees with Staff.

b. Staff is the party creating confusion in this case because it refuses to consider any argument other than its own and thus cannot grasp that the OPC has raised a separate and distinct legal argument for why FAC costs should be disallowed

Staff's brief complains that having the issues surrounding Evergy's demand response programs decided in two separate dockets generates unnecessary confusion. However, it is Staff who is really causing the confusion in this case because it either will not or cannot come to terms with the fact that the OPC has raised its own legal argument for why FAC costs should be disallowed. OPC witness Ms. Lena Mantle made this clear in her direct testimony:

Q. [Are the demand response programs] a matter for the MEEIA prudence case or the FAC prudence case?

A. It could be a matter for both. The MEEIA prudence case is the case in which the Commission should determine that Evergy was imprudent by using customer funding to pay for a program that is not meaningfully utilized as a resource. However, because the program effects the cost of energy that has passed through Evergy's FAC, not utilizing this program to reduce energy purchased results in customers paying more for energy that they should have, so it can be a matter for the FAC prudence case also. In effect, captive customers are penalized twice: once by paying for thermostats that are never called and secondly by paying more money for energy during peak periods – of which the avoidance of incurring is used to justify the demand response program.

Mantle, *Direct*, pg. 20 lns. 11 – 21. Unfortunately, the Commission's Staff have developed an extreme case of tunnel vision. It cannot conceive of any legal argument for a disallowance beyond the MEEIA statute based argument it made in the MEEIA prudence review case and thus obstinately demands that only that **one** argument be considered. Further, because Staff's MEEIA argument is wholly dependent on the MEEIA statute and because Staff is requesting the disallowance of costs related to running the MEEIA program, Staff correctly determined that the argument **it** wishes to make belongs in the MEEIA prudence review case. However, Staff's argument is not the same as the argument raised by the OPC **in this case**.

The Commission needs to consider the separate legal arguments being raised in separate case dockets separately. Staff's argument that Evergy should not be permitted to recover MEEIA program costs because it failed to "achieve demand savings that are beneficial to all customer classes" is a very real problem that should

be addressed in Evergy's MEEIA prudence review.[7] On the other hand, the OPC's legal argument that Evergy acted imprudently because it willing chose not to call demand response events for economic reasons (despite having the opportunity to do so) and thereby forewent the resulting cost savings needs to be addressed in this FAC case as it is **exclusive** to the FAC case. Staff's repeated attempt to have the Commission ignore the OPC's argument because of its exceedingly myopic understanding of this case should not be permitted.

Conclusion

Despite the best efforts of Staff and the Company, this case should be very simple for the Commission to resolve. Evergy had an obligation to prudently employ its available demand and supply side resources to mitigate FAC costs. Mantle, *Surrebuttal*, pg. 14 lns. 10 – 12. Calling demand response program events for economic reasons was an example of one such resource that Evergy had to mitigate FAC costs. *See* Exhibit 204, pgs. 3, 5, 13, 15, 19, and 22. Evergy called no demand response events for economic reasons. Tr. pg. 143 lns. 13 – 22. If Evergy had called demand response events for economic reasons, its FAC costs would have been lower and its customers would have avoided paying unnecessary costs. Mantle, *Surrebuttal*, pg. 12 lns. 7 – 9. Evergy had access to a resource and willing chose not to use it. That was imprudent.

[7] Once again, the OPC agrees with Staff's assessment on this issue as it has been raised in the MEEIA docket.

None of the excuses raised by the Company pardons its imprudence. The *Stipulation and Agreement* from cases EO-2019-0132 and EO2019-0133 does not control in this case, did not pertain to the FAC, only established a minimum number of events to call, and could have been changed if necessary. The existence of Evergy's imprudence is proven without resorting to hindsight analysis and the disallowance proposed by the OPC is the best available method of calculating (in a very conservative manner) what damage Evergy's imprudence produced. No changes would be needed to the demand response programs to allow Evergy to call the number of events the OPC argues the Company should have called; nor would calling more events have posed a threat to Evergy meeting its MEEIA goals. Finally, there is no evidence that calling events for economic reasons would have posed an actual risk to Evergy's customers.

Tear down the false facades built by the Company to hide its imprudence and brush away its excuses and one will be left with the truth of this case. Evergy got its demand response programs approved in the MEEIA cases and was thereby allowed its coveted earnings opportunity. Evergy has no interest in **ever** calling more events than the absolute bare minimum necessary to justify its MEEIA and keep this earnings opportunity. The OPC's demand that Evergy use the tools it has been given to achieve the maximum benefit possible for its customers is an anathema to the Company not for any of the reasons its raises; but rather, because it would require the Company to put in more work for little to no reward (to them). To put it bluntly, the real reason the Company called no demand response events for economic reasons

during the 2018 and 2019 curtailment periods is simply because it ignored its duty to customers. The question now is whether the Commission will reward that behavior or compensate customers for it. The OPC respectfully requests the latter. The Commission should find Evergy imprudent for failing to call demand response events for economic reasons and thus give the Company a real reason to call such events in the future.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission accept this *Reply Brief* and rule in favor of the OPC as to all issues 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 fifteenth day of March 2021.

/s/ John Clizer