BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Evergy Missouri West, Inc. d/b/a Evergy Missouri West for Authority to Implement Rate Adjustments Required by 20 CSR 4240-20.090(8) and the Company's Approved Fuel and Purchased Power Cost Recovery Mechanism	)))))))))	Case No. ER-2023-0011

REPLY BRIEF OF THE MISSOURI OFFICE OF THE PUBLIC COUNSEL

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Introduction

The OPC and the Staff of the Commission ("Staff") are principally aligned on the issues presented in this case. Therefore, the OPC will not respond to any portion of Staff's brief. The brief of Evergy Missouri West, Inc. d/b/a Evergy Missouri West ("Evergy West" or "the Company"), on the other hand, contains a litany of errors, both legal and logical, that need to be addressed. Yet, to respond to everything wrong with the Company's brief would necessitate a line-by-line refutation that would almost certainly require more work than the exercise would ultimately prove useful. To that end, the OPC will only highlight the specific errors in the Company's initial brief that most need addressing. It must be understood, however, that the OPC's decision not to respond to any one statement or segment of Evergy West's initial brief **does not** signify an agreement or acceptance of what the Company has said. Again, to properly dispute *everything* wrong with Evergy West's brief would require the OPC to compose a reply brief of such length that it would become counter-productive. With that understanding in mind, the OPC will address the issues raised in the Company's initial brief in the order presented therein.

An initial examination of the legal fallacy essential to the Company's position

The OPC will begin the analysis of Evergy West's brief by drawing the Commission's attention to the first full paragraph of the section that begins on page five. It is here that the Company starts the substantive discussion of its legal argument. The specific passage the OPC is referring to is this:

> OPC's attempt to exclude increases in rates that will be caused by rebasing EMW's base energy costs in the 2022 Rate Case ignores the plain language of Subsection 5 and the PISA law's intent to deal with [fuel and purchase power] costs –largely beyond the utility's control -- differently from "qualifying electric plant" costs and other costs recovered through base rates.

(Evergy MO West Initial Brief, pg. 5, ER-2023-0011, EFIS Item No. 47).[1] The key concept embedded in this excerpt is the Company's assertion that the Plant-in-Service Accounting ("PISA") legislation intended to treat fuel and purchase power costs different from "other costs recovered through base rates." This claim, which forms the basis of the Company's whole argument, is simply wrong. There is nothing in the "plain language" of the PISA legislation that even mentions fuel and purchase power costs, let alone suggest that **all** fuel and purchase power costs were to be treated differently from other costs included in base rates. *See* Tr. Vol. 1 pg. 90 ln. 2 – pg. 91 ln. 7. In fact, when proper methods of statutory interpretation are used, the

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

exact opposite conclusion is reached. Before explaining that, though, it is first important to understand how Evergy West's argument works and where its principle flaw is.

To better understand the Company's argument, one must first unpack the claim it makes in the above excerpt. Using this assertion as a starting point (in conjunction with confirming passages throughout the brief), it is possible to summarize the Company's argument as such:

(Premise 1): **Some** fuel and purchase power costs are recovered through the FAC rate adjustment mechanism;

(Premise 2): The legislature passed a statute (RSMo. section 393.1655.5) that requires a deferral of costs normally recovered through the FAC rate adjustment mechanism if the rates charged under the FAC would cause an electric corporation to exceed certain annual rate growth caps; therefore

(Conclusion): The legislature intended that **all** fuel and purchase power costs should be subject to deferral (or at least considered when determining if there should be a deferral) under RSMo. section 393.1655.5.

The critical problem with the Company's argument, which is highlighted in the diagram above, is that Evergy West needs the Commission to assume **all** fuel and purchase power costs are equivalent, or rather, that a provision that referenced the FAC rate adjustment mechanism is meant to apply to **all** fuel and purchase power costs regardless of how they are recovered. This is a problem because it is an undisputed fact that not all fuel and purchase power costs are recovered through the

FAC. Instead, the majority fuel and purchase power costs are recovered in base rates. This brings us to the central flaw in the Company's argument:

> Just because the legislature allowed the deferral of FAC costs that could be collected through the FAC rate adjustment mechanism does not mean that the legislature intended to defer fuel and purchase power costs that are **not** recovered through the FAC rate adjustment mechanism.

The main thrust of the next several sections of this brief will be aimed squarely at proving this point, and, by the same process, disproving the central claim Evergy West is making.

Before going any further, though, let us take a moment to consider why it is an undisputed fact that some fuel and purchase power costs are recovered through base rates and not through the FAC. First, the OPC's witness explained this point multiple times in rebuttal testimony. (*see*, *e.g.*, Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 13 (PDF) pg. 10 (internal) lns. 9 – 13, ER-2023-0011, EFIS Item No. 43). Evergy West made no effort to contradict the OPC's assertion at any point whether through surrebuttal testimony, cross-examination at the hearing, or its briefing. Second, the Commission's own rules define "net base energy costs" to mean "the fuel and purchased power costs net of fuel-related revenues billed during the accumulated period **in base rates**[.]" 20 CSR 4240-20.090(1)(U) (emphasis added). This definition shows that the Commission's rules presuppose that fuel and purchase power costs are included in base rates set in a general rate case proceeding and not collected through the FAC rate adjustment mechanism. Finally, the Company's own exhibit literally labels part of the fuel and

purchase power costs: "Base Retail Rates – Fuel[.]" (Exhibit No. 3 - Mo West Fuel Impact on Overall Rates, pg. 2, ER-2023-0011, EFIS Item No. 39). Given these factors, it is a completely undisputed fact that some fuel and purchase power costs are recovered through base rates and not through the FAC.

Having firmly established that not all fuel and purchase power costs are recovered through the FAC rate adjustment mechanism and that some are recovered through base rates set in a general rate proceeding, let us return to Evergy West's argument. As already stated, the Company's argument depends on the Commission assuming that, because the legislature **explicitly** allowed the deferral of certain fuel and purchase power costs **recovered through the FAC**, the legislature *also* intended to **implicitly** allow the deferral of fuel and purchase power costs **recovered through base rates**. Needless to say, the Company offers no legal support for making this leap in logic and instead appear to rely solely on the basic idea that both instances involve fuel and purchase power costs. However, this ignores the plain reality that, if the legislature **truly** intended for **all** fuel and purchase power costs to be treated differently under PISA, the legislature could have just identified **all** fuel and purchase power costs in section 393.1655.5. *See* Tr. Vol 1 pg. 92 lns. 4 – 10. ("Q. And you would agree with me that if the legislature wanted to ensure that all future fuel and purchased power costs were considered in the determination of this provision of statute they could have identified all fuel and purchased power costs, correct? A. Correct."). That, however, is not what the legislature did.

Coming back to the excerpt that began this discussion, Evergy West wants the Commission to believe that the PISA laws intended to treat fuel and purchase power costs different from those costs that are "recovered through base rates." As we have now seen, however, some fuel and purchase power costs **are** recovered through base rates. Evergy West is thus **actually** asking the Commission to assume, with absolutely no evidence whatsoever, that the legislature intended to treat one set of costs recovered through base rates (fuel and purchase power) different from another set of costs recovered through base rates (everything else). This argument has absolutely no legal or factual support. Instead, the plain language of section 393.1655.5, when read in conjunction with 393.1655.3, clearly indicates the legislature's intent to treat all costs, fuel and purchased power costs and non-fuel and non-purchased power costs, recovered in base rates **the same** and only draw a distinction between those costs and the costs recovered through the rates "charged under" the FAC rate adjustment mechanism. This comparison will form the next section of this brief.

<u>Examining Evergy West's misrepresentation of relevant statutes</u>

Beginning on page six, Evergy West makes an argument reliant on language found in RSMo. section 393.1655.5. (<u>Evergy MO West Initial Brief</u>, pg. 6, ER-2023-0011, EFIS Item No. 47). In particular, Evergy West emphasizes the language in 393.1655.5 that states the Company "shall" make a deferral and seems to argue that the deferral it seeks is mandatory. *Id*. Evergy's argument both misrepresents the relevant statute and ignores the necessary interplay between 393.1655.5 and 393.1655.3. To correct these mistakes, and provide a much-needed reorientation of the issue, it is necessary to consider the relevant statutory provisions in their entirety.

The first statutory provision that needs to be considered is 393.1655.3. That provision reads, in its entirety, as follows:

> This subsection shall apply to electrical corporations that have a general rate proceeding pending before the commission as of the later of February 1, 2018, or August 28, 2018. If the difference between (a) the electrical corporation's average overall rate at any point in time while this section applies to the electrical corporation, and (b) the electrical corporation's average overall rate as of the date new base rates are set in the electrical corporation's most recent general rate proceeding concluded prior to the date the electrical corporation gave notice under section 393.1400, reflects a compound annual growth rate of more than three percent, the electrical corporation shall not recover any amount in excess of such three percent as a performance penalty.

RSMo. § 393.1655.3. This Statutory provision creates what the OPC will refer to as the "default" or "general" rate cap provision. *Id*. It effectively establishes that if <u>**any**</u> costs would cause the electric corporation's average overall rate to increase to a

percentage that is above the 3% compound annual growth rate at **any** time, a performance penalty is triggered. *Id.* It is essential to note that this provision does not refer to any one part of the electric corporation's rate or any one component that would make up part of any one rate. *Id.* Instead, the statutory provision just refers to the "electric corporation's average overall rate" as a single complete concept. *Id.* Consequently, it does not matter whether it is, for example, the return on plant investment, depreciation expense, fuel expense, personnel expense, taxes, or one of the many other factors that are included in a company's base retail rates that causes the "average overall rate" to exceed the 3% compound annual growth rate limit for purpose of triggering the performance penalty. *Id.* Put differently, this provision plainly and unambiguously states that it is the total of **all** costs included in base rates that triggers the performance penalty. *Id.*

Before moving on to the next statutory provision, we need to consider one point raised in the Company's brief. Evergy West expresses much concern over the idea that the Company cannot "control" its fuel and purchase power costs. (Evergy MO West Initial Brief, pg. 6, ER-2023-0011, EFIS Item No. 47). This is false, by the way, because the Company can take steps to control its fuel and purchase power costs through various means, as demonstrated by the comparatively smaller FPA of Evergy West's sister utility, Evergy Metro, Inc., which is under the very same management as Evergy West. However, the real problem is that section 393.1655.3 makes no exceptions for whether or not an electric corporation can or cannot control a cost. Consider, for example, taxes. The electric corporation clearly cannot control the

federal tax law to which it is subject. Yet, if a change in the federal tax codes suddenly caused an electric corporation's rates to exceed the 3% compound annual growth rate, the performance penalty would still clearly be triggered. RSMo. § 393.1655.3. Therefore, it does not matter even remotely whether a company can or cannot control a cost. *Id*. If **<u>any</u>** cost would cause the company's average overall rates to rise above the 3% compound annual growth rate limit at **<u>any</u>** time, the performance penalty of section 393.1655.3 is triggered. *Id*.

With RSMo. section 393.1655.3 having established the default, we now turn to section 393.1655.5, which provides the exception. This provision reads, in its entirety, as such:

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

RSMo. § 393.1655.5. As sated, this provision creates an exception that allows for an electric corporation to defer certain costs instead of losing them to the performance penalty set forth in section 393.1655.3. *Id*. However, and this is **<u>essential</u>**, the

provision only works if the triggering mechanism is met. *Id*. That triggering mechanism is dependent on there being a change to a rate "**charged under**" two very specific statutorily enabled rate adjustment mechanisms. *Id*. A change to any **other** rate would therefore not trigger this provision nor cause a deferral. *Id*. Moreover, there is to be no deferral at all if a change to the rate charged under those two specific statutory provisions (sections 386.266 and 393.1030) does not cause the electric corporation's average overall rate to exceed the applicable compound annual growth rate. *Id*.

These two provision of the PISA legislation must be read together.[2] When this is done, the result is quite clear. Section 393.1655.3 creates the general or default rate cap that applies **regardless** of what costs cause the electric corporation to exceed its compound annual growth rate limit. RSMo. § 393.1655.3. Section, 393.1655.5, meanwhile, creates a very narrow exception that allows for a very specific set of costs that might otherwise trigger the rate caps to be deferred. RSMo. § 393.1655.5. At no point in either provision is there any mention of whether or not the utility can control the costs. RSMo. §§ 393.1655.3, 5. At no point in either provision is there any mention whatsoever of fuel and purchase power costs. *Id*.; Tr. Vol. 1 pg. 90 ln. 2 – pg. 91 ln. 7. At no point in either provision is there any mention whatsoever of PISA costs. RSMo. §§ 393.1655.3, 5. As such, **any** cost that does not meet the exception found in section 393.1655.5 will, by the plain language of section 393.1655.3, trigger the performance

[2] Weirdly, the Company suggests that the OPC intended to read these provisions separately. (Evergy MO West Initial Brief, pg. 12, ER-2023-0011, EFIS Item No. 47). Nothing could be farther from the truth.

penalty regardless of whether it is a "fuel and purchase power" cost, a "PISA" cost, or a cost subject to the electric corporation's control. *Id*. That is the proper way to read these two statutes together.

<u>**Considering Evergy West's failure to properly interpret statutes**</u>

Having outlined the Company's overarching legal fallacy and its misrepresentation of the relevant statutes, it is now possible to dive right into the heart of this case. To do that, the OPC will focus on this passage from Evergy West's brief:

> There is no language in Subsection 5 that directs the electrical corporation or the Commission to exclude the rebasing of base energy costs that are required in general rate cases (pursuant to the FAC Rule approved by the Commission) from the calculation of the 3% [compound annual growth rate] and the mandate to ensure that the [compound annual growth rate] cap is "not exceeded" and that the "performance penalties ... are not triggered."

(<u>Evergy MO West Initial Brief</u>, pg. 7, ER-2023-0011, EFIS Item No. 47). This statement is simply wrong. The language that "directs the electrical corporation or the Commission to exclude the rebasing of base energy costs that are required in general rate cases . . . from the calculation of the 3% [compound annual growth rate]" is the language in section 393.1655.5 that requires the electrical corporation or the Commission to consider only the "change in any rates <u>**charged under**</u> a rate adjustment mechanism approved by the commission under sections 386.266 and 393.1030[.]" RSMo. § 393.1655.5. This should be self-evident, but "base energy costs" are not an amount recovered in rates "charged under" the two relevant rate adjustment mechanisms because those costs are instead included in base rates.[3] Because base energy costs are not recovered through one of the two rate adjustment

[3] The fact that "base" energy costs are included in "base" rates is the reason they have that name. *see* 20 CSR 4240-20.090(1)(C).

mechanisms explicitly identified in section 393.1655.5, those costs should obviously be excluded when calculating whether section 393.1655.5 is triggered. To more fully establish this from a *legal* perspective, it is necessary to consider how statutes are meant to be interpreted.

The "primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 455 (Mo. banc 2011) (quoting *Parktown Imps., Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009)). When necessary, courts may sometimes rely on maxims known as "the canons of statutory interpretation" as "considerations made in a genuine effort to determine what the legislature intended." *Id*. One such cannon is the maxim "expressio unius est exclusio alterius" *State v. Carson*, 317 S.W.3d 136, 141 (Mo. App. W.D. 2010). This Latin phrase is understood to mean "the expression or inclusion of one thing implies the exclusion of the other or of the alternative." *Id.*

> The maxim teaches that where a statute designates a form of conduct, its manner of performance and operation, and the persons and things to which it refers, there is an inference that all omissions are understood as exclusions. When the items expressed are members of an associated group or series, they justify the inference that the legislature deliberately excluded items not mentioned.

Id. (internal citations omitted). "The maxim's force is strengthened where a thing is provided in one part of the statute and omitted in another[.]" *Id.*

This maxim was relied upon by the Western District Court of Appeal s in the case of *State v. Carson*. *Id*. The central issue in the case was explained by the Court as such:

> The defendant appeals his judgment of conviction for the class-D felony of driving while intoxicated ("DWI"). The trial court used his prior municipal-court conviction for driving with excessive blood-alcohol content ("BAC") to enhance the penalty he faces for DWI. The defendant challenges the use of this municipal-court BAC conviction, citing *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008). The defendant argues that the Missouri Supreme Court's reasoning in *Turner* compels us to conclude, by logical extension, that the use of his prior municipal-court BAC conviction to enhance the penalty for DWI was in error.

Id. at 137. In deciding the case, the Court explicitly relied on the *expressio unius est exclusio alterius* cannon of statutory interpretation:

> On one hand, section 577.023.1(3) lists the specific offenses that constitute intoxication-related traffic offenses, including BAC. On the other hand, section 577.023.16 omits municipal-court BACs from those offenses it identifies as prior convictions for punishment enhancement. *Turner*, 245 S.W.3d at 828. Thus, the canon of *expression unius est exclusion alterius* reinforces our conclusion that prior municipal-court BAC offenses cannot be used to enhance punishment under section 577.023.16. Essentially, the Supreme Court decided *Turner* on the basis of *expression unius est exclusion alterius*. The logic of the maxim underlies the Supreme Court's determination that certain dispositions . . . were excluded by necessary implication from subsection 14, now subsection 16, because such dispositions were not listed therein. *Id*.

Id. at 142. A similar conclusion was reached in the case of *DiSalvo Props., LLC v. Bluff View Commer., LLC*, 464 S.W.3d 243 (Mo. App. W.D. 2015). In that case, the sole question on appeal was “whether a foreclosure or court-ordered sale of charged membership interests in a limited liability company ("LLC") is a remedy authorized by Missouri statutes or case law.” *Id*. at 246. The Court ultimately upheld the trial

court's decision, once again relying in part on the *expressio unius est exclusio alterius* cannon of statutory interpretation:

> Importantly, at the time section 347.119 and the Missouri LLC Act were originally enacted in 1993, sections 358.280.2 and 358.060.2 of the Uniform Partnership Law and section 359.671 of the Uniform Limited Partnership Law were already in existence, and we presume the 1993 General Assembly legislated with knowledge of those existing laws. *Turner*, 318 S.W.3d at 667. As explained in Section II.B.1.b., those provisions of the Uniform Partnership Law and Uniform Limited Partnership Law expressly and implicitly authorize a foreclosure and court-ordered sale of charged partnership interests in a general partnership and limited partnership. **The legislature could have enacted similar language expressly or implicitly authorizing a foreclosure and court-ordered sale of charged membership interests in an LLC but failed to do so**. Given that the legislature was fully aware of the provisions of sections 358.280.2 and 358.060.2 of the Uniform Partnership Law and section 359.671 of the Uniform Limited Partnership Law when enacting the Missouri LLC Act, then under the rule of *expressio unius est exclusio alterius*, we find the legislature must have intentionally omitted foreclosures and court-ordered sales as a remedy with respect to charged membership interests in an LLC.

Id. at 248 – 49 (emphasis added). With the general maxim of *expressio unius est exclusio alterius* and these two cases in hand, it is now easy to interpret the relevant statutes before the Commission.

Section 393.1655.3 creates a default provision providing that if **any** cost would drive an electric corporation's average overall rates above the compound annual growth rate limit of 3%, a performance penalty is triggered. RSMo. § 393.1655.3. Meanwhile, section 393.1655.5 begins with a triggering mechanism that explicitly states it is met only when a change in rates "charged under" an electric corporation's FAC or RESRAM would exceed the rate cap of section 393.1655.3. RSMo. §

393.1655.5. Because (1) section 393.1655.5 **explicitly** states that it is triggered only by a change in rates needed to recover costs "charged under" electric corporation's FAC or RESRAM and (2) section 393.1655.3 applies regarding a change in any other rate, under the maxim of *expressio unius est exclusio alterius* costs that are recovered under any rate **other than** the two rate mechanism explicitly set forth in section 393.1655.5 should be excluded from the determination of whether the triggering mechanism of 393.1655.5 is met. *See Carson*, 317 S.W.3d at 142; *DiSalvo Props., LLC*, 464 S.W.3d at 248 – 49. To put it simply, the express inclusion of language that identifies a deferral may occur if rates "charged under" the FAC exceed a rate cap implies the exclusion from consideration for deferral of any costs **not** recovered through rates "charged under" the FAC. *Id.*

The Missouri legislature obviously knew the existence and operation of the FAC and its accompanying rules when it passed section 393.1655 because the legislature referenced the FAC enabling statute in section 393.1655.5. RSMo. § 393.1655.5. Consequently, the legislature clearly **could** have enacted legislation that would have explicitly allowed **any and all** fuel and purchase power costs to be considered when determining if a deferral should be made under 393.1655.5, but the legislature declined to do so. *See* Tr. Vol 1 pg. 92 lns. 4 – 10. This factor was a major component of the *DiSalvo Props., LLC* decision. *DiSalvo Props., LLC*, 464 S.W.3d at 248 – 49 ("The legislature could have enacted similar language expressly or implicitly authorizing a foreclosure and court-ordered sale of charged membership interests in an LLC but failed to do so"). The Commission should follow the Western District's

lead and conclude, under the maxim of *expressio unius est exclusio alterius*, that the legislature implicitly meant that any fuel and purchase power costs **not** recovered through a rate "charged under a rate adjustment mechanism approved by the commission under sections 386.266 and 393.1030" should be **excluded** when determining whether section 393.1655.5 applies.

The last piece of the puzzle is simply to identify and reinforce the unquestionable fact that fuel and purchase power costs included in base rates are not recovered through a rate "charged under" the FAC. This was already addressed in the OPC's initial brief, so only a simple recap will be provided here:

- The one and only **rate** that is actually "charged under" the FAC is the "fuel adjustment rate (FAR)" which is defined by the Commission's rules as "the rate used to determine the FAC charge on each utility customer's bill during a recovery period of a FAC." 20 CSR 4240-20.090(1)(J).

- The FAC charge is also defined by the Commission's rules as "the positive or negative dollar amount on each utility customer's bill, which in the aggregate is to recover from or return to customers the fuel and purchased power adjustment (FPA) amount[.]" 20 CSR 4240-20.090(1)(H).

- The FPA amount includes, in part, "[t]he difference between the ANEC and NBEC of the corresponding accumulation period taking into account any incentive ordered by the commission[.]" 20 CSR 4240-20.090(1)(K)1.

- ANEC, actual net energy costs, "means prudently incurred fuel and purchased power costs net of fuel-related revenues of a rate adjustment mechanism (RAM) during the accumulation period[.]" 20 CSR 4240-20.090(1)(B).

- NBEC, net base energy costs, "means the fuel and purchased power costs net of fuel-related revenues billed during the accumulated

period **in base rates**[.]" 20 CSR 4240-20.090(1)(U) (emphasis added).

- Because the FPA is the *difference* between the ANEC and NBEC, there are no fuel and purchase power costs **already included in base rates** (*i.e.* in the NBEC) in the FPA.[4] 20 CSR 4240-20.090(1)(K)1; (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 13 (PDF) pg. 10 (internal) lns. 2 – 13, ER-2023-0011, EFIS Item No. 43); Tr. Vol 1 pg. 91 ln. 24 – pg. 92 ln. 3.

- Because the fuel and purchase power costs already included in base rates are **not** included in the FPA, no fuel and purchase power costs already included in base rates are recovered through the FAC charge. *See* 20 CSR 4240-20.090(1)(H).

- Because no fuel and purchase power costs already included in base rates are recovered through the FAC charge, no fuel and purchase power costs already included in base rates are recovered through the FAR. *See* 20 CSR 4240-20.090(1)(J).

- Because no fuel and purchase power costs already included in base rates are recovered through the FAR, no fuel and purchase power costs already included in base rates are recovered through the one and only rate that is, by Commission rule, "charged under" the FAC.

These conclusions are all drawn from the Commission's own rules and the application of simple logic. No party anywhere can seriously argue for even a moment that fuel and purchase power costs already included in base rates are being recovered a **second** time through rates "charged under" the FAC.

[4] In addition to the citation provided and the basic logic that supports this statement, it should also be noted that if fuel and purchase power costs *were* included in both base rates and the FPA, those costs would be recovered twice through both base rates and the FAC. It should be obvious that the FAC is not intended to allow Evergy to recover the same costs twice, so it must be true that there are no fuel and purchase power costs **already included in base rates** in the FPA, and hence, that those same costs are not recovered in a rate "charged under" the FAC.

Having thus examined the proper means to interpret the statutory language and the relevant Commission rules, it becomes easy to see why the statement from Evergy West's brief at the beginning of this section is so clearly legally wrong. Reading sections 393.1655.3 and 393.1655.5 together and using the maxim of *expressio unius est exclusio alterius* shows that both the electrical corporation and the Commission **have** been "directed" to "exclude the rebasing of base energy costs that are required in general rate cases . . . from the calculation of the 3% [compound annual growth rate]" when determining if there is an amount to be deferred. RSMo. §§ 393.1655.3, 5; *see Carson*, 317 S.W.3d at 142; *DiSalvo Props., LLC*, 464 S.W.3d at 248 – 49. The plain and simple language of the statute thus compels the **opposite** conclusion from what the Company asserts. Moreover, the OPC's analysis has been presented with a careful examination of the complete text of the relevant statutory provisions and is further supported by citation to relevant legally authority. *Id.* The Company's assertion, by contrast, is offered with no legal support. It should thus be very easy for the Commission to dismiss Evergy West's illegal and unsupported position.

Bringing the issue full circle

At the beginning of the brief, the OPC discussed how Evergy West's argument was dependent on the idea that the legislature intended that all fuel and purchase power costs should be treated the same under the PISA legislation. The OPC has now shown how the exact opposite is true. If that had truly been the legislature's intent, then the legislature would have written 393.1655.5 in such a manner as to consider **all** fuel and purchase power costs in determining whether a deferral should occur. However, the legislature did not do this. Instead, the legislature told the Commission to consider **only** those fuel and purchase power costs that are recovered through rates "charged under" the FAC when deciding if a deferral is triggered. RSMo. § 393.1655.5. That decision has real legal meaning. *DiSalvo Props., LLC*, 464 S.W.3d at 248 – 49. It cannot simply be ignored to achieve a desired result. *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 455 (Mo. banc 2011) ("The rules of statutory interpretation are not intended to be applied haphazardly or indiscriminately to achieve a desired result." (quoting *Parktown Imps., Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009)).

The Commission's FAC rule defines the FAC itself as follows: "a mechanism established in a general rate proceeding which is designed to recover from or return to customers the fuel and purchased power adjustment (FPA) amounts through periodic changes to the fuel adjustment rates (FAR) made outside a general rate proceeding[.]" 20 CSR 4240-20.090(1)(H). Notwithstanding the Company's illogical assertions to the contrary, the FAR identified in the Commission's own definition of

the FAC is clearly and unambiguously the one and only rate "charged under a rate adjustment mechanism approved by the commission under sections 386.266[.]" 20 CSR 4240-20.090(1)(J); RSMo. § 393.1655.5. The fuel and purchase power costs that are included in base rates are not recovered through a rate "charged under" the FAC because they are collected through base rates, which the Commission's own FAC rules define as the "the tariffed rates **<u>that do not change between general rate proceedings</u>**[.]" 20 CSR 4240-20.090(1)(E). Nothing else, including the FAC rule's requirement that fuel and purchase power costs be re-based during subsequent general rate proceedings, changes this basic concept. To fully drive home that point, just ask a simple question: what would occur if there were no FAC at all?

Absent the FAC provision, Evergy West would still recover its fuel and purchase power costs through base rates. At each subsequent general rate proceeding, the proper amount to include for fuel and purchase power costs would be re-considered as part of the general calculation for the cost of service. This is exactly how fuel and purchase power costs were handled prior to the promulgation of the FAC statute. The only thing that the FAC statute enabled the Company to do differently was to apply for approval of "rate schedules authorizing an interim energy charge, or periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its prudently incurred fuel and purchased-power costs, including transportation." RSMo. § 386.266.1. This "interim energy charge[] or periodic rate adjustments outside of general rate proceedings" is thus clearly the only rate or charge associated with the "rate adjustment mechanism approved by the

commission under sections 386.266[.]" RSMo. § 393.1655.5. The Statute even goes as far as requiring that "[a]ny amounts **charged under** any adjustment mechanism approved by the commission under this section shall be separately disclosed on each customer bill" to ensure that the rates "charged under" the FAC are clearly identifiable to customers. RSMo. § 386.266.7 (emphasis added). It is thus indisputable that there is one and only one rate that can be singularly identified with, and thus claim to be, "charged under" the FAC rate adjustment mechanism, and that is the fuel adjustment rate defined in the Commission's rules and separately disclosed on each customer's bill. 20 CSR 4240-20.090(1)(J).

"[The PSC's] powers are limited to those conferred by statutes, either expressly or by clear implication as necessary to carry out the powers specifically granted." *Amendment of the Comm'ns Rule Regarding Applications for Certificates of Convenience & Necessity v. Mo. Pub. Serv. Comm'n*, 618 S.W.3d 520, 524 (Mo. banc 2021) (citing *State ex rel. Mogas Pipeline LLC v. Mo. PSC*, 366 S.W.3d 493, 496 (Mo. banc 2012)). The provision of section 393.1655.5 only allows the Commission to defer fuel and purchase power costs if those costs are recovered through rates "charged under" the FAC rate mechanism and recovery of those costs would cause the electric corporation in question to exceed the relevant compound annual growth rate cap. RSMo. § 393.1655.5. The OPC's initial brief goes into great length to show that the costs to be recovered through the rates "charged under" the FAC will not cause Evergy West to exceed the 3% compound annual growth rate cap. Evergy West's attempt to shoehorn unrelated fuel and purchase power costs into this analysis is entirely

unwarranted and illegal because those costs are recovered through base rates and are thus **not** recovered through rates “charged under” the FAC. *see* 20 CSR 4240-20.090(1)(J), (K), (B), (U); (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 13 (PDF) pg. 10 (internal) lns. 2 – 13, ER-2023-0011, EFIS Item No. 43). There is no way around this simple truth.

Response to Evergy West's strawman argument

Beginning at the bottom of page eight and continuing on to page nine, the Company' initial brief accuses the OPC of making an argument based on what "caused" Evergy West's rate increase in the general rate case. (Evergy MO West Initial Brief, pg. 8, ER-2023-0011, EFIS Item No. 47). The OPC has made no such argument and this is nothing but an attempt to attack some phantom straw man the Company has presented of its own accord. The OPC will not attempt to defend an argument it never made, even though the Company's assertions in this section are ridiculously false. The Commission should ignore this section of the Company's brief entirely because it is meaningless.

Response to Evergy's argument regarding the extraordinary nature of the costs it seeks to defer

In its initial brief, the OPC expressed uncertainty regarding how much the Company's argument rested upon its claim that the costs it sought to defer were extraordinary. After reading the Company's initial brief, the OPC is still unsure on this point. However, the Company did devote two pages to the subject, so the OPC will respond. (Evergy MO West Initial Brief, pg. 10 - 11, ER-2023-0011, EFIS Item No. 47).

The Company begins with a reference to Commission rule 20 CSR 4240-20.090(8)(A)2.A.(XI). *Id*. at pg. 10. As the OPC explained in its initial brief, this rule provision requires Evergy West to include in its minimum filing requirements in a FAC rate change case, in electronic format and for the period of historical costs which are being used to propose the fuel adjustment rates, a list of the "Extraordinary costs not to be passed through, if any, due to such costs being an insured loss, or subject to reduction due to litigation or for any other reason[.]" 20 CSR 4240-20.090(8)(A)2.A.(XI). Evergy West did **not** mention the $31 million that it seeks to defer, let alone identify that cost as extraordinary, in its minimum filing requirements for this case. (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 28 (PDF) pg. 25 (internal) ln. 5 – 25, ER-2023-0011, EFIS Item No. 43); Tr. Vol. 1 pg. 105 lns. 5 – 12).[5] In other words, the same costs that

[5] Evergy West was aware of this filing requirement because it did detail the adjustments it made in costs in AP 30 for Storm Uri resettlement costs in response to this filing requirement (Exhibit No. 200

Evergy West now asks the Commission to consider extraordinary were not claimed as extraordinary in compliance with the Commission's rules. For that reason alone, Evergy West's claim that some portion of the costs it now seeks to defer are subject to deferral under rule 20 CSR 4240-20.090(8)(A)2.A.(XI) should be dismissed out of hand. The Company literally did not follow the same Commission rule on which it now attempts to rely.

That being said, the OPC wants to draw down on an issue that needs to be emphasized. The Witness for the OPC pointed out how the FPA for this accumulation period (the 30th) was actually **smaller** than the FPA for the last accumulation period (the 29th). (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 21 (PDF) pg. 18 (internal) ln. 19 – pg. 22 (PDF) pg. 19 (internal) ln. 5, ER-2023-0011, EFIS Item No. 43). Specifically, she stated:

> [T]he FPA or difference between what Evergy West included in revenue requirement and actual FAC costs incurred in this accumulation period, AP 30, is $2.9 million (6.1%) less than the FPA in Evergy West's last accumulation period, AP 29. Evergy West did not claim in its testimony in its FAC rate change case for AP 29, that the costs incurred in AP 29 were extraordinary. AP 29 was June 1, 2021 through November 31, [2021] - the six months immediately preceding AP 30. Evergy West faced many of the same external factors in AP 29 that it did in AP 30 and yet it did not claim that the FPA for AP 29 was "extraordinary." It did not consider the costs that it incurred "extraordinary" until it discovered that including the total FPA in AP 30, while not hitting the cap for deferral provided in the PISA statute, *would limit the amount of revenue requirement increase that it could get in the general rate case*.

- Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 28 (PDF) pg. 25 (internal) ln. 24 – pg. 29 (PDF) pg. 26 (internal) ln 1, ER-2023-0011).

Id. (emphasis in original). This same concept was picked up on by the witness for Staff. (Exhibit No. 100 - Rebuttal Testimony of Brooke Mastrogiannis, pg. 8 (PDF) pg. 5 (internal) ln. 11 – pg. 9 (PDF) pg. 6 (internal) ln. 3, ER-2022-0011, EFIS Item No. 41). The problem here should be pretty obvious: how can *this* accumulation period be extraordinary if the previous and **larger** accumulation period was not?

Every West has an answer to this obvious dilemma, but, as we will soon see, it is very flawed. The Company's argument is that the 30th accumulation period was "extraordinary" despite having a lower FPA than the 29th because of the "persistence of market conditions." Tr. Vol. 1 pg. 65 lns. 20 – 24 ("You know, it's interesting and I'll address the question that was brought up is, you know, why extraordinary now if not extraordinary in accumulation period 29. It's the persistence of the market conditions."). The Company's position is irreconcilably flawed, however, given the definition of "extraordinary."

The General Instructions of the Uniform System of Accounts ("USOA") includes a provision for extraordinary items. 18 CFR part 101, General Instructions 7. This provision has been previously relied upon by this Commission. *Office of Pub. Counsel & Midwest Energy Consumers Grp. v. Evergy Mo. W., Inc.*, 609 S.W.3d 857, 866 (Mo. App. W.D. 2020) ("The PSC has followed the guidance in 18 C.F.R. Part 101, General Instruction 7, that costs should not be deferred to another accounting period except for 'extraordinary items.'" (quoting *Kan. City Power & Light Co.'s Request v. Mo. Pub. Serv. Comm'n'n*, 509 S.W.3d 757, 770 (Mo. App. W.D. 2016))). The provision for extraordinary items found in instruction seven state "[t]hose items related to the

effects of events and transactions which have occurred during the current period and which are of unusual nature and **infrequent occurrence** shall be considered extraordinary items." 18 CFR part 101, General Instructions 7 (emphasis added). The Instructions go on to state "[a]ccordingly, they will be events and transactions of significant effect which are abnormal and significantly different from the ordinary and typical activities of the company, **and which would not reasonably be expected to recur in the forseeable future**." *Id.* (emphasis added). What both of these passages make exceptionally clear is that, to be considered extraordinary, an event needs to be infrequent and non- reoccurring. *Id.*; *see Evergy Mo. W., Inc.*, 609 S.W.3d at 867 (detailing how the Commission relied upon the fact that Evergy has not retired any major generating facilities over a thirty year period as one basis for declaring the retirement of the Sibley generating facility extraordinary). In that regard, Evergy's claim that the 30th accumulation period was "extraordinary" due to "persistent" market conditions is inherently nonsensical. "Persistent" market conditions would mean conditions that are both frequent and reoccurring and hence would be the exact opposite of what the USOA defines as extraordinary. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1686 (1976) (defining "persistent" to mean, in part, "existing for a long or longer than usual time or continuously").

To recap, the OPC and Staff pointed out that Evergy should not be able to claim the costs incurred in the 30th accumulation period were extraordinary because the Company did not identify the **higher** costs incurred in the **earlier** 29th accumulation period as extraordinary. (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle

(Public and Confidential), pg. 21 (PDF) pg. 18 (internal) ln. 19 – pg. 22 (PDF) pg. 19 (internal) ln. 5, ER-2023-0011, EFIS Item No. 43; Exhibit No. 100 - Rebuttal Testimony of Brooke Mastrogiannis, pg. 8 (PDF) pg. 5 (internal) ln. 11 – pg. 9 (PDF) pg. 6 (internal) ln. 3, ER-2022-0011, EFIS Item No. 41). The Company's response is that the costs of the 30th accumulation period are extraordinary while the costs of the 29th were not because of the "persistence of market conditions." Tr. Vol. 1 pg. 65 lns. 20 – 24. This argument is clearly wrong, however, because, if that were true, the "persistent market conditions" would not meet the USOA definition of extraordinary upon which the Commission has previously relied. *See Evergy Mo. W., Inc.*, 609 S.W.3d at 866-67. In particular, "persistent" market conditions would not be infrequent or non-reoccurring and hence would not be extraordinary under the USOA.[6] 18 CFR part 101, General Instructions 7. This bring us back to the original contention, which is that the fuel and purchase power costs Evergy incurred during the current (30th) accumulation period were not extraordinary because they were less than those incurred during the previous (29th) accumulation period. (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 21 (PDF) pg. 18 (internal) ln. 19 – pg. 22 (PDF) pg. 19 (internal) ln. 5, ER-2023-0011, EFIS Item No. 43; Exhibit No. 100 - Rebuttal Testimony of Brooke Mastrogiannis, pg. 8 (PDF) pg. 5 (internal) ln. 11 – pg. 9 (PDF) pg. 6 (internal) ln. 3, ER-2022-0011, EFIS Item No. 41). Evergy clearly has no answer to this dilemma because, at the end of the day, the Company itself does not **truly** consider the costs incurred in *either* accumulation

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[6] For further consideration, please see the conversation between counsel for OPC and Staff witness during the evidentiary hearing. Tr. Vol 1 pg. 92 ln. 11 – pg. 93 ln. 25.

period 29 or accumulation period 30 were extraordinary, as demonstrated by their own behavior in the last accumulation period.

Given the foregoing, it should be clear why Ms. Mantle stated that Evergy West "did not consider the costs that it incurred 'extraordinary' until it discovered that including the total FPA in AP 30, while not hitting the cap for deferral provided in the PISA statute, would limit the amount of revenue requirement increase that it could get in the general rate case." (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 21 (PDF) pg. 18 (internal) ln. 19 – pg. 22 (PDF) pg. 19 (internal) ln. 5, ER-2023-0011, EFIS Item No. 43). This is the real truth of the matter. As clearly indicated by its past behavior, Evergy West would **never** have claimed the costs incurred during the current FAC accumulation period were extraordinary **but for** the fear of hitting the statutory cap imposed by section 393.1655.3. This can be even further proven by examining the position taken in the Company's brief.

The $31 million that Evergy West originally requested to be deferred was calculated in order to maximize the increase the Company could receive in its current general rate case without surpassing the compound annual growth rate cap. *Id*. at pg. 18 (PDF) pg. 15 (internal) lns. 8 – 10. The Company did **not** base its decision on what to defer on any calculation of what was supposedly "extraordinary." Moreover, the Company is now arguing that the amount to be deferred should be changed based on what the Commission decides in the rate case. (Evergy MO West Initial Brief, pg. 12, ER-2023-0011, EFIS Item No. 47). There is an obvious problem here. If the

amount that needed to be deferred were **<u>truly</u>** "extraordinary" and subject to Commission rule 20 CSR 4240-20.090(8)(A)2.A.(XI), then it would not **<u>stop</u>** being extraordinary just because Evergy West can collect more through the FAC without triggering the rate cap. The fact that the amount the Company attempts to claim is "extraordinary" changes based on how much it can collect through the FAC while avoiding the statutory rate cap shows how the Company does not really believe these costs are extraordinary. The Company is instead just making that claim as part of a larger attempt to game the regulatory system and harm ratepayers. For all these reasons, the Commission should ignore Evergy West's blatantly false claim that the costs it incurred during the 30th FAC accumulation period were extraordinary.

Response to Evergy's attempt to delay this case

The OPC's initial brief predicted that Evergy would now seek to manipulate the regulatory process in order to delay the outcome of this case. Our concerns were sadly proven correct. On page twelve of its brief, Evergy states: "[b]ecause neither the Commission nor the parties can know the exact amount that should be deferred under Subsection 5 until after decisions are reached in the 2022 Rate Case, the Commission should not render its decision in this case until after the rate case order is issued." (Evergy MO West Initial Brief, pg. 12, ER-2023-0011, EFIS Item No. 47). This is a false statement. All parties can determine right this very second "the exact amount that should be deferred under" section 393.1655.5, because there should be no deferral at all.

Most of Evergy West's discussion over the next roughly two pages of its brief is just a bland recitation of its clearly erroneous legal argument. Because that has already been addressed, the OPC will not restate those points here. Instead, the OPC will just reiterate the point made in its initial brief: Evergy West is seeking a delay just so that it can harm ratepayers by collecting sums to which it is not entitled given the obvious illegality of its argument. (*see* Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 29 (PDF) pg. 26 (internal) ln. 21 – pg. 30 (PDF) pg. 27 (internal) ln. 10, ER-2023-0011, EFIS Item No. 43). All the Commission needs to understand is this one, simple point:

> There is no harm to the Company if the Commission decides this case **before** deciding the general rate case, but there is irreversible harm to

> Evergy West's ratepayers if the Commission decides this case **after** deciding the general rate case.

Let us take a moment to consider this statement. First, the idea that there is no harm to Evergy West if the Commission decides this case before deciding the general rate case. There are obviously two outcomes here. First, the Commission could correctly decide that there should be no deferral in this case based on the arguments raised by Staff and the OPC. If this occurs, the Company is not "harmed" because it is only being denied that which it was never legally permitted to do in the first place. In the alternative, the Commission could incorrectly allow the deferral requested by Evergy, plain language of section 393.1655.5 notwithstanding. Under that scenario, the Commission will only need to order the Company to wait until after the general rate case is concluded to determine the amount that should be deferred. That is what Evergy West is actively advocating for the Commission to do, so the Company cannot possibly claim prejudice. In either case, the Company is in no way harmed. But what about the inverse?

If the Commission waits until after the general rate case goes into effect, then the Company will be able to argue for a deferral under 393.1655.5 regardless of whether they were legally allowed to before the case was decided. *Id.* In other words, if the Company can secure the delay, it can force customers to pay costs that they otherwise would not legally have been required to pay absent the Commission's decision to delay. *Id.* That is the true reason why the Company wants to delay. To squeeze out a victory to which they have no legal right by abusing the regulatory process and thereby circumventing the consumer protections that the legislature

included in this statute and that Evergy West agreed to abide by when it elected PISA. *Id*. The OPC is asking the Commission not to allow that to happen. Please decide this case and order rates to go into effect for the FAC **before** the effective date for any rates ordered pursuant to Evergy West's current general rate case (ER-2022-0130).

Response to Evergy's response to the OPC's Motion for Summary Determination

Beginning on page thirteen of its brief and continuing to page fifteen, Evergy West lays out its argument for why the OPC's motion for summary determination should be denied. This is a pointless exercise. The rationale behind a motion for summary determination is to dispose of all or part of a case without the need for an evidentiary hearing. That is precisely **why** the movant must show that there is no genuine issue as to any material fact and that they are entitled to relief as a matter of law. *See* 20 CSR 4240-2.117(E). Stated another way, a motion for summary determination is an adjudicative tool for expediting and/or simplifying proceedings by allowing the Commission to rule directly on legal questions when there are no facts in dispute. The OPC sought summary determination in this case specifically due to the timing constraints outlined in the preceding section. The OPC wanted to avoid a lengthy trial process so that the case could be decided before the general rate case. None of that matters now.

The Commission has already held the evidentiary hearing for this case. The briefs have already been filed. The OPC no longer *needs* a summary determination nor does the Commission need to consider it. Even if the Commission were to deny the motion for summary determination, the outcome would only be that the case would proceed to a full evidentiary hearing, and that has already occurred. All of this just means summary determination at this stage of the case is completely irrelevant. Why the Company has decided to waste time on this point is confounding.

Almost all of what Evergy West has to say about the motion for summary determination is wrong on either a legal, logical, or factual level. However, the OPC does not need to respond to any of it, nor shall it. The Commission should issue an order in this case on the basis of the evidence adduced during the evidentiary hearing and then deny the motion for summary determination as moot. To reiterate, as soon as the Commission issues an order deciding the issues presented to it by the parties based on the evidentiary hearing and the filed briefs, the motion for summary determination becomes moot and should be denied on that basis. There is no reason for the Commission to do otherwise.

Response to statements made in the "Joint Issue List" portion of Evergy's Brief

Beginning on page sixteen of its brief, Evergy makes an argument that allowing the amount that Evergy seeks to defer in this case to be addressed in the Company's general rate case (ER-2022-0130) will somehow lower the FAC base factors in that case. The OPC feels it necessary to briefly touch upon this argument. First, this is not the appropriate case for this argument to be made. This argument has and should be addressed in the same general rate case previously alluded to. The OPC directs the Commission to review the initial brief already filed, and the soon-to-be filed reply brief, of the OPC in case ER-2022-0130 for more information.

In addition to, or perhaps in spite of, the foregoing, the OPC would like to point out that Evergy's argument here is just plain wrong. The FAC base factors included in base rates in the ER-2022-0130 case were established in agreement reached between the parties. (Stipulation and Agreement (Public & Confidential), pg. 4 ¶ 6a, ER-2022-0130, EFIS Item No. 312). The FAC base factor for Evergy Missouri West is set at $0.02983, and that number is not subject to change based on the Commission's decision on any as-yet undecided issue.[7] *Id.* at ¶ 6a(1). Further, this *Stipulation and Agreement* has already been approved by the Commission. (Order Approving Four Partial Stipulations and Agreements, pg. 7, ER-2022-0130, EFIS Item NO. 340). This

[7] Compare this to the FAC base factor for Evergy Missouri Metro, which is set at $0.01829 but contains the express provision "EMM Base factor will be adjusted, if needed, based on Commission order in this case on the Central Nebraska Public Power and Irrigation District ("CNPPID") hydro issue as identified in the attached **Exhibit 1**." (Stipulation and Agreement (Public & Confidential), pg. 4 ¶ 6a(2), ER-2022-0130, EFIS Item No. 312).

means Evergy's claim that addressing a deferral in the general rate case will somehow change the agreed-to FAC base factor would violate the approved *Stipulation and Agreement*.

The OPC wishes to again make clear that there should be absolutely no deferral granted in this case given the plain language of the section 393.1655.5, section 393.1655.3, and the Commission's FAC rules. Should the Commission agree with the OPC's argument, as expressed in this brief and its earlier Initial brief, and orders no deferral in this case, then this entire section may be disregarded.

<u>Conclusion</u>

Evergy West's brief repeatedly asserts that the legislature intended to treat fuel and purchase power costs "differently" than other PISA costs. Unfortunately, there is nothing in the actual PISA statutes to back up that assertion. Instead, section 393.1655.3 creates a blanket rate cap that applies if **<u>any</u>** part of the electrical corporation's average overall rate exceeds the 3% compound annual growth rate for **<u>any</u>** reason "at **<u>any</u>** point in time while this section applies to the electrical corporation[.]" RSMo. § 393.1655.3 (emphasis added). Section 393.1655.5 does create an exception, but only allows for consideration and deferral of costs recovered in rates "**<u>charged under</u>** a rate adjustment mechanism approved by the commission under sections 386.266 and 393.1030" RSMo. § 393.1655.5 (emphasis added). At no point in either statute is there any mention of fuel or purchase power costs generally or more specifically those that are included in base rates. RSMo. § 393.1655.3, 5. Thus, Evergy West's misguided claim about the legislature's intent is offered with no support except the hope that if the Company repeats it often enough, it might just stick. The Commission should not be fooled by such an obvious ploy.

The exact language of section 393.1655.5 states that it is triggered only if there is a change in rates "charged under" Evergy West's FAC of sufficient size to cause the Company to exceed its 3% compound annual growth rate cap. RSMo. § 393.1655.5. The only rate "charged under" Evergy West's FAC is the fuel adjustment rate (FAR). 20 CSR 4240-20.090(1)(J). "The FAR shall be designed to recover from or return to customers the recovery period FPA." *Id*. The FPA amount for the 30th accumulation

period is $44,604,020. (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), LMM-R-4 pg. 63, ER-2023-0011, EFIS Item No. 18). If the FAR for the 30th accumulation period is set to allow Evergy to recover the full $44,604,020 FPA, the resulting average overall rate for the Company is 9.14%. (Exhibit No. 200 - Rebuttal Testimony of Lena M. Mantle (Public and Confidential), pg. 12 (PDF) pg. 9 (internal) lns. 16 – 25, LMM-R-4 pg. 4 of 63, ER-2023-0011, EFIS Item No. 18). This is less than the 3% compound annual growth rate that could be applied in this case **under all possible circumstances**. *Id.* To attempt to include fuel and purchase power costs that Evergy seeks to include in this calculation would violate the plain language of section 393.1655.5, and the cannon of statutory interpretation known as *expressio unius est exclusio alteriu*. *DiSalvo Props., LLC v. Bluff View Commer., LLC*, 464 S.W.3d 243 (Mo. App. W.D. 2015); *State v. Carson*, 317 S.W.3d 136, 142 (Mo. App. W.D. 2010). Evergy West has presented no legal analysis to the contrary. Therefore, the law and facts of this case establish without any shadow of a doubt that Evergy West's FAC rate adjustment mechanism will not trigger the deferral required under section 393.1655.5. The Company's request to defer costs pursuant to that statutory provision must therefore be denied. Consequently, "the Commission should immediately order that Evergy West file a substitute tariff that includes all of Evergy Wests FPA to assure that Evergy West's FAC rate change takes effect before the effective dates of new rates in Evergy West's current general rate case, ER-2022-0130." (Exhibit No. 200 - Rebuttal Testimony of

Lena M. Mantle (Public and Confidential), pg. 29 (PDF) pg. 30 (PDF) pg. 27 (internal) lns. 13 – 16, ER-2023-0011, EFIS Item No. 43).

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission accept this *Reply Brief* and rule in the Office of the Public Counsel's favor on all matters addressed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ John Clizer