BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Evergy Missouri West, Inc. d/b/a Evergy Missouri West for Approval of a Special High Load Factor Market Rate for a Data Center Facility in Kansas City, Missouri	)))))))	Case No. EO-2022-0061

REPLY BRIEF OF THE MISSOURI OFFICE OF THE PUBLIC COUNSEL

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

February 18, 2022

Table of Contents

Introduction and Correction

The OPC's initial brief was structured as an analysis of the major points of disagreement between the two competing sample tariff provisions that were attached to the two non-unanimous stipulations filed in this case. The brief was structured this way as the OPC considered it the most expedient means to address the issues after the stipulations became the *de facto* position of each party by operation of rule 20 CSR 4240-2.115(D). In doing so, however, the OPC overlooked order number 6(G) of the Commission's *Order Setting Procedural Schedule* filed December 15, 2021, which stated the "[b]riefs shall follow the same list of issues as filed in the case." The OPC apologizes for this inadvertent error.

By means of correction for the OPC's oversight, the OPC will quickly outline the response presented in its initial brief such that it "follow[s] the same list of issues as filed in the case." The first issue presented to the Commission stated: "[s]hould the Commission approve the Special High Load Factor Market Rate ("Schedule MKT") tariff proposed by [Evergy Missouri West]?" The OPC's response to this issue is that the Commission should only approve Schedule MKT tariff sheets if it orders modifications consistent with the sample tariff sheets attached to the non-unanimous stipulation and agreement filed by the OPC, Staff, and MECG for the reasons laid out in the OPC's initial brief. The first issue further contained a sub-issue that asked whether the Schedule MKT was lawful. The OPC raises no concerns regarding the lawfulness of Schedule MKT save for those related to specific provisions as outlined in the OPC's initial brief. The second issue presented to the Commission asked, in the

event an affirmative response to the first issue, "what if any modifications to the Schedule MKT tariff proposed by [Evergy Missouri West] or other conditions should the Commission order?" The OPC's response to this second issue is, again, the Commission should only approve Schedule MKT tariff sheets if it orders modifications consistent with the sample tariff sheets attached to the non-unanimous stipulation and agreement filed by the OPC, Staff, and MECG for the reasons laid out in the OPC's initial brief.

While the OPC acknowledges that it did not present its initial brief in a manner that explicitly reiterated the issues as set forth in the list of issues, the OPC believes that it did follow the spirit of the Commission's *Order*. Given the effect of rule 20 CSR 4240-2.115(D) and the provisions of paragraph six of the non-unanimous stipulation the OPC entered into with Staff and MECG, the response to the first and second issues is a foregone conclusion. The OPC's initial brief therefore simply focused on setting forth legal and factual analyses to support the modifications presented in the OPC, Staff, and MECG sample tariff as to the issues that were still in disagreement. Nevertheless, to the extent that the Commission may consider the OPC to have transgressed its December 15th *Order*, the OPC does apologize.

General response to the arguments of other parties

As set forth in the non-unanimous stipulation and agreement entered into between the OPC, Staff, and MECG, the OPC is not opposing Commission approval of Schedule MKT to the extent that the Commission approves the version attached to that stipulation. *See* Exhibit 203, *Non-Unanimous Stipulation and Agreement and Attached Schedule 1 of OPC, Staff and MECG*, pg. 2 ¶ 6. For this reason, the OPC chooses not to respond to the arguments presented by any party regarding the propriety or prudence of the Commission approving the MKT tariff provision as a whole or the lawfulness of Schedule MKT.[1] This does not constitute either an agreement with those matters not addressed or a waiver of the OPC's right to challenge those statements either in a motion for rehearing, on appeal, or in other cases. Indeed, there is a not unsubstantial number of claims that other parties have made regarding the propriety or prudence of Schedule MKT, or the lawfulness of Schedule MKT, with which the OPC takes issue. Given that the OPC is more than happy for the Commission to approve at least one version of Schedule MKT, however, it would be a tremendous waste of time and energy to address all of these points. The OPC will instead simply ask the Commission to disregard everything related to these questions that other parties have presented and just focus on the truly important and meaningful issue that remains unresolved: which of the two competing sets of sample Schedule MKT tariff sheets should the Commission approve. To that end, the OPC

[1] This includes, for example, everything through the first eleven pages of the brief filed by Evergy and everything through the first sixteen pages of the brief filed by Velvet Tech.

will proceed by once again examining each of the four major points of dispute laid out in its initial brief and responding to the specific arguments raised as to each.

Hold Harmless Provision

The OPC will begin its analysis of the hold-harmless provision by addressing the overall fundamental issue with what Evergy and Velvet Tech have proposed. The OPC will then move on to more specifically addressing the arguments that both Evergy and Velvet Tech have made regarding the Commission's need to consider "all relevant factors" in a general rate case and how that mandate affects this case.

Fundamental failure of Evergy and Velvet Tech's position regarding a hold-harmless provision

Imagine for just a moment that you are looking to purchase a used car. You go to your local used car dealership and a friendly salesman shows you around the lot. Eventually, you find a car that matches all of your qualifications. The price is right, the color nice, and the mileage low. The salesman, seeing your interest, makes a pitch for why you should buy the car. As he approaches the end of his sales pitch, he slaps the hood of the car and tells you "this is a fine car, hardly ever been used, I can guarantee that you won't have any problems with it for at least five years." "Fantastic," you say back to the salesman, "can I get that in writing?" The used car salesman looks confused for a moment and you explain that you want the guarantee he just made to be written down as part of the sales contract. After a long pause the used car salesman finally tells you "no, I can't give you a written guarantee despite what I said earlier." To the normal and rational person, this exchange between a used car salesman and prospective used car buyer should raise some red flags. Why, for example, is the used car salesman so hesitant to commit the guarantee he made

verbally to writing? What is preventing the used car salesman from standing by his word; from "putting his money where his mouth is" as the expression goes? If one can understand the problems at play in this hypothetical example and would share the concerns of (or at least empathize with) this prospective used car buyer, then one will understand the OPC's dilemma in the present case.

The used car salesman hypothetical just offered perfectly encapsulates the problem now facing the OPC and this Commission. In this case, Evergy is the used car salesman and the guarantee the company will not commit to is its intention to hold legacy customers harmless. It is no secret that the proposed MKT tariff provision was designed to recover the cost of serving MKT customers exclusively from the MKT customers. Tr. Vol. 2 pg. 183 ln. 23 – pg. 184 ln. 8. Evergy's own witness expressly acknowledged that this was the Company's intent and that Evergy had no desire for non-MKT customers to subsidize MKT customers. *Id.*; Tr. Vol. 2 pg. 184 lns. 9 – 13. Yet, when the OPC simply requested that this expressed intent be memorialized in writing in the tariff, the Company balked. Instead, Evergy has remained steadfastly adamant that it needs a clawback provision that will allow it to force non-MKT customers to subsidize MKT customers in the event of a revenue deficiency.[2] *See* Tr. Vol. 3 pg. 475 ln. 5 – pg. 477 ln. 22, pg. 557 ln. 15 – pg. 558 ln. 10. Just as with the

[2] As explained in the OPC's initial brief, the clawback provision is the line in the sample tariff attached to the non-unanimous stipulation filed by Evergy and Velvet Tech that reads: "It is expressly recognized that the Company and the Schedule MKT customer shall have the right to present evidence for the Commission's consideration of other economic benefits as a result of Schedule MKT customers taking service from the Company." *See* OPC, *Initial Brief*, pg.21. This provision was added to ensure that Evergy has a means to harm non-participants to the proposed MKT tariff rate and thus "clawback" the ability to harm non-MKT customers after Evergy originally averred they would be held harmless. *Id.*; *see also* Tr. Vol 3 pg. 476 ln. 5 – pg. 477 ln. 22.

hypothetical used car buyer, this complete unwillingness by Evergy to commit to its proffered intent raises many red flags for the OPC and will hopefully raise just as many red flags for the Commission as well.

Why is Evergy so reluctant to oblige itself to actual hold non-MKT customers harmless and not force them to subsidize MKT customers? What is preventing Evergy from "putting its money where its mouth is" and committing to its expressly stated intent? There are two rationales that the OPC can deduce as possible explanations for the Company's behavior. Either (1) Evergy is afraid that it will not be able to negotiate the MKT contract in a manner that prevents a revenue deficiency and the Company is unwilling to accept any risk in serving MKT customers on that basis; or (2) Evergy is actively anticipating or intending that a revenue deficiency will occur and seeks the ability to force non-MKT customers to subsidize the MKT customers using the clawback provision despite its proffered statements to the contrary. If Evergy is given the benefit of the doubt, the OPC must assume that the Company's purpose is the former rather than the latter. The OPC will therefore proceed to explain just why Evergy cannot legally eliminate all of its risk using the clawback provision the Company proposes.

It is a fundamental principle with regard to regulated utilities that the return a utility is allowed to earn (*i.e.* its profit) is tied directly to – and thereby ultimately justified by – the risk to which the utility is exposed. This can be seen in the seminal U.S. Supreme Court case that concerned the setting of utility rates: *Bluefield Water*

Works & Improvement Co. v. Public Serv. Comm'n, 262 U.S. 679 (1923). Specifically, the US Supreme Court stated:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings **which are attended by corresponding risks and uncertainties** . . . .

Id. at 692. This relationship between risk and return (*see* risk and reward) has been further acknowledged by Missouri Courts. *See Kan. City Power & Light Co.'s Request v. Mo. Pub. Serv. Comm'n*, 509 S.W.3d 757, 765 (Mo. App. W.D. 2016) ("A rate of return is generally considered to be fair if it covers utility operating expenses, debt service, and dividends, if **it compensates investors for the risks of investment**, and if it is sufficient to attract capital and assure confidence in the enterprise's financial integrity." (quoting *State ex rel. Mo. Gas Energy v. PSC*, 186 S.W.3d 376, 383 (Mo. App. W.D. 2005) (emphasis added)). Evergy now seeks to disrupt this essential relationship by seeking a return on investment without any attendant risk whatsoever. The Company is proposing to do this by shifting all risk of a potential revenue deficiency onto non-MKT customers using the clawback provision, which is designed to force those customers to cover said deficiency. Tr. Vol 3 pg. 476 ln. 5 – pg. 477 ln. 22. This proposal by the Company will not work, however, as it is retroactive ratemaking and is thus prohibited under Missouri law.

There should be no dispute that, if Velvet Tech or a similar MKT customer were to take service under Evergy's standard large power rate and a revenue

deficiency occurred (due to a difference between what it cost Evergy to serve all of its customers and what Evergy recovered in rates), Evergy would not be permitted to recover that difference from ratepayers moving forward. This conclusion was established irrefutably by the Missouri Supreme Court. *Spire Mo., Inc. v. Pub. Serv. Comm'n*, 618 S.W.3d 225, 232 (Mo. banc 2021) ("[T]he PSC is prohibited from engaging in retroactive ratemaking."). In particular, the Missouri Supreme Court stated:

> The [PSC] has the authority to determine the rate [t]o be charged. In so determining it may consider past excess recovery insofar as this is relevant to its determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery. **It may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process** . . . . **The utilities take the risk that rates filed by them will be inadequate, or excessive, each time they seek rate approval**. **To permit them to collect additional amounts simply because they had additional past expenses not covered by either clause is retroactive rate making**[.]

Id. Evergy is now seeking to circumvent this well-established legal prohibition by simply separating the proposed MKT rate from the general ratemaking process so as to hide the retroactive nature of the clawback provision.

Let us take a moment to consider how the system will work. To start, Evergy will set the rates in the MKT contract through a negotiation with the proposed MKT customer. *See*, *e.g.*, Exhibit 2, Direct Testimony of Darren R. Ives, pg. 5 lns. 18 – 22; Exhibit 8, *Non-Unanimous Stipulation and Agreement and Attached Schedule 1 of*

Evergy/Velvet, Schedule 1 pg. 3. These rates will be designed to allow Evergy to recover all costs of serving the MKT customer. Tr. Vol. 2 pg. 183 ln. 23 – pg. 184 ln. 8. If at some point in the future there is a revenue deficiency, then Evergy will seek to retroactively collect additional revenue from its other customers to make up for the fact that the past expenses it incurred to serve the MKT customer were not covered by the MKT contract. Tr. Vol 3 pg. 477 lns. 18 – 22. However, in doing so, Evergy will have done the very thing that the Missouri Supreme Court said that it could not do. *Id*. ("To permit [the utility] to collect additional amounts simply because they had additional past expenses not covered by either clause is retroactive rate making." "[T]he PSC is prohibited from engaging in retroactive ratemaking.").

Evergy's attempt to shift away its risk by allowing for retroactive ratemaking to occur using its proposed clawback provision directly contradicts Missouri law. As the Missouri Supreme Court said: "The utilities take the risk that rates filed by them will be inadequate, or excessive, each time they seek rate approval." *Spire Mo., Inc.*, 618 S.W.3d at 232. This maxim must apply just as much to a special rate contracts as it does to general rates found in tariffs. This finding by our State's Supreme Court means that, in the context of this particular tariff proposal, Evergy is legally **required** to hold non-MKT customers harmless (in the face of any future revenue deficiency) once the rates for the MKT customers are set in the initial MKT contract. To permit Evergy to attempt to collect additional revenue from non-MKT customers simply because the Company had additional expenses not covered by the MKT contract is retroactive ratemaking and is prohibited by law. *Id*. ("To permit [the

utility] to collect additional amounts simply because they had additional past expenses not covered by either clause is retroactive rate making." "[T]he PSC is prohibited from engaging in retroactive ratemaking."). Evergy's efforts to eradicate what little risk this MKT tariff proposal would present to them is thus unlawful.

Response to "all relevant factors" argument

Both Evergy and Velvet Tech argue in their respective briefs that the hold-harmless provision offered in the sample tariff attached to the OPC, Staff, and MECG non-unanimous stipulation and agreement is unworkable because it would prevent the Commission from "considering all relevant factors" during the Company's future general rate cases. *See* Evergy, *Initial Brief*, pg. 14; Velvet Tech, *Initial Brief*, pg. 20. This argument fails for two major reasons. The first is the argument that the OPC has already presented: any attempt by the Company to make up a past revenue deficiency would be an exercise in the legally prohibited practice of retroactive ratemaking. The second is the comparatively more complex argument that the MKT tariff proposal is not designed to consider "all relevant factors" and attempting to stick this general ratemaking principle onto the MKT proposal is thus illogical.

Evergy and Velvet Tech are seeking an avenue for retroactive ratemaking

This argument was already presented above in the OPC's general response to the hold-harmless provision. The OPC will therefore only briefly reiterate the argument here. Evergy claims that "[t]he OPC Stipulation's Hold Harmless provision is designed to limit EMW from introducing evidence of the economic benefits and other relevant evidence in any proceeding in which the Commission considered

making a revenue deficiency adjustment related to the Special High-Load Factor Market Rate." Evergy, *Initial Brief*, pgs. 14 – 15. This statement is largely correct.[3] The OPC **is** in fact seeking to prevent Evergy from arguing for a "revenue deficiency adjustment" in relation to the MKT contract in a later general rate case because the Commission **legally cannot make** such an adjustment. The "revenue deficiency adjustment" that Evergy wants the Commission to consider is nothing more nor less than an adjustment to permit Evergy to collect additional amounts from its non-MKT customers simply because Evergy incurred additional past expenses to serve the MKT customers that were not covered by the MKT contract. This is the very definition of retroactive ratemaking. *Spire Mo., Inc. v. Pub. Serv. Comm'n*, 618 S.W.3d 225, 232 (Mo. banc 2021) ("To permit [a utility] to collect additional amounts simply because they had additional past expenses not covered by either clause is retroactive rate making[.]"). This is clearly prohibited under Missouri law. *Id*. ("[T]he PSC is prohibited from engaging in retroactive ratemaking."). The OPC has every right and every reason to prevent Evergy from doing what Evergy is legally prohibited from doing.

[3] There are a number of issues with the statement that are either incorrect or misleading, but those issues do not merit intense scrutiny. For example, the OPC notes that while it was willing to refer to the stipulation signed between itself and Velvet Tech as the "EMW/Velvet Stipulation," Evergy decided to refer to the stipulation filed by the OPC, Staff, and MECG not as the "OPC/Staff/MECG stipulation" but rather only as the "OPC Stipulation." *See* Evergy, *Initial Brief*, pgs. 1 – 2. This designation is misleading as it hides the fact that the hold-harmless language that the OPC is seeking to include is the same language supported by both the Staff of the Commission and MECG. As previously stated, however, this issue is so small in the OPC's opinion that it does not merit any further discussion beyond this footnote.

Evergy and Velvet Tech are attempting to trick the Commission into thinking that the legal requirement to "consider all relevant factors" during a general rate case means that the Company should get "a second bite at the apple" when it comes to recovering the cost to serve MKT customers. However, nothing in the law cited by either Evergy or Velvet Tech supports this argument and the Missouri Supreme Court's most recent decision directly refutes it. *Id.* The requirement that the Commission consider "all relevant factors" when setting rates in a general rate case was clearly never meant to be considered a backdoor means by which a utility could argue for retroactive ratemaking. To allow Evergy and Velvet Tech's proffered clawback provision to build such a backdoor would consequently be a mistake. This is especially true when one considers that neither the MKT contract concept **overall** nor the clawback provision that Evergy and Velvet Tech have offered is designed to consider "all relevant factors" and that attempting to graft the concept onto the current tariff proposal would necessitate a fundamental re-design. Let us take a moment to consider why.

The design of MKT tariff proposal is not meant to consider "all relevant factors"

Stop for a moment and remember how the proposed MKT tariff provision is meant to work. This tariff proposal was designed to use a special rate contract. *See*, *e.g.*, Exhibit 2, Direct Testimony of Darren R. Ives, pg. 5 lns. 18 – 22; Exhibit 8, *Non-Unanimous Stipulation and Agreement and Attached Schedule 1 of Evergy/Velvet*, Schedule 1 pg. 3. This means that Evergy and the prospective MKT customer are going to enter into a contract to define what rates that customer will pay for service

instead of relying on a generally applicable tariff rate provision. *Id*. This special rate contract will be presented to the Commission for review, but only as part of a separate contract review filing and not during a general rate case. Exhibit 8, *Non-Unanimous Stipulation and Agreement and Attached Schedule 1 of Evergy/Velvet*, Schedule 1 pg. 4. Further, these contracts will be in place for five years and will not be subject to review in a general rate case during their pendency. *Id*. This means that at no point during the contract's creation or its pendency will the Commission have the ability to consider "all relevant factors" as it relates to the rates being set for service in the contract itself, which completely undermines the argument Evergy and Velvet Tech now seek to present.

Before going any further, it is important to first note and understand that when this Commission considers "all relevant factors" in a general rate case, the goal is to attempt to demine **all** the factors that go into the provision of service for customers. This is what is sometimes called the "full distributed cost" of service, as explained by Staff witness Mr. Jim Busch during the hearing. Tr. Vol. 3 pg. 499 ln 21 – pg. 500 ln. 11; pg. 513 ln. 16 – pg. 515 ln. 18. This idea is important because the proposed MKT tariff is not designed to recover the fully distributed cost of serving an MKT customer, but rather, only the incremental cost:

> Q. And when you say cost of service, you are referring to fully distributed cost or incremental cost?
>
> A. A fully distributed cost.
>
> Q. All right. Which is not what this tariff is based upon; is that correct?

> A. Yeah. This tariff is based upon more on the incremental cost providing service to any customer that might be able to take service off of it.

Tr. Vol. 3 pg. 515 lns. 15 – 23 (Jim Busch re-direct examination). Because the MKT contract is (1) only designed to recover the incremental cost of serving an MKT customer, (2) approved outside of a general rate case, and (3) not subject to re-negotiation or re-consideration inside of a general rate case, it is functionally impossible for "all relevant factors" related to the MKT contract to be considered in a general rate case. In order for the Commission to truly consider "all relevant factors" as it relates to the service Evergy will supply prospective MKT customers, it would instead be necessary for the terms of the contract (most importantly the rates charged for service) to be subject to review in a general rate case where the fully distributed cost of serving the MKT customer could be considered. This idea, however, is not acceptable to Evergy or Velvet Tech, hence the current problem.

Neither Evergy nor Velvet Tech want a contract that is subject to review in general rate proceedings. As Evergy witness Mr. Brad Lutz explained:

> Linking the Market Rate Contract term to the rate cases would subject customers under this rate to an unreasonable level of uncertainty about their rates, particularly since the customer would have no control over the timing of rate cases filed by the Company. One of the primary features of the rate design is to set out a predefined term for the rate so that data center customers may execute large infrastructure investments with a reasonable assurance to their cost.

Exhibit 6, *Surrebuttal Testimony of Bradley D. Lutz*, pg 8 lns. 7 – 12; *see also* Exhibit 300, *Surrebuttal Testimony of Maurice Brubaker*, pg. 18 lns. 1 – 14. The logic of the companies' position may seem reasonable, but the Commission needs to understand that if the MKT contracts are not going to be linked to rate cases **and** the MKT contracts are only designed to recover the incremental cost of serving the MKT customers, then the Commission will not be able to "consider all relevant factors" when the rates in these contracts are set. *See* Tr. Vol. 3 pg. 515 lns. 15 – 23. That is why the OPC maintains the MKT contracts were never designed to allow the Commission to consider "all relevant factors" in the first place.

Having gotten this far, let us pause for just one moment to address a potential concern. One might be tempted to think that the MKT contracts having never been designed to allow the Commission to consider "all relevant factors" presents a problem, but that is not necessarily the case. The fact that the MKT tariff proposal is designed to recover only the incremental cost of serving the MKT customers and not the fully distributed cost (as would be the case if "all relevant factors" were considered) is not a problem so long as the Commission is consistent. Stated differently, it is fine if the Commission only considers the incremental cost so long as the Commission only considers and allows the utility to recover the incremental revenues (*i.e.* those revenues generated directly from the contract itself) as well. This idea of considering only the incremental revenues is the conceptual basis of a true and proper hold-harmless provision, which effectively isolates the entire ratemaking treatment of the MKT contract from the rest of Evergy's rates. So long as both the

costs and revenues incrementally related to the MKT customers are kept separate and considered in isolation, then it does not matter that the Commission did not consider "all relevant factors" in relation to the contract because the MKT contract can be effectively removed from the ratemaking equation in its entirety. The problem in this case, of course, lies with the fact that Evergy and Velvet Tech are opposed to the Commission considering this issue consistently.

As we have already observed, the MKT contracts are only designed to recover incremental costs to serve MKT customers. Tr. Vol. 3 pg. 515 lns. 15 – 23. Further, the Contracts are to be approved outside of a general rate case and not subject to review inside a general rate case. *See* Exhibit 8, *Non-Unanimous Stipulation and Agreement and Attached Schedule 1 of Evergy/Velvet*, Schedule 1 pg. 4. This means that the Commission will necessarily not be considering "all relevant factors" when addressing the question of the **rates** to be included in the MKT contract. Yet, Evergy and Velvet Tech are now demanding that the Commission consider "all relevant factors" when it comes to the **revenue** that arise from these MKT contracts. By doing so, Evergy and Velvet Tech are arguing for an unworkable discrepancy wherein they can present the Commission with a one-sided story.

Consider, for example, the following explanation offered by Staff witness Mr. Jim Busch in response to questions from the bench:

> So [there] is a benefit that [the MKT customer] should be paying for, but realistically through these special contracts they are not paying for that. They're just paying the incremental cost to be added to the system. So then to come back, looking at the hold harmless, to say well look at the

> economic benefits to the area. Well, you know, what's the benefit to Velvet. Do we get to look at their profitability for simply having access to energy 100 percent of the time? If we can get access to all of that information, then maybe we can have a discussion about that, but I bet we're going to be told we can't look at any of their information because the Commission does not have jurisdiction over Velvet or Google or anybody else.

Tr. Vol. 3 pg. 497 lns. 11 – 24. Another example would be the question of whether Velvet Tech or another MKT customer received a benefit from being allowed to be on Evergy's Economic Development Rider for some period of time before switching to the MKT rate. Tr. Vol. 3 pg. 499 lns. 9 – 20. These issues serve to demonstrate how the Evergy and Velvet Tech proposed clawback provision is designed not to allow the Commission to consider "all relevant factors" but rather only those select few factors that Evergy and Velvet Tech wish for the Commission to consider. Further evidence of this point can be found from the wording of the clawback provision itself.

To refresh the Commission's memory, the phrase at issue here is the following: "It is expressly recognized that the Company and the Schedule MKT customer shall have the right to present evidence for the Commission's consideration of other economic benefits as a result of Schedule MKT customers taking service from the Company." *See* Tr. Vol. 3 pg. 477 lns. 6 – 17; OPC, *Initial Brief*, pg.21. There are two important points to consider. First, it should be noted that this provision only grants the right to present evidence to Evergy and the MKT customer themselves. *Id.* By denying Staff, the OPC, or other interveners the ability to present evidence, this provision can already be said to have failed in its goal of getting the Commission to

consider **all** relevant factors. More importantly, though, this provision only allows for evidence of "economic **benefits**" that arose because of an MKT customer taking service. *Id*. As already explained, for the Commission to truly consider "all relevant factors," it would need to consider not only the economic benefits but also the costs and detriments to Evergy's other customers that arose from the MKT customer being added to Evergy's system. *See* Tr. Vol. 3 pg. 513 ln. 16 – pg. 515 ln. 23; pg. 497 lns. 11 – 24. Overall, therefore, the clawback provision that Evergy and Velvet Tech have proposed is not meant to allow the Commission to consider "all relevant factors," but rather, is designed to allow only one small part of what would otherwise be a much large evaluation. An evaluation that, the OPC reminds the Commission, is not possible given the overall design of the MKT tariff proposal.

As much as Evergy and Velvet Tech complain about the sanctity of the Commission's ability to consider "all relevant factors," the truth of the matter is that this was never a part of the MKT tariff proposal's design in the first place. The MKT tariff proposal is only meant to recover the incremental cost of serving MKT customers. Tr. Vol. 3 pg. 515 lns. 15 – 23. The MKT contracts are to be approved outside of a general rate case and not subject to review inside a general rate case. *See* Exhibit 8, *Non-Unanimous Stipulation and Agreement and Attached Schedule 1 of Evergy/Velvet*, Schedule 1 pg. 4. Therefore, the rates for the MKT contract are necessarily going to be set without considering "all relevant factors." The addition of the Evergy and Velvet Tech proposed clawback provision does not solve this problem. Instead, the clawback provision only serves to allow Evergy and Velvet Tech to

introduce a very specific and limited form of evidence designed to allow Evergy to retroactively seek additional revenue from its other customers to make up for any revenue deficiency. *See* Tr. Vol. 3 pg. 477 lns. 6 – 22. We have thus come full circle to explain why Evergy and Velvet Tech's arguments regarding the necessity of considering "all relevant factors" is wrong.

Summation

Evergy and Velvet Tech want the Commission to believe it is legally obligated to consider evidence of "economic benefits" in the event of a revenue deficiency as part of its mandate to consider "all relevant factors" in a general rate case. This is completely untrue. Not only does the Commission not need to consider whatever proffered economic benefits the companies wish to show, the Commission is legally obligated not to give Evergy a "second bite at the apple" when it comes to recovering its cost to serve MKT customers. *Spire Mo., Inc. v. Pub. Serv. Comm'n*, 618 S.W.3d 225, 232 (Mo. banc 2021). Moreover, the entire MKT contract framework is designed to occur outside of a general rate case in such a manner as to prevent the Commission from considering "all relevant factors." Evergy and Velvet Tech's ridiculous argument that the Commission needs to consider the one piece of evidence identified in the clawback provision so that it can consider "all relevant factors" is therefore an attempt to mislead and obfuscate the true means by which this whole tariff proposal works.

If the Commission truly wishes to consider "all relevant factors" when setting rates for MKT customers, then it needs to order that MKT contracts can only be

considered as part of a general rate case and are always subject to review in a general rate case. If the Commission instead decides to allow the MKT contract to operate as designed, meaning that the contracts are approved outside of general rate cases and are not subject to review in a general rate case, then the Commission also needs to behave consistently by denying Evergy and Velvet Tech the right to present evidence of "economic benefits" (in support of a cross-customer-class subsidy related to those contracts) during a general rate case. Above all, the one thing the Commission is clearly prohibited from doing is allowing Evergy to first set rates designed to serve a particular customer and then retroactively seek additional revenue from **other** customers because the cost of serving the first customer was higher than Evergy expected. It is Evergy who has "the risk that rates filed by [it] will be inadequate, or excessive, each time [it] seek[s] rate approval" and the Company cannot shift this burden off to other customers using this clawback provision. *Spire Mo., Inc.*, 618 S.W.3d at, 232. This point will remain true and will continue to be argued by the OPC moving forward even if the Commission decides to approve an MKT tariff sheet that includes Evergy and Velvet Tech's proffered clawback provision.

RES Compliance

As the OPC explained in its initial brief, either of the two proposals offered by the competing sample tariffs filed in this case should ostensibly solve the RES compliance issue. OPC, *Initial Brief*, pg. 31. The only reason the OPC was hesitant to adopt the solution offered by Evergy and Velvet Tech was its belief that the proposal represented an illegal overreach of the Commission's authority. *Id.* The OPC has already laid out its explanation for this belief and sees no benefit arguing the point further. *Id*. at pgs. 34 – 37. Before moving on, however, there are a number of bafflingly untrue statements and outright fabrications in the briefs filed by Evergy and Velvet Tech that the OPC feels it is necessary to address less the Commission rely on them erroneously.

Addressing the claim that the OPC, Staff and MECG stipulation would require Velvet Tech and other MKT customers to pay more than other Evergy customers.

Both Evergy and Velvet Tech claim in their respective briefs that the RES compliance solution offered by the OPC, Staff, and MECG would result in Velvet Tech and other MKT customers paying "115%" of their RES compliance costs compared to other customers who only pay "15%." Specifically, Evergy states: "Under [the OPC, Staff, and MECG] approach, Velvet would be paying for 115% of the RES compliance costs--not the 15% RES standard compliance costs paid by other customers." Evergy, *Initial Brief*, pg. 20 – 21. Velvet Tech states nearly the same: "This proposal asks Velvet to essentially pay 115% of RES compliance costs, well beyond the 15% paid by

Evergy's other customers." Velvet Tech, *Initial Brief*, pg. 23. These claims are patently untrue on multiple different levels.

The OPC, Staff, and MECG RES proposal would not require any MKT customer to pay 115% of their RES compliance costs

As explained in the OPC's initial brief, the solution offered by OPC, Staff, and MECG only requires an MKT customer to pay their **incremental** RES compliance costs. Tr. Vol 3 pg. 440 ln. 16 – pg. 441 ln. 2. This means that if Evergy already has sufficient renewable resources to serve the MKT customer under the RES statue, that MKT customer will not have to pay anything at all. Tr. Vol. 3 pg. 441 lns. 3 – 11. Right from the start, this means that Evergy and Velvet Tech are wrong. The OPC, Staff, and MECG proposal has the potential to cost MKT customers absolutely nothing and so clearly does not force them to "pay 115% of RES compliance costs." Moreover, this offer is actually **exceedingly** generous.

During the Evidentiary hearing, the witness for the OPC, Ms. Lena Mantle, explained just how beneficial the OPC, Staff, and MECG proposal is for MKT customers. It all comes down to the fact that Evergy already has a surplus of Renewable Energy Credits ("RECs") that it can use to meet the RES requirement. Tr. Vol. 3 pg. 570 lns. 20 – 22. These RECs are the result of purchase power agreements ("PPAs") that Evergy currently has in place and that its legacy customers are already paying for through the Company's Fuel Adjustment Clause ("FAC"). Tr. Vol. 3 pg. 570 ln. 22 – pg. 571 ln. 5. These RECs form the surplus of renewables that could possibly eliminate any incremental cost of meeting the RES compliance caused by the addition

of an MKT customer to Evergy's system. Tr. Vol. 3 pg. 441 lns. 3 – 11. What this all means is that Evergy's current customers are **already** paying hundreds of millions of dollars for wind power through the FAC related to Evergy's current PPAs to produce a surplus of RECs that may allow a prospective MKT customer to pay **nothing** for RES compliance costs. Tr. Vol. 3 pg. 571 lns. 6 – 9.

The OPC, Staff, and MECG proposal has effectively established a situation where there is a potential that an MKT customer may have to pay nothing for its RES compliance costs because Evergy's legacy customers have already covered those costs. This is clearly very different from Evergy and Velvet Tech's claim that the proposal would require MKT customers to pay 115%. Moreover, the 115% claim is further false for other reasons. Namely, Evergy and Velvet Tech are conflating a statutory requirement for utilities to produce 15% of their energy from renewable sources and Velvet Tech's **voluntary** pledge to cover 100% of its **own** energy usage with renewables.

Velvet Tech does not have a legal obligation to procure 100% of its energy from renewable sources. Tr. Vol. 3 pg. 458 lns. 12 – 16. Velvet Tech may **voluntarily** choose to adopt this position, but that is entirely of their own discretion. Tr. Vol. 3 pg. 458 lns. 17 – 19; pg. 452 ln. 19 – pg. 453 ln. 23. There is nothing in the proposal offered by the OPC, Staff, and MECG that would change this fact. It is therefore blatantly false for Evergy and Velvet Tech to claim that the OPC, Staff, and MECG proposal **requires** the Company to pay 115%. The absolute worse that the companies can truthfully state is that the OPC, Staff and MECG proposal might possibly create a

scenario where Velvet Tech or another MKT customer would have to pay for Evergy to meet its RES compliance goals in addition to the cost the customer incurred to meet its own internal renewable energy mandate. This brings us to the next major issue with the companies' statements, which is the fact that this exact outcome is true for **every other Evergy customer**.

All other Evergy customers who also voluntarily chooses to fully cover their energy usage with renewable energy are in the same position.

There was two halves to the statement made by Evergy and Velvet Tech that set off this discussion. The first was the idea that the OPC, Staff, and MECG proposal would require MKT customers to pay 115% of RES compliance costs, which has now been shown to be utterly wrong. The second is the idea that this 115% is "well beyond the 15% paid by Evergy's other customers." Velvet Tech, *Initial Brief*, pg. 23. It should come as no surprise to learn that this second half is just as completely untrue as the first half.

During the evidentiary hearing, the counsel for the OPC had the following conversation with Mr. Maurice Brubaker, witness for Velvet Tech:

> Q. . . . As I understand it, Velvet Tech's concern is effectively this: Velvet Tech intends to meet its own energy needs with 100 percent renewables and it feels that if it does that [and] it is also required to pay RESRAM, it is paying twice. It that a fairly accurate assessment?
>
> A. At least more than once. I wouldn't say twice, but at least more than once.
>
> Q. Okay. Fair enough. I just want to make sure that we were on the [same] page as to that. All right. Let's consider, for example for a moment, a large auto manufacturer like Ford who is being -- who might build a plant in Evergy West service territory. This customer is going to

> take under the LP or large power rate. All right. As it stands, taking energy on the large power [rate] this customer, Ford, would be paying a RESRAM. Correct?
>
> A. Yes, basically.
>
> Q. And if this customer chose on its own to have 100 percent renewable goal similar to Velvet, meaning this customer also strives to meet 100 percent of its load requirement with renewable resources, under your theory this customer would also be paying more than once as you phrase it?
>
> A. With just a straight application of the RESRAM, that would be the case.
>
> Q. Correct. And that would be true if I exchanged Ford for any other large power customer who might operate in Evergy West territory like AG Power or others?
>
> A. Absent some other alternative arrangement, that would be true.

Tr. Vol. 3 pg. 346 ln. 17 – pg. 347 ln. 23. The point of this discussion should be obvious: absolutely any Evergy customer who voluntarily chooses to pursue an internal renewable energy goal similar to Velvet Tech is going to be paying more under Evergy and Velvet Tech's theory. This is equally true for large industrial and commercial customers such as Ford, Amazon, and Walmart as it is for small mom-and-pop stores. Any customer who currently takes service under an existing Evergy rate will have to pay its own share off the RES compliance costs collected through Evergy's existing RESRAM **in addition to** whatever that customer may choose to spend on procuring RECs if they wish to claim to have used renewable energy. The OPC, Staff and MECG proposal thus does not represent a break from the *status quo*, but rather **is** the *status quo*.

Much of Evergy and Velvet Tech's brief and overall position on this issue stems from an attempt to paint Velvet Tech as unique in its goals of climate stewardship and responsibility. It is not. The reality is that there are hundreds of major corporations across the United States and the world that have pledged and even taken steps to move toward using 100% renewable energy. *See RE100 Members*, Climate Group (February 15, 2022), https://www.there100.org/re100-members; *Green Power Partnership Fortune 500® Partners List*, United States Environmental Protection Agency (February 15, 2022), https://www.epa.gov/greenpower/green-power-partnership-fortune-500r-partners-list; Samantha Page, *9 Massive US Companies Pledge to Go 100% Renewable*, Our World (September 24, 2015), https://ourworld.unu.edu/en/9-massive-us-companies-pledge-to-go-100-renewable; Nathaniel Bullard, *The Corporate Climate Pledges Are as High as an Elephant's Eye*, Bloomberg (July 8, 2021 5:00 AM CDT), https://www.bloomberg.com/news/articles/2021-07-08/the-corporate-climate-pledges-are-as-high-as-an-elephant-s-eye. Velvet Tech is thus not some virtuous saint amidst a sea of sinners. Instead, Velvet Tech is merely the one company among hundreds of others who have taken the same pledge that is now attempting to pay less than what every other Evergy customer has to pay.

Summation

Under no circumstances should the Commission believe the statement found in both Evergy and Velvet Tech's briefs that claim (1) the OPC, Staff, and MECG proposal would require Velvet Tech or another MKT customer to pay 115% of its RES

compliance costs, and (2) that Velvet Tech or another MKT customer is being asked to pay more than any other Evergy customer does. Both of these statements are entirely fallacious, as the OPC has shown. Instead, Velvet Tech and all other MKT customers should be held to the same standard and expected to pay the same amount as any other Evergy customer, which is **exactly** what the proposal by the OPC, Staff, and MECG is intended to do.

Addressing Evergy's reliance on the NUCOR situation.

In its brief, Evergy argues that the Commission should exempt Velvet Tech and other MKT customer from having to pay the RESRAM because that is consistent with the decision reached in the Nucor special contract case. Evergy, *Initial Brief*, pg. 18. The difference between Nucor and the present situation was addressed at length during the evidentiary hearing. *See* Tr. Vol 3 pg. 454 ln. 3 – pg. 458 ln. 11. The OPC will very briefly outline the difference between the cases and why it matters.

Evergy agreed to enter into purchase power agreements ("PPAs") to serve Nucor's load. Tr. Vol. 3 pg. 457 lns. 2 – 10. These PPAs had a renewable component to them. Tr. Vol. 3 pg. 457 lns. 11 – 14. Nucor is paying for the cost of the PPAs, but Evergy is retaining and retiring the RECs that come from those PPAs itself. Tr. Vol. 3 pg. 457 lns. 15 – 19. Because Evergy is retiring the RECs itself, it gets to claim the renewable energy for its own use to meet the RES compliance mandate thus eliminating any incremental cost for Evergy to meet the RES mandate induced by Nucor. This is not the situation for an MKT customer.

In the case of Velvet Tech (or a similar MKT customer), the customer is buying the RECs and retiring them, **not Evergy**. Tr. Vol. 3 pg. 457 ln. 23 – pg. 458 ln. 1. Thus the major difference is just who retires the RECs. Tr. Vol. 3 pg. 458 lns. 2 – 4.[4] The Commission should therefore not worry about the decision in the present case being consistent with the Nucor case because the Nucor case was based on a completely different set of circumstances regarding who was retiring the RECs at issue.

Addressing the Velvet Tech argument regarding Evergy's solar subscription program.

Velvet Tech presents an argument in its brief claiming that the proposal it and Evergy have put forward regarding the RESRAM is consistent with the Commission's recent approval of Evergy's Solar Subscription Pilot ("Schedule SSP"). Velvet Tech, *Initial Brief*, pg. 23. Velvet Tech goes so far as to quote its expert witness's claim that they are "essentially the same thing." *Id.* (citing Tr. Vol 3 pg. 370 lns. 8 – 11). Evergy's expert witness has no idea what he is referring to and this concept is completely wrong. Schedule SSP is not at all similar to what Evergy and Velvet Tech have proposed in this case for very obvious reasons.

Understanding Schedule SSP

Schedule SSP is designed to allow a small number of Evergy customers to voluntarily pay Evergy so that those customers can "purchase" energy from a solar

[4] Who retires the RECs is important because that is what allows one to claim the energy in question was "renewable." Tr. Vol. 3 pg. 453 lns. 1 – 11. If the MKT customer retires the RECs, then Evergy cannot claim the energy it supplied was renewable and if Evergy retires the RECs then the MKT customer cannot claim the energy it consumed was renewable. Tr. Vol. 3 pg. 458 lns. 5 – 11.

generating facility. Exhibit 104, *Solar Subscription Pilot Rider*, pg. 2. The solar generating facility itself is going to be built and owned by Evergy. *Id*. Customers who subscribe will be assigned monthly an amount of energy that they "purchased," which is equal to their subscription level divided by the total subscription capacity for the generating facility multiplied by the actual monthly energy produced by the facility. *Id*. at pg. 4. As a basic example, if a customer has purchased 10 spots or "blocks" for a generating facility that has 100 spots or "blocks" available, then each month that customer will be assigned 10/100 (or 10%) of the total energy the generating facility produces as their "monthly purchase quantity." *Id*. The monthly amount of energy that the customer has deemed to have "purchased" in this manner is then subtracted from the metered energy that customer has consumed for the same month. *Id*. This means that the customer is still paying Evergy for the energy the customer consumed, just through the Schedule SSP fee as opposed to the generally applicable rates. However, at no point – **and this is very important** – does the customer receive any RECs related to the energy they "purchased" from Evergy as part of this transaction. This is very specifically spelled out in the tariff:

> Renewable Energy Credits (RECs) produced by solar resources associated with this program will be tracked by company, consistent with the Customer subscriptions. All rights to the renewable energy certificates (REC) associated with the generation output of the solar facility will be retired **by the Company** on behalf of Participants. The Company will create a group retirement subaccount in NAR for retirement of RECs. The RECs associated with the output of the solar facility will be designated in NAR for public viewing. The Company will retain any RECs received by the Companies through the unsubscribed allocations.

Id. at pg. 6 (emphasis added). The way that Schedule SSP handles the RECs is the whole reason why this tariff provision is **nothing** like what Velvet Tech and Evergy are proposing.

The OPC has been putting the word "purchased" in quotes during the preceding paragraph to highlight the fact that, while a customer who subscribes to Schedule SSP is certainly going to be paying for solar energy, the customer cannot claim the renewable nature of the solar energy he "purchased" without retiring the corresponding RECs. *See* Tr. Vol. 3 pg. 458 lns. 5 – 11; Vol 2 pg. 179 ln. 21 – pg. 180 ln. 1. That certainly leaves something to be said about the value of purchasing a subscription under Schedule SSP,[5] but this is not the point. The real issue simply lies with the fact that Evergy, being the party who is retiring the RECs, will be the only one able to claim the renewable nature of the energy generated by the solar farms built to accommodate Schedule SSP. This is the complete opposite of the situation in the present case where Velvet Tech is intending to procure its own RECs and retire those RECs itself. Tr. Vol. 3 pg. 349 lns. 8 – 14. This takes us to the second part of the analysis.

Understanding where Velvet Tech went wrong

In its brief, Velvet Tech quotes a section of Schedule SSP that describes how a participant's monthly energy "purchase" will be subtracted from the metered energy

[5] *Caveat emptor*.

consumed by the Participant for the billing month. Velvet Tech, *Initial Brief*, pg. 23. Velvet Tech then goes on to draw two conclusions from this excerpt:

> The result of this provision is two-fold (1) if the customer's share of renewable energy covers 100% its usage, because net energy is zero, there is no RESRAM charge and (2) the customer's renewable energy is not included in "total electric retail sales" and therefore falls outside of the RES portfolio requirements.

Id. at pg. 24. The first of these two conclusions is questionable, but there is no need to evaluate it at the moment. Let us therefore assume it is correct for the sake of argument. The Second conclusion, by contrast, is just plain wrong.

Nothing in Schedule SSP remotely talks about modifying RES portfolio requirements or describes how the energy a customer "purchases" under Schedule SSP will be considered in relation to Evergy's "total electric retail sales." *See generally* Exhibit 104, *Solar Subscription Pilot Rider*. There is no reason at all to jump to this conclusion. Instead, the only logical conclusion is the direct opposite of what Velvet Tech assumes: that the energy consumed by customers who subscribe under Schedule SSP is still being counted toward Evergy's "total electric retail sales" because it is electricity that is still being sold to (and "purchased" by) the customer, thereby increasing the overall amount of energy Evergy procures that would need to be sourced from renewable resources under the RES statute. This might naturally cause concern given that we are assuming that these customers may not be paying the RESRAM that would normally cover Evergy's cost to meet the mandate imposed by the RES statute. Fortunately, this is not a problem.

Given everything stated previously, it should be quite obvious why there is no problem with counting the energy sold to customers who subscribe to Schedule SSP as part Evergy's "total electric retail sales" despite those customers not paying anything through the RESRAM. The answer is effectively the same with the Nucor case discussed previously. Because Evergy has retained the RECs generated by the solar generating facility that Schedule SSP is designed to pay for, the Company can retire those RECs to meet the RES statute requirement related to the energy it sells from that same solar generating facility. Stated a different way, customers who subscribe to Schedule SSP may not need to pay the RESRAM because they have already paid to cover the incremental RES cost for Evergy to serve them as they have directly paid for the solar generating facility that produced the RECs Evergy retained and retired to meet its RES statue requirements.

Because Evergy is retaining the RECs from the solar generating facility built to serve Schedule SSP customers, it already has more than enough renewable energy to cover the RES statute compliance requirement associated with serving the Schedule SSP customers. As such, there is no need for a Schedule SSP "customer's renewable energy [to not be] included in [Evergy's] 'total electric retail sales' and therefore fall[] outside of [Evergy's] RES portfolio requirements" as Velvet Tech suggests. This is the exact same as the situation with Nucor who is paying for the cost of the PPAs to serve its load but allowing Evergy to retain and retire the RECs that come from those PPAs for itself. Tr. Vol. 3 pg. 457 lns. 15 – 19. Velvet Tech or another MKT customer could also have used this method by purchasing RECs and

then giving those RECs to Evergy to retire. Tr. Vol. 3 pg. 458 lns. 5 – 8. The problem, though, is that if Velvet Tech took this approach, then it could not also claim all the energy associated with those RECs as renewable for purpose of meeting its own self-imposed standard to procure 100% renewable energy. Tr. Vol. 3 pg. 458 lns. 9 – 11. Consequently, Velvet Tech rejects the approach offered in both Schedule SSP and the Nucor example in favor of its own approach.

As previously stated, the OPC does not see a need to argue any further as to why it believes the approach offered by Velvet Tech and Evergy is not legally sound. That being said, the OPC flatly rejects the claim Velvet Tech has made about its approach being consistent with Schedule SSP. What Evergy and Velvet Tech have proposed in this case and what the Commission approved for Schedule SSP are very different things based simply on who is retaining and retiring RECs. The Commission may yet decide that it does have the legal authority to grant the variances that Evergy and Velvet Tech have requested, but the Commission should absolutely not rely on Schedule SSP for support of that proposition.

Securitization

The OPC stands on the arguments raised in its initial brief regarding this issue. With all due respect to Evergy, the question of law at issue here is not complicated. The statutory law makes it exceedingly clear that **every** retail customer (except special contract customers who executed a contract prior to August 28, 2021) must pay any securitization fees imposed. RSMo. Section 393.1700.2(C)d. As such, Velvet Tech and all other MKT customers will pay these fees. The only question before the Commission is whether to deal with this problem now (while it is still easy to resolve) or wait until a later date where more filing, arguing, and briefing may be needed. In either case, the ultimate outcome will be the same.

Economic Development Rider

As explained in the OPC's initial brief, the procedural posture surrounding the economic development rider issue makes discussion somewhat challenging. There are effectively two "sides" to the debate; the first being Evergy, Velvet Tech, and Google and second being the OPC, Staff, and MECG. Further, both of these sides have effectively put forward two different solutions; the first coming from the competing non-unanimous stipulations and the second from the two competing exhibits (exhibits 7 and 904) that were offered and accepted at the hearing. Due to this difficult and unorthodox situation, the OPC will constrain its response to addressing two broad issues raised by the other "side" of this debate and then conclude with a general assessment of the situation.

Response to claims of a lack of evidence

Evergy, Velvet Tech, and Google have each independently argued that there is not sufficient evidence for the Commission to support the inclusion of an EDR provision. *See* Evergy, *Initial Brief*, pg. 13; Velvet Tech, *Initial Brief*, pg. 24; Google, *Initial Brief*, pg. 9. This is obviously wrong. There was substantial evidence deduced during the evidentiary hearing on this topic. *See, e.g.*, Tr. Vol 3 pg. 501 ln. 24 – pg. 502 ln. 17; 3 pg. 523 ln. 24 – pg. 529 ln. 4. There is no legal requirement that the Commission consider only the evidence produced in pre-filed testimony and not the evidence produced during cross-examination of witnesses. If such a legal requirement existed, it would effectively eliminate the purpose of holding hearings and allowing for cross-examination in its entirety. Moreover, any possible argument that there is

insufficient evidence for the inclusion of an EDR provision is fundamentally eradicated by the simple fact that Evergy itself presented an exhibit to support just such a provision.

Evergy moved for the admission of Exhibit 7 during the evidentiary hearing. Tr. Vol. 3 pg. 285 lns. 24 – 25. Neither Google nor Velvet Tech objected to this exhibit. Tr. Vol. 3 pg. 286 lns. 1 – 5. This exhibit itself contained a sample EDR provision that Evergy testified it would find acceptable if included in a final Schedule MKT ordered by the Commission. *See* Exhibit 7, *Velvet/Evergy Position Language*; Evergy, *Initial Brief*, pg. 13 (citing Tr. Vol. 3 pg. 285). The existence of this sample EDR provision offered into the evidentiary record by Evergy without corresponding objection by Google or Velvet Tech kills dead any claim by those three parties that the evidentiary record is not sufficient to support the inclusion of an EDR provision. Further, the corresponding counter proposal offered by the OPC, Staff, and MECG is again sufficient evidence to support the inclusion of an EDR provision. *See* Exhibit 904, *Reply to Exhibit 7, EDR Issue from Evergy/Velvet*. For all these reasons, the claim by Evergy, Velvet Tech, and Google that there is not sufficient evidence for the Commission to order the inclusion of an EDR provision is clearly wrong and should be dismissed.

Response to argument that an EDR provision would violate statute

Velvet Tech has raised an argument that the inclusion of an EDR provision would violate the EDR enabling statute (RSMo. § 393.1640). Velvet Tech, *Initial Brief*, pg. 24. Specifically, Velvet Tech argues that the statute does not allow any

restriction to be placed on the granting of an EDR discount. *Id*. A similar sentiment is echoed in the brief filed by Google. *See* Google, *Initial Brief*, pg. 10. This argument is unfounded. All three of the EDR proposals (including the one offered by Evergy that Velvet Tech now supports) works the same way in that they place a restriction on the availability of the MKT tariff provision and not the EDR tariff provision.

The current set of proposals effectively offers any prospective MKT customer a choice: either unrestricted access to the EDR tariff provision or unrestricted access to the MKT tariff provision. Nothing in any of these three proposals prevent the prospective customer from making full use of either tariff provision; the proposals just stop a customer from making full, unrestricted use of **both**. This is important because, under these circumstances, a customer could only argue that such a restriction was unlawful if there was evidence that the customer was legally entitled to **both**. If a customer cannot show that he is legally entitled to both options, for example if the customer can only show that he is legally entitled to one option, then offering the alternative as a mutually exclusive **choice** that the customer can still decline cannot be said to deny him of anything he is legally entitled to.

To better illustrate this point, consider this analogy. Imagine looking after a five-year-old child. This child has grown accustomed to a rule that he gets a cookie after his nap. One day you offer the child an option: he can have his usual post-nap cookie, or he can have a slice of cake. The child begins to cry and argues that you are violating the post-nap cookie rule by forcing him to choose between cookies and cake.

He further argues that the only way to enforce the post-nap cookie rule correctly is to give him both the cookie and the slice of cake. The child is obviously wrong.

You have not violated your post-nap cookie rule because the child is still permitted his post-nap cookie. You are trying to be generous by offering him an alternative that he might enjoy more, yet you do not believe that he deserves both. The child, however, has decided that your generous offer of cake is something that he should receive under **any** circumstances and that by forcing him to choose you are denying him the cookie he should get as a rule. Thus, the mistake clearly lies in the child's assumption that he is entitled to his slice of cake despite the lack of any rule or promise supporting that assumption. Let us now apply this analogy to the present case.

The child in our situation is quite obviously the MKT customer, while the cookie and the slice of cake are the EDR and MKT tariff provisions respectively. The post-nap cookie rule represents the EDR enabling statute. Just as with the five-year-old child in the analogy, our prospective MKT customers (Velvet Tech and Google) fail to understand that they have no legal right to the MKT tariff provision.[6] As such, they misconstrue the Commission's generous offer to approve an MKT tariff provision that would serve as an **alternative** to the EDR tariff provision as a denial of the legal right granted to them by the EDR enabling statute. The Commission should see, however, that this is clearly not the case as it is under no legal obligation to approve

[6] In fact, there is not even any statutory language that contemplates or directly authorizes the MKT tariff provision at all.

the MKT tariff provision in any form whatsoever. In fact, the Commission could simply deny the MKT tariff provision in its entirety and neither Velvet Tech nor Google would have any possible legal grounds for claiming that denial placed a restriction on the EDR tariff provision. If denying the MKT tariff provision outright does not constitute a restriction on the EDR tariff provision, then allowing the MKT tariff provision with a precondition for use cannot be a restriction on the EDR tariff provision either.

If it seems that the OPC has spent more than is warranted on this issue, please understand that this discussion was largely in response to the statement in the brief filed by Google that preempted this response. Google, *Initial Brief*, pg. 10. The same brief attempted to dismiss the argument by claiming it was mere "sophistry" without offering any analysis of either law or logic to support that conclusion. The OPC therefore felt compelled to fully explain the extent of the gaping logical error in Google's curt and unsupported dismissal.

General assessment of the EDR issue

If one compares the similarities between exhibit 7 and exhibit 904, one can see how little difference there really is between the two. Given this, the OPC believes that this issue would almost certainly have settled had the parties the ability to negotiate further on the particular language that Evergy initially offered. Sadly, that is not the case. Yet this should not prevent the Commission from ruling in favor of the illusive compromise by adopting the EDR language offered by Evergy but

modified by the OPC, Staff, and MECG and ultimately reduced to writing in exhibit 904.

Response to Velvet Tech arguments regarding Section 393.1655

Velvet Tech requests the Commission make three findings related to the application of section 393.1655 to MKT customers in its brief. Velvet Tech, *Initial Brief*, pg. 27. There is no evidence anywhere to support this request either in pre-filed testimony or in testimony offered during the hearing. This is shown, in part, by the simple fact that Velvet Tech cites to **nothing** in support of this request. Moreover, it is not even clear what the basis for the request is. The last sentence of the brief just states: "Section 393.1655, RSMo, by its plain language 'rate classes' and the setting of 'rates in the applicable general rate proceeding' neither of which applies to customers taking service pursuant to a special contract." This appears to be a legal argument, but the OPC cannot even discern what Velvet Tech is arguing. Regardless, there is nothing to support this request and the Commission should therefore dismiss it.

Conclusion

As the OPC stated in the introduction of its initial brief, this case is not about whether the Commission should approve an MKT tariff provision. Instead, this case is about **which** MKT tariff provision the Commission should approve. For all the reasons laid out both in the initial brief and this reply, the answer is obviously the sample MKT tariff sheets set forth in the attachment to the non-unanimous stipulation and agreement entered into between the OPC, Staff, and MECG. The OPC consequently requests that, should the Commission issue an order approving an MKT tariff, the Commission approve the version of the MKT tariff attached as Schedule 1 to the non-unanimous stipulation filed by the OPC, Staff and MECG.

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,

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

CERTIFICATE OF SERVICE

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

/s/ John Clizer