

**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 GOOGLE LLC

Comes now Google LLC and for its post-hearing reply hearing brief states as follows:

A. INTRODUCTION

In this reply brief, Google LLC (“Google”) will explain why the arbitrary restriction on the use of the Limited Large Customer Economic Development Discount Rider (Schedule PED) for customers taking service under Schedule MKT proposed by Staff of the Commission and the Office of the Public Counsel (“OPC”) is neither supported by the evidence nor in the public interest.

B. ARGUMENT

In their initial briefs, both Staff and OPC posit not only that there is a public policy that limits the amount of economic incentives that can be offered to a company, but that they know exactly what that limit is. No statute, regulation, case, treatise, or any other authoritative source is cited that supports this position. The only support for this position is the hearing testimony of Staff witness James Busch in response to bench questions and friendly cross-examination by the Midwest Energy Consumers Group (“MECG”).¹ But Mr. Busch made very clear that any limit

¹ Transcript, pages 394 and 502

to economic development incentives is based solely on his opinion of how an economic development rate should work:

So to me it's a -- when you do an economic development rider it's to get a customer there and then to get them onto a regular rate with all the other customers. **To me it's** not supposed to be transitory to go from here is a great rate we're going to give you for two or three or five years and oh by the way, once that is over with here is the better rate that keeps the rest of the customers from benefiting from getting on the system. **So that is why I don't think – I think** we need to put that economic development rider prohibition into the tariff.²

Mr. Busch does not attempt to make the case that his opinion is based on any sort of authority, and Mr. Busch (although qualified in the field of utility regulation) lacks expertise in the public policy of economic development incentives generally or in the specific public policy implications related to data centers. Staff and OPC had the opportunity in their initial briefs to cite to some authority to support Mr. Busch's stated opinion, but did not do so.

Counsel for MCEG took this unsupported position even further during his cross-examination of Mr. Busch. Referring to the statutory Schedule PED, MCEG counsel said: **“it's a loss leader that it's designed to attract customers to get them on the system at which point in the future they will start paying full tariffed rates.”**³ There is no evidence that the legislature ever “designed” the economic development discounts in Section 393.1640 to be a “loss leader.”

What makes the arbitrary limit on the use of Section 393.1640 incentives even more untenable is that Staff, OPC and MCEG all believe that it is appropriate for a customer to use those incentives for two years, but not for the five years that the statute contemplates. This is a subjective limitation, based entirely on the willingness of one particular customer (Velvet Tech Services, LLC (“Velvet”)) to voluntarily limit its own use of the Schedule PED discounts. Had

² Transcript, page 394; emphasis added

³ Transcript, page 502

Staff, OPC and MCEG developed this issue properly, we may have learned that those parties would have accepted a three year limit or even a four year limit on the use of Schedule PED. But because they did not consider the issue important enough to address in pre-filed testimony or position statements, all we know is that they would be willing to accept a two year limit on the use of Schedule PED, but not five years. There is absolutely no evidence in the record to support this arbitrary cut-off.

In their briefs OPC, Staff and MCEG treat the opinion of Staff witness Busch (that a customer should not be allowed to take advantage of otherwise applicable tariffs sequentially) as identifying a public policy problem in proposed Schedule MKT that must be solved. OPC even structures its argument in its initial brief on this fallacious approach.⁴ The argument in the OPC brief is a syllogism based on a false premise: OPC creates a standard out of whole cloth (an imaginary “quid pro quo” exchange as a requirement for the use of economic development incentives) that has no basis in law or policy, claims that Schedule MKT fails to meet this standard, and then proposes solutions to this fabricated problem.

Staff witness Busch’s personal opinions aside, the complete rest of the evidence in the record shows that promoting economic development is a core public policy principal of the state. Mark Stombaugh, the Director of the Regional Engagement Division of the Missouri Department of Economic Development, stated:

The DED seeks to create solid, high-paying jobs and to boost economic development across the state to help local communities grow and prosper. DED and its collective boards, councils, commissions, and divisions aspire to transform Missouri into the best state in the Midwest for businesses and talent.

...

DED works to create an environment that encourages economic growth by supporting Missouri’s businesses and diverse industries, strengthening our

⁴ The Staff’s initial brief generally takes the same approach, although the structure of the fallacious argument is less well defined.

communities, developing a talented and skilled workforce, and maintaining a high quality of life.⁵

To put an even finer point on it, he testified that **“The public policy of the state as established by the Legislature is to attract data centers.”**⁶

Jill McCarthy, Senior Vice President of Corporate Attraction at the Kansas City Area Development Council, testified that “Over the past 15 years, Missouri has been bypassed when it comes to hyperscale data center development.”⁷ She attributed that failure to Missouri failing to put together appropriate packages of economic development incentives and described what a successful package should include: “Missouri Works, Missouri BUILD, Chapter 100 Property Tax Abatement and/or Sales Tax Exemption are all valuable tools. However, for a large data center, the Data Center Tax Exemption Program, Chapter 100 Property Tax Abatement **and most critically the ability to negotiate an electric rate** are key tools.”⁸ Ms. McCarthy testified to the significant benefits that will accrue to the state and the Kansas City area from the development of data centers there.⁹ Although her written testimony focused on the Velvet project in particular, she agreed that similar benefits would accrue to the state and to the region if other similar data centers were to be developed.¹⁰

If the Commission believes that it should impose some limitation on the economic development incentives offered to data centers, it should adopt only the limitation in the second paragraph of Exhibit 904:

For a period of five years from the effective date of the first Special High-Load Factor Market Rate Contract, Schedule MKT shall be limited to the lesser of three

⁵ Stombaugh Direct Testimony, Exhibit 5, page 2

⁶ Stombaugh Direct Testimony, Exhibit 5, page 4; emphasis added.

⁷ McCarthy Direct Testimony, Exhibit 4, page 7

⁸ McCarthy Direct Testimony, Exhibit 4, pages 8; emphasis added

⁹ McCarthy Direct Testimony, Exhibit 4, pages 12-14

¹⁰ Transcript, page 376

(3) customers or 500MW, at which point the impact of this Schedule MKT on non-MKT customers, including the Schedule PED discounts, shall be analyzed before any additional customers may be included.

Such a limitation would allow data centers to take advantage of the statutorily created incentives in Schedule PED, but would also allow the Commission to limit the impact of those incentives until such time as it has the opportunity to fully analyze those impacts. If the Commission were to adopt the first paragraph of Exhibit 904 (artificially restricting an otherwise qualifying customer from taking full advantage of the provisions of Schedule PED), then it is quite possible that the second paragraph (limiting MKT customers on the Evergy West system to just three customers or 400MW demand before triggering an analysis of the impact) would be moot, because there is no evidence that any other qualifying customers would choose to develop data centers in the Kansas City area under those limitations.¹¹

D. CONCLUSION

The Commission has lawful authority to approve Schedule MKT, and it should approve Schedule MKT for use by any qualifying customer without limiting a Schedule MKT customer's use of otherwise available rate schedules. The evidence in this case fails to show that limiting a Schedule MKT customer's use of Schedule PED is in the public interest, and in fact shows that such a limit is contrary to the public policy of the state to encourage the development of data centers. Nonetheless, if the Commission finds that the evidence in this case shows that there is a compelling public policy need to limit the overall amount of economic development incentives available to data centers by limiting the use of Schedule PED, the Commission should not tie its own hands by embedding a limit in Schedule MKT on the use of Schedule PED. Rather than establishing an absolute limit in Schedule MKT, the Commission should evaluate the risk of

¹¹ Transcript, pages 216-217

bankruptcy of each specific MKT customer when approving that customer's contract as discussed in Google's initial brief, or it should provide in Schedule MKT an opportunity for the Commission to analyze the impacts of that schedule after a certain threshold has been reached on the Evergy West system (as provided for in the second paragraph of Exhibit 904).

Respectfully submitted,

BRYAN CAVE, LLP

By: /s/ Lewis Mills

Lewis Mills, #25375

221 Bolivar Street, Suite 101

Jefferson City, MO 65109

Telephone: (573) 556-6622

Facsimile: (573) 556-7442

Email: lewis.mills@bclplaw.co

Attorney for Google LLC

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been emailed this 18th day of February, 2022, to all counsel of record.

/s/ Lewis Mills