
**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) **File No. EO-2022-0061**
West for Approval of a Wholesale Energy)
Market Rate for a Data Center Facility in)
Kansas City, Missouri)

INITIAL BRIEF OF STAFF

Respectfully Submitted,

Jeffrey A. Keevil

Deputy Counsel

Missouri Bar No. 33825

Attorney for Staff of the

Missouri Public Service Commission

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COMES NOW Staff of the Missouri Public Service Commission and submits the following Initial Brief pursuant to the schedule previously ordered by the Commission.

INTRODUCTION

Evergy Missouri West, Inc. d/b/a Evergy Missouri West (“Evergy,” “EMW,” or “Company”), the Office of the Public Counsel (“OPC”), and Staff each filed proposed draft tariffs with their prefiled written testimony in this proceeding. The List of Issues and Position Statements were filed based on these proposed tariffs. However, on January 24, 2022, Staff, OPC, and the Midwest Energy Consumers Group (“MECG”) filed a non-unanimous stipulation with a proposed draft tariff attached (Ex. 203 and Ex. 203 Schedule 1). Also on January 24, 2022, Evergy and Velvet Tech Services, LLC (“Velvet”) filed a non-unanimous stipulation with a proposed draft tariff attached (Ex. 8 and Ex. 8 Schedule 1). The hearing in this matter, held January 25-26, 2022, focused on the “competing” tariffs attached to the non-unanimous stipulations. Therefore, this brief will also focus on the “competing” tariffs attached to the non-unanimous stipulations.

One thing that should be kept in mind is that the tariff at issue in this proceeding – Schedule MKT – will, if approved by the Commission, apply not only to Velvet but to all

future customers taking service under Schedule MKT. Although Evergy and Velvet talk extensively about Velvet’s plans and representations – which may or may not be included in a future special contract between Evergy and Velvet – there is no guarantee that other future Schedule MKT customers will be willing to include the same provisions in their special contracts (such as the “Renewable Energy Support Charge” Velvet has purportedly offered to include in its special contract). Therefore, it is important that any tariff resulting from this case “cover all the bases” and include all necessary provisions for all future Schedule MKT customers, as well as provisions to safeguard Evergy’s non-Schedule MKT customers.

Issue No. 1: Should the Commission approve the Special High Load Factor Market Rate (“Schedule MKT”) tariff proposed by Evergy Missouri West (“EMW”) [and Velvet, pursuant to their non-unanimous stipulation (Ex. 8 and Ex 8 Schedule 1)]?

a. Is the Schedule MKT tariff [proposed by Evergy and Velvet in Ex. 8 Schedule 1] lawful?

Although the draft tariff proposal attached to the Evergy/Velvet non-unanimous stipulation is less objectionable than the draft tariff originally proposed by Evergy and contains fewer unlawful provisions, it is still unlawful and should not be approved.

RESRAM / RES

As Ms. Eubanks testified, there is a difference between the Renewable Energy Standard (“RES”) requirements and the Renewable Energy Standard Rate Adjustment Mechanism (“RESRAM”):

Q. Would you please explain the difference between those two [RES requirements and RESRAM charge] and what those two represent?

A. Sure. So when we're talking about RES requirements it's the renewable energy standard, which is **a statute** that requires the utilities to provide electricity from renewable energy resources and that's based on their sales that they make. The highest level of the standard is 15 percent and it starts in 2021 at 15 percent. There were stairsteps before then. And continually, you know -- continues at 15 percent annually.

When we're talking about the renewable energy standard rate adjustment mechanism, that is intended to represent the [*sic*] all [the] cost and all benefits related to compliance with the renewable energy standard and that is a charge that per Evergy's tariff is assessed to all customers.

Q. So getting **a variance from a charge wouldn't necessarily mean a variance from the RES requirement**. Correct?

A. **That's correct.**

Q. All right. Now, there's also been a lot of talk in the hearing about the rule regarding RES. Is there also a statute that talks about the RES?

A. There is.

Q. And to your knowledge -- I know you are not a lawyer, but to your knowledge does the statute and the rule -- let me backup.

Does the statute use the phrase "total electric retail sales," which Mr. Fischer was referring to?

A. It uses the phrase "electric utility sales." The rule uses the phrase retail electric -- "total retail electric sales."

Q. So there is different references and different terms?

A. To me they're the same, they mean the same, but the words are different.

Q. Okay. When you -- going back to one of the examples that Mr. Clizer, I think it was -- or maybe it was the judge. Velvet, it's my

understanding -- is it -- who's going to be doing the contract in here? Velvet is going to somehow execute -- is buying its own energy through SPP?

A. So my understanding is the -- for renewable energy, is that your question?

Q. Yes.

A. For renewable energy my understanding is they're -- they will do something whether it's procuring a wind PPA somewhere in SPP, but I think Mr. Brubaker indicated it could potentially be construction of a resource.

Q. Okay. Now, getting away from Velvet specifically, an MKT customer, **will an MKT customer cause Evergy's RES requirement to go up?**

A. **Yes.**

Q. Okay. And that's true regardless of whether -- of where -- how do I say this? I'm trying to distinguish this from the Nucor. The Nucor situation. Evergy got the PPA for Nucor and got the RECs itself. Correct?

A. Yes.

Q. Okay. That's not necessarily what is happening here?

A. Correct.

Q. So even though Evergy and the MKT customer have a different relationship [than] under the SIL tariff, **the Evergy RES requirements are still going up because of these MKT customers?**

A. **Exactly.**

Q. All right. And do you see a distinction there between the SIL tariff and the MKT tariff in that regard?

A. So I don't think renewable energy standard compliance or RESRAM is specifically in the SIL tariff. I don't know that those phrases exist in the SIL tariff. But I don't have it in front of me, unfortunately.

Q. The only language I am aware of in the SIL tariff regarding the RESRAM is that which Mr. Fischer read to you just a moment ago. It says, service under this tariff shall be excluded from projected energy

calculations used to establish charges under riders FAC and RESRAM and the MEEIA program.

A. Yeah, so that is not the same as RES requirements for the renewable energy standard. That's for the RESRAM charge.¹ (Emphasis added)

The statute to which Ms. Eubanks refers is Section 393.1030, RSMo., which provides in pertinent part as follows:

1. The commission shall, in consultation with the department, prescribe by rule a portfolio requirement for all electric utilities to generate or purchase electricity generated from renewable energy resources. **Such portfolio requirement shall provide that electricity from renewable energy resources shall constitute the following portions of each electric utility's sales:**
 - (1) No less than two percent for calendar years 2011 through 2013;
 - (2) No less than five percent for calendar years 2014 through 2017;
 - (3) No less than ten percent for calendar years 2018 through 2020;
 - and
 - (4) No less than fifteen percent in each calendar year beginning in 2021.

At least two percent of each portfolio requirement shall be derived from solar energy. **The portfolio requirements shall apply to all power sold to Missouri consumers** whether such power is self-generated or purchased from another source in or outside of this state. A utility may comply with the standard in whole or in part by purchasing RECs. Each kilowatt-hour of eligible energy generated in Missouri shall count as 1.25 kilowatt-hours for purposes of compliance.

* * * *

¹ Tr. Vol. 3, page 467 line 6 – page 470 line 17.

6. **The commission shall have the authority to promulgate rules for the implementation of this section, but only to the extent such rules are consistent with, and do not delay the implementation of, the provisions of this section.** Any rule or portion of a rule, as that term is defined in section [536.010](#), that is created under the authority delegated in this section shall become effective only if it complies with and is subject to all of the provisions of [chapter 536](#) and, if applicable, section [536.028](#). This section and [chapter 536](#) are nonseverable and if any of the powers vested with the general assembly pursuant to [chapter 536](#) to review, to delay the effective date, or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after August 28, 2013, shall be invalid and void. (Emphasis added)

So why does this matter? In paragraph 6 under “Additional Provisions,” the draft tariff now proposed by Evergy and Velvet (Ex. 8 Schedule 1) provides:

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

Although their proposed tariff only references the rule, 20 CSR 4240-20.100, that rule contains the same RES requirements as the statute quoted above (Section 393.1030,

RSMo.). In paragraph 6 of their non-unanimous stipulation (Ex. 8), Evergy and Velvet specifically request a “variance” from the rule, but again make no reference to the statute. Why? Because while the Commission can grant a variance from the rule, it cannot grant a variance from the statute.

As Ms. Eubanks testified, Evergy’s RES requirements under the statute will go up because of the addition of MKT customers. The proposal of Evergy and Velvet ignores the statutory language quoted above (for example, “The portfolio requirements *shall* apply to *all* power sold to Missouri consumers”) and is, therefore, unlawful. The Commission cannot grant a variance from the statute to save Evergy/Velvet’s unlawful proposal. Therefore, it must be rejected.

Unlike the unlawful Evergy/Velvet proposal, the tariff language proposed by Staff/OPC/MECG (Ex. 203 Schedule 1) focuses on the RESRAM *charge* (which is not mandated by statute), rather than the RES requirement (which is mandated by statute), and is therefore lawful. This language is contained in what is listed as paragraph 7² under “Additional Provisions” of Ex. 203 Schedule 1 and states as follows:

Any provisions of Evergy Missouri West’s RESRAM tariff to the contrary notwithstanding, Customer will not be subject to RESRAM charges if its contribution through a renewable energy contribution charge meets or exceeds the incremental RES compliance costs attributable to the Customer. In such an event, all monies collected through the renewable energy contribution charge shall be used to offset Evergy Missouri West’s RESRAM revenue requirement.

The Commission should adopt the foregoing Staff/OPC/MECG language.

² Although it is listed as paragraph 7 on the draft tariff proposal due to a typographical error, it should be paragraph 6.

SECURITIZATION

Evergy opposes the last sentence of paragraph 5 under “Additional Provisions” of the draft tariff proposed by Staff/OPC/MECG (Ex. 203 Schedule 1) which states “Customer will be subject to any other charge or surcharge including without limitation any charge related to the securitization of Company assets.” Evergy prefers to address this in its future securitization case(s).³ However, Evergy is once again ignoring the applicable statute.

Section 393.1700.2(3), RSMo., provides in part that

(c) A financing order issued by the commission, after a hearing, to an electrical corporation shall include all of the following elements:

* * *

d. **A requirement that**, for so long as the securitized utility tariff bonds are outstanding and until all financing costs have been paid in full, **the imposition and collection of securitized utility tariff charges authorized under a financing order shall be nonbypassable and paid by all existing and future retail customers receiving electrical service from the electrical corporation or its successors or assignees under commission-approved rate schedules** except for customers receiving electrical service under special contracts on August 28, 2021, **even if a retail customer elects to purchase electricity from an alternative electric supplier** following a fundamental change in regulation of public utilities in this state (Emphasis added)

Therefore, according to the statute, all customers – including future MKT customers – must pay securitized utility tariff charges (with one narrow exception for

³ See Tr. Vol. 2, page 264 lines 22-23.

customers receiving service under a special contract on August 28, 2021). To provide otherwise in a future financing order as envisioned by Evergy would be unlawful. The Staff/OPC/MECG proposed tariff language recognizes this fact and should be included in the tariff by the Commission.

Issue No. 2: If yes, what if any modifications to the Schedule MKT tariff proposed by EMW [and Velvet, pursuant to their non-unanimous stipulation (Ex. 8 and Ex 8 Schedule 1)] or other conditions should the Commission order?

If the Commission decides, for economic development reasons, to approve a version of the proposed Schedule MKT tariff, it should approve the version submitted by Staff/OPC/MECG (Ex. 203, Ex. 203 Schedule 1, and/or Ex. 904). The necessary modifications regarding the **RESRAM / RES** and **SECURITIZATION** language were addressed above under Issue No. 1. The remaining areas of disagreement between the “competing” tariffs attached to the non-unanimous stipulations will be addressed under this Issue No. 2.

SUBSTATION VOLTAGE CUSTOMERS

The tariff language proposed by Evergy/Velvet would make service under Schedule MKT available to what it refers to as “substation voltage customers.” The tariff language proposed by Staff/OPC/MECG removes these “substation voltage customers” from the tariff availability.

Evergy has represented that it based its proposed Schedule MKT, at least in part, on a tariff offered by the Omaha Public Power District (“OPPD”).⁴ However, unlike the tariff proposed by Evergy/Velvet, the OPPD tariff clearly states the transmission voltage

⁴ Ives Direct testimony, Ex. 1C Page 5.

levels available for service and *requires customer ownership of facilities beyond the service, including the customer's dedicated substation.*⁵ This is what the language proposed by Staff/OPC/MECG would do, thereby making the tariff more like the OPPD tariff than the language proposed by Evergy/Velvet.

Removing substation voltage customers, i.e., requiring customer ownership of the substation, eliminates the risk of stranded utility assets in the event that the customer leaves the Evergy system or goes bankrupt, thereby protecting other ratepayers from bearing the cost of stranded assets.⁶ Requiring customer ownership of the substation also ensures the MKT customers are paying the costs for which they are responsible. As Mr. Busch testified, “the best way to ensure that the appropriate class or the appropriate customer is paying for it is to do a direct assignment. The best way to do direct assignment is if the customer owns that system. So they own their substation. We don't have to worry about making sure that those costs are assigned. It might be easy to allocate the capital costs, but there are other costs, maintenance and stuff like that, that would be more difficult to parse out to just that customer than to the other classes. So to make it easier, just to make it clearer, keeping that substation voltage customer out would be better.”⁷ Substation voltage customers should not be included in the tariff.

⁵ Kliethermes Rebuttal testimony, Ex. 102 Page 6.

⁶ Tr. Vol. 3, page 502 line 18 – page 503 line 15.

⁷ Tr. Vol. 3, page 495 line 17 – page 496 line 4.

EDR DISCOUNTS

The tariff language submitted by Staff/OPC/MECG in Ex. 203 Schedule 1 provided that in order to receive service under Schedule MKT, a customer must not have accepted a discount under Section 393.1640, RSMo., in the past five years. In response to this language, Evergy submitted Ex. 7 at the hearing. Staff/OPC/MECG thereafter submitted Ex. 904 as alternative language regarding availability of Schedule MKT to customers who had received certain economic development discounts. At this time, Staff can support either the language submitted in Ex. 203 Schedule 1 or Ex. 904.

It must be remembered that when some customers receive discounts under Section 393.1640, RSMo., other customers wind up paying for those discounts. It is the other customers – not Evergy – that bears the brunt of the discounts.

Economic development discounts are designed to attract customers to the electric system, or in some cases to increase load, with the idea being that at some point in the future they will start paying full tariffed rates and then the other customers will receive the benefit of the new customers being on the electric system.⁸ If a Schedule MKT customer is allowed to migrate from a discounted rate to Schedule MKT before paying the full tariffed (non-discounted) rate, the other customers never receive the benefit of that customer joining the system. In other words, they never receive the benefit they should have received for paying for the new customer's discount.⁹

“When you do an economic development rider it's to get a customer there [on the system] and then to get them onto a regular rate with all the other customers.”¹⁰ It should

⁸ Tr. Vol. 3, page 502 line 2 – line 12.

⁹ Tr. Vol. 3, page 502 line 13 – line 17.

¹⁰ Tr. Vol. 3, page 493 line 1 – line 4.

not be a situation where a customer is given a discounted rate for a number of years and then, once that is over, given an even better rate that keeps other customers from benefitting from getting that customer on the electric system.¹¹ To remedy this problem, the Commission should adopt either the language submitted in Ex. 203 Schedule 1 or Ex. 904.

“HOLD HARMLESS” PROVISIONS

In paragraphs 3 and 4 under “Additional Provisions” of the “competing” tariffs attached to the non-unanimous stipulations, both Evergy/Velvet and Staff/OPC/MECG purport to include provisions to hold other customers (non-Schedule MKT customers) harmless from service to MKT customers. However, the language proposed by Evergy/Velvet does not truly hold other customers harmless.

Although the first sentence of the second paragraph under paragraph 4 of the Evergy/Velvet tariff includes certain “hold harmless” language, the immediately following sentence effectively negates the hold harmless language. As Dr. Marke testified “[it] is not really hold harmless if there's a clause immediately saying that, well, by the way we can go ahead and argue it that . . . , that customers can still bear all these costs.”¹²

The Evergy/Velvet proposal would permit Evergy to “present evidence . . . of other economic benefits as a result of Schedule MKT customers taking service from the Company” in order to avoid holding non-MKT customers harmless from the effects of the MKT customers. However, upon examination this language is truly one-sided. As Mr. Busch testified:

¹¹ Tr. Vol. 3, page 493 line 4 – line 9.

¹² Tr. Vol. 3, page 557 line 22 – line 25.

You know, to start bringing in a lot of those other factors, the benefits, you know, are we going to start bringing in the fact that the reason why the Company, Velvet or any of these large data centers or whatever other companies may be able to take advantage of this MKT tariff, the reason they are coming and getting hooked up to a utility system is because they need to have power all the time. We don't have a situation yet where renewable energy is 100 percent on a 100 percent of the time cost-effectively. That is a huge benefit that those customers are getting by being hooked up to the -- just by having access to that. So that is a benefit that they 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.¹³

Unlike the hold harmless language offered by Evergy/Velvet, the language offered by Staff/OPC/MECG would actually hold other customers (non-MKT customers) harmless from the effects of the MKT tariff. The hold harmless language offered by Staff/OPC/MECG is patterned after the hold harmless language found in Evergy's SIL tariff (Ex. 301).¹⁴ There are no differences between the SIL tariff and the facts surrounding it, and the MKT tariff and the facts surrounding it, that would make it

¹³ Tr. Vol. 3, page 496 line 24 – page 497 line 24.

¹⁴ Tr. Vol. 3, page 479 line 7 – line 15.

uneconomic to include virtually the same hold harmless language in the MKT tariff as that contained in the SIL tariff.¹⁵ Evergy's opposition to hold harmless language already found elsewhere in its tariffs is simply unreasonable. The Commission should adopt the hold harmless language proposed by Staff/OPC/MECG.

WHEREFORE, Staff prays that the Commission issue its order finding in favor of Staff on each of the issues set forth herein and making such further orders as the Commission deems just and reasonable.

Respectfully submitted,

/s/ Jeffrey A. Keevil

Jeffrey A. Keevil

Missouri Bar No. 33825

P. O. Box 360

Jefferson City, MO 65102

(573) 526-4887 (Telephone)

(573) 751-9285 (Fax)

Email: jeff.keevil@psc.mo.gov

Attorney for the Staff of the
Missouri Public Service Commission

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to counsel of record as reflected on the certified service list maintained by the Commission in its Electronic Filing Information System this 8th day of February, 2022.

/s/ Jeffrey A. Keevil

¹⁵ Tr. Vol. 3, page 479 line 16 – line 21.