BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

INITIAL BRIEF OF THE 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

March 1, 2021

Table of Contents

Table of Contents 2

Introduction 3

Standard and Burden of Proof 5

Issues Presented 21

Issue 4: Was Evergy imprudent in the management of its demand response programs? 21

A. Evergy had the ability to call demand response events when doing so would have reduced its energy costs. 22

B. There were ample opportunities for Evergy to have called events in a manner that would have reduced its energy costs 23

C. Evergy made no attempt to call curtailment events in a manner that would have reduced energy costs despite having the opportunity to do so. 25

D. Summation 26

Issue 5: Was it imprudent for Evergy to not call additional demand response events in a manner that would have reduced FAC costs? 27

Issue 6: If it was imprudent for Evergy to not call additional demand response events in a manner that would have reduced FAC costs, is it more appropriate to address the imprudent implementation of the programs through an ordered FAC adjustment or an ordered DSIM adjustment? 32

Conclusion 36

Introduction

This is a fuel adjustment clause ("FAC") prudence review case. The purpose of this case is to determine whether either Evergy Missouri West or Evergy Missouri Metro (collectively "Evergy" or "the Company") acted imprudently when incurring fuel costs that were later passed to customers through the Company's FAC. The review periods for this case are June 1, 2018, through November 30, 2019, for Evergy West, and July 1, 2018, through December 31, 2019, for Evergy Metro.

The OPC's position is that Evergy did act imprudently by failing to utilize its available demand response programs to reduce energy consumption and thereby reduce the Company's energy costs. If Evergy had properly utilized its demand response programs, less energy would have been required by its customers. If less energy was required by its customers, Evergy would have avoided paying the cost of the energy it no longer required. If Evergy had avoided paying part of its energy costs, the energy costs flowing through its FAC would have been lower. If the energy costs flowing through Evergy's FAC were lower, Evergy's customers would have paid less through the FAC. This did not happen, which is why the present case exists.

By imprudently failing to utilize its demand response programs, Evergy was required to pay Southwest Power Pool ("SPP") for more energy than it otherwise would have needed to, which resulted in the Company incurring more energy costs that it otherwise would have needed to, which resulted in Evergy's customers paying more through the FAC than they otherwise would have needed to. The rates Evergy charged customers through its FAC were thus unjust and unreasonable because they

were imprudently incurred due to Evergy's failure to prudently utilize its demand response programs.

It is essential that the Commission remember that this is an FAC prudence review case and not a MEEIA prudence review case. This would not normally be necessary to address, but the situation of this case is unique. The demand response programs at issue in this case are part of Evergy MEEIA's program, and there is a currently ongoing MEEIA prudence review case (EO-2021-0157) that also addresses these demand response programs. The procedural history, issues, and positions taken in this case have become intertwined with that MEEIA prudence review case. It would therefore not be a surprise if the Commission, or other parties, confused the issues in this case with those of the MEEIA prudence review case. This should not be allowed. A full explanation of this point may be found in the discussion of issue number six below.

Section 386.266.5(4) requires a prudence review of the costs **subject to the FAC**. Evergy's energy costs (including what it pays SPP) are subject to the FAC. Evergy Missouri Metro Tariff P.S.C. Mo. No. 7 Original Sheets No. 50.23 and 50.24; Evergy Missouri West Tariff P.S.C. Mo. No. 1 Original Sheet No. 127.15 and 127.16. The single, simple question before the Commission is this: did Evergy make proper use of the demand-side resources available to it to reduce its energy costs. The answer to that question is an unequivocal no. The OPC will now prove why.

Standard and Burden of Proof

During the evidentiary hearing, the Commission requested parties specifically address questions regarding the appropriate standard and burden of proof to be applied in this case and on whom the burdens rested. Tr. pg. 296 lns. 14 – 20. The answer to this question is paradoxically both simple and complex. The OPC will start with the simple answer, which is explained at length in the Commission's filed *Report and Order* issued in HC-2010-0235:

> Burden of Proof
>
> A. In form, this is a complaint brought by AGP against Aquila/KCPL-GMO. Normally in a complaint brought before the Commission, the burden of proof would be on AGP, the complainant, as the party asserting the affirmative on the issue of the utility's imprudence. However, this case is more complicated than a straight-forward complaint.
>
> B. An approved stipulation and agreement that resolved Aquila's 2005 steam rate case (HR-2005-0450) established a Quarterly Cost Adjustment mechanism that allowed Aquila to make quarterly rate adjustments to reflect 80 percent of the change in its actual fuel costs above or below an established base amount.
>
> C. That stipulation and agreement also establishes a method by which the prudence of Aquila's fuel purchase decisions can be reviewed. The Commission's Staff is required to conduct an initial, first-step, prudence review to determine "that no significant level of imprudent costs is apparent." If it determines a further review is necessary, Staff may also proceed, as a second-step, with a full prudence review.
>
> D. However, the stipulation and agreement also allows any Aquila steam customer, including AGP, to file a complaint to initiate the second-step full prudence review, even if Staff chooses not to pursue such a review. It is just such a complaint that AGP has currently brought before the Commission.
>
> E. **Because this is actually a full prudence review of Aquila's fuel purchasing decisions rather than an ordinary complaint, AGP is not saddled with the burden of proof throughout the**

> **proceeding. Instead, the Commission's modified prudence standard of review is applicable.**
>
> F. **Under that standard of review, which the Commission established in a 1985 decision, a utility's expenditures are presumed to be prudently incurred, but, if some other participant in the proceeding creates a serious doubt as the prudence of the expenditure, then the utility has the burden of dispelling those doubts and proving the questioned expenditure to have been prudent.** The Commission's standard of review regarding prudence decisions has subsequently been accepted by reviewing courts.

Ag Processing, Inc., a Cooperative, Complainant, v. KCP&L Greater Missouri Operations Company, Respondent, HC-2010-0235, 2011 Mo. PSC LEXIS 1182, *26-30 (Mo. P.S.C. September 28, 2011); *see also In the Matter of the Sixth Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of The Empire District Electric Company*, EO-2017-0065, 2018 Mo. PSC LEXIS 106, *25 (Mo. P.S.C. February 28, 2018) ("By statute - subsection 393.150.2, RSMo - the requesting utility bears the burden of proving that a requested rate is just and reasonable. Although Empire always bears the burden of proof, the Commission will, in the absence of adequate contrary evidence, presume that a utility's spending is prudent. This presumption of prudence affects who has the burden of proceeding, but does not change the burden of proof."); *In the Matter of Missouri Gas Energy's Purchased Gas Adjustment Tariff Revisions to be Reviewed in its 2000-2001 Actual Cost Adjustment et. al.*, GR-2001-382, GR-2000-425, GR-99-304, GR-98-167, 2007 Mo. PSC LEXIS 972, *34 (Mo. P.S.C. August 2, 2007) (applying substantially similar analysis in the case of a PGA review).

This standard is further substantiated by several opinions issued by the Missouri Supreme Court:

> The burden is on the gas corporation to prove that the gas costs it proposes to pass along to customers are just and reasonable. § 393.150.2; see also *Matter of Kansas Power and Light Co.*, 30 Mo. P.S.C. (N.S.) 76 (1989) (The gas corporation "has the burden of showing its proposed rates are just and reasonable ... [and] of showing the reasonableness of costs associated with its rates for gas.)
>
> While the burden of proof rests on the gas corporation, the PSC's practice has been to apply a "presumption of prudence" in determining whether a utility properly incurred its expenditures. The presumption of prudence is not a creature of statute or regulation. It first was recognized by the PSC in *Matter of Union Electric*, 27 Mo. P.S.C. (N.S.) 183 (1985) and has been applied by it since that point.
>
> Under the presumption of prudence, a utility's costs "are presumed to be prudently incurred. ... However, the presumption does not survive a showing of inefficiency or improvidence" that creates "serious doubt as to the prudence of an expenditure." *Id.* at 193, quoting *Anaheim, Riverside, Etc. v. Fed. Energy Reg. Com'n*, 669 F.2d 799, 809, 216 U.S. App. D.C. 1 (D.C. Cir. 1981). If such a showing is made, the presumption drops out and the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent. *Id.*

Office of the Pub. Counsel v. Mo. PSC, 409 S.W.3d 371, 376 (Mo. banc 2013); *see also Spire Missouri, Inc., f/k/a Laclede Gas Company, Appellant, vs. Public Service Commission of the State of Missouri, Respondent, and Office of Public Counsel, Intervenor.*, No. SC97834, slip op. at 10 (Mo. Banc. Feb. 9, 2021), https://www.courts.mo.gov/file.jsp?id=173453 (citing *Office of the Pub. Counsel*).

It would be perfectly reasonable for the Commission to stop its analysis here and simply adopt the language from the HC-2010-0235 or EO-2017-0065 cases to resolve this issue. However, the OPC wishes to use this opportunity to address certain

issues regarding the proper interpretation of the law and correct a prior Commission *Report and Order*. This will have the unfortunate effect of introducing greater complexity to this issue, but will also hopefully establish greater accuracy of the resulting answer moving forward.

To begin with, the HC-2010-0235 *Report and Order* speaks of the "standard of review." This terminology adds unnecessary confusion and should not be employed. The term "standard of review" is generally used to describe the "[t]he criterion by which an appellate court exercising appellate jurisdiction measures the constitutionality of a statute or the propriety of an order, finding, or judgement entered by a lower court." BLACKS LAW DICTIONARY 1535 (9th ed. 2009). In other words, it represents the degree of deference that a higher judicial body provides the decision rendered by a lower judicial body when determining whether the lower body erred. As such, the term is primarily reserved for appellate practice. Compare this to the term "standard of proof" which is defined as "[t]he degree or level of proof demanded in specific cases, such as 'beyond a reasonable doubt' or 'by preponderance of the evidence.'" *Id.* This is the standard that the initial fact-finder (in this case the Commission) should employ to determine whether he or she is convinced as to the accuracy of the claim being asserted. Thus, when describing the "standard" for this case, the Commission should be thinking in terms of the standard of proof, not of review. The analysis does not end here, however, as there is another concept that must be considered: the burden of proof.

The burden of proof is generally defined as "[a] party's duty to prove a disputed assertion or charge." BLACKS LAW DICTIONARY 223 (9th ed. 2009). It is a separate and distinct legal principle from either the standard of review or the standard of proof:

> Initially, appellant has confused the terms burden of proof, standard of proof, and standard of review in her briefs to this court. They are three separate legal principles. The burden of proof is the duty that the Department carries to prove its assertion that Ms. Tate abused Ms. Weber. The standard of proof in this case, as in most civil cases, is proof by a preponderance of the evidence. The standard of review, as applied by both the Circuit Court and the Court of Appeals, is whether there is competent and substantial evidence to support the agency's decision.

Tate v. Dep't of Soc. Servs., 18 S.W.3d 3, 7-8 (Mo. App. ED 2000). In addition, the burden of proof can be further subdivided into two separate concepts: the burden of persuasion and the burden of production:

> The director's burden of proof has two components - the burden of production and the burden of persuasion. *Kinzenbaw v. Dir. of Revenue*, 62 S.W.3d 49, 53 (Mo. banc 2001). The burden of production is "a party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as summary judgment or a directed verdict." BLACK'S LAW DICTIONARY 223 (9th ed. 2009). The burden of persuasion is defined as "[a] party's duty to convince the fact-finder to view the facts in a way that favors that party." *Id*.

White v. Dir. of Revenue, 321 S.W.3d 298, 304-05 (Mo. banc 2010); *see also Guinn v. Treasurer of State*, 600 S.W.3d 874, 879 (Mo. App. SD 2020) (providing a substantially similar analysis in the context of an appeal from the Labor and Industrial Relations Commission decision). This division of the burden of proof into its two constituent parts is important when considering the next part of puzzle: presumptions.

In legal terms, a presumption is a legal inference or assumption that shifts either the burden of proof, the burden or persuasion, or both from one party to another BLACKS LAW DICTIONARY 1304 (9th ed. 2009).; *Byous v. Mo. Local Gov't Emples. Ret. Sys. Bd. of Trs.*, 157 S.W.3d 740, 745 (Mo. Ct. App. 2005) ("In this case we are dealing with the interaction of the burden of proof and presumptions. The burden of proof has two parts: the burden of production and the burden of persuasion. . . . **A presumption alters who has these various burdens, shifting them from one party to another**." (internal citations omitted) (emphasis added)). In this case, the presumption at issue is the "presumption of prudence" as first recognized in *Matter of Union Electric*, EO-85-17 and ER-85-160, 27 Mo. P.S.C. (N.S.) 183 (1985). The *Byous* court notes that "under the general rule in Missouri, when a party against whom a presumption operates introduces evidence controverting a presumed fact, that fact must then be determined from the evidence in the case as if there never was a presumption." *Byous*, 157 S.W.3d at 746.[1] This is consistent with how the presumption of prudence operates under Missouri law. *Office of the Pub. Counsel v. Mo. PSC*, 409 S.W.3d 371, 376 (Mo. banc 2013) ("If such a showing is made, the presumption drops out and the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent."). Therefore, it is most

[1] It should be noted that the *Byous* court determined that the presumption in that case actually shifted both the burden of persuasion and production. That decision is easily distinguishable from the present issue, however, because the presumption in that case was a creature of statute where the presumption of prudence is not. *Office of the Pub. Counsel v. Mo. PSC*, 409 S.W.3d 371, 376 (Mo. banc 2013) ("The presumption of prudence is not a creature of statute or regulation.").

logical to conclude that the presumption of prudence only shifts the burden of production. In other words, the presumption only requires the party alleging the imprudence to introduce enough evidence to call the presumption into question, at which point the presumption "drops out" and the burden to persuade the fact-finder as to the prudency of the expenditures remains with the applicant utility. *Id*. This appears to be the view that the Commission has previously endorsed. EO-2017-0065, 2018 Mo. PSC LEXIS 106 at *25. ("This presumption of prudence affects who has the burden of proceeding, but does not change the burden of proof.").

Having reviewed the basics of the law, the next question is how to apply it to this case. To begin with, we must ask who has the burden of proof in this situation. The answer is that the utility is the party who carries the burden of proof to establish that rates are just and reasonable. This is codified in RSMo. § 393.150.2 ("At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the . . . electrical corporation. . . ."), and has been further recognized by both the Commission and Missouri Courts. EO-2017-0065, 2018 Mo. PSC LEXIS 106 at *25; *Office of the Pub. Counsel v. Mo. PSC*, 409 S.W.3d 371, 376 (Mo. banc 2013). Despite the simplicity of this answer, there is one potential *caveat* that is worth addressing. That is the fact that this case is styled as a "prudence review" and not a "rate increase" as referred to in RSMo. § 393.150.2. However, that should not change the answer to the question. To understand why, one must consider what a "prudence review" case actually is.

An FAC prudence review case is, effectively, a retroactive analysis performed to determine if the FAC rates previously placed into effect were just and reasonable. Such a case does not, **and cannot**, exist *ab initio*. Instead, these types of cases must necessarily follow a request to either establish or change an existing FAC. *See* RSMo. § 386.266.1. This is important because in the any situation where an FAC is to be established (which is by default an increase over the *status quo* rate of zero dollars) or otherwise increased, RSMo. § 393.150.2 would clearly apply and the burden of proof would fall squarely on the utility. There is no reason to conclude that the follow-on prudence review, which is part and parcel to the FAC case by operation of RSMo. § 386.266.5(4), would change this legal effect.

The idea that this case being a "prudence review" does not change the fact that utility bears the burden of proof is supported further by the mere existence of the presumption of prudence. Because the purpose of a presumption is to shift who bears the respective burdens of production and persuasion, there would be no reason for the presumption to be applied in any situation where the burden already rests with the party asserting imprudence. This has, again, been directly recognized by the Commission. EO-2017-0065, 2018 Mo. PSC LEXIS 106 at *25 ("By statute - subsection 393.150.2, RSMo - the requesting utility bears the burden of proving that a requested rate is just and reasonable. Although Empire always bears the burden of proof, the Commission will, in the absence of adequate contrary evidence, presume that a utility's spending is prudent. **This presumption of prudence affects who**

has the burden of proceeding, but does not change the burden of proof." (emphasis added)).

If it appears that the OPC is spending an inordinate amount of time discussing this point, it is only because the Commission has considered this issue before and unfortunately reached the wrong result. The *Report and Order* issued in case number EO-2011-0390 – the third prudence review of KCP&L Greater Missouri Operations Company (Now Evergy West)'s FAC – includes an extensive discussion of the issue of burden of proof in an FAC case. However, the legal conclusion reached in the *Report and Order* is clearly unsound.

The *Report and Order* starts off well by acknowledging correctly that "it is well settled law that in rate cases" the "utility has the burden of proof to justify its proposed rate increase;" but the *Report and Order* goes on to suggest this relationship is altered in an FAC prudence review case due to a fundamental misunderstanding of how presumptions work. *In the Matter of the Third Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of KCP&L Greater Missouri Operations Company*, EO-2011-0390, 2012 Mo. PSC LEXIS 865, *11 (Mo. P.S.C. September 4, 2012). Specifically, the *Report and Order* states:

> The general rule in Missouri is that when a party against whom a presumption operates introduces evidence controverting a presumed fact, that fact must then be determined from the evidence in the case as if there never was a presumption. This rule only shifts the burden of production, not the burden of persuasion. **GMO's burden, if Staff can demonstrate a serious doubt as to the prudence of its hedging costs, becomes one of production and not persuasion**.

> Consequently, Staff maintains the burden of persuasion and the overall burden of proof throughout this proceeding.

EO-2011-0390, 2012 Mo. PSC LEXIS 865 at *13 (internal quotations and citations omitted) (emphasis added). The problem here is that a presumption shifts the burdens of persuasion and production between the **parties**; not between the burdens themselves. BLACKS LAW DICTIONARY 1304 (9th ed. 2009); *Byous v. Mo. Local Gov't Emples. Ret. Sys. Bd. of Trs.*, 157 S.W.3d 740, 745 (Mo. Ct. App. 2005). Therefore, the *Report and Order* is clearly wrong when it states that the presumption of prudence (when overcome) shifts GMO's burden from one of persuasion to one of production. Instead, the presumption should be shifting the burden of production from either Staff to Company or from Company to Staff. *Id*. However, this runs directly into the next problem: the assertion that the Staff (the party alleging imprudence) maintains the burden of persuasion and the overall burden of proof. This creates an incongruity because, if Staff already had the burden of proof, then it also already had the burden of production. The presumption of prudence (which is clearly meant to work in the utility's favor), would therefore not shift *anything* onto the Company, as to do so would harm, not help, the utility.

The underlying problem in this *Report and Order* lies with the assumption it is clearly making that, because Staff is the asserting party, Staff must carry some burden. EO-2011-0390, 2012 Mo. PSC LEXIS 865 at *14 ("The Commission's Staff has levied allegations of imprudence against GMO, and it is Staff that is requesting relief in this matter."). What the *Report and Order* fails to account for, though, is that the Staff is only the asserting party **because** of the presumption of prudence. Absent

the presumption of prudence, the applicant utility would necessarily have to prove the prudence of each and every expenditure it seeks recovery for in the course of proving its rates are just and reasonable. *See Office of the Pub. Counsel v. Mo. PSC*, 409 S.W.3d 371, 376 (Mo. banc 2013). The presumption of prudence, however, permits the Commission to assume the expenditures are prudent and thus shifts the burden of production onto the party alleging imprudence to come forward and provide evidence to demonstrate a *prima facie* case of imprudence. *Id*. Stated differently, Staff in that case is only a challenging party because the burden of production has been placed upon it due the presumption of prudence, and, absent that presumption, Staff would not have had any burden or even be required to request any relief other than rebutting the Company assertions that its costs were prudent.

This idea that the presumption of prudence is shifting the burden of production from the Company onto the party alleging imprudence is something that the EO-2011-0390 *Report and Order* itself seems to grasp: "[a]s the charging party, Staff must first demonstrate serious doubt as to the prudence of GMO hedging costs in order to overcome the presumption of prudence and in order for the claim of imprudence to survive a summary determination." EO-2011-0390, 2012 Mo. PSC LEXIS 865 at *14; *compare* BLACKS LAW DICTIONARY 223 (9th ed. 2009) (**Burden of Production**: A party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgement or directed verdict."). Unfortunately, the *Report and Order*'s correct analysis of the effect the presumption of prudence has on shifting the burden

of production from Company to Staff is lost amidst its incorrect conclusion that Staff had the burden of proof (and by consequence the burden of production) in the first place. This can be seen again when it states: "[s]hould Staff succeed with overcoming the presumption of prudence, then, although GMO has a burden of production to dispel any serious doubt, Staff still bears the burden of proof to conclusively establish imprudence on GMO's part." EO-2011-0390, 2012 Mo. PSC LEXIS 865 at *15. As before, this makes no sense. If Staff initially has the burden of proof, then it already had the burden of production, so there would be no reason to employ the presumption of prudence in the first place. The only way to give any real effect to Staff "overcoming" the presumption of prudence would be if the presumption originally shifted the burden of production from the utility to the Staff and that Staff overcoming the presumption shifted the burden back in the opposite direction (*i.e.* back to the Company).

For all the reasons laid out herein, the Commission should reject the legal analysis presented in EO-2011-0390 as it relates to the burden of proof and instead employ the analysis found in EO-2017-0065, 2018 Mo. PSC LEXIS 106 at *25 and, HC-2010-0235, 2011 Mo. PSC LEXIS 1182 at *26-30. Evergy, the utility whose rates are in question, bears the burden of proof in this case to show those rates are just and reasonable, but it is entitled to a presumption of prudence that shifts the burden of production (and only the burden of production) from it onto the party alleging imprudence. EO-2017-0065, 2018 Mo. PSC LEXIS 106 at *25. Once that presumption is overcome, however, the burden shifts back to the Company. *Id.*

Having covered this much, we are still not entirely done. There are two last things to consider: the standard of proof and the prudency standard. We previously reviewed what the term "standard of proof" means, but there has not been any analysis as to what the standard actually is in this case. Sadly, there is not much case law to clarify this point. The issue *is* addressed directly in the EO-2011-0390 case, but, once again, there seems to be some significant confusion.

The *Report and Order* in EO-2011-0390 states:

> In order to carry its burden of proof, Staff must meet the preponderance of the evidence standard. This is the minimum burden in a civil case, and in order to meet this standard, Staff must convince the Commission it is "more likely than not" that GMO engaged in imprudent conduct related to its allegation that GMO imprudently used natural gas futures contracts as a means of mitigating risk associated with the costs of natural gas fuel for generation and spot market purchased power. It is important to recognize the proper standard for the burden of proof, because there is no burden of proof less than the preponderance of the evidence standard called "serious doubt" that would comply with the Constitutional requirements of due process.

EO-2011-0390, 2012 Mo. PSC LEXIS 865, at *15 (internal citations omitted). That would make it clear that the standard of proof is "beyond the preponderance of the evidence," which (as the *Report and Order* correctly point out) is the standard for almost all civil cases. *See*, *e.g.*, *Tate v. Dep't of Soc. Servs.*, 18 S.W.3d 3, 7-8 (Mo. App. ED 2000). There is a problem with this conclusion, however, in that the same *Report and Order* also states: "[i]n order to demonstrate serious doubt [regarding the presumption of prudence], Staff must introduce 'substantial controverting evidence' to rebut the presumption of prudence." EO-2011-0390, 2012 Mo. PSC LEXIS 865 at

*14 (internal citations and quotations omitted). The *Report and Order* then goes on to say:

> Finally, Article V, Section 18, of the Missouri Constitution requires the Commission to support its findings of fact and conclusions of law with substantial and competent evidence on the record as a whole. Consequently, for Staff to meet its burden of proof at the preponderance of the evidence standard, for its allegation of imprudence and its complaint allegations, it must do so with substantial and competent evidence.

EO-2011-0390, 2012 Mo. PSC LEXIS 865 at *19 (internal citation omitted). This raises an important question: how does the need to support the conclusion with "substantial and competent evidence" factor into the standard of proof?

The claim that the standard of proof is "beyond a preponderance of the evidence" is inherently incompatible with the requirement that a party present "substantial and competent evidence" to support its case, as the "substantial and competent evidence" requirement effectively elevates the standard of proof. The answer to this conundrum lies in comparing the "substantial and competent evidence" language to the already existing "clear and convincing evidence" standard of proof. "The clear and convincing standard refers to evidence that instantly tilts the scales in the affirmative when weighed against the opposing evidence, leaving the fact finder with an abiding conviction that the evidence is true." *Buescher Mem'l Home, Inc. v. Mo. State Bd. of Embalmers & Funeral Dirs.*, 413 S.W.3d 338, 342 (Mo. App. WD 2013) (quoting *State ex rel. Dep't of Soc. Servs., Div. of Child Support Enforcement v. Stone*, 71 S.W.3d 643, 646 (Mo. App. W.D. 2002)). Given the similarities between the phrases, the OPC asserts that the correct standard of proof

for this case **is** "substantial and competent evidence" and that this standard is functionally equivalent to the "clear and convincing evidence" standard.

The second issue that merits some discussion is the idea of the "prudence standard." Return again to EO-2011-0390, where the *Report and Order* states as follows:

> The "prudence standard" further qualifies how Staff must meet its burden of proof in relation to its allegations. To determine if GMO's conduct was imprudent, the Commission looks at whether the utility's conduct was reasonable at the time, under all of the circumstances, considering that the company had to solve its problem prospectively rather than in reliance on hindsight. More specifically, Staff must prove, by the preponderance of the evidence, that GMO's conduct was unreasonable at the time, under all of the circumstances, from a prospective viewpoint, not in hindsight. Additionally, "[i]f the company has exercised prudence in reaching a decision, the fact that external factors outside the company's control later produce an adverse result do not make the decision extravagant or imprudent. "
>
> In order for the Commission to direct a refund for any alleged imprudently incurred costs, it must apply a two-part test. The Commission must find both that: (1) the utility acted imprudently when incurring those costs and, (2) such imprudence resulted in harm to the utility's ratepayers. Harm to ratepayers in relation to imprudently incurred costs requires proof of causation, i.e., that the increased costs recovered from the ratepayers were causally related to the alleged imprudent action, and evidence as to the amount those expenditures would have been if the utility acted prudently.

EO-2011-0390, 2012 Mo. PSC LEXIS 865 at *19-21 (internal citations omitted). The OPC does not take issue with the conclusion reached in this excerpt, but feels it is necessary to discuss it here solely because the use of the term "prudence standard" has the potential to confuse the situation even further. The OPC would proffer that what is being referred to in this excerpt should not be considered a *standard* so much

as a representation of one of the *elements* for proving imprudence. The OPC makes this suggestion in the hopes that it will avoid further confusion between the term "prudence standard" and the terms standard of review, standard of proof, and burden of proof. Regardless of whether the Commission accepts this argument, though, the consideration alluded to in this excerpt is a necessary component of the overall prudence review process.

We have thus now covered in full the issues related to the standard and burden of proof in this case. First, there is no standard of review in this case because it is not an appeal. Second, the burden of proof lies with the utility who must prove its rates are just and reasonable. EO-2017-0065, 2018 Mo. PSC LEXIS 106 at *25; *Office of the Pub. Counsel v. Mo. PSC*, 409 S.W.3d 371, 376 (Mo. banc 2013). The utility has the benefit of a "presumption of prudence," however, that shifts the burden of production element of the burden of proof from the utility to the party alleging imprudence. EO-2017-0065, 2018 Mo. PSC LEXIS 106 at *25. The burden of persuasion and the ultimate burden of proof remains with the utility throughout the case. *Id*. The party alleging imprudence may overcome the burden of production placed upon it due to the presumption of prudence by a "showing of inefficiency or improvidence that creates serious doubt as to the prudence of an expenditure." *Office of the Pub. Counsel v. Mo. PSC*, 409 S.W.3d 371, 376 (Mo. banc 2013) (internal citations and quotations omitted). Once the burden is overcome, the presumption "drops out" and the applicant utility (who has to this point retained burden of persuasion and the ultimate burden of proof) "has the burden of dispelling these doubts and proving the questioned

expenditure to have been prudent." *Id*. The standard of proof to be applied in all these considerations is substantial and competent evidence, which "refers to evidence that instantly tilts the scales in the affirmative when weighed against the opposing evidence, leaving the fact finder with an abiding conviction that the evidence is true." *Buescher Mem'l Home, Inc. v. Mo. State Bd. of Embalmers & Funeral Dirs.*, 413 S.W.3d 338, 342 (Mo. App. WD 2013). Finally, the question of prudence must be reviewed by considering the utility actions "at the time, under all of the circumstances, from a prospective viewpoint, not in hindsight." EO-2011-0390, 2012 Mo. PSC LEXIS 865 at *19-21. This last requirement may be referred to as the "prudence standard." *Id.*

Issues Presented

The OPC will review the issues in the order they were listed in the joint filed *List of Issues, Order of Witnesses, Order of Opening Statements, Order of Cross-Examination and Joint Stipulation of Facts*. Because issues 1, 2, 3, and 7 have all now been resolved through stipulations filed in the case and approved by the Commission, they will not be addressed in this brief.

Issue 4: Was Evergy imprudent in the management of its demand response programs?

Yes. Evergy imprudently managed its demand response programs by failing to utilize those programs to reduce its FAC costs. Three things need to be understood for the Commission to reach the correct conclusion in this case:

(1) Evergy had the ability to call demand response events (otherwise known as curtailment events) when doing so would have reduced its energy costs;

(2) there were ample opportunities for Evergy to have called events in a manner that would have reduced its energy costs; and

(3) Evergy made no attempt to call any such events.

By failing to call the demand response programs when reasonable, Evergy imprudently increased the energy costs that it then flowed through to customers using its FAC. Let us now walk through each of these issues in turn.

A. Evergy had the ability to call demand response events when doing so would have reduced its energy costs.

A simple review of the tariff sheets for the demand response programs proves Evergy could have called demand response events if doing so would have reduced its energy costs. Consider, for example, PSC Mo. No. 2, Original Sheet Number 2.33, which governs the residential programmable thermostat program for Evergy Metro in effect for the prudence review period in question. Exhibit 204, pg. 13. Under the heading labeled "need for curtailment" the tariff reads as follows:

> Curtailments may be requested for operational or economic reasons. Operational curtailments may occur when any physical operating parameter(s) approaches a constraint on the generation, transmission or distribution systems or to maintain KCP&L's capacity margin requirement. Economic reasons may include any occasion when the marginal cost to produce or procure energy or the price to sell the energy in the wholesale market is greater than a customer's retail price.

Id. The language of the tariff clearly states that KCP&L (*i.e.* Evergy) was permitted to call curtailment events "for economic reasons" which are defined as "any occasion when the marginal cost to produce or procure energy or the price to sell the energy in

the wholesale market is greater than a customer's retail price." *Id.* Moreover, the same or nearly the same language is in the tariff for every other demand response program at issue in this case. *See Id*. at pgs. 3, 5, 15, 19, and 22. This means that Evergy was expressly allowed to call demand response program events when it would have result in reduced energy costs. Mantle, *Surrebuttal*, pg. 7 ln. 18 – pg. 8 ln. 7; Tr. pg. 280 ln. 21 – pg. 281 ln. 14; Tr. pg. 189 ln. 22 – pg. 190 ln. 2.

B. There were ample opportunities for Evergy to have called events in a manner that would have reduced its energy costs

One of the more important things to understand about this case is that, due to the way Evergy interacts with the regional transmission organization it belongs to (SPP), the Company stands to reduce energy costs and thereby save money just about any time that it can reduce its energy consumption. *See* Tr. pg. 183 ln. 18 – pg. 184 ln. 4. As explained by OPC witness Ms. Mantle during the evidentiary hearing: "anytime the cost of energy is above the cost of the demand response program, calling that demand response program will save the customers money, it will save energy that the customers do not have to pay for." Tr. pg. 278 ln. 24 – pg. 279 ln. 9.; *see also* Tr. pg. 191 lns. 4 – 14 ("Q. So any time where the cost of that energy that they're buying is positive and it costs them money to purchase it, would you agree that a reduction in the amount of energy they're buying is going to reduce their cost? A. To the extent that the cost of an incremental demand response call does not exceed that, I would say that is true.") While there is a small incremental cost to calling an event for **some** of the large customers operating under Evergy's tariffs, "there are no variable costs for the other participants in the large customer DR program or for the

residential and commercial participants." Mantle, *Surrebuttal*, pg. 11 lns. 25 – 27. This means that for the residential and commercial participants, at a minimum, the Company stood to reduce energy costs and save money when it called an event at **any** time the cost to purchase energy off the market was positive. The record clearly shows that there were numerous periods during the curtailment seasons for this prudence review period when the cost of energy was positive. *See* Ex. 13. Consequently, there were ample opportunities for Evergy to call demand response programs in a manner that would have reduced its energy costs during this prudence review period.

In addition to understanding why there were ample opportunities for the Company to call cost-effective demand response events, the Commission also needs to understand the difference between acting prudently and acting with **maximum** prudence. As Ms. Mantle explained during the evidentiary hearing, Evergy did not need to know which days were going to have the **highest** energy costs in order to act prudently. Tr. pg. 279 lns. 4 – 9. That information would only have been important if Evergy wanted to maximize the prudency of its behavior. *Id.* Understanding this is necessary for two reasons. First, the Company is almost certain to argue that the OPC is engaged in hindsight review in defense of its imprudent actions. Second, the Commission appeared to place un-due attention on the issue of hitting the load "peaks" during the evidentiary hearing. As to the first of these concerns, the OPC will address this argument at length in its reply brief, if necessary, but for now will simply point the Commission to the response the OPC's witness gave to the issue of hindsight. Tr. pg. 278 ln. 16 – pg. 279 ln. 3. Regarding the second, while the mitigation

of load peaks is important to reducing the Schedule 11 fees assessed by SPP, the Company still had an obligation to call the demand response program events in a manner that would have reduced energy costs even if they did not hit the peaks:

> Q. So even if they don't hit the peaks, even if they don't hit the highest prices, it's still imprudent if they don't try to even attempt to call them, the demand response events?
>
> A. If they do not attempt to call them, the customers lose. It's just that simple. By not doing anything, the customers lose.
>
> Q. [It's] that whole you miss a hundred percent of the shots you don't take scenario, right?
>
> A. Doing nothing is a choice.

Tr. pg. 286 ln. 9 – 18. So again, the critical question is not: "could Evergy have predicted when the highest energy prices were going to occur during the curtailment season and then call curtailment events at those times?" Instead, the question is more simply: "were there were **any** times during the curtailment season when the Company could have called a curtailment event in a manner that would have reduced energy costs?" The answer to that second question is an unqualified yes. *See* Ex. 13.

C. Evergy made no attempt to call curtailment events in a manner that would have reduced energy costs despite having the opportunity to do so.

During the evidentiary hearing, the OPC asked Evergy witness Mr. Brian File directly whether Evergy called any events for the economic reasons spelled out in its tariffs and the Company's witness responded that it did not. Tr. pg. 143 lns. 13 – 22. There really is nothing more to say. The Company had the express grant of authority to call demand response events for economic reasons as spelled out in its tariffs.

Exhibit 204, pgs. 3, 5, 13, 15, 19, and 22. There were numerous opportunities where calling such an event would have been economically reasonable, reduced Evergy's energy costs, and saved the Company's customers money. *See* Ex. 13. Instead of seizing these options, though, Evergy simply choose to ignore them. Tr. pg. 143 lns. 13 – 22. This simple yet unambiguous dereliction of due diligence is more than enough to overcome the presumption of prudence and render Evergy's failure to call such events imprudent. Tr. pg. 286 lns. 9 – 18; Tr. pg. 190 lns. 3 – 21.

D. Summation

Once again, this is an FAC prudence review case, not a MEEIA prudence review case. The Commission needs to think about this case in the same manner as it would any similar FAC case by answering the question of whether the utility utilized its available resources effectively to reduce FAC costs. For sake of comparison, consider a hypothetical utility who builds what is commonly known as a "peaker" plant, meaning a plant that was cheaper to construct but more expensive to operate and thus is only expected to be used to produce energy during peak hours. If this hypothetical utility failed to use the peaker plant during peak hours when it was economic to do so and instead opted to purchase energy at a higher cost, the Commission would have no problem finding the utility failed to make prudent use of its available energy resources. The demand response programs at issue in this case are effectively no different. The only real dissimilarity is the fact that the peaker plant is meant to produce more energy during periods of peak usage while the demand

response program is meant to reduce energy consumption during periods of peak usage. The effect on customers, however, is the same.

Evergy's failure to properly utilize these resources cost its customers money that the Company otherwise would not have needed to spend. That was imprudent.

Issue 5: Was it imprudent for Evergy to not call additional demand response events in a manner that would have reduced FAC costs?

In many respects, this issue is nothing but a reiteration of the previous issue. Therefore, the Commission should consider all the arguments raised with regard to the previous issue to be applied to this issue as well. Once again, Evergy was imprudent for failing to call additional demand response events in a manner that would have reduced FAC costs. Evergy had the express grant of authority to call events for economic reasons in its tariff. Exhibit 204, pgs. 3, 5, 13, 15, 19, and 22. There were numerous opportunities where Evergy could have reduced its FAC costs by calling such events. *See* Ex. 13. Evergy chose not to call any such events for economic reasons. Tr. pg. 143 lns. 13 – 22. This was imprudent.

There is little more that need be said on this issue, save perhaps for addressing the argument that Evergy is likely to raise in response. However, the OPC primarily chooses to address such arguments as part of its reply brief. There is one issue, though, that the OPC will address here. That issue is the number of additional events that the Company should have called.

Based exclusively on the tariffs that were in effect at the time of the prudence review period, Evergy had little restrictions to the number of events that it could call in the summer months of June through September.[2] Ex. 204 pg. 13 ("curtailment limits"). Specifically, the Company was permitted to call a curtailment event:

> any weekday, Monday through Friday, excluding Independence Day and Labor Day, or any day officially designated as such. A curtailment event occurs whenever the thermostat is being controlled by [Evergy] or its assignees. [Evergy] may call a maximum of one curtailment event per day per Participant, lasting no longer than four (4) hours per Participant. [Evergy] is not required to curtail all Participants simultaneously and may stagger curtailment events across participating Participants.

See, *e.g.*, *Id*. Based on this language, Evergy was really only restricted to calling one event every weekday save for the two federal holidays in the summer months. *Id.* This could obviously have resulted in well over fifty events being called during the curtailment period for each year under review. However, that is **not** what the OPC is advocating for in this case.

The OPC wishes to draw specific attention to this issue because it underlines a very important part of this case. Evergy witnesses testified how this program was only designed to allow for 15 residential and small commercial events and 10 large commercial and industrial events to be called. Tr. pg. 105 lns. 16 – 23; pg. 115 ln. 23 – pg. 116 ln. 3; pg. 138 lns. 3 – 10; see also pg. 133 lns. 9 – 21; pg. 31 lns. 3 – 6. This is obviously much less than what is allowed under the Company's tariffs. Yet the OPC is not taking issue with this in this case, despite what Evergy might argue to the

[2] The curtailment season.

contrary. Instead, the OPC is only asking the Commission to find Evergy was imprudent for failing to call the specific number of events that its own witness claims the program was designed to call (*i.e.* 15 residential and small commercial events and 10 large commercial and industrial events). *Id*. Hence, any argument that the Company might offer to the extent that calling more events will harm the underlying program (by encouraging greater opt-outs for example) is inherently undermined by the fact that the Company **designed** the program to allow for this many events to be called.

During the Evidentiary hearing, the Commission specifically asked Evergy witness Brian File about what customers can expect based on the contracts that are entered into:

> Q. Okay. One more clarification here. Just a second. So we talked about when the customers sign up for the programs and you said what all they were given. Let me just make sure I have this in the record. Are they given the specific parameters, for example, how many times they may have to be called to participate in the program?
>
> A. Yes.
>
> Q. Okay. So you believe with the contracts and the further communications with the customers both on the industrial side and on the residential side that they understand that they may be called upon to reduce their power for the total number of events in the contract?
>
> A. I believe they understand that those number of events are what's in the contract.

Tr. pg. 131 ln. 22 – pg. 132 ln. 12. Mr. File then went on to attempt to modify his answer by suggesting that customers will have a different expectation of how many events will actually be called based on the "intent" of the program. Tr. pg. 132 lns. 12

– 25. But this nonsensical attempted back-pedal does little to address the underlying point, which is that customers should be aware that they may be called upon to have up to ten or fifteen curtailment events each year depending on the terms of the contract. Requiring that Evergy call as many events as Evergy told customers they could expect to be called is not imprudent.

Evergy called two residential/small commercial events and two large commercial/industrial events during the summer of 2018. Tr. pg. 106 ln. 20 – pg. 107. In 2019, the Company again only called two large commercial/industrial events but increased the number of residential/small commercial events to a paltry five. Tr. pg. 107 lns. 7 – 14. Evergy could have called fifty events in total between these two years under the parameters of the demand response programs and the terms of the individual contracts; it called eleven. This was not prudent. Evergy had an obligation to its customers to maximize the benefits arising out of its demand response programs. Evergy not only failed to meet this goal of maximizing benefits, but, as pointed out by Staff Witness Mr. J Lubbert, "failed to even **attempt** to maximize it." Tr. pg. 190 lns. 20 – 21. (emphasis added).

The costs of the Company's failure are not insubstantial. Between the lost energy sales and the potential Schedule 11 fees that could have been avoided had Evergy acted prudently, the total cost as calculated by the OPC amounts to approximately $760,000.[3] Mantle, *Surrebuttal*, pg. 2. Moreover, this is a **very**

[3] This cost includes both the cost of energy the Company purchased from SPP that it otherwise would not have needed to if the demand response programs been utilized

conservative estimate, as it represents not even half of what the Company could have done. This is because the OPC only looked at calling five **hours** worth of events for each of the four months in the curtailment period of each year (meaning a total of twenty hours a year). Tr. pg. 245 ln. 19 – pg. 246 ln. 15. However, one hour does not equate to one event. For the residential/commercial thermostat programs, each event could last up to four hours. Tr. pg. 281 lns. 21 – 22. For the Industrial program, an event could be as long as eight hours. Tr. pg. 282 lns. 2 – 3. That means the OPC's twenty hours constituted only one-third of the total available hours for the residential/commercial thermostat program and one-fourth of the total time available for the Industrial program.

---

prudently and SPP assessed schedule 11 fees that would have been smaller had the demand response programs been utilized prudently. Schedule 11 fees recover costs associated with new transmission system investment in the SPP footprint. Mantle, *surrebuttal*, pg. 6 fn. 6; Tr. pg. 77 ln. 2 – pg. 78 ln. 14. "Schedule 11 fees are based on an average of the monthly peaks of the previous year." Mantle, *surrebuttal*, pg. 20 lns. 20 – 21.

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

Id. at pg. 21 lns. 11 – 15. Therefore, the more events Evergy called, the more likely it would have been to hit the system peak for any given month and save SPP fees. Tr. pg. 87 ln. 25 – pg. 88 ln. 2.

At the hearing, OPC witness Ms. Mantle explained how many actual events Evergy would have needed to call in order to achieve savings equal to the adjustment she proposed:

> Q. So for the 20 hours that you looked at, do you have an idea of how many events that would actually correlate to?
>
> A. When I -- I was careful that when I went and priced this out, and I calculated for summer of 2018, it would have been, I think, nine events and most of those events were an hour or two hours long. · They were not the full four hours that the Company could've called for. · And in 2019, it did get up to ten events, but, again, those were not -- each of those were not four hours long.

Tr. pg. 282 lns. 8 – 17. As one can plainly see, the OPC is asking for an adjustment that would have required calling far less events than what Evergy's own witness claimed was the maximum amount these programs were designed to allow. *See*, *e.g.*, Tr. pg. 105 lns. 16 – 23. This demonstrates how just a small change in Evergy behavior could have resulted in major benefits to its customers and further highlights how imprudent Evergy's decision not to even **attempt** to claim these benefits was.

Issue 6: If it was imprudent for Evergy to not call additional demand response events in a manner that would have reduced FAC costs, is it more appropriate to address the imprudent implementation of the programs through an ordered FAC adjustment or an ordered DSIM adjustment?

It is more appropriate for the *FAC costs* that Evergy imprudently incurred to be addressed through an FAC adjustment than through an ordered DSIM adjustment in a separate case. This answer should be self-evident. Suggesting that imprudently incurred FAC costs should be addressed outside of an FAC case is inherently illogical. As OPC witness Lena Mantle explained:

> [T]he utilization of Evergy's demand response programs can have a direct impact on the FAC. It is therefore reasonable and necessary that an FAC prudence review should include a review of the utilization of the available demand response programs.

Mantle, *Surrebuttal*, pg. 4 lns. 4 – 7; see also Tr. pg. 291 ln. 18 – pg. 291 ln. 2. To reach any other conclusion on this issue risks confusing the underlying purposes of the FAC and MEEIA prudence review processes.

As the OPC explained in the introduction to this brief, it is very important to understand the difference between this case and a MEEIA prudence review case. In a MEEIA prudence review case, the goal is to determine whether the funds previously allocated to the Company's MEEIA portfolio were prudently spent. This includes questioning whether the administrative and overhead costs associated with the MEEIA program were reasonable and determining whether the cost of employing the demand response programs were prudently incurred to meet the stated MEEIA objective. In the FAC, by contrast, none of these questions are relevant. It does not matter what the administrative costs of operating the demand response programs are for purposes of the FAC because those costs do not flow through the FAC. Likewise, the question of whether the sunk-costs of the demand response programs were prudently employed does not matter in an FAC prudence review because, again, those are not FAC related costs. There are, on the other hand, issues raised in this FAC prudence review that *are* specific to the FAC.

The OPC's argument in this FAC case is premised on Evergy's conscious decision not to even **attempt** to employ its demand response programs for the

"economic reasons" stated in the relevant tariffs. Exhibit 204, pg. 13. These economic reasons are separate and distinct from the capacity reduction rationale that underlies the MEEIA program. *Id.* (note the ability to call "operational curtailments," which are the curtailments meant to serve the purpose of the MEEIA program). Moreover, it is substantially less sensible to raise the question of whether a utility should have sought to use its demand response programs to achieve benefits in the form of general energy cost reductions in the MEEIA prudence review case (which does not concern general energy costs) as opposed to the FAC prudence review case (which is dedicated almost excessively to the prudency of incurred energy costs).

This issue stems from the tunnel vision that has developed in the minds of certain other parties to this case who fail to appreciate that the imprudent operation of Evergy's demand response program can have effects that ripple across multiple rate mechanisms. As Ms. Mantle explained during the evidentiary hearing:

> Q. Could the failure to properly utilize a program create costs that should flow to the FAC even if the underlying program was pursuant to a separate statute or a separate recovery mechanism?
>
> A. Definitely, just as the building -- or the inefficient utilization of a power plant. Those costs flow through regular rates. Inefficient use of that [power plant], causes increase[d] costs in the FAC. Again, they're both resources similar in that the initial capital costs are recovered through different mechanisms that [then] effect the FAC.

Tr. pg. 291 ln. 18 – pg. 291 ln. 2. Just as Ms. Mantle describes, the failure to properly **use** these demand response programs resulted in an imprudence that flowed through the FAC that is *independent* of any imprudence in the management of the underlying MEEIA. To get a better picture of this, let us consider an analogy.

Imagine for a moment a man who owns a house with extensive back and front yards. This man buys a riding lawnmower with the intent of using it to mow his back yard. He justifies this purchase to his wife by arguing that the cost of purchasing and using the mower will be less than the cost of hiring a landscaping crew to take care of his back yard (and we will assume that he is correct and that his purchase is therefore prudent). However, this man, despite now owning a riding lawnmower, still decides to hire a landscaping crew to come and mow his front yard on a weekly basis. This, his wife argues, is imprudent. Specifically, she argues that it is imprudent because it would be substantially cheaper to mow the front-yard with his new riding lawnmower than it is to pay the landscaping crew (again let us assume her math is right). His wife is clearly correct.

Even if it was prudent to buy the lawnmower to manage the back yard, the man still acted imprudently when he failed to use the lawnmower to manage the front yard and instead incurred higher costs. In the exact same way, Evergy may have been prudent in how it used the demand response programs to meet its MEEIA objectives, but the Company still acted imprudently when it failed to use the demand response programs to reduce energy costs. Moreover, this second form of imprudence effects only costs that would otherwise flow through the FAC. Because the imprudence alleged effects costs that flow through the FAC and because the imprudence exists independently of whether the Company exercised prudence meeting its MEEIA objectives, this issue should be resolved in the FAC prudence review case and not the concurrent MEEIA prudence review case.

Conclusion

The Commission handed Evergy a tool in the form of demand response programs as part of its MEEIA application. The Utility argues that because it used this tool the smallest number of times it could possibly get away with in order to justify its existence, it is absolved of any duty to even **attempt** to make further use of the tool. This is wrong. Evergy had an obligation to act prudently and use every tool at its disposal to mitigate the fuel costs that it intended to pass onto its customers with the FAC. This included calling demand response programs when it was economically reasonable to do so as spelled out in Evergy's tariffs. Exhibit 204, pgs. 3, 5, 13, 15, 19, and 22. There were numerous times during this prudence review period where calling events in such a manner would have reduced Evergy's energy costs and saved the Company, and more importantly its customers, money. *See* Ex. 13. Evergy did not make even the slightest attempt to utilize the demand response programs in this manner. Tr. pg. 143 lns. 13 – 22. This decision to waste the tool and incur unnecessary costs was imprudent.

The OPC can already guess several of the excuses that Evergy is sure to raise as it attempts to ameliorate the careless failure arising from its inexcusable behavior, but the OPC will reserve its response to these apologist pretexts for the reply brief. Instead, the OPC will leave the Commission with this one final thought. No matter what Evergy might claim, the true reason it did not attempt to call demand response events for economic reasons is simply because there is no real profit for the Company to do so. The lion's share of benefits that would arise from prudent application of the

demand response programs will normally pass thorough the FAC and ultimately be enjoyed by the Utility's customers. Evergy, however, does not appear to mind foregoing the obvious and easily attainable customer benefits that would come with calling more demand response program events. It is thus only the Commission who can force Evergy to behave prudently. The OPC hopes that this Commission will adhere to its duty to the public and find Evergy imprudent in this case.

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

/s/ John Clizer