BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Evergy Missouri West, Inc. d/b/a Evergy Missouri West's Request for Authority to Implement a General Rate Increase for Electric Service	)))))	Case No. ER-2024-0189

REPLY BRIEF OF THE MISSOURI OFFICE OF THE PUBLIC COUNSEL FOLLOWING SUPPLEMENTAL EVIDENTIARY HEARING

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Introduction

The OPC, the Public Service Commission's Staff ("Staff"), and the Midwest Energy Consumer's Group ("MECG") all share generally similar positions on the one issue now before the Commission and this is reflected in the parties' filed initial briefs. Given this, the OPC's reply brief will omit reference to the brief of Staff or MECG, unless deemed necessary, in order to prevent unhelpful redundancies. That leaves only one brief for the OPC to respond to: the initial brief of Evergy Missouri West, Inc. ("Evergy" or "the Company").

Evergy makes many statements over the course of its brief that the OPC would generally disagree with. However, to demonstrate the inaccuracy of these many claims by refuting the Company's brief in a line-by-line manner would be excessive and counterproductive. Therefore, the OPC will restrain its response to addressing only the four most critical points from Evergy's brief and then quickly addressing one point that has arisen due to facts disclosed in the hearing. In doing so, though, the OPC would ask the Commission to recognize that the decision not to respond to any one statement made in Evergy's brief (or any other brief for that matter) does not represent tacit agreement by the OPC. Stated again, the OPC's decision not to respond to any statement, section, argument, or other portion of any other brief is neither a sign of agreement by the OPC nor even an inference that there is no counter-argument to be made. It is rather a decision taken to ensure this reply brief remains manageable in size.

Addressing Evergy's Faulty Legal Argument Regarding Advisory Opinions

Beginning at page seven of its initial brief, Evergy lays out its legal argument for why the decisions it is now asking the Commission to make would not constitute an advisory opinion. Given the degree to which the OPC's initial brief addressed this point, the OPC will devote significant time to refuting the Company's argument. To accomplish this, the OPC will start by addressing this portion of Evergy's brief paragraph by paragraph.

The first substantive paragraph of Evergy's brief begins on page seven with the sentence "Evergy Missouri West will take action if the PSC decides Issue 5.C." This statement and, the sentences following that detail what actions the Company will take, do not merit response. The second paragraph begins by addressing what will happen if the Commission correctly determines that it would be an advisory opinion to address the prudency of renewing a contract that does not expire until 2029. Here the Company threatens that, should the Commission not render the decision Evergy demands, the Company will not renew the service agreement contract and further insinuates that this will be entirely the result of the Commission's decision. What Evergy has said is wrong.

There are significant reasons for the Company to renew the firm point-to-point transmission service agreement even if the Commission declines to rule on the prudency of that decision in this case. A full explanation of those reasons is presented below in the section title "Addressing Evergy's Threat." [*see infra* pg. 30]. For now, it is sufficient to say that Evergy's decision not to renew is wholly and totally a product of its management's own choices and is in no way the responsibility of this Commission. Again, there are strong reasons (addressed below) for why Evergy should renew the service agreement – even if the Company does not receive transmission costs – and it is Evergy and only Evergy who is deciding to ignore those factors if

the Commission correctly determines that what is now before it constitutes a request for an advisory opinion.

Evergy's next paragraph begins on page eight and initiates Evergy's attempt at actual legal analysis by trying to draw a parallel between the current situation and the Missouri Supreme Court's decision in *State ex rel. Ag Processing, Inc. v. PSC* (hereinafter "*AG Processing*"). While making this comparison, however, Evergy selectively ignores a major point that demonstrates the dissimilarity between these cases. Specifically, while Evergy correctly identifies that *AG Processing* was a merger and acquisition case (wherein UtiliCorp United, Inc. sought to acquire St. Joseph Light & Power Company), it omits and ignores that this fact set the standard by which the Commission's decision had to be made. As the Missouri Supreme Court itself explained:

> Having found the PSC's decision to be lawful, the Court must examine its reasonableness. Reasonableness turns on the standard used to evaluate a merger subject to approval by the PSC, which is whether or not the merger would be "detrimental to the public."

[*State ex rel. AG Processing, Inc. v. PSC*, 120 S.W.3d 732, 735 (Mo. banc 2003) (emphasis added)]. This is essential because the Supreme Court's reversal depended on the fact that addressing the future impact of the acquisition premium was necessary to meeting this standard. Again, as the Court explained:

> The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. The PSC's refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve the merger.

[*Id*. at pg. 736 (emphasis added) (internal citations removed)]. The significant differences in the applicable standard between the merger and acquisition case at play in *AG Processing* and the present rate case is what makes the Company's comparison inapposite.

In a merger and acquisition case, the central question before a Commission is whether the proposed acquisition should be approved. To answer that question, the Commission must consider whether it would be "detrimental to the public." [*Id*. at 735]. To determine whether a transaction would be "detrimental to the public," it is necessary to consider the long-term rate impact any potential acquisition premium might have on said "public" because that is the only way to know whether said acquisition premium would pose a detriment. [*Id*. at 736 ("[the Commission] can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public.)" (emphasis added)]. However, the same does not apply to the present case because this case is not a merger and acquisition, but rather, a general rate increase request case. [s*ee* Tr. vol. 9 pg. 80 lns. 16 – 17].

The standard for a general rate case is whether the rates being set are "just and reasonable." [*see*, *e.g.*, Mo. Rev. Stat. §393.130.1 ("All charges made or demanded by any such . . . electrical corporation . . . for . . . electricity . . . shall be just and reasonable . . . .) (emphasis added); *In re in re Union Elec. Co. v. Mo. Pub. Serv. Comm'n*, 591 S.W.3d 478, 481 (Mo. App. W.D. 2019) ("Missouri established the PSC and requires a "just and reasonable" rate structure mandated under § 393.130.1 . . . .")]. The prudence issue now before the Commission concerns costs that could only be placed into rates in the future. [*see*, *e.g.*, Tr. Vol 9 pg. 82 lns. 3 – 8]. Consequently, the outcome of this decision does not and cannot alter whether the rates being set in this rate case are "just and reasonable." Therefore, determining the prudency of the future renewal of the Crossroads

service agreement is definitively not necessary for the Commission to reach the standard on which it must make its determination in the present case. This distinguishes the present case from the Supreme Court's decision in *AG Processing*.

The next paragraph of Evergy's brief, which begins at the bottom of page eight, seeks to argue that the resolution of the present issue does not turn on hypothetical facts (or as the Company phrases it, is "not based on a hypothetical situation."). There are several points to address here. First, Evergy offers the line "[t]he Signatories expressly agreed to a means to resolve the Crossroads transmission issue in the Stipulation." This is wrong. What the signatories actually agreed to was stated in the stipulation: "[f]or purposes of this rate case, the Signatories agree to an extension of Issue 5.C. from the Commission's List of Issues . . ." [Stipulation page 2 (emphasis added)]. The OPC will return to this point when it becomes a larger issue later in the Company's brief. For now, the OPC simply points out that there was never an agreement that the demobilization study would "resolve" the Crossroads issue and there is literally nothing in the stipulation or issue 5.C regarding transmission costs.

The second problem begins with the sentence that reads: "[w]hether the Commission determines renewal is prudent or imprudent, a decision will provide certainty and legal 'relief' to EMW because such a decision will directly affect EMW's resource planning decisions." This is wrong on two fronts. First, the Commission's decision in this case cannot legally bind a future Commission, as was discussed at length in the OPC's initial brief. [ER-2024-0189, *OPC Initial Brief*, pgs. 15 – 18 (EFIS Item No. 499)]. As such, there is, legally speaking, no "certainty" that can be granted to Evergy in this case. Second, for the reasons discussed at length below, a ruling that renewing the Crossroads transmission service agreement is prudent does not and should not result in the transmission costs incurred related to that agreement being deemed "prudently

incurred" and thus recoverable by Evergy. [*see infra* pg. 18]. Again, for the reasons that the OPC provides below, an abstract finding that it is prudent to renew some form of service agreement does not resolve the cost recovery of the transmission costs associated with Crossroads in any way, shape, or form and hence provides no certainty or relief. The remaining legal citations in Evergy's brief are just to general statements of what an advisory opinion is without meaningful analysis as to how those citations apply to the present case, so the OPC will not respond to them.

The next four paragraphs of Evergy's brief need to be addressed somewhat together. Beginning on page nine, Evergy devotes two paragraphs to outlining the legal standard for when an issue is ripe for judicial review and leans heavily on the United States Supreme Court decision of *Abbott Laboratories v. Gardner* (hereinafter "*Abbot Laboratories*"). However, the Company offers no application of this standard to the facts of this case in those two paragraphs. The next paragraph, beginning on page ten, then cites to the terms in the stipulation in an attempt to reach a conclusion that it was "the Signatories' clear intent" that the issue is ripe and appropriate for decision. The last paragraph then seems to attempt to bridge the gap by bringing back the language the US Supreme Court applied in *Abbot Laboratories*. In responding to these four paragraphs, it is thus necessary to address and refute two separate points: (1) the idea that the signatories to the stipulation agreed that the Commission should decide the prudency of renewing the service agreement in this case, and (2) that *Abbot Laboratories* is comparable to the present case.

To begin with the first point, the OPC has never agreed that the Commission should decide the prudency of renewing the service agreement in this case and that is certainly not what the Stipulation dictates. First, the OPC points to its filed position statement with regard to issue 5.C (the issue now before the Commission) as it appeared <u>before</u> the Commission ruled on and approved the stipulation. The critical segment of that statement reads as follows:

> C. In this case, should the Commission determine it is prudent for Evergy to renew its firm point-to-point transmission service agreement with Entergy Corp. before it expires in February 2029?
>
> Position: No. 'It should remain silent regarding the renewal of the transmission contract for that is an Evergy West management decision."

[*Public Counsel's Statement of Positions*, Pg 11 (EFIS Item No. 244) (emphasis added) (internal citations omitted)]. The OPC made it very clear that its position is – and always has been – that it was inappropriate for this Commission to rule on the prudency of renewing the transmission service agreement as part of this case. In light of this fact, when the OPC agreed to the extension for issue 5.C as part of the stipulation, the OPC made sure that language was included that would preserve its ability to argue that the Commission should not render a decision in this case. Specifically, the stipulation states: "[a]t the time of such hearing the Signatories will not be limited in presenting their arguments on the Crossroads issues." [*Unanimous Stipulation and Agreement*, pg. 4 (EFIS Item No. 264) (emphasis added)]. It was never the OPC's belief or intent that the Commission should render a decision on the prudency of renewing the Crossroads transmission agreement and the OPC therefore included language in the stipulation to ensure the ability to argue it was inappropriate for the Commission to render such a decision. This includes the present argument that this is a request for an advisory opinion.

Turning now to the application of *Abbot Laboratories*, a careful review of the case shows that it, much like *AG Processing* discussed above, is nothing like the present situation. As Evergy does correctly state, the *Abbot Laboratories* case concerned a pre-enforcement challenge to a Federal Drug Administration regulation requiring that labels and advertisements for prescription drugs include the corresponding generic name of a drug. [*Abbott Labs. v. Gardner*, 387 U.S. 136, 137-38 (1967)]. The pertinent part of the case for this issue comes where the Supreme Court

determined that it was necessary to determine whether the issue was "'ripe' for judicial resolution" before an injunctive and/or declaratory judgment could be ordered. [*Id*. at pg. 148]. To that end, the Court had this to say:

> Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

[*Id*. at pgs. 148 – 49 (emphasis added)]. Right off the bat, it should be noted that the underlying rationale of the Supreme Court, as stated, is premised on protecting administrative agencies from overreach by judicial bodies, and not on establishing the basis for ripeness before those administrative bodies. But what is more important is the way the Court determined the issue before it was "fit" for "judicial decision."

The *Abbot Laboratories* court identified two distinct bases for concluding that issue before it was "fit" for judicial determination. First, the Court relied on the fact that "all parties agree that the issue tendered is a purely legal one: whether the statute was properly construed by the Commissioner to require the established name of the drug to be used *every time* the proprietary name is employed." [*Id*. at pg. 149 (emphasis in original)]. The Court went on to note:

> It is suggested that the justification for this rule might vary with different circumstances, and that the expertise of the Commissioner is relevant to passing upon the validity of the regulation. This of course is true, but the suggestion overlooks the fact that both sides have approached this case as one purely of congressional intent, and that the Government made no effort to justify the regulation in factual terms.

[*Id*. (emphasis added)]. It should be immediately obvious that the present issue is not at all similar to the situation in *Abbot Laboratories*.

The prudency question now before the Commission is absolutely not a question "purely of congressional intent," but rather is a very fact-based question as demonstrated by the extensive testimony evidence provided in the case. Moreover, there are numerous facts that are not known (and cannot be known) at this time, as discussed in the OPC's initial brief. [ER-2024-0189, *OPC Initial Brief*, pgs. 12 – 15 (EFIS Item No. 499)]. This includes, most importantly, the length of time for which Evergy is proposing to renew the transmission service agreement, which testimony evidence shows has a direct and possibly profound impact on the prudency of the decision. [Tr. vol 9 pg. 127 ln. 21 – pg. 128 ln. 2; pg. 133 lns. 17 – 21].

The second reason that the *Abbot Laboratories* Court determined the issue before it was "fit" for "judicial decision" was that the Court found "the regulations in issue . . . to be [a] 'final agency action' within the meaning of § 10 of the Administrative Procedure Act . . . ." [*Abbott Labs*, 387 U.S. at 149]. Again, as the Court explained:

> The regulation challenged here, promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties is quite clearly definitive. There is no hint that this regulation is informal, or only the ruling of a subordinate official, or tentative. It was made effective upon publication, and the Assistant General Counsel for Food and Drugs stated in the District Court that compliance was expected.

[*Id*. at pg. 151 (internal citation omitted)]. And again, it should be quite clear that the present case bears no similarity to what the *Abbot Laboratories* Court just described. There is no "final agency action" at play in this case. In fact, not only is there no "agency action" at all. There is not even a "final action" on the part of the utility in this case because the Company is seeking a prudence determination before the contract at issue is defined and renewed. Further, nothing this

Commission could do with regard to this case could possibly be considered "quite clearly definitive" because, as the OPC presented at length in its initial brief, the Commission's decision here cannot bind a future Commission. [ER-2024-0189, *OPC Initial Brief*, pgs. 15 – 18 (EFIS Item No. 499)].

For all the reasons just expressed, the *Abbot Laboratories* case has no bearing on the present issue as it is completely unlike what is now before this Commission. The remaining portion of the Company's brief that is devoted directly to arguing that this is not a request for an advisory opinion just returns to pointing out that that the Company intends to rely on the Commission's decision moving forward. Evergy argues that its own intent to rely on the Commission's decision must make the issue one of "sufficient immediacy" rather than hypothetical. But the problem, as already expressed, is that this is clearly Evergy's choice and that the Commission is not and cannot bind itself based on the decisions rendered in this case. For these reasons, Evergy's legal arguments should be dismissed.

Having covered the full breadth of what Evergy had to say in the section directly addressing whether this is a request for an advisory opinion, the OPC turns to addressing similar legal claims made elsewhere in Evergy's brief. Specifically, on page thirteen of its brief, the Company cites to Commission case WA-97-46, wherein "Missouri-American Water Company ("MAWC") sought a certificate of convenience and necessity ("CCN") to build a new treatment facility in St. Joseph and related supporting infrastructure[.]" If you take what the Company offers at face value, it would appear that the Commission decided in that case to grant a pre-emptive determination similar to what Evergy requests now. Reading the actual *Report and Order* issued by the Commission, however, shows the Commission reached what is effectively the exact opposite conclusion.

As part of its application in case WA-97-46, MAWC included "a request that the Commission make a finding that there is a need for the proposed project and that the alternative selected by MAWC is the most appropriate and cost effective method of addressing this need." [WA-97-46, *Report and Order*, pg. 7 (EFIS Item No. 80)]. The Commission referred to this request as "a finding of prudence or project pre-approval." [*Id*.]. Moreover, the issues presented for the Commission's determination specifically included: (1) Is it appropriate for the Commission to determine the prudence of the proposed project?; and (2) If so, is the project selected by MAWC reasonable and prudent? [*Id*.]. In response to that request and those listed issues, this Commission ruled as follows:

> In the regulation of monopoly providers, one of the basic functions of this Commission is to stand in the stead of competition. The Commission performs this function principally in the context of a rate proceeding, authorizing recovery through rates of only those costs which were prudently incurred, that is to say spent as if the utility were operating in a competitive environment. This places a proper amount of risk on the regulated utility to manage its decisions and funds as if it were in a competitive environment. The Commission finds that pre-approval of the actual costs incurred and the management of construction of the proposed project would upset this balance. The Commission is reluctant to assume the role of utility management in the decision-making process. This is true for large projects such as this one and for decisions made on a day- to-day basis. The Commission stated in order of rulemaking, December 4, 1992, Case No. EX-92-299, as follows:
>
> > In reviewing this matter, the Commission has considered numerous factors and arguments, both in favor and against initiation of plan pre-approval, and has substantial concerns regarding several key issues. First, serious statutory and precedential issues exist as to the Commission's authority to engage in what may be termed single-issue ratemaking, the preallocation of costs, and the granting of a presumption of prudent action by utility management. Secondly, the Commission is wary of assuming, either directly or in de facto fashion, the management prerogatives and responsibilities associated with strategic decision making, preferring to allow utility management the flexibility to make both overall strategic planning decisions and more routine management decisions in a relatively unencumbered framework.

> Therefore, the Commission will make no finding regarding the prudence of the actual costs incurred and the management of construction of the proposed project.

[*Id*. at pg. 10 (emphasis added)]. As can be seen, this Commission emphatically denied MAWC's request to determine the prudence of its application before the project had begun.

The Commission's decision in case WA-97-46 directly supports the OPC's position in the present case that the Commission should not rule on the issue of prudency. This is true both in terms of the direct outcome (wherein the Commission declined to make any finding of prudency) and the rationale espoused by the Commission. That rationale, which remains as true today as it was when this opinion was issued in 1997, also directly reflects the position that the OPC took in its initial position statement as referenced above. [*see supra* pg. 9]. It should be plain to see that this case does not support the Company's argument but rather refutes it.

From this point the Company then turns to addressing how the CCN case impacted the later MAWC rate case where the Company sought rate recovery for the new treatment plant. Apart from making numerous claims regarding the prudence standard (which are largely benign), Evergy states on page fourteen of its brief that, "[w]hile the Commission found the decisions to build the plant and to recover its costs were prudent, its decision three years before in the CCN case laid the critical foundation for that conclusion when it determined that MAWC's proposal to build the plant was 'a reasonable alternative.'" [(emphasis added)]. Once again, review of the Commission's order in that later rate case paints a much different picture. Specifically, this Commission stated the following:

> As a preliminary matter, MAWC contends that this prudence issue has already been litigated and determined by the Commission in MAWC's favor. MAWC is incorrect and evidently misunderstands the Commission decision upon which it relies.
> . . .

> MAWC attempted in that case to also secure preapproval by the Commission of the project. However, after a lengthy analysis, the Commission refused to preapprove the project . . .
> . . .
> This language, together with the reservation of ratemaking treatment in Ordered Paragraph No. 5, already quoted in full herein, make it plain that the Commission purported to do no more in Case Nos. WA-97-46 and WF-97-241, than to grant a certificate of public convenience and necessity and to approve a proposed scheme of financing.

[WR-2000-28, *Report and Order*, pgs. 39 – 40 (EFIS Item No. 260)]. While the Commission did ultimately find the St. Joseph water treatment plant prudent, it did so only after relying extensively on the testimonial evidence presented at the hearing in the rate case, as shown in the three solid pages of discussion given over to that subject. [*Id*. at pgs. 42 – 44]. The actual language of the report and order shows definitively that this Commission did not rely on the prior order issued in WA-97-46 as the basis of its determination and actually explicitly rejected that notion. This is a direct contravention of what Evergy would have the Commission believe.

Evergy's next effort to ground their request in Commission precedent is a reference to the approval of a non-unanimous stipulation and agreement regarding the resource plans of Kansas City Power & Light Company (KCPL) in 2005, which begins on page fifteen of the Company's brief. The short version of this reference is that some of the parties in that case agreed not to dispute portions of KCP&L' s "Experimental Regulatory Plan" in a future rate case. Frankly the OPC does not even understand how an agreement between parties in a rate case to not dispute certain aspects of a regulatory plan supports the contention that the Commission has the power to determine the prudency of a proposed future contract renewal as these appear to be completely unrelated issues. Also, Evergy's brief points out that, in approving the stipulation, the Commission directly found that it contained nothing "which commits the Commission . . . to a preapproval of rates" and that the signatories retained the ability to "challenge any conduct they believe is imprudent." This

would again be the exact opposite of what Evergy is seeking in this case as the Company's entire position is dependent on foreclosing the ability of other parties to challenge the prudence of renewing the transmission service agreement moving forward and to ensure that it is permitted to recover those costs in rates.

As a very last point, Evergy argues on page seventeen of its brief that there is "general support" for the Commission determining the prudence of the contract renewal in this case because "the PSC has regularly issued policy guidance to Evergy in its decisions which did not affect or modify existing rates or tariffs." Evergy supports this with two citations to what is effectively Commission *obiter dicta*. [*Swisher v. Swisher*, 124 S.W.3d 477, 482 (Mo. App. W.D. 2003) ("Obiter dicta, by definition, is a gratuitous opinion. Statements are obiter dicta if they are not essential to the court's decision of the issue before it." (quoting *Richardson v. Quiktrip Corp.*, 81 S.W.3d 54, 59 (Mo. App. W.D. 2002))]. It is well understood that such language is neither binding nor precedential. [*Id*. ("While dicta can be persuasive when supported by logic, it is not precedent that is binding upon us.")]. This is, again, not the same as what Evergy is requesting, which is a binding determination of prudence backed by multiple other requests designed to ensure it will recover Crossroads transmission costs from its customers in the future.

The OPC believes that this should now cover the full range of the legal analysis that Evergy undertook in an attempt to establish that its request for pre-determination of the prudency of renewing the Crossroads transmission service agreement is not a request for an advisory opinion. As the OPC has hopefully now shown, that analysis is fatally flawed. The cases that Evergy relies upon are either inapplicable or directly contravene what Evergy is now arguing. At the same time, Evergy cannot hope to overcome the twin central problems which are: (1) that the outcome of the prudence determination requested in this case will have no impact on the rates being set in this

case; and (2) that the outcome of the prudence determination requested in this case will not produce the binding guarantee that Evergy will be permitted to recover transmission costs related to Crossroads from ratepayers in some future case, which the Company is so desperate to receive. And, as the OPC laid out in its initial brief, and will not reiterate here, it is these two major issues that render the requested decision in this case an illegal advisory opinion.

This Commission should therefore refrain from issuing an order that either affirms or denies the prudence of the renewal of Evergy's firm point-to-point transmission service agreement related to Crossroads.

Addressing Evergy's Inaccurate Legal Argument Regarding Prudency

Having addressed the legal argument regarding why the Commission cannot render the requested decision *in this case*, the OPC now reaches an odd juncture in responding to the Company's initial brief. The problem is that the next section of Evergy's brief (which begins on page eleven and continues to page twenty-five) is given over to an extensive argument as to why it is prudent for Evergy to renew its transmission service agreement. This is a problem simply because, contrary to what one would expect from the issue as written, the "prudency" of renewing the Crossroads transmission service agreement is not and has never been the true basis of the dispute between the parties. This means there is actually very little reason to argue over whether it is "prudent" for Evergy to renew the transmission service agreement. So, instead of reviewing the Company's arguments for why the service agreement should be renewed, the OPC will attempt to address the real problem head-on.

Any person who has read the filed testimony, position statements, and initial briefs (or who has viewed the opening arguments for the case) should understand that the real problem regarding Crossroads is the transmission costs associated with it. Evergy is currently paying those transmission costs with shareholder money because this Commission found "that including the Crossroads transmission costs [in rates] does not support safe and adequate service at just and reasonable rates[.]" [Ex. 280, *Direct Testimony of Keith Majors*, pg. 32 lns. 39 – 43; Ex. 300, *Direct Testimony of Lena M. Mantle*, pg. 40 ln. 17 – pg. 41 ln. 18]. Evergy wants to reverse this Commission's determination and so has now developed a plan designed to trick the Commission into reaching a different conclusion than what it has previously reached in two separate cases. [Ex. 300, *Direct Testimony of Lena M. Mantle*, pg. 40 ln. 17 – pg. 41 ln. 18]. That plan hinges on an inaccurate legal argument surrounding the nature of the requested prudency determination and the

implications it would bring. To properly address that argument, it is therefore necessary to begin with addressing the Company's misapplication of prudency.

Evergy's argument for why it should be allowed to recover transmission costs related to Crossroads from ratepayers in a future rate case (following a renewal of the transmission service agreement) is fairly basic and can be pieced together from the arguments raised in its brief. Reduced to its simplest form, the argument is essentially this:

1. Evergy should be allowed to recover prudently incurred costs in rates
2. Renewal of the service agreement is prudent
3. Therefore, the transmission costs arising from the service agreement are prudently incurred costs
4. Therefore, Evergy should be allowed to recover those costs in rates.

This argument may appear sturdy on its face, but it is actually quite wrong. Specifically, it is wrong because renewing the service agreement constitutes a remedial action necessary to cure the harm caused by Evergy's prior decisions and the costs of such remedial actions are not prudently incurred even if the action itself is prudent. This is a somewhat complex idea that merits additional discussion.

Prudency of Remedial Actions

A remedial action is one undertaken with the intention " to correct something that is wrong or to improve a bad situation." [*Remedial Definition*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/remedial (last visited Dec. 5, 2025)]. If the term is applied in the context of utility regulation, a remedial action becomes an action undertaken by a utility to correct or improve a bad situation arising from that same utility's past imprudence. What is critical to understand, however, is that the costs associated with a remedial action <u>are only</u>

incurred because of the prior imprudence. This is a necessary conclusion because, if there was no prior imprudence, then there would be no need for the remedial action. Therefore, the costs associated with the remedial action must be considered directly caused by the imprudence that drove the need for remediation. And if the cost of the remedial action is driven by the impudence that necessitated remediation, then those costs are imprudently incurred, even if the act of remediation is itself prudent. This is the all-important point to understand:

> **The costs arising from a remedial action taken to redress past utility imprudence are imprudently incurred even if the remedial action itself was prudent because the need for the remedial action was directly caused by the prior imprudence.**

The OPC would hope that the given explanation makes clear the logic of the preceding statement. But just to ensure understanding, the OPC will offer an illustrative example.

Imagine an electric utility that directly and purposefully ignores recommended maintenance on a combustion turbine generator. The lack of maintenance directly results in a fire that damages the turbine and the facility housing it. This should be considered an unquestionably imprudent decision by the utility and will have resulted in significant costs related to the damage caused by the fire. However, there are other harms arising from this imprudence as well. This is because the utility is also part of a regional transmission organization ("RTO") and was relying on that combustion turbine unit to meet the RTO's imposed capacity requirements. Thus, because of the fire, the utility will now also need to acquire additional capacity in some form or risk penalties imposed by the RTO. The utility therefore decides to bring online another combustion turbine unit that it owns but that had been previously retired from standard use and maintained only as a potential back-up (a practice sometimes known as "mothballing" a generating plant). This will mitigate the harm that arose as the result of the utility's imprudence by providing the utility with

capacity to cover the shortfall resulting from the loss of the first combustion turbine unit. Such an action would thus be considered a remedial action.

Recommissioning the previously mothballed plant in this example only occurs because of the fire. The cost or recommissioning the previously mothballed plant are therefore directly caused by the utility's imprudence and would not have arisen otherwise. Because the costs of the recommissioning would not have occurred "but for" the utility's imprudence, those costs are and should be considered "imprudently incurred" costs. What is more important, the fact that those costs are "imprudently incurred" does not change even if the decision to recommission the plant is found to be prudent. And this is, again, because the decision to recommission the mothballed plant, while prudent, was only undertaken because of the fire that resulted from the utility's imprudence.

Between the explanation and provided hypothetical example, the OPC would hope it is clear that, when there exists a direct causal link between the imprudent actions of a utility and the remedial action taken by the utility to cure the harm caused by that imprudence, the costs of that remedial action are themselves merely "costs of the imprudence" and are hence imprudently incurred. And again, this logic holds true even when the remedial action is found to have been prudent. After all, it is prudent to take action to try and fix one's mistakes. But taking action to fix one's mistakes does not change the fact that the action was only required due to the mistake itself. As a result, the cost of the action taken to fix the mistake is part of the overall cost of the mistake. Having established this idea, now it must be applied to the present case.

Application of the Remedial Action Principle to this Case

As already indicated, the reason this extensive discussion has been undertaken is because the decision for Evergy to renew the firm point-to-point transmission service agreement at issue is a remedial action. Specifically, it is a remedial action necessary to address Evergy's imprudence arising from:

1. Acquiring a generating facility in Mississippi from its parent company instead of building one in Missouri thereby necessitating a service agreement that includes transmission costs;
2. Spending more than a decade since that acquisition making no effort to find or develop a replacement for that generating facility despite knowing when the existing service agreement would expire; and
3. Actively exacerbating the situation by retiring base-load generation located in Missouri more than 20 years before the end of its expected life and thereby compounding the Company's reliance on the Mississippi based generation to meet capacity requirements.

If you consider the full history of events leading up to this point in time, it becomes clear that renewing the firm point-to-point transmission service agreement is only prudent as a means of fixing the problems that Evergy itself created.

There has already been an immense amount of ink spilled in detailing the history of Crossroads in this case alone, so the OPC will stick to just the important highlights here. Please review the filed testimony for more details. [*see*, *e.g.*, Ex. 280, *Direct Testimony of Keith Majors*, pgs. 25 – 58].

- Crossroads was originally "constructed in 2002 as a merchant plant by and for the former Aquila Merchant, a non-regulated wholly-owned subsidiary of Aquila[, Inc.]." [*Id*. at pg. 27 lns. 2 – 3].

- "When the merchant power market collapsed in 2002 after the Enron bankruptcy, Aquila, Inc. and its affiliates decided to exit the non-regulated energy market and

concentrate on traditional regulated operations, primarily the generation, transmission and distribution of electricity in Missouri." [Ex. 280, *Direct Testimony of Keith Majors*, pg. 27 lns. 15 – 18].

- "Although every other investor-owned electric utility in Missouri built generation, Aquila, Inc. had a corporate policy not to build regulated generating units that it followed until it built South Harper in 2005. Instead, Aquila, Inc. relied exclusively on purchased power to meet its retail customers' increasing demands for electricity." [ER-2010-0356, Report and Order, pg. 80 (EFIS Item No. 1085)].

- "Great Plains Energy (the former parent company of what is now Evergy) acquired Aquila, Inc. and its remaining affiliates including [Missouri Public Service] and [St. Joseph Light and Power] in July 2008." [*Id*. at pg. 28 lns. 12 – 13].

- Crossroads was then transferred to the Missouri Public Service subsidiary, which then went on to become Kansas City Power & Light – Greater Missouri Operations before ultimately becoming Evergy Missouri West. [*Id*. at lns. 16 – 18; pg. 26 lns. 4 – 7, 15 – 19].

- This Commission denied Evergy the ability to recover transmission costs related to Crossroads first in case ER-2010-0356 where the Commission found:
    - "This higher transmission cost is an ongoing cost that will be paid every year that Crossroads is operating to provide electricity to customers located in and about Kansas City, Missouri. GMO does not incur any transmission costs for its other production facilities that are located in its MPS district that are used to serve its native load customers in that district. This ongoing transmission cost GMO incurs for Crossroads is a cost that it does not incur for South Harper, and is the cause of one of the biggest differences in the on-going operating costs between the two facilities." And
    - "It is not just and reasonable to require ratepayers to pay for the added transmission costs of electricity generated so far away in a transmission constricted location. Thus, the Commission will exclude the excessive transmission costs from recovery in rates."

  [Ex. 324, *Supplemental Rebuttal Testimony of Lena M. Mantle*, pg. 6 ln. 16 – pg. 7 ln. 4 (emphasis added)]

- This decision was re-affirmed in Evergy's next rate case in 2012. [Ex. 280, *Direct Testimony of Keith Majors*, pg. 32 ln. 42 – pg. 33 ln. 10; Ex. 300, *Direct Testimony of Lena M. Mantle*, pg. 40 ln. 17 – pg. 41 ln. 18].

- Evergy has had multiple known opportunities to replace the Crossroads facility since these decisions were issued. These included:
    - Acquiring the merchant portion of Jeffrey Energy Center [Ex. 280, *Direct Testimony of Keith Majors*, pg. 77 ln. 11 – pg. 79 ln. 10]. And
    - Acquiring larger shares of Dogwood [*Id*. at pg. 79 ln. 11 – pg. 80 ln. 25].

- Evergy has also chosen not to build any significant amount of generation to replace Crossroads over the decade between when this Commission first handed down its decisions and 2022, with the only request for a certificate of convenience and necessity regarding new generation filed by Evergy during that period being a 3 MW solar facility in 2015. [Ex. 281, *Rebuttal Testimony of Keith Majors*, pg. 52 lns. 8 – 23].

- Evergy made the decision "to retire the Sibley 3 coal plant more than twenty years before the previously projected end of the unit's life." [Ex. 323, Supplemental Direct Testimony of Lena M. Mantle, pg. 5 lns. 20 – 26]. "This resulted in a significant reduction in the Company's capacity and greatly increased Evergy West's reliance on the Crossroads facility for capacity." [*Id*.].

Again, the facts as related here can be summarized in the three points referenced in the preceding paragraph. Evergy created this problem by choosing to incorporate a failed merchant generating facility located in Mississippi (that it acquired from Aquila) into rates. Evergy prolonged the transmission cost problem by choosing to ignore every available opportunity to replace or supplement Crossroads and by making zero effort to build any new generation in the decade following the Commission's decisions in Crossroads I and II.[1] And then Evergy exacerbated the problem by prematurely retiring Sibley 3 thus increasing its need for additional capacity. This is why renewing the Crossroads transmission service agreement is a remedial action.

Evergy desperately wants this Commission to ignore all the history surrounding Crossroads and instead consider the decision to renew the transmission service agreement in total isolation. This is unreasonable. Instead, the Commission needs to see that the renewal of the Crossroads service agreement is only prudent as a remediation of the problems that Evergy created through its decisions both before and after the Commission issued its orders in Crossroads I and II. Evergy is directly responsible for the creation of the current situation and the imprudent costs arising from this situation remain imprudently incurred regardless of whether it is prudent to renew the

[1] Case No. ER-2010-0356 ("Crossroads I") and Case No. ER-2012-0175 ("Crossroads II")

transmission service agreement. And, just as this Commission previously determined in Crossroads I and II, it would be both unjust and unreasonable for this Commission to now require ratepayers to cover the cost of transmitting energy from Clarksdale Mississippi to Western Missouri just because Evergy could not be bothered to take any action in the intervening decade to remedy the mess it created.

Summary

For the reasons laid out above, any finding by this Commission that it is prudent for Evergy to renew the firm point-to-point transmission service agreement will not end the issue nor should it result in Evergy recovering transmission costs related to that service agreement. All that being said, however, the OPC maintains that, at this exact point in time, the only order this Commission should issue is that the requested prudence determination is an illegal request for an advisory opinion. All the preceding discussion should be held and weighed only in a future rate case where the costs associated with any renewal of the service agreement are finally ready to be placed into rates.

Addressing Evergy's Blatant Hypocrisy

At page twenty-five of its *Initial Brief*, Evergy begins a new section that it titles: "Moving Beyond the Status Quo." This section opens with a plea by Evergy that this Commission simply ignore its own prior determinations that requiring ratepayers to cover transmission costs related to Crossroads would be unjust and unreasonable. This is done, as addressed above, because Evergy wants to frame this case entirely in the context of an "isolated incident" prudency review while denying all the historical factors that explain how Evergy came to be in its current position. The Company then attempts to reinforce its argument by reiterating its prior threat to abandon Crossroads if the Commission does not rule now that the Company would be allowed to recover Crossroads transmission costs in a future rate case. The implications of this threat, and the proper response to it, are addressed below. [*see infra* pg. 30]. Before reaching that point, though, the OPC would first touch on the new series of requested "findings" that the Company would have this Commission make in this case and the implicit hypocrisy those requests entail.

There are three broad "findings" that the Company is asking the Commission to make despite not being included in the list of issues. The first is that the Commission will "confirm that its prudence standard will be applied" when the Company seeks recovery of future transmission costs, as stated on page twenty-six of the initial brief. This is a deceitful attempt to further advance the Company's efforts to argue that transmission costs must be recoverable by framing the issue exclusively in the context of an "isolated incident" prudence evaluation and ensuring that no attempt by the Commission will be made to consider whether inclusion of the transmission costs are just and reasonable. As expressed before, any determination regarding the "prudency" of the renewal of Evergy's transmission service agreement will not prevent the Commission from further determining that inclusion of transmission costs are not just and reasonable. [*see supra* pg. 18].

"Confirmation" that the Commission will apply the prudence standard therefore means nothing in this case.

The second is that the Company wants the Commission to order that it will not "impose any prospective penalties, disallowances, or asset replacement value caps in any future rate case regarding Crossroads or any resources that replace it[,]" as discussed beginning at page twenty-seven of Evergy's brief. This is an even more direct attempt at requesting the Commission issue a binding decision now to ensure that the Company will be allowed to recover transmission costs in a future rate case. This request is supported by nothing but half-baked claims that the Commission "has" to restrict its analysis to a prudence standard evaluation and cannot, under any circumstances, reiterate its prior decisions that it is unjust and unreasonable to require ratepayers to pay Crossroads transmission costs, not based on the magnitude of those costs, but based on the history surrounding Crossroads both before and after the Commission issued those decisions.

The third major finding is buried somewhat, in that it does not get its own heading, but represents the most egregious request to ensure future cost recovery of transmission costs. At page twenty-eight of its brief, Evergy asks the Commission to "confirm that it will not rely on the Crossroads I or Crossroads II orders" when ruling on the recovery of transmission costs in a future rate case. What becomes perplexing, however, is that the Company supports this request by citing to law that establishes the "Commission is not bound by its own precedents or the principle of stare decisis." This is where the hypocrisy comes into play. Evergy has somehow managed to nonsensically argue both that the Commission is not bound by its past decisions but does have the power to bind future Commissions with the three "findings" it is requesting in this section.

Evergy categorically cannot legitimately argue both: (1) that the Commission is not bound by its own prior decisions, and (2) that the Commission should issue decisions in this case that will

be binding on a future Commission. Those are inherently incompatible and mutually exclusive claims. If the Company wants to argue that the Commission is not bound by its prior decisions in Crossroads I or II, then it must also necessarily accept that a future Commission will not be bound by the decisions that the Company is itself asking this Commission to make *in this case*. That would render those decisions non-binding and therefore advisory opinions on their face. [*see* ER-2024-0189, *OPC Initial Brief*, pgs. 15 – 18 (EFIS Item No. 499)].

On the other hand, if the Company wants the rulings that it is asking the Commission to make as part of this case (as set forth above) to be binding decisions *in the future*, then it must accept that past Commission decisions are binding. At that point, the Company has nothing left to dispute that the Commission's decisions in Crossroads I and II are binding and the issue Evergy wants to re-litigate is now concluded. The Company's position is thus unsustainably hypocritical. Evergy has to pick a lane.

It may be beating a dead horse at this point, but the OPC would point out that the Company literally states at page twenty-eight of its brief that "[a]pplying past Commission orders is neither required nor appropriate[.]" The OPC wishes to know how the Company can possibly make that statement earnestly and then directly follow it with:

> Therefore, it is appropriate for the Commission to affirm that future transmission costs which are incurred after a renewal of the Crossroads transmission path will be assessed under the Commission's prudence standard, and to assure Evergy Missouri West that no prospective penalties, automatic disallowances, or asset replacement value caps related to Crossroads will be imposed in any future rate case.

Once again, how can Evergy actually state it is "appropriate" for the Commission to "assure" the Company that will receive full recovery of the Crossroads transmission costs in a future rate case after explicitly stating that it would be "neither required nor appropriate" for the Commission

acting in said future rate case to "apply" that decision? The answer, naturally, is that this Commission cannot do both.

Evergy is correct about one thing: this Commission cannot bind future Commissions just as it is not bound by past Commissions. And that is the very reason the Company's request should fail. Evergy is clearly and unambiguously seeking an order that will bind a future Commission in a way that ensures Evergy will recover transmission costs related to Crossroads and that is simply not something this Commission can do under the Company's own logic.

Addressing Evergy's Threat

As stated before, Evergy's brief seeks to scare the Commission into believing that a decision must be made in this case regarding the prudence of renewing the transmission service agreement through the issuance of a threat. That threat takes the form of Evergy stating that it categorically will not renew the service agreement for Crossroads unless the Commission issues an order finding it prudent to do so even though the Company believes that not renewing that service agreement will result in "considerable increased cost to customers through either additional capacity contracts, the cost of building additional generation, or paying a penalty to SPP for not meeting its resource adequacy requirements." [Ex. 324, *Supplemental Rebuttal Testimony of Lena M. Mantle*, pg. 13 lns. 14 – 20; *see*, *e.g.*, ER-2024-0189, *Evergy Initial Brief*, pg. 25(EFIS Item No. 501) ("Contrary to other parties' recommendations, EMW cannot be expected to renew a contract 'that the Commission has repeatedly stated as "imprudent"' without assurances that cost recovery of the transmission expense will be subject to a future proper prudence determination."]. This threat represents an incredibly bad faith argument on the part of Evergy for two reasons.

Purposefully Withholding a Remedial Action is Itself Imprudent

Consider the prior discussion concerning remedial actions and recall that a remedial action is one necessary to cure a past harm. As previously shown, it is prudent to engage in remedial actions even if the costs incurred as a result are considered "imprudently incurred" because they arise directly from prior imprudence. Equally true, however, is the fact that is imprudent to purposefully withhold a readily available remedial action. A simple example: if one sets the interior of their garage on fire while engaged in an ill-advised indoor BBQ, that is imprudent. If one stands by and does *nothing* to extinguish the fire despite having a fire extinguisher ready and at hand,

then that is a separate but equally impudent decision. A more extensive example can be found by considering the prior hypothetical.

Recall to mind the utility described above; the one that caused a fire in the combustion turbine due to improper maintenance and then recommissioned a prior mothballed unit as a replacement. Failing to perform proper maintenance (thus causing a fire) was imprudent. At the same time, though, failing to recommission one of the mothballed plants after the fire had occurred would also be imprudent because the alternative would be paying for the even higher penalties for failing to meet the RTO capacity requirements. In other words, once a utility engages in imprudence the failure to take additional actions necessary to mitigate the harm arising from that imprudence is also imprudent. Moreover, the failure to take the remedial action is imprudent regardless of whether the utility will recover its costs for the exact same reason that the cost of the remedial action is "imprudently incurred" despite the prudency of the action itself. This is because it is the utility that caused the problem, so it is the utility that has the duty to remediate the problem and to cover the cost of that remediation.

Now imagine if the hypothetical utility in this example acted the way Evergy is now acting by telling the Commission that, unless the Commission orders that the recommissioning costs for the mothballed plant are going to be recoverable, it won't recommission the plant despite knowing that the RTO penalties would cost more. Does this sound acceptable? Does this Commission really want for a utility to be able to say "we caused the problem, now allow us to recover the cost of our solution or we will make the problem worse?" The OPC hopes that the answer is a definitive no.

Evergy alone is responsible for acquiring Crossroads and placing it in rates, not anyone else. [Ex. 301, *Rebuttal Testimony of Lena M. Mantle*, pg. lns. 20 – 24]. Evergy alone made the decision not to acquire any replacement for Crossroads despite knowing when the Crossroads

transmission service agreement would expire and having multiple opportunities to gain replacements. [Ex. 280, *Direct Testimony of Keith Majors*, pg. 77 ln. 11 – pg. 80 ln. 25]. Evergy alone made the decision to add no additional generation save for 3 MW of solar in the decade between when Crossroads II was handed down in 2012 and 2022. [*Id.* at pg. 52 lns. 8 – 23]. And It was Evergy alone who made the decision to retire the Sibley 3 coal plant more than twenty years before the previously projected end of the unit's life despite knowing that this would result "in a significant reduction in the Company's capacity and greatly increased Evergy West's reliance on the Crossroads facility for capacity." [Ex. 323, *Supplemental Direct Testimony of Lena M. Mantle*, pg. 5 lns. 20 – 26]. At every step of the way it was Evergy acting alone that dug the Company into the metaphorical hole that it now finds itself in and relies on to justify the prudence of renewing the Crossroads transmission service agreement. For Evergy to now turn to the Commission and say "give us the cost of being in this hole, or we will dig even deeper and make the problem worse" is wholly unacceptable.

The proper response to Evergy's threat is to tell the Company: "you chose to get yourself into this mess, you will pay the cost of getting yourself out" and then to follow that up with a reminder that "any action you take that makes this situation worse will only increase the costs you are required to shoulder." This brings up the second point.

The Commission can Disallow Costs if the Company Chooses to Replace Crossroads with a More Costly Source of Capacity

Evergy's entire argument is premised on telling the Commission that it only has three possible choices: let the Company recover the transmission costs, let the Company recover the cost of moving Crossroads, or let the Company recover the cost of new generation. [*see* Tr. Vol. 9 pg. 7 ln. 22 – pg. 8 ln. 4]. In reality, though, this Commission has a plethora of additional options to

consider when this issue is truly ripe for review. For example, the Commission can choose to impute the current cost of capacity for Crossroads even if the Company decides not to renew the contract in favor of a more costly option. [Ex. 323, *Supplemental Direct Testimony of Lena M. Mantle*, pg. 2 lns. 10 – 14]. As Staff's witness explained, this "would entail capturing the balances of plant with additions, depreciation reserve with retirements, all operations, maintenance, and fuel costs. In a future rate case, these items would be included in revenue requirement in place of increased capacity costs of the replacement generation." [Ex. 281, *Rebuttal Testimony of Keith Majors*, pg. 53 lns. 9 – 12]. This is something that both the Staff and OPC witnesses endorse. [Ex. 323, *Supplemental Direct Testimony of Lena M. Mantle*, pg. 2 lns. 10 – 14; Ex. 281, *Rebuttal Testimony of Keith Majors*, pg. 53 ln. 13 – pg. 54 ln. 5].

The fact that the Commission can and should make such a disallowance in a future case (if those circumstances occur) directly contradicts the Company's position that it would be imprudent for the Company to renew absent a Commission determination on prudence. [*see* ER-2024-0189, *Evergy Initial Brief*, pg. 6 (EFIS Item No. 501)]. As OPC witness Mantle explained:

> **Q. Do you agree with Mr. Ives that it would be imprudent for EMW to renew the transmission agreements unless the Commission allows these transmission costs to be recovered in rates?**
>
> A. No. Evergy West needs to consider the potential cost impact on shareholders if the Commission were to order a disallowance, in part or in whole, of the cost of capacity acquired to replace Crossroads as well as the energy Evergy West would need to acquire up until the end of the life of the Crossroads plant. If the cost of such a disallowance were to outweigh the cost of paying transmission costs, then paying the transmission costs would be the more prudent course of action for Evergy West.

[Ex. 324, *Supplemental Rebuttal Testimony of Lena M. Mantle*, pg. 8 lns. 7 – 16]. This is why the Commission should just ignore Evergy's threat. The decision as to whether the Crossroads transmission service agreement is renewed is in absolutely no way dependent on the Commission's

decision in this case. It is instead solely the responsibility of Evergy's management to weigh the cost to shareholders for paying those transmission costs against the possibility of a future disallowance should the Company opt for a more costly approach. [*Id*.]. At the end of the day, it is Evergy who must make the choice, not the Commission.

Summary

The Commission should not be intimidated into believing that it is incumbent on the Commission to render a decision in this case lest ratepayers end up paying more due to Evergy abandoning Crossroads. Rather, any decision to abandon Crossroads will come only from Evergy and its management team. And if Crossroads is abandoned in favor of a more costly alternative just because the Company no longer wishes to bear the cost of remediating its own past imprudent decisions, then the difference in those costs should be placed on the Company. That is the fourth alternative that the Company wishes to deny this Commission, but which this Commission nevertheless has the option to employ should it ultimately find it just and reasonable.

Renewal for More Than Five Years is *De Facto* Imprudent

Everything prior to this section has delt with the OPC's position that the Commission should not issue an order regarding the prudency of renewing the Crossroads transmission service agreement that is currently set to expire in 2029. This section deviates from that prior discussion to address a point that was developed during the course of the evidentiary hearing held pursuant to the stipulation. That point is this: regardless of whether the Commission grants the requested prudency determination, based on the evidence produced during the hearing, it would be *de facto* imprudent to renew the Crossroads transmission service agreement for a period of more than five years. Given the OPC's overall position, as well as the fact that the Company never explicitly told the Commission how long it intended to renew the service agreement for, this section is not intended to alter the outcome of this case. Instead, it is offered to "plant a flag" so to speak and inform all parties, including Evergy, of the OPC's position moving forward. The OPC does this out of a desire for transparency and to prevent any future acquisition of "hindsight analysis," which is a claim that Evergy often inappropriately abuses.[2]

The basic nature of the OPC's argument is very simple and relies on two points that were developed during the hearing. The first is the Company's insistence that there are no negotiated

[2] For proof of that point, look no further than the Company's initial brief. On page 28, Evergy states: "[t]o apply Crossroads I or Crossroads II as a categorical bar or as a predetermined disallowance would be to import hindsight and fact-bound determinations from different circumstances, violating the Commission's own prudence framework." The OPC points out that it is not functionally possible to legitimately argue that the application of two case precedents handed down over a decade prior to the proposed renewal could possibly constitute relying on hindsight to determine the prudence of that same proposed renewal. In fact, because this entire case is based on granting pre-approval of the requested renewal, it is logically impossible for anything argued at this point to be "hindsight." This is because hindsight requires considering facts that were not known until after the decision to renew was made and the decision to renew has not been made yet (which, again, is the very basis of this entire case) so there is literally no possible way to employ hindsight at this juncture. The fact that Evergy continues to rely on claims of "hindsight" in a case where it is seeking prudency pre-approval shows the complete logical bankruptcy of that argument.

terms in the service agreement. This was made quite clear during the hearing by Evergy Witness Kevin Gunn:

> So when we talk about terms and we talk about negotiation, there's really none of that existing today because it's a reservation agreement through the -- through the MISO tariffs. So all of those, what is accounted for in that will be contained within that MISO tariff.
>
> . . .
>
> So today there's not a negotiation with Entergy, there's not a negotiation with MISO. The -- It's formulaic based upon the FERC-approved MISO tariff. So all the -- all the terms, all of -- all of everything that governs that transmission path is done through the MISO tariff.
>
> So are we are not doing independent negotiations with MISO. It's a reservation agreement now where you literally say, We are going to sign up for this reservation agreement and then the terms of the MISO tariff would kick in.

[Tr. Vol. 9 pg. 59 lns. 3 – 8, pg. 61 lns. 4 - 14]. The second comes from the fact that it only requires five years for a service agreement to be considered "long-term" under the MISO tariff and that this triggers automatic rollover rights that would allow the Company to renew at will. Again, this was stated quite clearly during the hearing by Evergy Witness Cody VandeVelde:

> We have the reservation agreement in place through February of '29 as indicated throughout this case. We have up until 12 months prior to that expiration to make a decision on whether or not we would like to renew or extend that reservation. Because it is a long-term agreement, we have that right.
>
> If we were to extend that anywhere from one year -- it has to -- it has to at least be a one-year extension, it can be longer, but anywhere between one and four years, we will then relinquish our right to extend beyond that new term. If we were to enter into and extend the agreement five years or more, we would continue to retain the rollover rights just like we do today because then it would be viewed as a long-term agreement under the MISO tariff and we retain those rights.

[Tr. Vol. 9 pg. 95 lns. 5 – 20 (emphasis added)]. Based on these two statements by Company witnesses (and assuming they are accurate), it would be completely inappropriate to ever renew

the service agreement for more than five years simply because there would be no benefit for doing so but there would be significant risk.

What is the benefit of a longer term in a service agreement? Prior to the introduction of MISO, it would appear that the benefit would come from negotiating more favorable terms. It is not uncommon in many commercial settings to receive a discounted price when opting for a longer contract term. This generally benefits the service provider who has a longer period of guaranteed income. But if the service agreement terms are now based solely on the MISO tariff, then this concept clearly no longer applies. And if there is no longer a means by which to negotiate for more favorable terms through a longer contract period, then the only reason at all to accept the longer contract period is simply because the Company expects to need the capacity for a longer period. But this is where automatic renewal provision comes into play.

If just a five-year service agreement "locks in" the ability to renew, which is what Evergy's witness clearly indicated on the stand, then there would be no need for a twenty-year service agreement because the Company could just renew four five-year service agreements in a row. There is literally no downside to this because, as just established, it has no impact on the price or other terms in the agreement which are dictated by the MISO tariff. There is a major upside however: it mitigates the risk that MISO transmission costs become unreasonable.

Imagine for a moment a situation where the MISO transmission costs included in the Crossroads service agreement were to increase to such an extent that it did become more expensive to continue using Crossroads as opposed to moving the plant, building a new plant, or buying capacity elsewhere. At that point, there would be no argument that it would be imprudent to continue operating Crossroads at the current location (again, as compared to moving, building new, or buying capacity elsewhere). If the Company was operating on rolling five-year service

agreements at that point, it would have a much greater opportunity to exit Crossroads (the unambiguously prudent action) than if it was locked into a twenty-year service agreement. So, there is a clear benefit to having shorter service agreement terms because that provides flexibility to the Company to shift its decisions in relation to changes in economic environment (or other factors).

Given that there is a clear benefit to having a shorter, five-year service agreement (increased flexibility) and no detriment (guaranteed renewal plus fixed terms under the MISO tariff), there is no prudent reason for Evergy to ever renew the service agreement for more than five years.[3] The OPC recognizes that this is different than the recommendation offered by its own witness in pre-field testimony.[4] But that recommendation was offered before the OPC became aware of the facts outlined above. This is but one more reason the OPC felt it necessary to include this section in its brief. To reiterate, assuming the Company's claims that (1) there are no negotiated terms in the service agreement, and (2) that a five-year service agreement is the minimum to be considered "long-term" and thus trigger automatic renewal rights, the OPC maintains that any renewal of the service agreement related to Crossroads for more than five years is *de facto* imprudent for the reasons outlined above.

[3] Again, this is all dependent on the accuracy of the Company's witnesses. If those same witnesses misrepresented facts or omitted important facts then the OPC may take a different position.

[4] Ms. Mantle agreed with the recommendation of MECG witness Mr. Greg Meyer's recommendation "that Evergy West should negotiate a new 20-year point-to-point transmission contract." [Ex. 324, *Supplemental Rebuttal Testimony of Lena M. Mantle*, pg. 3 lns. 4 – 10].

Conclusion

The OPC has carefully laid out its argument for why it believes Evergy should not be permitted to recover transmission costs related to Crossroads regardless of how the Commission rules on the issue now before it. At the end of the day, however, the OPC still does not believe that this is the proper venue for the Commission to rule on this issue, even if it were to rule in the OPC's favor. This rate case is concluded and will have been concluded for nearly a year. Nothing the Commission decides here will impact the rates now in effect and nothing the Commission decides here will be binding on a future Commission. With those two basic and irrefutable points in hand, it becomes impossible to reach any conclusion other than determining the requested decision constitutes an illegal advisory opinion. Nor should the Commission feel obligated to attempt to avoid this clear legal conclusion.

Evergy's continued threat that it will respond to a finding that no prudence determination will be made by not renewing the Crossroads transmission service agreement is wholly and totally the decision of Evergy's management, not this Commission. Moreover, this Commission has plenary power to set just and reasonable rates moving forward, which may include imputing Crossroads to Evergy regardless of the Company's decision. In short, this Commission should call the Company's bluff and, should the Company follow through with its threat, hold Evergy's management accountable for the damages it may cause as a result. However, all of that will be properly addressed in a future rate case. For now, this Commission should do absolutely nothing more than rule the requested determination is an illegal advisory opinion and decline to address it further.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission rule in the OPC's favor on the issues presented herein and grant any such other relief as is just and reasonable under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this fifth day of December, 2025.

/s/ John Clizer