BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Evergy Metro, Inc. d/b/a Evergy Missouri West for Approval of a Transportation Electrification Portfolio	))))	Case No. ET-2021-0151

INITIAL POSTHEARING BRIEF

OF

MIDWEST ENERGY CONSUMERS GROUP

David L. Woodsmall
Woodsmall Law Office
308 E. High Street, Suite 204
Jefferson City, MO 65101
Phone: 573-797-0005
david.woodsmall@woodsmalllaw.com

ATTORNEY FOR MIDWEST
ENERGY CONSUMERS GROUP

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In its Initial Brief, MECG will only address select issues set forth in the List of Issues. As reflected in its Position Statement, MECG generally supports the positions set forth by Staff and OPC, including their criticisms of the selected Evergy programs. Rather than burden the record with argument that will largely be redundant of the arguments raised by Staff and OPC, MECG will limit its brief to: (1) a couple overarching thoughts regarding Evergy's proposed electrication program and (2) legal issues underlying Evergy's request (the Commission setting rates outside of a general rate case and the effect of Evergy's election to utilize Plant In-Service Accounting).

OVERVIEW

1. EVERGY RATES AND CUSTOMER SATISFACTION

It is well established that "[t]he Commission's principal interest is to serve and protect ratepayers."[1] One essential component of fulfilling this interest is not only ensuring that electric service is "safe and adequate", but also that rates remain "just and reasonable."[2] Given this "principal interest", the Commission should not only be cognizant of whether utilities are meeting this standard, but also whether the steps it takes in any particular docket will put pressure on the utility's future ability to meet this standard. The evidence in this case shows that Evergy is failing miserably in this regard. Not only are Evergy's rates "well above" the national average, but also Evergy customers are dissatisfied with Evergy's service. Moreover, the requested actions in this case, if approved, will put additional pressure on Evergy's ability to meet this standard in the future. Therefore, the Commission should be hesitant to approve Evergy's request.

[1] State ex rel. Capital City Water Co. v. Public Service Commission, 850 S.W.2d 903 (Mo. App. 1993) (citing to State ex rel. Crown Coach Co. v. Public Service Commission, 179 S.W.2d 123, 126 (1944)).
[2] Section 393.130.1

During cross-examination, OPC witness Dr. Marke discussed both the competitiveness of Evergy's rates as well as Evergy's customer satisfaction. With regard to rates, Dr. Marke detailed that Evergy's rates are "well above the national average."

> Q. Can you tell me your understanding of the affordability of Evergy's rates?
>
> A. So I usually focus on a couple of data points to help me gauge the affordability of rates. One is the Epson (sic, Edison) Electric Institute's, you know, rate schedule book, which looks at rates across utilities and across service classes. It also looks at EIA Form 861 data. ***Evergy Metro is well above the national average***. That's despite not coming in for a rate case in roughly three years. Evergy West is more affordable. However, Evergy West is looking -- you've got to keep in my (sic – mind) context is important because we have $300 million in Storm Yuri (sic – Uri) costs that are coming down that are going to be borne those ratepayers. We also know, you know, based off of Evergy's as publicly stated that they're planning to coming in for a rate case the first quarter of 2022. This is to say nothing for the many surcharges where those rates and those costs are being borne and included in customers' bills.[3]

The data regarding the "adequate" nature of Evergy's service, as measured by customer satisfaction, is equally troublesome in that Evergy's customer satisfaction is "well below average".

> Q. Does JD Power have a survey ranking electric utilities on customer satisfaction?
>
> A. They do.
>
> Q. ***Will you agree that Evergy ranks well below average in customer satisfaction?***
>
> A. ***Yes, I do. I would say that.*** They're not as low as Empire, but they are low.
>
> Q. And would you agree that the Number 1 factor driving Evergy's below average ranking in customer satisfaction is rate affordability?
>
> A. Yep. Absolutely. JD Power looks at a number of different metrics to kind of -- to pull that altogether, but that absolutely customer affordability is the Number 1 concern of Evergy's customers.[4]

[3] Tr. 535 (emphasis added)
[4] Tr. 537 (emphasis added)

The actions requested in this case will place additional pressure on Evergy's ability to fix its inflated rates or its inadequate customer service. As Dr. Marke revealed, a utility's earnings are directly dependent on ongoing investment. Specifically, since a utility's earned return is multiplied by its investment, a utility earns more as investment increases. The troublesome fact for Evergy stockholders, however, is that, absent further investment, earnings will decrease due to the effects of depreciation in the ratemaking formula.[5] Thus, Evergy has a powerful incentive to constantly look to further invest in its system. In this case, this powerful incentive is reflected in Evergy's desire to add additional charging stations to the slew of charging stations that are already going unused by Evergy's customers and to provide rebates to customers to build charging units in their homes.[6]

While the notion that a utility would invest in their systems may provide some visceral attraction to regulators, the undeniable downside is that the investment envisioned in this case will place additional pressure on customer rates and customer satisfaction. Especially for a utility like Evergy, which already suffers from chronically high rates and low customer satisfaction, the Commission should be reticent to approve an unnecessary program to build out a "nonessential service."

2. ELECTRIC VEHICLE CHARGING INVESTMENT IS UNNECESSARY

In his testimony, Dr. Marke also pointed out that Evergy's proposed investment is unnecessary because this investment is already assured through the recently enacted federal infrastructure legislation. As the Commission undoubtedly is aware, President Biden signed the Infrastructure Investment and Jobs Act on November 16.[7] While the evidentiary hearing in this case was held prior to the enactment of that federal legislation, the details of that legislation were

[5] Tr. 533.
[6] Tr. 533-534.
[7] Public Law No. 117-58.

not a secret. As Dr. Marke testified, included in the $1 trillion federal price tag is a significant amount of funding for electric vehicle infrastructure. Of that, $100 million of electric vehicle infrastructure funding is earmarked exclusively for Missouri.[8] The enormity of this federal investment in Missouri electric vehicle infrastructure is staggering.

> If you think about, like, just for a second Mr. Woodsmall, there's about 3,500 gas stations roughly in this state. ***If we just put a DCFC fast charging station at a 50 kW, you know, current, voltage, we can effectively put a DC FC fast charger in just about every gas station in the state. And that's all federal dollars.*** If that existed, I think that pretty much nullifies any argument for range anxiety. That is not borne by ratepayers.[9]

Given this, the entire rationale behind Evergy's electrification portfolio (range anxiety for electric vehicles) is already slated to be addressed by the recent enactment of federal legislation. As such, the portfolio proposed by Evergy is likely to result in nothing more than "redundant" facilities,[10] all at the expense of ratepayers already suffering from "above average" electric rates and "below average" customer satisfaction.

3. PREVIOUS COMMISSION DECISIONS

Throughout this case Evergy has repeatedly attempted to sway the Commission's decision through its incomplete recitation of previous Commission decisions. Specifically, in its testimony, Evergy claimed that the Commission had previously ordained the ubiquitous installation of electric vehicle charging stations. Subsequent testimony and review of the Commission decisions, however, reveal that Evergy's reliance on past Commission decisions was "misleading."[11]

For instance, at the very beginning of its opening statement, Evergy touted a select quote from the Commission's decision in ER-2014-0370.

[8] Tr. 533-534.
[9] Tr. 534 (emphasis added).
[10] Tr. 467.
[11] Tr. 540.

> In its Report and Order in KCPL's 2015 rate case, the Commission stated: KCPL's proposed clean charge network is an important step in creating an infrastructure to serve the increasing number of customers who choose to purchase electric vehicles and the Commission commends KCPL for its efforts to anticipate this future demand and for its commitment to environmental sustainability. That's a quote from Page 77 of the Commission's Report and Order in File Number ER-2014-0370.[12]

Conveniently, however, Evergy misleads the Commission by ignoring the next critical sentences.

> However, this issue was raised for the first time more than three months after KCPL first filed this case and without seeking input from this Commission or other parties to the case. The proposal currently lacks important information that is critical to designing and implementing a program unlike any other existing in the state. While the Commission believes that it would be beneficial to move forward with the Clean Charge Network, ***it is premature to require KCPL's customers to bear the costs of the program. The Commission concludes that KCPL has failed to meet its burden of proof to demonstrate that the charging stations placed in service in its Missouri service territory as of May 31, 2015, should be included in rate base as a part of the revenue requirement for this case, so that request will be denied***.[13]

A litany of Commission concerns with Evergy's clean charge network was forthcoming in the next rate case. In fact, in an extremely prescient decision, the Commission pointed out that Evergy's clean charge network: (1) was nonessential; (2) was anticompetitive; (3) shifted risks from shareholders to ratepayers; (4) was inefficient; (5) was unnecessary because charging is largely conducted at home; (6) would lead to stranded costs because of lack of use; and (3) failed to provide benefits to other customers that do not use the charging stations:

> 116. If the charging stations go into rate base, utilities would receive a reasonable chance to recover a rate of return on that investment from ratepayers. This is problematic for services that can be considered both nonessential and/or in which a competitive market already exists. Allowing utilities to recover costs for such services from ratepayers effectively creates a regulatory barrier for new entries, unfairly punishes existing competition, and shifts risk from utility shareholders to ratepayers. Instead of promoting growth, an insulated regulated monopoly can undermine competition, which may reduce efficiency.

[12] Tr. page 10.
[13] *Report and Order*, Case No. ER-2014-0370, issued September 2, 2015, pages 75-76 (emphasis added).

> 117. Introducing a regulated entity such as KCPL into a competitive market creates the potential for inefficiencies as the negative consequences of any given risk are merely shifted to captive ratepayers.
>
> 118. Electric vehicle owners already do the vast majority of electric vehicle charging at home.
>
> 119. The Kansas Commission has denied KCPL's request to regulate EV charging stations. In its order, the Kansas Commission noted that private businesses are already installing EV stations, and that shareholders, rather than KCPL ratepayers, should be responsible for the costs of installing KCPL's Kansas EV stations.
>
> 120. If Missouri regulated those stations, Kansas EV station owners would operate in a free-market environment, while Missouri EV station owners would be working from a more traditional ratemaking model that builds in regulatory lag. That traditional ratemaking model increases the likelihood of stranded assets because unregulated companies can more easily adapt to new technologies than regulated companies can. Thus, if Kansas charging stations, operating in a free-market environment, become better, cheaper, faster, etc., at charging vehicles, then EV owners taking a short trip across the state line in the Kansas City area to charge their vehicles in Kansas could make the Missouri EV stations obsolete. Failure to account for this may result in Missouri ratepayers funding EV charging stations that no longer operate the way they were designed to, or that are poorly supported by the utility.
>
> 121. Stranded EV charging stations are a reality. Some taxpayer-funded EV charging stations in Oregon are rarely used.
>
> 122. If the Commission regulates EV charging stations, then, at least in the near term, only EV drivers and KCPL shareholders would reap the financial rewards. Non-participants, which would be many of KCPL ratepayers, would bear most of the risk and cost.[14]

Given all the shortcomings inherent in Evergy's clean charge network, the Commission held that vehicle charging was not a regulated service and refused to include Evergy's clean charge network investment in rate base.

[14] *Report and Order*, Case No. ER-2016-0285, issued May 3, 2017, at pages 42-44.

While a subsequent appellate decision held that the clean charge network investment was electric plant and could not be excluded from rate base,[15] Evergy recognized the obvious shortcomings associated with the clean charge network and agreed to recover that investment only from customers that used the vehicle chargers AND that no other customers would incur any of the costs of that investment.

> The Signatories agree that a new customer class for electric vehicle charging stations shall be established. ***The Signatories agree that no other customer class shall bear any costs related to this service either through base rates or through any rate adjustment mechanism such as a FAC, DSIM or RESRAM***. KCP&L and GMO agree that joint and common costs shall be allocated to the electric vehicle charging class consistent with how joint and common costs are allocated to other classes.[16]

In light of the Commission's concerns as expressed in its 2014 and 2016 decisions, as well as the subsequent settlements designed to protect other customers from the costs of the clean charge network, the Commission should not be swayed by Evergy's misleading citation to the 2014 rate decision.

ISSUES

Issue 4: Should the Commission approve Evergy's proposed Electric Transit Service Rate?

Issue 5: Should the Commission approve Evergy's proposed Business EV Charging Service Rate?

Sub-issue A: Is it lawful for the Commission to approve a rate for this new service outside of a general rate case?

[15] *Kansas City Power & Light Company v. Public Service Commission*, 557 SW3d 460 (2018) ("Our conclusion that KCP&L's electric vehicle charging stations constitute "electric plant" within the meaning of § 386.020(14) does not leave the Commission without remedy; to the contrary, it provides a basis for the Commission to exercise its full range of regulatory authorities with respect to those stations. Because we conclude that the Public Service Commission erroneously concluded that KCP&L's electric vehicle charging stations did not constitute "electric plant" within the meaning of § 386.020(14), we reverse that portion of the Commission's Report and Order, and remand the matter to the Commission for further proceedings consistent with this opinion.").

[16] *Order Approving Stipulations*, Case No. ER-2018-0145, issued October 31, 2018, Stipulation 1, page 3 (emphasis added).

Section 393.270(4) provides:

> In determining the price to be charged for. . . electricity . . . the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable average return . . .

Later the Supreme Court interpreted this provision as mandating a consideration of "all relevant factors."

> [The] phrase 'among other things' clearly denotes that 'proper determination' of such charges is based upon *all* relevant factors, and that however difficult may be the ascertainment of relevant and material factors in the establishment of just and reasonable rates, neither impulse nor expediency can be substituted for the requirement that such rates be 'authorized by law' and 'supported by competent and substantial evidence upon the whole record.'[17]

Subsequently the Supreme Court clarified that the requirement to consider all relevant factors must necessarily include "all operating expenses and the utility's rate of return."[18] Failure to consider all relevant factors when adjusting a utility's rates is condemned as single-issue rate making and is generally prohibited in Missouri.[19]

In the case at hand, the rates set forth by Evergy fail to consider all relevant factors. For instance, Evergy fails to provide any evidence regarding "all operating expenses." Similarly, Evergy fails to consider its "rate of return." Additionally, Evergy fails to consider revenues provided by other customer classes or any of the annualization and normalization adjustments with which the Commission has become familiar. Given its failure to consider all relevant factors, Evergy's request to set rates in this case constitutes "single-issue ratemaking."

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[17] *State ex rel. Missouri Water Co. v. Public Service Commission,* 308 S.W.2d 704, 719-720 (Mo. 1957) (emphasis in original).
[18] *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. 1979) ("UCCM").
[19] *State ex rel. Pub. Counsel v. Public Service Commission,* 397 S.W.3d 441, 448 (Mo. App. W.D. 2013).

Evergy desperately seeks to find legal authority to excuse this shortcoming. In its Position Statement, Evergy claims:

> The courts and the Commission have recognized that the implementation of rates for new services outside the context of a general rate case does not violate the single-issue ratemaking prohibition. In State ex rel. Sprint Spectrum L.P. v. Missouri Public Service Com'n, 112 S.W.3d 20, 28–29 (Mo.App. W.D.,2003), the Missouri Court of Appeals held that the introduction of rates for new services did not violate the prohibition against single-issue ratemaking which would otherwise require that all relevant factors be considered in a general rate case.[20]

As the following analysis indicates, however, Evergy's reliance on the *Sprint Spectrum* case as justification for its failure to consider all relevant factors is misplaced.

In *Sprint Spectrum*, the Commission considered a request by several small rural telephone companies to establish a Wireless Termination Service Tariff to establish rates for "delivering calls that originate from wireless phones."[21] As the Court expressly noted, "this dispute arose because no one compensates the rural carriers for the use of their networks in completing these calls."[22] Instead, these calls were terminated on the networks for the rural carriers "without compensation."[23]

There the Court held that the doctrine against single issue ratemaking was not applicable.

> The rationale behind the single-issue ratemaking prohibition is to prevent the Commission from allowing a utility to "raise rates to cover increased costs in one area without realizing there were counterbalancing savings in another area." ***This rationale does not apply in the instant case because tariffs have never been established for the rural carriers' termination of the wireless-originated traffic. Both of the cases cited by the wireless companies, in support of their claim of single-issue ratemaking, deal with attempts to increase or change existing rates. These cases are clearly distinguishable from the subject dispute because no rates existed at the time the rural carriers filed for approval of Wireless Termination Service tariffs***.[24]

[20] Evergy Position Statement, filed September 27, 2021, at page 11.
[21] *State ex rel. Sprint Spectrum v. Public Service Commission*, 112 S.W.3d, 22 (Mo.App. W.D. 2003).
[22] *Id.*
[23] *Id.* at 23.
[24] *Id.* at pages 28-29 (emphasis added; citations omitted).

Given this, the Court held that the doctrine of single-issue ratemaking did not prevent the Commission from approving the Wireless Termination Service rates outside of a rate case because the Commission was not changing an existing rate for an existing service. "We find no error in the Commission's determination that the termination services at issue here cannot be characterized as an '***existing*** service' for which '***existing*** rates' are being charged. The single-issue ratemaking prohibition does not bar the approved tariffs because they do not change ***existing*** rates."[25]

The same situation does not exist in the case at hand because the services in question are existing services for which Evergy already charges an existing rate. Specifically, the record clearly indicates that the service that Evergy seeks to offer through its Electric Transit Service and Business EV Charging Service is "electric service".[26] Interestingly, this is the same service currently being offered by Evergy to these customers through its Small General Service; Medium General Service; Large General Service; and Large Power rate schedules.[27] In fact, the evidence shows that Evergy is already providing these services at current rates.

Electric Transit Service:

> Q. Are you aware that Kansas City Metro, the city itself already has transit vehicles that are electric?
>
> A. Yes.
>
> Q. And Kansas City is able to charge its transit vehicles, despite the fact that there is currently an Evergy electric transit service rate schedule?
>
> A. Right. So the electric streetcar or electric buses would be charged under one of the current general service rate schedules.

[25] *Id.* at page 29.
[26] Tr. 547-548.
[27] Exhibit 500. See also, Tr. pages 545-546.

Q. So then this would not be a new service because they're already able to access electric service under current tariffs?

A. Correct.[28]

Business EV Charging Service:

Q. Are you aware that there are currently business customers in Evergy's service area that are providing charging service to its customers electric vehicles such as movie theaters, shopping malls, restaurants, etc?

A. Yes.

Q. And these customers are able to offer that service to its customers, electric vehicle charging customers, despite the fact that there is not currently a business EV charging rate schedule?

A. That's correct.

Q. Do you have an opinion as to what rate schedules these customers may be using to provide electric vehicle charging to their customers?

A. Since those customers are nonresidential customers, they would rely on one of the current general service rate schedules.[29]

Given that Evergy already offers both the Electric Transit Service and the Business EV Charging service through current rates, it is not a new service. Therefore, this is not a new service and the authority provided in the *Sprint Spectrum* case is not applicable.

Possibly realizing the tenuous nature of its reliance on the *Sprint Spectrum* decision, Evergy also directs the Commission to several Commission cases to support its misplaced assertion that the Commission can set rates in this case without considering all relevant factors.[30] Evergy's reliance on these Commission cases as authority for its request to establish rates in this case is equally misplaced.

[28] Tr. 549.
[29] Tr. 550.
[30] Evergy Position Statement, filed September 27, 2021, pages 12-13.

It is well established that the Commission is a "creature of statute." Therefore, the Public Service Commission's powers are limited to those expressly conferred by statute.[31] In fact, the Courts have warned the Commission that they will not cut the Commission any slack in this regard. "Neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by the statute." [32] Given this limit on its authority, the Commission must look to the statutes, or court decisions interpreting those statutes, for its authority. The Commission cannot, as Evergy now seems to claim, look at its own decisions to create its authority.

In the *UCCM* case the Supreme Court considered whether the Commission had authority to implement a fuel adjustment clause.[33] There the Court directly asked the Commission for the authority that allows for the implementation of the fuel adjustment clause. Unable to locate specific statutes, the Commission instead referred the Court to the Commission's own prior decisions authorizing the legally questionable fuel adjustment clause.

> Respondents themselves have difficulty pointing to what provisions in the statutes give them authority to utilize a fuel adjustment clause. In their brief, as noted *supra*, they simply argue that "it is clear that the statutes and case law in Missouri authorize such provisions." In oral argument, they admitted that it was hard to find specific sections authorizing an FAC, but that we should approve it on the basis of §§ 393.130, 393.140, and 393.270, and through application of the principle that where an agency is given broad supervisory authority, deference should be given to its interpretation of a statute. ***Since FAC's have been used in regard to industrial and large commercial users for 60 years, and because other jurisdictions approve them, it is posited that we should also approve them. It is for the legislature, not the PSC, to set the extent of the latter's jurisdiction. The mere fact that the commission has approved similar clauses in the past, or that***

[31] *UCCM* at 49.
[32] *Id.*
[33] The UCCM decision struck down the Commission's use of a fuel adjustment clause on the basis that the Commission did not have statutory authority to implement a fuel adjustment clause. That decision was issued in 1979. Subsequently, in 2005, the General Assembly enacted legislation that provides the statutory authority for the current fuel adjustment clause that is in place for all Missouri electric utilities.

> ***other states permit them, is irrelevant if they are not permitted under our statute***.[34]

Thus, Evergy's reliance on previous Commission's decision as authority for its request that the Commission establish rates in this case is misplaced.

Given that the *Sprint Spectrum* decision is clearly not relevant to the immediate inquiry, and recognizing that Evergy has not been able to direct the Commission to any other statutory authority or case law that allows for the establishment of rates in this case, the Commission must reject Evergy's proposed rates.

Sub-issue B: Is it lawful for the Commission to approve a rate for this new rate at this time given the Company has elected PISA?[35]

Section 393.1655.2 imposes a rate moratorium on any utility that has opted in to the Plant In-Service Accounting provisions contained in Section 393.1400.

> Notwithstanding any other provision of law and except as otherwise provided for by this section, an electrical corporation's base rates shall be held constant for a period starting on the date new base rates were established in the electrical corporation's last general rate proceeding concluded prior to the date the electrical corporation gave notice under subsection 5 of section 393.1400 and ending on the third anniversary of that date, unless a force majeure event as determined by the commission occurs.

The statute then provides guidance on what constitutes "base rates" by delineating those rates that are considered "nonbase rates". Specifically, the statute defines "nonbase rates" as the utility's fuel adjustment clause (Section 386.266); renewable energy standard rate adjustment mechanism (Section 393.1030) and MEEIA (Section 393.1075) rates.

> This subsection shall not affect the electrical corporation's ability to adjust its nonbase rates during the three-year period provided for in this subsection as

[34] *UCCM* at 54 (emphasis added).

[35] In this section MECG points out that Section 393.1655.2 precludes the rates that Evergy proposes in this case until December 6, 2021. Given that this brief is being filed on November 19, it is very unlikely that rates would be established in this case prior to that date. Therefore, once December 6 arrives, this section will have been rendered moot. Despite this, as detailed in the previous section, the Commission is precluded from setting rates in this case outside of a rate case in which all relevant factors are considered.

> authorized by its commission-approved rate adjustment mechanisms arising under section 386.266, 393.1030, or 393.1075, or as authorized by any other rate adjustment mechanism authorized by law.

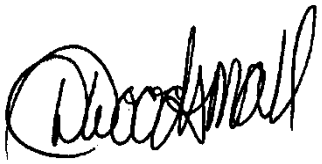
In its Notice filed in Case No. EO-2019-0045 and 0046, Evergy West and Evergy Metro provided notice of its election to make deferrals set forth in Section 393.1400 effective January 1, 2019. Evergy's base rates were last established immediately prior to this election on December 6, 2018.[36] Given this, Evergy is precluded from changing base rates (i.e., everything other than its FAC, RESRAM and MEEIA rates) any time prior to December 6, 2021. Given this, Evergy is precluded from setting any new rates, other than FAC, RESRAM and MEEIA rates, prior to December 6, 2021. Importantly, as reflected in the position on the previous issue, Evergy is precluded from setting any new rates after that date except in a rate case in which "all relevant factors" are considered.

CONCLUSION

For all the reasons expressed herein, as well as given all of the criticisms leveled by Staff and Public Counsel in regard to the specific Evergy programs, MECG respectfully requests that the Commission reject Evergy's transportation electrification portfolio.

[36] See, *Order Approving Tariffs*, Case No. ER-2018-0145 and 0146, issued November 26, 2016, page 8.

Respectfully submitted,

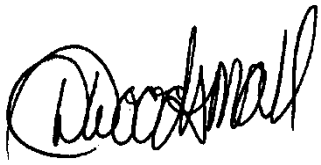


David L. Woodsmall, MBE #40747
308 E. High Street, Suite 204
Jefferson City, Missouri 65101
(573) 797-0005
david.woodsmall@woodsmalllaw.com

ATTORNEY FOR THE MIDWEST ENERGY CONSUMERS' GROUP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

Dated: November 19, 2021