BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Evergy Missouri West, Inc. d/b/a Evergy Missouri West for Approval of a Special High Load Factor Market Rate for a Data Center Facility in Kansas City, Missouri	**Case No. EO-2022-0061**

INITIAL BRIEF OF GOOGLE LLC

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

A. INTRODUCTION

Evergy Missouri West, Inc. d/b/a Evergy Missouri West ("Evergy" or "Evergy West") filed an application for approval of a new rate schedule along with supporting testimony on November 2, 2021. On November 8, 2021, Google LLC ("Google) applied to intervene because it has an interest in potentially developing data center facilities that would take service under a similar tariff that is likely to be filed for the Evergy Missouri Metro, Inc. d/b/a Evergy Missouri Metro ("Evergy Metro") territory. On November 9, 2021, the Commission granted Google's application to intervene.

On January 18, 2022, the parties filed the List of Issues and Order of Witnesses, Order of Opening Statements, and Order of Cross-Examination. The issues presented for Commission decision are straightforward:

1. Should the Commission approve the Special High Load Factor Market Rate ("Schedule MKT") tariff proposed by EMW?
a. Is the Schedule MKT tariff lawful?
2. If yes, what if any modifications to the Schedule MKT tariff proposed by EMW or other conditions should the Commission order?

While the Schedule MKT approved here for service in the Evergy West territory will not be precedent for a similar tariff to be filed in the Evergy Metro territory in a strict legal

sense, the Evergy West Schedule MKT is likely to serve as a template for an Evergy Metro Special High Load Factor Market Rate. Although Velvet was the "design customer" for the MKT tariff under consideration, there are a number of other potential data center customers who are interested in the MKT tariff, and a similar tariff for the Evergy Metro territory. (Transcript, pages 215-217). The MKT tariff is one of general applicability, not one intended to serve just one design customer, and there are differences among prospective MKT customers as well as differences between the Evergy West and Evergy Metro operations, so a Metro MKT tariff may not simply mirror the West MKT tariff verbatim.

Google will address in this brief: Section B., the threshold issue of whether the Commission has authority to approve Schedule MKT (Issue 1.a); and Section C., the issue of modifications to, or conditions on the use of, Schedule MKT (Issue 2). In particular, in Section C., this brief will explain why restricting or prohibiting the use of the Limited Large Customer Economic Development Discount Rider (Schedule PED) for customers taking service under Schedule MKT is not in the public interest. By not addressing every point raised by other parties, Google is not conceding those points and reserves the right to address all arguments in its reply brief.

B. THE COMMISSION HAS LEGAL AUTHORITY TO APPROVE SCHEDULE MKT

In their position statements, both the Staff of the Commission and the Midwest Energy Consumers Group ("MECG") asserted that Schedule MKT is unlawful.[1] The Commission has routinely – and correctly – found that it has the authority to approve a tariff like Schedule MKT, including in two very recent decisions.

[1] In their position statements, Evergy and Velvet Tech Services, LLC ("Velvet") both took the position that it is lawful for the Commission to approve Schedule MKT in this case, and the Office of the Public Counsel ("OPC") took no position on the question of lawfulness.

The first of these recent decisions was in the Nucor Steel case.[2] In its Report and Order in that case, issued on November 13, 2019, the Commission found that:

> The Nucor contract and related tariff concern a new service being offered by [Evergy] and do not change EMW's existing rates. Therefore, the Commission can approve the new rates outside a general rate case, without engaging in prohibited single-issue ratemaking.

An even more recent case in which the Commission has determined that it has authority to approve a new rate such as Schedule MKT is Evergy's application for Commission approval of its transportation electrification pilot program.[3] In that case, the Commission issued its Report and Order less than a month ago, on January 12, 2022. In that Report and Order, at pages 27-28, the Commission included the following Conclusions of Law:

> Section 393.270.4, RSMo provides: "[i]n determining the price to be charged for gas, electricity, or water the commission may consider all facts which in its judgement have any bearing upon a proper determination of the question…."
>
> …
>
> In practice, the courts have held that the Commission's determination of the appropriateness of a utility's rate is to be based upon all relevant factors.
>
> …
>
> Failure to consider all relevant factors is generally forbidden as single issue ratemaking.
>
> …
>
> The rationale of the prohibition on single issue rate making is to prevent the Commission from permitting a utility to raise rates to cover increased costs in one area without considering counterbalancing savings in another area. That rationale does not apply to rates being applied to new services for which a rate has not previously been in effect.

The decisions of the Commission in both the Nucor case and the Evergy electrification case relied upon *State ex rel. Sprint Spectrum L.P. v. Mo. Pub. Serv. Comm'n*,

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[2] *In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval of a Special Rate for a Facility Whose Primary Industry is the Production or Fabrication of Steel in or around Sedalia, Missouri*, File No. EO-2019-0244.

[3] *In the Matter of the Application of Evergy Metro, Inc. d/b/a Evergy Missouri Metro and Evergy Missouri West, Inc. d/b/a Evergy Missouri West for Approval of a Transportation Electrification Portfolio*, File No. ET-2021-0151.

112 S.W.3d 20 (Mo. App. W.D. 2003). In *Sprint*, the Court considered the question (among a number of other issues on appeal) of whether the general prohibition against single-issue ratemaking prevented the Commission from approving the tariffs of certain rural telephone companies that were not filed in general rate cases. The tariffs at issue were designed to establish rates for the termination of wireless calls that were sent to the rural carriers' networks when there were no existing tariffs pursuant to which the rural carriers could charge the wireless companies. The Court in *Sprint* found that the Commission could lawfully approve new tariffs for new services without violating the prohibition against single-issue ratemaking. The holding in *Sprint* noted the rationale behind the single-issue ratemaking prohibition (to prevent the raising of rates to cover increased costs in one area without taking into account counterbalancing savings in another area), and then explained why it did not apply in the situation where the rural carriers were establishing tariffs for a new service:

> 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.[4]

Just as in the Nucor, Evergy electrification, and *Sprint* cases, the Commission's approval of Schedule MKT here would not be an increase to existing rates, but rather the establishment of a new rate for a new service, and as such, approval is clearly within the Commission's lawful authority.

C. THE COMMISSION SHOULD NOT RESTRICT OR PROHIBIT THE USE OF SCHEDULE PED FOR CUSTOMERS TAKING SERVICE ON SCHEDULE MKT

The question of whether the Commission should restrict or prohibit Evergy customers from taking service under Schedule PED (Exhibit 308) before taking service under Schedule

[4] *State ex rel. Sprint Spectrum L.P. v. Mo. Pub. Serv. Comm'n*, 112 S.W.3d 20 (Mo. App. W.D. 2003), at 23.

MKT is a troubling one in several respects. First, the proposal that the Commission should impose such a prohibition or restrictions was introduced into the case literally hours before the start of evidentiary hearings, which makes it somewhat difficult to counter that proposal. Second, the record is devoid of evidence of any examples of any similar type of prohibition or restriction among Evergy's tariffs (or any other utility's tariffs, for that matter), and a reading of the statute pursuant to which Schedule PED was created and approved by the Commission reveals that the legislature did not intend or contemplate that its use would be restricted or prohibited in ways beyond those explicitly set forth in the statute. The proponents[5] of restricting or prohibiting Evergy customers from taking service under Schedule PED before taking service under Schedule MKT have created a vague standard for limiting economic development incentives that has no basis in statute, in the Commission's rules, in Evergy's tariffs, or in public policy. Third, and finally, there is a better approach that allows the Commission to evaluate a particular customer's use of Schedule MKT after having taken service under Schedule PED instead of inserting a blanket restriction or prohibition in the MKT tariff that would apply to all customers under all circumstances.

1. The Provenance of the Schedule PED Prohibition or Restriction

The Commission's rules and procedures regarding evidence are designed to ensure a well-developed record on which the Commission can make informed decisions. The Commission's rule on Evidence (20 CSR 4240-2.130) addresses the filing of written testimony. In particular, 20 CSR 4240-2.130(7)(C) provides:

[5] Although the first Non-Unanimous Stipulation and Agreement (EFIS entry 38), which introduced the proposal to prohibit the use of Schedule PED by any customer taking service under Schedule MKT, was filed by MECG, Staff and OPC, both Staff and OPC declined to discuss it in their opening statements but instead deferred discussion and explanation of the proposal to MECG.

> Where only the moving party files direct testimony, rebuttal testimony shall include all testimony which explains why a party rejects, disagrees or proposes an alternative to the moving party's direct case.

None of the parties in this case even mentioned Schedule PED in their rebuttal testimony, nor in their cross-surrebuttal, despite the fact that Evergy, in the direct testimony of Darren Ives made clear that:

> [p]rior to taking service under the proposed tariff [Schedule MKT], the Project Velvet site will receive service under our Large Power rate and Limited Large Economic Development rider [Schedule PED], allowing them to construct, make ready the facility, and begin increasing load.[6]

Pursuant to 20 CSR 4240-2.130(7)(C), the parties that are proposing to prohibit or restrict Velvet from receiving service under Schedule PED before moving to Schedule MKT were required to include that proposal in their rebuttal testimony.

Not only did they not include that proposal in testimony, none of the parties that are proposing to prohibit or restrict the use of Schedule PED mentioned this proposal in their position statements. The Commission's Order Setting Procedural Schedule in this case, issued on December 15, 2021, stated:

> E. Although not all parties may agree upon how each issue should be described or on whether a listed issue is in fact a proper issue in this case, the parties shall agree upon and file a list of the issues to be heard, the witnesses to appear on each day of the hearing, the order in which they will be called, and the order of cross-examination for each witness. The list of issues should be detailed enough to inform the Commission of each issue that must be resolved. The Commission will view any issue not contained in this list of issues as uncontested and not requiring resolution by the Commission.
> F. Each party shall file a simple and concise statement summarizing its position on each disputed issue, including citations to pre-filed testimony supporting its position.

The list of issues agreed to and filed by the parties did list the issue of "what if any modifications to the Schedule MKT tariff proposed by EMW or other conditions should the

[6] Exhibit 2, Direct Testimony of Darren Ives, pages 9-10.

Commission order?" By not including anything in their statements of position raising the prohibition or restriction of the use of Schedule PED as a modification to the Schedule MKT tariff or as a condition that the Commission should order, those parties that attempted to introduce it as an issue through the filing of the first Non-Unanimous Stipulation and Agreement (EFIS entry 38) have failed to comply with the Commission's Order Setting Procedural Schedule. Accordingly, the Commission should consider "as uncontested and not requiring resolution by the Commission" the unrebutted proposal contained in the direct testimony of Darren Ives that, prior to taking service under Schedule MKT, a customer can take service under Schedule PED without restriction or limitation.

2. There Is No Evidence in the Record of any Similar Type of Prohibition or Restriction on the Use of Otherwise Applicable Tariffs, and Section 393.1640 RSMo Does Not Include any Restrictions

During cross examination of Evergy witness Ives, counsel for MECG attempted to draw an analogy between certain restrictions in the Missouri Energy Efficiency Investment Act ("MEEIA") and the proposed restriction on a prospective Schedule MKT customer's use of Schedule PED (Transcript, page 294). But that analogy misses the mark, and indeed proves exactly the opposite point. What the restriction **in the MEEIA statute** shows is that the legislature understands full well how to place restrictions on how utility customers can take advantage of utility programs implemented pursuant to statute. In enacting MEEIA, the legislature chose to do exactly that. In enacting Section 393.1640 (the statute under which Schedule PED was created), the legislature explicitly chose not to place any restrictions. It could easily have said that a customer taking advantage of discounts in tariffs implemented pursuant to Section 393.1640 cannot take advantage of discounts in any other tariff, but it

chose not to. The evidence on the record concerning the promulgation of Section 393.1640 was offered by Evergy witness Ives during cross-examination:

> Q. [T]here was at the time that the legislature passed 393.1640, other statutes that would offer customers significant discounts and the legislature chose not to restrict the use of 393.1640 in any way?
> A. That's correct. And I think we might have talked yesterday as well.I mean, there are also other special contract tariffs in place that would have been in place at that time as well.
> Q. Right. So there are any number of other discounted mechanisms that a customer could use once the ability to use something like Schedule PED under 393.1640 had expired?
> A. That's correct.
> Q. And the legislature would have been aware of all of those?
> A. That's correct.
> (Transcript, pages 288-289)

Other than a flawed comparison to a **statutory** restriction, there is not a shred of evidence in the record of any restriction or prohibition similar to that proposed here. In fact, the evidence shows that utility customers taking advantage of economic develop rates in other states may move from one economic development rate to a different economic development rate. Velvet witness Brubaker testified under cross-examination by counsel for MECG:

> Q. Are you familiar with the EDRs in other states?
> A. Some of them.
> Q. Would you agree with the notion that an EDR is designed to attract customers by giving them a discount for electric service?
> A. Yes.
> Q. Okay. And in general, after a certain period of time that customer then goes back to paying the full tariffed rate; is that correct?
> A. It may.
> Q. You're aware of EDRs where a customer can stay on perpetually?
> A. Well, the EDR is made -- they themselves may expire or they -- and they may be alternative EDRs or alternative tariffs that their customer can migrate to.
> (Transcript, page 337)

The proponents of restricting or prohibiting the use of Schedule MKT will no doubt claim that they are not proposing restrictions on the use of Schedule PED, but instead placing restrictions on the use of Schedule MKT. This is sophistry. Asking that the Commission

restrict the use of Schedule PED as a precondition for the use of Schedule MKT is clearly asking the Commission to restrict the use of Schedule PED in a way that that legislature neither contemplated nor authorized.

3. A Better Way than Limiting the Use of Schedule PED to Mitigate the Risks to Other Customers is to Address those Risks in the Market Contract Approval Process

OPC witness Marke explains the rationale behind the parties' push for restrictions or prohibitions on the use of Schedule PED before the use of Schedule MKT.

> Again, this is where the EDR becomes a critical issue for us and why the hold harmless language is important for our office. Again this risk/reward. We've been throwing the term hold harmless out a lot. I would make the observation that nonparticipants would already be on the hook for 40 percent of that discount. Whether that is the five years or the two years that has been offered up. I mean, there's going to be some dollar amount that nonparticipants are going be asked to bear, period. So right off the bat nonparticipants are paying a cost. If they switch over at that point, if we accept what the Company is putting forward, **then customers are then exposed to the risk of that company going under or any number of other factors that are not meeting that revenue.** So the hold harmless is really designed as a risk/reward. The Company is being rewarded. The risk should be minimal. We have every reason to believe it should be, but given the order of magnitude that we are talking about here, I would be negligent not to go ahead and advocate for customers to have some sort of protection.
>
> …
>
> As this is defined, I mean, this could include any number of different types of customers. I will just give the example of bitcoin, for example. We could have a customer that wanted to open up a bitcoin mining and take advantage of this rate. Very speculative business at the moment. Last Monday bitcoin hit a six-month low in terms of overall cost. They could take advantage of this. The Company could go ahead and buildout. Everything that they needed to do all the transmission, distribution, get the generation. **And that company could easily go under.** I just use that as a hypothetical. **There is a huge amount of risk that is associated with that.** And again, it is all the more important why customers who are already being asked to pay on the front end of this with that EDR get some sort of level of protection on the backend.
>
> …
>
> [T]he EDR is designed, again -- you know, and this has been hit home, but I want to reiterate this: We've got that economic development rider out there that customers take advantage of for a set number of years and then they are on the system. They're paying back. That's the give-and-take that's taking place with

> customers here. The nonparticipants are being made whole because we've got that load coming on **and they are a viable customer**. (Transcript, pages 546-547; 551; 560; emphasis added.)

So the point of the restriction on the use of Schedule PED as a precondition for taking service under Schedule MKT is to mitigate the risk that a customer might "[go] under or any number of other factors that are not meeting that revenue" after having taken advantage of the discounts under Schedule PED. Instead of outright prohibiting all prospective MKT customer from taking advantage of the provisions of Schedule PED or limiting their use of those provisions, a better way to mitigate that risk is to address it in the market rate contract approval process. Approval of Schedule MKT in this proceeding is only the first step in a customer taking service under that Schedule. Unless and until the Commission affirmatively approves a specific market rate contract for a specific customer, that customer cannot take service under Schedule MKT. The Commission can assess the risk of a particular customer "going under" at the time it approves the contract. The Commission can assess the provisions of the market rate contract itself to ensure that the contract itself mitigates that risk. If the customer or the contract does not meet the Commission's risk criteria, the Commission can reject the contract. A blanket restriction on a customer's use of a statutory economic development program as a precondition to that customer being able to use a tariff for which it otherwise fully qualifies, is neither in the public interest nor consistent with this Commission's long-standing support for economic development and for economic development rates. It is also inconsistent with the principle that tariffs are generally available to take service under by any qualifying customer.

D. CONCLUSION

The Commission has lawful authority to approve Schedule MKT, and it should approve Schedule MKT for use by any qualifying customer without limiting a Schedule MKT customer's use of otherwise available rate schedules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been emailed this 8th day of February, 2022, to all counsel of record.

/s/ Lewis Mills