

**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

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Case No. ER-2024-0189

**INITIAL BRIEF OF THE MISSOURI OFFICE OF THE PUBLIC COUNSEL
FOLLOWING SUPPLEMENTAL EVIDENTIARY HEARING**

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Evergy Missouri West is requesting the Commission render a decision that would constitute an illegal advisory opinion and would also improperly bind future Commissions. The Company's request should therefore be denied. To understand these points, one must begin with the issue presented.

Review of the Issue

There was one issue included in the written list of issues to be addressed by this Commission following the second evidentiary hearing. That issue, which is a verbatim recitation of Issue 5(C) from the originally filed list of issues, reads as follows:

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?

This issue is, on its face, just a question of whether the Commission should be rendering a decision in this particular case as opposed rendering that same decision in some future case. There are consequently at least two obvious ways this issue could be answered:

1. No, the Commission should not make a determination of prudence in this case, or
2. Yes, the Commission should make a determination of prudence in this case.

It is interesting to note, though, that in answering *this* question the Commission is not actually being asked to make the determination of prudence. Instead, the Commission is just being asked whether it is even appropriate to be making such a

determination at all in the present case. If the Commission were to reach the second conclusion, however, it would almost be expected that the Commission would then proceed to rule on the prudence of the renewal (despite it not actually being on the issue list). Thus, we must expand the ways by which the Commission could answer this question.

As stated, if the Commission concludes it was reasonable to determine the prudence of Evergy renewing the firm point-to-point transmission service agreement as part of this case, then the Commission would probably also need to answer the question of whether it is, in fact, prudent to renew the agreement. This then expands the available options for answers that the Commission could give in this case:

1. No, the Commission should not make a determination of prudence in this case, or
2. Yes, the Commission should make a determination of prudence in this case, and
 - a. It is not prudent to renew the firm point-to-point transmission service agreement, or
 - b. It is prudent to renew the firm point-to-point transmission service agreement.

However, even this is not the end of this line of possible responses because there is yet a third problem buried deep inside these first two that Evergy is desirous to have answered.

Staff witness Keith Majors provides an excellent and extensive history of the Crossroads Generating facility. [Ex. 280, *Direct Testimony of Keith Majors*, pgs. 25 – 58]. This history, which the OPC will not reiterate here for brevity, is important to

understanding the current state of affairs which are driving this issue. This current state being that Evergy Missouri West ratepayers are not actively paying for the transmission costs related to the Crossroads generating facility because this Commission found “that including the Crossroads transmission costs does not support safe and adequate service at just and reasonable rates[.]”¹ [*Id.* at pg. 32 lns. 39 – 43; Ex. 300, *Direct Testimony of Lena M. Mantle*, pg. 40 ln. 17 – pg. 41 ln. 18]. Evergy very much wants this to change such that it can shift these transmission costs, which are currently being borne by its shareholders, onto Evergy’s customers despite the Commission’s prior rulings. To accomplish this, the Company requires the Commission to further rule that, if the firm point-to-point transmission service agreement with Entergy Corp. is renewed, the transmission costs associated with that agreement will be fully recoverable from ratepayers. What is interesting is how Evergy has tied this question into the filed issue.

Right now, the whole case turns on a legal theory that Evergy has implicitly presented. That theory can be expressed as such: Evergy believes that a determination by the Commission that is prudent for Evergy to renew its firm point-to-point transmission service agreement necessarily means that it should be permitted to recover transmission costs related to the same. Evergy’s witness made

¹ The Commission actually made this determination twice. [Ex. 300, *Direct Testimony of Lena M. Mantle*, pg. 40 ln. 17 – pg. 41 ln. 18]. The first time in case ER-2010-0356 and then a second time in case ER-2012-0175. [*Id.*]. The Commission’s rationale for both decisions was the same, *i.e.* that “including the Crossroads transmission costs does not support safe and adequate service at just and reasonable rates” [*Id.*].

this clear during cross examination. [Tr. vol 9 pg. 84 ln. 21 – pg. 85 ln. 4]. However, Evergy's legal theory is wrong.

It is entirely reasonable to conclude that it would be prudent for Evergy to renew its firm point-to-point transmission service agreement and that the inclusion of Crossroads transmission costs does not support safe and adequate service at just and reasonable rates because that is what the Commission has previously determined. [Ex. 280, *Direct Testimony of Keith Majors*, pg. 32 lns. 39 – 43, pg. 58 ln. 26 – pg. 59 ln. 7; Ex. 300, *Direct Testimony of Lena M. Mantle*, pg. 40 ln. 17 – pg. 41 ln. 18]. However, the OPC would prefer to save the arguments supporting this point to be raised in its reply brief (to the extent necessary) to mitigate the length of this brief. Suffice to say that, given what Evergy actually wants from the Commission, a third layer can be added to the reasonable answers that the Commission could give in this case:

1. No, the Commission should not make a determination of prudence in this case, or
2. Yes, the Commission should make a determination of prudence in this case, and
 - a. It is not prudent to renew the firm point-to-point transmission service agreement, or
 - b. It is prudent to renew the firm point-to-point transmission service agreement, and
 - i. The inclusion of transmission costs related to the firm point-to-point transmission service agreement as part of a future rate case will not result in just and reasonable rates, or
 - ii. The inclusion of transmission costs related to the firm point-to-point transmission service agreement as part of a future rate case will result in just and reasonable rates.

As one can see, what would appear on its face to have been a simple question has become a multi-faceted request by Evergy to ensure that the Commission will allow it to recover transmission expenses arising from a possible renewal of its firm point-to-point transmission service agreement despite those expenses not being eligible to be placed into rates until a future rate case that is expected to occur sometime after 2029. If that is confusing, then there is good news! The correct answer to the question ends with the first proposed response outlined above: the Commission should not make a determination of prudence in this case.

This Commission should simply and solely find that it should not (and legally cannot) make a determination of prudence in this case. In doing so, the remaining dispute regarding prudence and transmission costs can be safely disregarded as unnecessary. Those questions will no doubt be answered, but only in the future when they are properly presented before this Commission. What remains for this brief, therefore, will be the direct examination of *why* the Commission should conclude that it legally cannot render a prudence decision here and now. The principal reason for reaching that conclusion is that Evergy's request is for an illegal advisory opinion.

This Issue Calls for an Advisory Opinion

“An advisory opinion is a ‘nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose.’” [*State v. Graves*, 619 S.W.3d 570, 577 (Mo. App. E.D. 2021) (quoting Black's Law Dictionary 1125 (8th ed. 2004))]. This Commission is prohibited from offering such an opinion. [*State ex rel. Laclede Gas Co. v. PSC*, 392 S.W.3d 24, 38 (Mo. App. W.D. 2012) (“Like other administrative agencies, the [Public Service] Commission is not authorized to issue advisory opinions.”)]. To determine whether a requested determination is an advisory opinion, the Commission should consider the three means directly identified by the Missouri Supreme Court:

An opinion is advisory if there is no justiciable controversy, such as if the question affects the rights of persons who are not parties in the case, the issue is not essential to the determination of the case, or the decision is based on hypothetical facts.

[*Mo. Dep't of Nat. Res. v. Hickory Neighbors United, Inc. (In re Trenton Farms RE, LLC)*, 603 S.W.3d 286, 293 (Mo. banc 2020)(quoting *Cope v. Parson*, 570 S.W.3d 579, 586 (Mo. banc 2019))]. It is important to note the use of the “or” in the preceding list, which indicates that any one of the three reasons outlined by the Missouri Supreme Court is sufficient to establish there is no justiciable controversy. Given that, the first of these three points (whether the question affects the rights of persons who are not parties in the case) will not be addressed as it is not an impediment to issuance of a decision here. The same cannot be said for the other two points.

This Issue is not Essential to the Determination of this Case

This case is what is commonly known as a “rate case.” [Tr. vol. 9 pg. 80 lns. 16 – 17]. It began when Evergy Missouri West “filed tariff sheets designed to implement a general rate increase for utility service.” [ER-2024-0189, *Report and Order*, pg. 4 ¶ A, (EFIS Item No. 442)]. A series of stipulations were subsequently filled in the case, which, after review, the Commission found would “result in just and reasonable rates” and thus chose to “approve the Stipulations.” [*Id.* at pg. 4 – 5, ¶ A]. The Commission subsequently ordered Evergy Missouri West “to file tariff sheets sufficient to recover revenues approved in compliance with [its] order.” [*Id.* at pg. 11, ¶ 3]. That *Report and Order* was issued December 4, 2024, and became effective December 14, 2024. [*Id.* at pg. 1].

Evergy Missouri West filed revised tariff sheets on December 16, 2024, in compliance with this Commission’s *Report and Order*. [ER-2024-0189, *Letter of Transmittal*, pg. 1 (EFIS Item No. 445)]. Those revised tariffs had an effective date of January 1, 2025. [*Id.* at pg. 4]. This Commission then issued an order approving the revised tariff sheets on December 20, 2024. [ER-2024-0189, *Order Approving Tariff*, pgs. 1 – 2, (EFIS Item No. 451)]. So to summarize, this case began when Evergy submitted tariff sheets designed to implement a general rate increase; a series of stipulations was reached and approved by the Commission; new tariff sheets were drafted, submitted, and approved; and the new tariff sheets with their new rates have now gone into effect and will have been in effect for nearly a year by the time this Commission promulgates a decision on the pending issue.

Evergy's witness acknowledged during cross examination that the issue currently before the Commission will not in any way impact the tariffs that are now in effect. [Tr. Vol 9 pg. 82 lns. 3 – 8]. Instead, the Commission's decision on the present issue could only possibly impact rates in some hypothetical future rate case where Evergy seeks rate recovery for the transmission costs related to a renewal of its firm point-to-point transmission service agreement. As, such, this issue is categorically non-essential to the determination of the present case.

While it seems generally unnecessary to further establish this point, the OPC will offer the 2012 case of *State ex rel. Laclede Gas Co. v. PSC* as a comparative example. In that case, Laclede Gas Company sought an appeal from two decisions of this Commission, the first "being a summary determination finding that Laclede violated a Stipulation and Agreement approved by the Commission in 2001" and the second "being a dismissal of Laclede's counterclaim against the Commission's Staff." [*State ex rel. Laclede Gas Co. v. PSC*, 392 S.W.3d 24, 27 (Mo. App. W.D. 2012)]. It is this second decision that bears attention. In short, the Laclede Gas Company asserted in its counterclaim against the Commission's Staff that "the Staff failed to comply with the Commission's affiliate transaction rules and with the CAM." [*Id.* at pg. 38]. However, "[t]he Commission dismissed Laclede's counterclaim, in part, because it refused to issue an advisory opinion telling the Staff that the position it took in its ACA review of Laclede's gas costs was incorrect." [*Id.* (emphasis added)]. In doing so, this Commission stated:

Through its counterclaim and motion for the Commission to take notice, Laclede is really asking the Commission to issue an advisory opinion telling Staff that the position it has taken in the ACA cases is incorrect. The Commission may ultimately agree with Laclede that the position Staff has asserted is inconsistent with the affiliate transaction rules and Laclede's Cost Allocation Manual, but the proper forum for resolving that question is in those ACA cases, rather than as a counterclaim in Staff's complaint.

[*Id.* (emphasis added)]. The Court agreed, stating that “[w]hether or not the Staff failed to comply with the Commission's affiliate transaction rules and with the CAM should be resolved in the ACA cases and not in an action seeking a determination of whether Laclede violated an agreement with the Commission by refusing to respond to discovery requests.” [*Id.* at pgs. 38 – 39]. The same logic is applicable to the present case.

As with the *State ex rel. Laclede Gas Co. v. PSC* case, this rate case is simply not the appropriate venue for determining the prudence of costs for which Evergy is presently not seeking recovery. Instead, the appropriate venue for determining the prudence of an expense is the case in which the expense is known, measurable, and most importantly subject to potential recovery. Because the transmission expenses that Evergy seeks a prudence determination on in this case will not be subject to recovery for at least four years (and possibly longer depending on when Evergy initiates a rate case following a renewal), the issue is not essential to the determination of this case and is thus merely a request for an advisory opinion.

The Requested Decision is Based on Hypothetical Facts

As discussed above, the question before the Commission is whether it should make a decision on the prudence of renewing the Company's firm point-to-point transmission service agreement with Entergy Corp. before it expires in February 2029. The problem is that, in order for the Commission to be able to properly determine the prudence of that renewal, the Commission would need to know – or at least have a reasonable basis to estimate – the costs associated with that decision in 2029. The record before the Commission makes it clear that this information is unknown at this time, as demonstrated in the cross examination of Entergy's Witness Mr. VandeVelde:

Q. The prior witness I guess was asked about some MISO provisions and pointed to you as someone who might be able to answer. Do you know what the transmission point-to-point rate will be in 2029?

A. I do not.

Q. Do you know what the escalations to that transmission within the point-to-point transmission cost might be beyond 2029?

A. I do not.

Q. When will you know those cost figures?

A. When the bill from MISO shows up, just like we do today.

[Tr. vol 9 pg. 90 lns. 12 – 23]. As this exchange demonstrates, not only is there no information before this Commission to allow for an estimation of the transmission costs associated with Crossroads as of the date of the expiration of the existing service agreement, but there is also nothing before the Commission to indicate what level of

increase those costs could experience moving forward if the service agreement is renewed. This creates a major problem.

It is established that transmission costs associated with Crossroads have increased since the Commission's original decision. [Ex. 160, *Direct Testimony of Cody VandeVelde*, pg. 8 lns. 1 – 11]. This is actually one of the things the Company points to when arguing for a change to the *status quo*.² [*Id.*]. However, if this trend continues, then there is genuine concern that it would become imprudent for Evergy to renew the firm point-to-point transmission service agreement based on the length of that agreement. This was acknowledged by both MECG witness Mr. Greg Meyer and Staff Witness Mr. Keith Majors:

Q. . . . Would you agree [with] me that the prudence evaluation for a one-year service extension versus four year versus a five, et cetera, would all be different?

A. Yes. Because as I've learned today, the cost could be different depending on the interval. So that would play into the overall prudence or the overall cost of the -- to the options.

[Tr. vol 9 pg. 127 ln. 21 – pg. 128 ln. 2 (for Mr. Greg Meyer)];

Q. . . . In your opinion does the length or term length of the renewal of the service agreement impact the prudence decision?

A. I -- I think it would depend on what the ultimate outcome of Crossroads is going to be.

² In reality, this only further justifies the Commission's conclusion "that including the Crossroads transmission costs does not support safe and adequate service at just and reasonable rates[.]" [Ex. 280, *Direct Testimony of Keith Majors*, at pg. 32 lns. 39 – 43]. If it was already unreasonable for ratepayers to pay the existing transmission costs, it certainly would not become reasonable for them to pay even higher transmission costs. [Ex. 300, *Direct Testimony of Lena M. Mantle*, pg. 42 lns. 3 – 9].

[Tr. vol 9 pg. 133 lns. 17 – 21 (for Mr. Keith Majors)]. The possible variation in the term length of the contract means that the Commission is now faced with multiple hypotheticals regarding the prudence of the renewal.

The current service agreement has a twenty-year term. [Tr. vol 9 g. 134 lns. 7 – 9]. However, the contract can be renewed for apparently as little as one year. [*Id.* at pg. 95 lns. 12 – 13 (“it has to at least be a one-year extension”)]. Yet if the renewal is for at least five years, then Evergy “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” [*Id.* at lns. 17 – 20]. It’s easy to see that there are now multiple hypothetical scenarios before the Commission regarding the renewal of the firm point-to-point transmission service agreement:

1. Renew for a short-term agreement for anywhere between one year and four years;
2. Renew for the shortest long-term agreement (five years) in order to retain the “rollover rights;”
3. Renew for the same twenty years as the original service agreement;
- or
4. Renew for any other number of years.

[*Id.* at lns. 11 – 20]. However, the question before the Commission is only asking for a determination of the prudence of the renewal “in general.” Given this, there is no clear way for the Commission to render a decision without making hypothetical assumptions regarding the length of the contract term and the prospective transmission costs that would incur during that term, which as stated above should

directly impact the prudence evaluation. [Tr. vol 9 pg. 127 ln. 21 – pg. 128 ln. 2; pg. 133 lns. 17 – 21]. In other words, it is impossible for this Commission to render a decision in this case that would not be based on hypothetical facts. Thus, the requested decision is, again, a request for an advisory opinion.

The Present Commission Cannot Bind Future Commissions

There is a third point to address as it relates to the issue of advisory opinions that is unique to the Public Service Commission. That is this Commission's long-standing determination that one Commission cannot bind future Commissions. For example, in case number ER-2014-0258 (In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase Its Revenues for Electric Service), this Commission considered a non-unanimous stipulation and agreement that included a ten-year term. [ER-2014-0258, *Report and Order and Dissenting Opinion of Commissioner Stephen M. Stoll*, pg. 133, (EFIS Item No. 745)]. The Commission found as follows:

Second, the ten-year term of the joint position is too long, and is largely illusory. Ten years is a very long time, and the market for electricity may look very different by that time. Attempting to set a rate at that distance, even with escalator clauses and opt-out measures, would not be prudent. Additionally, while a stipulation and agreement can be binding on its signatories for ten years, the Commission cannot bind future Commissions, nor can it preclude future litigants from presenting contrary positions in future rate cases, positions to which the Commission will need to give due consideration.

[*Id.* (emphasis added)]. Another example can be found in Commission case number ER-2011-0028. The only issue presented to the Commission in that case was “whether to order Ameren Missouri in this case to return any tax refund it may receive to its customers.” [ER-2011-0028, *Report and Order*, pg. 110 ¶ 14 (EFIS Item No. 594)]. The Commission noted both that “[t]here is no disagreement about Ameren Missouri’s duty to track that refund” and that “[i]f Ameren Missouri does receive a tax refund, then the Commission would certainly expect that the company would return that refund to its customers who are ultimately paying the tax bill.” [*Id.*]. It even went on to state that it was “hard to imagine any circumstance in which such a refund would not be ordered.” [*Id.*]. However, the Commission ultimately concluded as follows:

Any such order the Commission could issue in this case would be ineffective, as this Commission cannot bind a future Commission. At this time, the Commission can only order Ameren Missouri to track any possible refund. A decision about how any such tax refund is to be handled must be left to a future rate case.

[*Id.* at pg. 111 ¶15 (emphasis added)]. So even when the Commission clearly knew how it intended to rule, it still found it could not issue such a ruling.

To round out the examples, the OPC will offer a third. Case number EA-2012-0281 concerned “Ameren Missouri’s application for a certificate of convenience and necessity to expand the boundaries of its Labadie Energy Center so that it can construct and operate a utility waste landfill at that location.” [ER-2012-0281, *Report and Order*, pg. 2 (EFIS Item No. 270)]. One of the issues concerned a condition proposed by the Sierra Club and Labadie Environmental Organization that Ameren

should not be able to recover from ratepayers the costs attributable to environmental damage caused by the landfill. [*Id.* at pgs. 22 – 23]. The Commission rejected that proposed condition stating this:

The Commission recognizes that coal ash is a by-product of coal generation, and storage of the coal ash is part of that process. There are potential risks associated with any coal ash landfill. In fact, there are potential risks associated with transporting coal ash to another facility via truck, barge, or rail. It is inappropriate to make any determination regarding how to address those risks in future rates at this time. Simply put, this Commission cannot bind future Commissions. Even if the Commission were to impose such a condition in this order, a future Commission, looking at the issue many years from now, or even next week, would be free to decide for itself whether Ameren Missouri should be allowed to recover such costs.

[*Id.* at pg. 23 (emphasis added)]. This conclusion is perhaps the most telling regarding the implications for Evergy's request for this case.

This Commission has itself found plenty of times that it cannot bind future Commissions. This means that, even if the present Commission were to render a decision stating that it found Evergy's renewal of the point-to-point transmission service agreement prudent, a future Commission "looking at the issue many years from now, or even next week" would be free to render a contrary determination or else find that the transmission costs associated with that agreement should not be included in rates. [*Id.*]. As stated above, "[a]n advisory opinion is a 'nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose.'" [*State v. Graves*, 619 S.W.3d 570, 577 (Mo. App. E.D. 2021) (quoting Black's

Law Dictionary 1125 (8th ed. 2004))(emphasis added)]. Given the Commission cannot bind a future Commission, the determination requested is “nonbinding” on its face and thus an advisory opinion.³ [*Id.*].

³ And even if it was not deemed an “advisory opinion” it would still be nonbinding and thus effectively null.

Conclusion

There is much that could be said regarding the history of Crossroads, the proper legal lens to examine the prudence of the proposed renewal, the implications of Evergy's threat to purposefully increase costs for ratepayers if not permitted recovery of the transmission costs, and many other factors that will likely be addressed at some level in reply briefing. For now, though, the only thing this Commission needs in order to properly resolve this case is to cite to the law set forth above and determine that it cannot legally render a decision on the prudence of renewing a contract that expires in 2029 as part of a rate case decided in 2024 for which rates are already in effect. The Commission need not – and should not – delve any deeper into this matter than the law permits and practical realities require. Therefore, the OPC requests the Commission answer only the issue presented and conclude that it should not determine if it is prudent for Evergy to renew its firm point-to-point transmission service agreement with Entergy Corp. in this case.

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 Twenty-fifth day of November, 2025.

 /s/ John Clizer