

BEFORE THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

In the Matter of the Joint Application of )  
Evergy Kansas Central, Inc., Evergy Kansas )  
South, Inc., and Evergy Metro, Inc. for ) Docket No. 23-EKCE-588-TAR  
Approval of Tariff Changes Related to )  
Wholesale Demand Response Participation. )

**BRIEF OF CITIZENS' UTILITY RATEPAYER BOARD  
IN SUPPORT OF NON-UNANIMOUS SETTLEMENT AGREEMENT**

COMES NOW, the Citizens' Utility Ratepayer Board ("CURB") and submits this brief in support of the Non-Unanimous Settlement Agreement filed with the Kansas Corporation Commission ("KCC") on August 10, 2023 ("Settlement Agreement").

**INTRODUCTION**

1. CURB urges the KCC to approve the Settlement Agreement, as it reasonably allows Kansas retail customers and Demand Response Aggregators ("DRAs")<sup>1</sup> to bid Demand Response<sup>2</sup> in the Southwest Power Pool ("SPP") integrated market ("IM"). Yet, the Settlement Agreement also protects Evergy ratepayers against certain practices of Kansas retail customers and DRAs regarding Demand Response that may detrimentally affect the reliability of Evergy's system at significant costs. As discussed below, the Settlement Agreement reasonably and lawfully balances the parties' interests in this docket, and KCC approval of the same is in the public interest.

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<sup>1</sup> Demand Response Aggregators are entities that aggregate the load of one or more retail customers for purposes of participation as a Demand Response Resource in wholesale markets. Third-party non-utility aggregators are sometimes referred to as Aggregators of Retail Customers (ARCs). See Darrin R. Ives, Direct Testimony of Darrin R. Ives on Behalf of Evergy Kansas Central, Inc., Evergy Kansas South, Inc. And Evergy Kansas Metro, Inc. (hereinafter, Direct Testimony of Darrin R. Ives), January 11, 2023, p. 5.

<sup>2</sup> "Demand Response" is a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy, and "Demand Response Resources" is a retail customer's capability to provide Demand Response in wholesale markets like the SPP IM. Direct Testimony of Darrin R. Ives, January 11, 2023, p. 3.

## **Abbreviated Procedural History**

2. On January 25, 2023, Evergy Kansas Central, Inc. and Evergy Kansas South, Inc. (collectively, “Evergy Kansas Central” or EKC) and Evergy Metro, Inc. (“Evergy Kansas Metro” or EKM) (together with Evergy Kansas Central referred to as “Evergy”) filed an application for approval of tariff changes related to wholesale Demand Response Resource participation.<sup>3</sup>

3. On January 26, 2023, CURB filed a Petition to Intervene and Motion for Protective Order, Discovery Order and Order Assessing Costs.<sup>4</sup> The Commission granted the same on February 2, 2023.<sup>5</sup> In addition to granting CURB’s intervention, the Commission has granted intervention to Voltus, Inc. (“Voltus”); the Empire District Electric Company (“Empire”); Southern Pioneer Electric Company (“Southern Pioneer”); Sunflower Electric Power Company (“Sunflower”); Sierra Club and Vote Solar.<sup>6</sup>

4. On March 21, 2023, the KCC issued a procedural schedule.<sup>7</sup> On April 3, 2023, Voltus filed a Petition for Reconsideration of Order Establishing Procedural Schedule.<sup>8</sup> On May 12, 2023, Voltus filed a Motion for Leave to Depose Evergy Witnesses and Motion for Expedited Order.<sup>9</sup> Evergy opposed both the petition and motion.<sup>10</sup> Nonetheless, the parties engaged in

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<sup>3</sup> Joint Application for Approval of Tariff Changes Related to Wholesale Demand Participation, Jan. 25, 2023.

<sup>4</sup> Petition to Intervene and Motion for Protective Order, Discovery Order and Order Assessing Cost, May 4, 2022.

<sup>5</sup> Order Designating Presiding Officer; Granting CURB’s Petition to Intervene; Protective and Discovery Order, February 2, 2023.

<sup>6</sup> Order Granting Intervention to Voltus, Inc. and The Empire District Electric Company; Denying Motion to Delay Issuance Of Procedural Schedule, April 4, 2023; Order Granting Intervention to Southern Pioneer and Sunflower, May 16, 2023; Order Granting Intervention to The Sierra Club and Vote Solar; Order Granting Motion For Admission Pro Hac Vice of David Bender, June 22, 2023.

<sup>7</sup> Order Setting Procedural Schedule, March 21, 2023.

<sup>8</sup> Voltus, Inc.’s Petition for Reconsideration of Order Establishing Procedural Schedule, April 3, 2023.

<sup>9</sup> Voltus, Inc.’s Motion for Leave to Depose Evergy Witnesses and Motion for Expedited Order, May 12, 2023.

<sup>10</sup> Answer to Petition for Reconsideration of Order Establishing Procedural Schedule, April 5, 2023; Evergy’s Response To Voltus, Inc’s Motion For Leave To Depose Evergy Witnesses. May 22, 2023.

discussion to arrive at a procedural schedule which Evergy filed for approval on June 16, 2023.<sup>11</sup>

The KCC approved a revised procedural schedule on June 22, 2023.<sup>12</sup>

5. Pursuant to the applicable procedural schedule at the time, the Staff of the KCC (Staff) filed its Report & Recommendation (“R&R”) on May 9, 2023.<sup>13</sup> In its R&R, Staff analyzed several data requests submitted to Evergy and the responses, and noted various examples of problems that could arise without adequate visibility and awareness of load patterns on Evergy’s distribution system.<sup>14</sup> Staff observed that, even though Evergy has managed these various challenges in the past, Evergy is now in a position of having to reactively respond to these issues as they arise.<sup>15</sup> Thus, Staff recommended that the Commission grant Evergy’s application. However, Staff noted that it would consider alternative solutions.<sup>16</sup>

6. Pursuant to the revised Procedural Schedule, CURB, Voltus, Empire, Southern Pioneer, Sunflower, Sierra Club and Vote Solar filed comments responding to Evergy’s application and Staff’s R&R.<sup>17</sup> Evergy filed its Response to Staff’s R&R and Intervenor Comments, supported by rebuttal testimony of Jayme D. Paytel and Darrin Ives on July 21, 2023,

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<sup>11</sup> Motion for Revised Procedural Schedule, June 16, 2023.

<sup>12</sup> Order Setting Procedural Schedule, June 21, 2023.

<sup>13</sup> Notice of Filing of Staff’s Report and Recommendation, May 9, 2023

<sup>14</sup> *Id.*, pp. 10-12.

<sup>15</sup> *Id.*, p. 10.

<sup>16</sup> *Id.*, p. 12.

<sup>17</sup> Initial Comments of Sierra Club And Vote Solar, July 7, 2023; Response of The Citizen’s Utility Ratepayer Board to Staff’s Report and Recommendation, July 7, 2023; Comments of Southern Pioneer Electric Company and Sunflower Electric Power Corporation in Response to Staff’s Report and Recommendation, July 7, 2023; The Empire District Electric Company’s Comments Related to Wholesale Demand Response Participation, July 7, 2023; Responsive Testimony of Gregg Dixon, Chief Executive Officer, Voltus, Inc., July 7, 2023; Responsive Testimony of Emily Orvis, Senior Director Of Energy Markets, Voltus, Inc, July 7, 2023; Responsive Testimony of Rao Konidena, Ceo Of Rakon Energy, LLC on Behalf of Voltus, Inc., July 7, 2023; and Declaration of Jon Wellinghoff in Response to the May 9, 2023 Staff Report and Recommendation, July 7, 2023.

all in accordance with the procedural schedule.<sup>18</sup> The parties engaged in settlement conference meetings, which led to the Settlement Agreement, which is the subject of this brief.

7. On July 5, 2023, the KCC Presiding Officer scheduled a Prehearing Conference for August 2, 2023. On July 31, 2023, on behalf of all of the Parties, Staff Counsel advised the Presiding Officer via email that the Settlement Agreement was being prepared, with Sierra Club and Vote Solar opposing the settlement. The email also explained that the opposition of Sierra Club and Vote Solar was based solely upon the issue of whether the Settlement Agreement is lawful under Kansas and federal law. Finally, it stated that the Parties agreed to cancel the scheduled evidentiary hearing and to proceed on a paper record.

8. Thereupon the KCC issued another revised procedural schedule on August 10, 2023.<sup>19</sup> On that same date, the Settlement Agreement was filed, with Evergy, CURB, Staff, Voltus, Southern Pioneer, and Sunflower as signatories.<sup>20</sup> On September 11, 2023, testimonies supporting the Settlement Agreement were filed by Evergy, Staff, CURB and Voltus.<sup>21</sup> However, Sierra Club and Vote Solar notified the KCC and the parties that it only intended to file a brief in opposition of the Settlement Agreement solely on legal issues and would not file evidentiary testimony.<sup>22</sup>

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<sup>18</sup> Response of Evergy Kansas Central, Inc., Evergy Kansas South, Inc. and Evergy Metro, Inc. to Staff Report and Recommendation and Intervenor Comments, July 21, 2023; Rebuttal Testimony of Jaymin D. Patel on Behalf of Evergy Kansas Central, Inc., Evergy Kansas South, Inc. and Evergy Kansas Metro, Inc., July 21, 2023; Rebuttal

<sup>19</sup> Order Amending Procedural Schedule, August 10, 2023.

<sup>20</sup> Joint Motion to Approve Non-Unanimous Settlement Agreement, August 10, 2023.

<sup>21</sup> Darrin R. Ives; Testimony in Support of Settlement of Darrin R. Ives on Behalf of Evergy Kansas Central, Inc., Evergy Kansas South, Inc. And Evergy Kansas Metro, Inc., September 11, 2023; Justin Grady, Testimony in Support of Non-Unanimous Settlement Agreement, September 11, 2023; Josh Frantz, Testimony in Support of Non-Unanimous Settlement Agreement, September 11, 2023; Jon Wellinghoff, Testimony of Jon Wellinghoff, Chief Regulatory Officer, Voltus, Inc. In Support of the Nonunanimous Settlement Agreement, September 11, 2023.

<sup>22</sup> Letter from Sierra Club and Vote Solar re Objection to Non-Unanimous Settlement, September 11, 2023.

## **Statement of Facts**

9. Evergy filed the subject application to coordinate its duty to provide safe and reliable electric service to retail customers with its handling of bids of Demand Response Resources in the SPP IM.<sup>23</sup> Indeed, Evergy’s application was brought about by Order 719 which the Federal Energy Regulatory Commission (“FERC”) issued on October 17, 2008, in Docket No. RM07-19-000.<sup>24</sup> Among other things, FERC intended its Order 719 to eliminate barriers to Demand Response Resources being bid into organized wholesale markets.<sup>25</sup> Accordingly, FERC Order 719 required Regional Transmission Organizations (RTOs), like SPP, and Independent System Operators (ISOs) to permit DRAs to bid Demand Response loads directly into wholesale markets, subject to certain exceptions.<sup>26</sup>

10. Evergy filed the subject application mindful that FERC wanted to expand organized wholesale electricity market access for Demand Response Resources and enable such resources to compete with other resource types at the wholesale energy level. In Order 719, the FERC stated that Demand Response Resources can provide competitive pressure to reduce wholesale power prices and can enhance reliability, among other benefits.<sup>27</sup> FERC intended Order 719 to ensure that Demand Response Resources are treated comparably to other (supply side) resources.<sup>28</sup>

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<sup>23</sup> Joint Application for Approval of Tariff Changes Related to Wholesale Demand Response Participation (hereinafter, Evergy Application), January 11, 2023, p. 5.

<sup>24</sup> Evergy Application, pp. 1-5.

<sup>25</sup> Direct Testimony of Darrin R. Ives, p. 6.

<sup>26</sup> Direct Testimony of Darrin R. Ives, p. 6.

<sup>27</sup> Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 125 FERC ¶ 61,071 (2008) (“Order No. 719”), order on reh’g, Order No. 719-A, 128 FERC ¶ 61,059 (2009) (“Order No. 719-A”), order on reh’g, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

<sup>28</sup> Id.

11. FERC was mindful of the jurisdictional split between states and the federal government with respect to electric power regulation, and in particular, the undue burden that its final rule could place on retail electric regulation.<sup>29</sup> Therefore, in its Final Rule in Docket No. RM07-19-000, FERC found that “an [Aggregated Retail Customer (“ARC”)] may bid retail load reduction into RTO or ISO regional markets unless the laws or regulations of the relevant electric retail regulatory authority (RERRA) do not permit a retail customer to participate in this activity.”<sup>30</sup> A RERRA’s decision to prohibit retail customers or their DRAs from bidding Demand Response Resources directly into wholesale markets is commonly referred to as an “opt out” under Order 719.<sup>31</sup>

12. Because Kansas has not “opted-out” of retail Demand Response Resource participation at the wholesale level, Evergy’s Kansas retail customers can participate in the SPP IM as Demand Response Resources.<sup>32</sup> Retail electricity consumers can individually participate in the SPP IM or participate through a DRA.<sup>33</sup> To participate in the SPP IM as a Demand Response Resource, retail customers must be registered with SPP.<sup>34</sup>

13. When a retail customer participates in SPP’s markets as a Demand Response Resource through a DRA, the DRA submits a registration package to SPP to serve as the Market Participant on behalf of the retail customer.<sup>35</sup> SPP’s protocols require notice to both Evergy and KCC and provide Evergy and the KCC with a 45-day period to raise any concerns about a retail

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<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> The KCC, and other state utility commissions like Kansas, are considered to be a RERRA under Order 719. The terms “state utility commissions” and “RERRAs” are used interchangeably in this brief.

<sup>32</sup> Joint Application, p. 2.

<sup>33</sup> Direct Testimony of Darrin R. Ives, pp. 4-5.

<sup>34</sup> Id., p. 10.

<sup>35</sup> Id., pp. 10-11.

customer's registration with SPP.<sup>36</sup> SPP's protocols also provide Evergy and the KCC with the ability to raise concerns about the validity of a Demand Response Resource's ongoing market participation.<sup>37</sup>

14. Evergy acknowledges that it is currently encountering challenges in reviewing Kansas Demand Response Resource registration and customer participation in the SPP IM through DRAs, which are not sufficiently addressed by its tariffs and which poses risks to the reliability of Evergy's retail distribution system.<sup>38</sup> These challenges include inaccurate registration information, retail customer confusion, and lack of retail customer consent prior to the registration submittal to SPP. Evergy also anticipates that, as SPP IM Demand Response participation increases, other issues will arise that could negatively affect all Evergy retail customers, including challenges associated with load-forecasting, operational challenges, and cost shifts.<sup>39</sup>

15. Hoping to alleviate these problems, Evergy sought KCC approval of an amendment to Section 7.12 of the EKC General Terms and Conditions ("GT&C") and a new corresponding section in the EKM General Rules and Regulations ("GR&R") to address these concerns.<sup>40</sup> Evergy intends to implement a transparent, consistent process to ensure that Evergy can support a retail customer's choice to participate in the SPP IM as a Demand Response Resource without compromising Evergy's ability to provide safe and reliable distribution utility and retail service to all of its customers.<sup>41</sup>

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<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> Id., at p.13.

<sup>39</sup> Joint Application, p. 4, citing Direct Testimony of Darrin R. Ives, p. 13, ln. 17-23; Id. at p. 14, ln. 1-9.

<sup>40</sup> Joint Application, at pp. 5-6.

<sup>41</sup> Direct Testimony of Darrin R. Ives, p. 3.

16. In its initial application, Evergy proposed two revisions to the EKC GT&C and the EKM GR&R. First, Evergy proposed to define the term, DRA. Second, Evergy proposed to insert a new corresponding section in these tariffs to (1) require any retail customer seeking to participate in SPP’s markets to first provide a “Customer Registration and Consent Form” to Evergy and (2) state that a retail customer is only permitted to participate in SPP’s markets through a DRA that has entered into and maintains an effective Distribution Utility – Demand Response Aggregator Agreement with Evergy.<sup>42</sup>

17. The procedures set forth in Evergy’s application were amended by the Settlement Agreement.<sup>43</sup> Although not an exhaustive summary, under the Settlement Agreement:

- Evergy’s express written consent is necessary for a customer to participate in the SPP’s Integrated Marketplace Demand Response program. To do so, a customer must submit an initial Customer Registration and Consent Form (Schedule 1 or 1A, depending upon DRA status) and a quarterly report of Operating Data for Demand Response Resources (Schedule 2). Additionally, if a customer discontinues participation, the customer must provide notice to Evergy.
- If Evergy wishes to make any non-clerical changes to Schedules 1, 1A, or 2, as approved by the Commission, an amendment to the Agreement must be obtained, allowing the Signatories to object to any contemplated change.
- Evergy shall make three annual compliance filings which will include summaries of (a) the number of customer registrations and (b) objections that

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<sup>42</sup> Id.

<sup>43</sup> Josh Frantz, Testimony in Support of Non-Unanimous Settlement Agreement, September 11, 2023, p. 5.



Evergy has submitted to SPP regarding a customer's registration and/or participation in the market.<sup>44</sup>

## **ARGUMENTS AND AUTHORITIES**

18. The Commission has established five factors that it reviews concerning whether to approve non-unanimous settlement agreements. These five factors are:

- a. Whether the settlement agreement conforms to applicable law;
- b. Whether parties have had an opportunity to be heard on reasons for opposing the settlement agreement;
- c. Whether the settlement agreement is supported by substantial competent evidence in the record as a whole;
- d. Whether the settlement agreement will result in just and reasonable rates; and
- e. Whether the results of the settlement agreement are in the public interest.<sup>45</sup>

Essentially, these factors allow the Commission to make an independent finding, supported by substantial competent evidence in the record as a whole, that the settlement will establish just and reasonable rates.<sup>46</sup> Kansas appellate courts have accepted such a finding, if supported by substantial competent evidence in the record as a whole, to be a lawful and reasonable determination.<sup>47</sup>

19. CURB believes the Settlement Agreement satisfies all five factors. Therefore, CURB believes it to be reasonable for the Commission to approve the same. These factors will be addressed in the foregoing order.

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<sup>44</sup> *Id.*, pp. 4-5.

<sup>45</sup> Order Approving Contested Settlement Agreement, Docket No. 08-ATMG-280-RTS (May 12, 2008).

<sup>46</sup> *Id.*

<sup>47</sup> *Citizens' Utility Ratepayer Board v. Kansas Corporation Comm'n*, 28 Kan. App. 2d 313, 316 (2000), rev. denied, (citing *Farmand Industries*, 24 Kan. App. 2d at 186-87 [1997]).

**A. The Settlement Agreement is lawful.**

20. Approval of the Settlement Agreement, which poses alternative relief to that pled in the application, is lawful. The Settlement Agreement, particularly the tariffs proposed therein, aligns with Kansas statutes that require the KCC to regulate utility practices to protect the safety and efficiency of the distribution grid by which Evergy provides electricity to its retail customers. Further, the regulatory scheme set forth in the Settlement Agreement is allowed under federal law.

21. Nonetheless, Sierra Club and Vote Solar argue to the contrary.<sup>48</sup> In their initial comments in response to Staff's R&R, they pose three rationales to support their argument that the KCC cannot lawfully approve the Settlement Agreement. Their argumentation is flawed.

22. First, they argue that the regulatory scheme proposed by the application unlawfully makes Evergy the regulator of its competitors in the wholesale market. Second, they contend that the KCC has no legal authority under either Kansas law or Order 719 to prohibit Kansas retail customers and ARCs from bidding Demand Response into SPP or to condition such bids through KCC tariff requirements. Third, they assert that the specific tariff provisions at issue go beyond the scope of the "opt-out" provision in Order 719 and are unlawfully aimed at matters that are regulated exclusively by FERC.<sup>49</sup>

23. The KCC should reject Sierra Club and Vote Solar's arguments. First, the KCC remains the regulator of Demand Response. Second, a reasonable interpretation of pertinent Kansas statutes and FERC Order 719 yields the conclusion that the KCC has ample authority to approve the tariffs in the Settlement Agreement. Finally, the evidence does not support the

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<sup>48</sup> Initial Comments of Sierra Club And Vote Solar, July 7, 2023.

<sup>49</sup> Id., p. 3.

assertion of Sierra Club and Vote Solar that the tariffs are unlawfully aimed at issues which are regulated exclusively by FERC. These arguments will be addressed in order below.

**a. Contrary to the arguments of Sierra Club and Vote Solar, the tariffs in the Settlement Agreement do not unlawfully appoint Evergy as the regulator of its competitors.**

24. Under the application as it was filed, even without the changes made by the Settlement Agreement, any dispute between Evergy and a retail consumer or a DRA is subject to review and determination by the KCC. Thus, the KCC, rather than Evergy, ultimately determines whether the retail consumer or a DRA can bid Demand Response into the SPP IM. Therefore, the application as it was filed, even without consideration of the changes made by the Settlement Agreement, did not appoint Evergy as regulator over its competitors.

25. In reality, the initial application in this docket did not contemplate a procedure that is materially different than a lawful common practice before the KCC. It is common practice before the KCC for the utility and the pertinent stakeholders to work out their differences and arrive at an agreed proposal for the KCC; that Settlement Agreement, or any dispute pertaining thereto, is then heard by the Commission to determine the issues, with all parties having an opportunity to present evidence supporting their position. That procedure is lawful and approved by Kansas appellate courts.<sup>50</sup>

26. Yet, even if one were to accept *arguendo* the assertion of Sierra Club and Vote Solar that the initial application unlawfully appointed Evergy as the actual regulator of its competitors, that dynamic is no longer present in the Settlement Agreement. Under the regulatory scheme set

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<sup>50</sup> See *Citizens' Utility Ratepayer Board v. Kansas Corporation Comm'n*, 28 Kan. App. 2d 313, 316 (2000), citing *Farmand Industries*, 24 Kan. App. 2d at 186-87 ([1997]).

forth in the Settlement Agreement, the requirements to obtain Evergy's consent which enables a retail customer to bid Demand Response into SPP markets are now proposed to be set out in tariffs governed by the KCC. This change actually obviates Sierra Club and Vote Solar's contention that Evergy will be appointed to be the regulator of its competitors.

**b. Contrary to the arguments of Sierra Club and Vote Solar, the KCC has ample authority under Kansas law and FERC Order 719 to approve the tariffs in the Settlement Agreement.**

27. Regarding their second argument that the KCC lacks authority under both Kansas law and Order 719 to prohibit retail Demand Response from being bid in the SPP marketplace, Sierra Club and Vote Solar too narrowly interpret the scope of the KCC's authority. Sierra Club and Vote Solar ignore the narrow purpose and effect of the tariff in the Settlement Agreement, which is merely to protect the reliability and safety of Evergy's distribution system. Regulation of that matter is clearly within the regulatory purview of the KCC under both Kansas and federal law.

28. Essentially, Sierra Club and Vote Solar misinterpret Order 719 to provide that a state public utility commission can prohibit a retail customer or DRA from bidding Demand Response into an RTO or ISO only if there is a statute specifically authorizing the same. There is no provision in Order 719 that requires so. Moreover, as will be discussed below, that interpretation of Order 719 by Sierra Club and Vote Solar is patently unreasonable.

29. Therefore, that faulty interpretation of applicable law should be rejected. Indeed, the KCC can lawfully approve the Settlement Agreement under Kansas law and be completely within its jurisdictional limitations under federal law. Under Kansas law, the KCC acts lawfully if it acts within its statutory authority and it follows the prescribed statutory and procedural rules.<sup>51</sup>

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<sup>51</sup> *Central Kansas Power Co. v. State Corporation Commission*, 221 Kan. 505, Syl. ¶ 1, 561 P.2d 779 (1977).

Kansas statutes give the KCC full power, authority and jurisdiction to supervise and control Kansas electric public utilities, as defined in K.S.A. 66-104.<sup>52</sup> Since Evergy is a Kansas electric utility pursuant to K.S.A. 66-104, the KCC has broad supervisory authority over Evergy as such.

30. Kansas law authorizes the KCC to approve tariffs to efficiently and sufficiently meet a utility’s safety and reliability obligations to Kansas retail customers.<sup>53</sup> Under K.S.A. 66-101f, if the KCC finds that any tariff relating to any public service performed by a Kansas electric public utility is unreasonably inefficient or insufficient, the KCC may substitute therefor a tariff which is reasonable and necessary.<sup>54</sup> The application and the Settlement Agreement simply seek KCC approval of revisions to a previously-approved tariff (in the case of EKC) and a new tariff (in the case of EKM), to “preserve Evergy’s ability to ensure safety and reliability of the distribution grid for all retail customers.”<sup>55</sup>

31. Indeed, Sierra Club and Vote Solar concede that the KCC has plenary authority “to supervise and control the electric public utilities” and to “do all things necessary and convenient for the exercise of such power, authority and jurisdiction.”<sup>56</sup> This authority would clearly include approving tariffs designed to provide reliable and safe electricity to retail consumers. Sierra Club and Vote Solar seem to acknowledge that the Commission has authority over Evergy in this case.

32. However, Sierra Club and Vote Solar then erroneously assert that the KCC does not have authority to issue tariffs governing a retail customer’s choice to use or not use electricity. In particular, they assert that the KCC lacks authority to regulate a consumer’s decision not to

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<sup>52</sup> K.S.A. 66-101.

<sup>53</sup> K.S.A. 66-101f.

<sup>54</sup> K.S.A. 66-101f.

<sup>55</sup> Direct Testimony of Darrin R. Ives, p. 14.

<sup>56</sup> *Initial Comments of Sierra Club and Vote Solar, July 7, 2023, p. 12.*

consume electricity.<sup>57</sup> However, that assertion mischaracterizes the whole of the matter being addressed in this docket.

33. Indeed, that erroneous assertion should also be rejected by the KCC. This case does not present the simple matter of a consumer deciding not to consume electricity; it involves Demand Response. If the consumer were not to attempt to market their non-use of electricity, that would be one thing. However, this case involves the marketing of a consumer's non-use of electricity as a resource which affects Evergy's ability to serve its customers.

34. Contrary to the characterization of the subject matter of this docket that Sierra Club and Vote Solar imply, the subject matter of the application entails oversight over Evergy's tariffs to ensure that Demand Response Resources can be managed on Evergy's retail distribution system. The KCC has broad authority to regulate the tariffs of any jurisdictional utility with respect to management of the distribution system to ensure that resources needed to fulfil its obligations to provide adequate and sufficient service are available. K.S.A. 66-101b and K.S.A. 66-101f, among other statutes, grant the KCC ample authority to regulate Kansas utilities to ensure reliable and efficient utility service.<sup>58</sup>

35. Importantly, the KCC has specific authority over Demand Response. Under the Kansas Energy Efficiency Investment Act (KEEIA), K.S.A. 66-1283, the KCC may permit public utilities to implement commission-approved demand-side programs and cost recovery mechanisms submitted to it by such utilities if they meet the public interest.<sup>59</sup> Kansas law recognizes Demand Response from Kansas retail customers as a resource that clearly affects retail

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<sup>57</sup> Id., p. 13.

<sup>58</sup> See K.S.A. 66-101b and K.S.A. 66-101f.

<sup>59</sup> K.S.A. 66-1283(c)(1)(A).

electricity at large. Therefore, the KCC has regulatory authority over Demand Response programs. The KCC certainly has authority under KEEIA to condition the types of consumer actions that would qualify as Demand Response.

36. It is noteworthy that, although K.S.A. 66-1283 is legislation specific to KEEIA, the KCC has exercised its general jurisdiction to determine how to best regulate demand-side management programs (which would clearly include Demand Response) in generic dockets circa 2009.<sup>60</sup> These dockets sprang from an earlier investigation, Docket No. 07-GIMX-247-GIV, in which the KCC determined:

[The KCC] has wide discretion to consider and apply methodologies for approving energy efficiency programs, including different cost-benefit tests, and that the Commission is not limited to any particular approach.<sup>61</sup>

37. In Docket No. 07-GIMX-247-GIV, the KCC recognized its broad authority to determine when to approve energy efficiency programs, including Demand Response programs. The KCC's authority is not diluted by the fact that Demand Response tariffs affect how consumers interact with utilities regarding their retail Demand Response. Here, in making their argument that the KCC has no authority over retail consumers' use of electricity, Sierra Club and Vote Solar ignore Kansas law that tariffs are the terms and conditions which govern the relationship between a public utility **and its customers**.<sup>62</sup> When approved by the KCC, tariffs bind both the public utility and its customers.<sup>63</sup>

38. Therefore, under the authority discussed above, the KCC may approve tariffs that express the terms and conditions that govern the relationship between a public utility and its

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<sup>60</sup> See Docket No. 08-GIMX-441-GIV and Docket No. 08-GIMX-442-GIMX.

<sup>61</sup> Docket No. 07-GIMX-247-GIV, Final Order, September 11, 2006, p. 11.

<sup>62</sup> *Southwestern Bell Tel. Co. v. Kansas Corporation Commission*, 233 Kan. 375, 377, 664 P.2d 798 (1983)

<sup>63</sup> *Id.*

customers regarding Demand Response programs. The KCC can provide terms and conditions under which a retail customer's choice "not to use electricity" may qualify as Demand Response. Therefore, the argument that the KCC cannot regulate a retail customer's "non-use" of electricity as it pertains to Demand Response should be rejected as not supported by Kansas law.

39. In addition, this assertion of Sierra Club and Vote Solar is contradictory and leaves a dangerous regulatory gap. It does not follow for Sierra Club and Vote Solar to concede that the KCC has plenary authority to protect the safety and reliability of the retail distribution system for the public benefit, but then claim that the KCC cannot impose reasonable restrictions upon consumers' actions that endanger that safety and reliability. The regulatory gap left by this skewed vision of regulation is manifest.

40. The policy problem that arises from the regulatory gap left by the analysis of Sierra Club and Vote Solar is especially obvious in today's complex, regulatory environment. As noted in the Harvard Law Review, "Today's electricity sector has matured into the 'most complex machine ever made.' And that machine is now evolving faster than at any point in its century-plus history."<sup>64</sup> Today, there are so many more effects that consumers' use of electricity now have on the electric grid with the advance of new technologies than there were before the technologies existed. Good public policy dictates that, in today's complex, electric regulatory environment, a public utility regulator's duties and discretion must be broad enough to regulate the use of new technologies that impact the distribution system, including consumers' use of technologies that facilitate a retail customer's Demand Response. The interpretation of KCC authority by Sierra Club and Vote Solar would unreasonably constrain the KCC's ability to regulate emerging

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<sup>64</sup> *Christiansen, Matthew R. and Macey, "Joshua C., Long Live the Federal Power Act's Bright Line," 134 Harv. L. Review 1360 (2021).*



technology and practices by requiring a specific act of legislature that responds to a new issue brought forward by a utility.

41. Kansas law does not leave such a regulatory gap. The KCC has broad power to approve tariffs, including the ability to consider public policy in the design of the same.<sup>65</sup> To phrase this principle differently, the KCC has authority to approve tariffs, which, in turn, govern the use and non-use of electricity between utilities and their customers, in accordance with public policy. Indeed, a tariff approved by the KCC can include terms beyond pricing.<sup>66</sup>

42. In reality, the KCC has historic and accepted authority to approve tariffs which govern the use and non-use of electricity by consumers. For example, the KCC can approve minimum bill tariffs or time-of-use tariffs. Minimum bill tariffs set a consumer's bill at an established amount of consumption in order to assure a utility's fixed costs are recovered and the grid remains stable. These types of tariffs effectively obviate a consumer's capabilities to reduce their bills through lower consumption. Moreover, in order to maintain the efficiency of the grid, time-of-use tariffs set conditions which attempt to control when consumers use and don't use electricity. In each case, these types of tariffs place conditions upon the use or non-use of electricity by the consumer.

43. Yet, in *Sierra Club and Vote Solar's* attempt to persuade the KCC that it has no authority in this docket to issue a tariff setting forth the conditions upon which the KCC will permit Demand Response to be bid into the SPP marketplace, they portray the whole of retail consumers'

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<sup>65</sup> See Midwest Gas Users Association v. State Corporation Commission, 5 Kan.App.2d 653 (1981). In that case, the Kansas Court of Appeals noted that the KCC has broad discretion to determine rate design and can design rate structures after consideration of public policy. Since the reliability of electric service to all consumers is a matter of state policy, it is quite logical to read the principle of this case as supporting the power of the KCC to create tariffs which encourage or discourage the use or non-use of electricity as appropriate to meet that state policy.

<sup>66</sup> *In re Southwestern Bell Telephone Company*, 9 Kan.App.2d 525, 531 (1984).

actions as merely executing a right “not to use electricity” combined with transacting business regarding the same in interstate commerce.<sup>67</sup> But that portrayal merely describes Demand Response being bid into SPP markets. It states the obvious: every party recognizes that such a transaction is governed by Kansas law and Order 719.

44. To support their argument, Sierra Club and Vote Solar then misinterpret Order 719 to “mean” that, in order for the KCC to lawfully prohibit Demand Response bids of Kansas retail customers or their DRAs into the SPP IM under Order 719, the KCC must have specific legislation expressly declaring that the KCC has explicit authority to **regulate** customer and third-party ARC participation in **wholesale markets**.<sup>68</sup> The irrationality of that argument is self-evident. Sierra Club and Vote Solar ignore that actions taken by the KCC within the scope of its general authority are as lawful as actions taken by the KCC under specific legislation. Thus, Sierra Club and Vote Solar are also wrong on this point of law.

45. To this point, although Sierra Club and Vote Solar assert that the pertinent language in Order 719 “only means” that FERC will not preempt state laws that specifically provide that a State may prohibit Demand Response in interstate commerce, there is no language in Order 719 that so specifies. The illogic of that position of Sierra Club and Vote Solar is apparent on the face of the argument. They essentially argue that FERC will not preempt any specific state law that expressly authorizes a state utility commission to prohibit Demand Response in interstate commerce, but will preempt a state that prohibits Demand Response in its RTO/ISO pursuant to its general authority. Why would one situation have any different effect upon wholesale markets

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<sup>67</sup> *Initial Comments of Sierra Club and Vote Solar, July 7, 2023, p. 13.*

<sup>68</sup> *Id.*, p. 12.

than the other? Since each situation has the same practical effect, it is illogical for the FERC to preempt one and not the other.

46. Rather, a logical reading of Order 719 is simply that FERC will allow states to veto their retail customers' attempts to bid Demand Response into their pertinent RTOs. That is how the U.S. Supreme Court interprets the order. In determining that FERC intended to approach bids of retail Demand Response in RTOs/ISOs in a manner consistent with cooperative federalism, the Court noted:

[T]he Rule allows any State regulator to prohibit its consumers from making demand response bids in the wholesale market. Although claiming the ability to negate such state decisions, the Commission chose not to do so in recognition of the linkage between wholesale and retail markets and the States' role in overseeing retail sales. The veto power thus granted to the States belies [The Electric Power Supply Association's] view that FERC aimed to "obliterate" their regulatory authority or "override" their pricing policies. And that veto gives States the means to block whatever "effective" increases in retail rates demand response programs might be thought to produce. Wholesale demand response as implemented in the Rule is a program of cooperative federalism, in which the States retain the last word. That feature of the Rule removes any conceivable doubt as to its compliance with § 824(b)'s allocation of federal and state authority. (Emphasis added and citations omitted.)<sup>69</sup>

Note the lack of conditions placed upon any RERRA's ability to prohibit Demand Response from being bid into the wholesale market. It is clearly significant. It defeats the arguments of Sierra Club and Vote Solar that Order 719 has a very limited set of conditions whereby states can prohibit Demand Response from being bid into the wholesale market.

47. As noted by the U.S. Supreme Court, the focus of FERC in allowing the veto by states was on the retail aspects of Demand Response. While it is possible that FERC may take future actions that could lawfully preempt states from prohibiting Demand Response from being

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<sup>69</sup> *Federal Energy Regulatory Commission v. Electric Power Supply Association*, 136 S.Ct. 760, 779-780 (2016).

bid into their pertinent RTOs/ISOs, that case has not been determined by the U.S. Supreme Court. In short, Order 719 allows the KCC to prohibit Kansas retail customers from bidding Demand Response in SPP, as the Order is now interpreted by the U.S. Supreme Court.

48. Indeed, FERC clearly intended Order 719 to enable state utility commissions to allow or to prohibit retail Demand Response to be bid (that is, become a transaction) in pertinent RTOs and ISOs. FERC recognized that the reliability of retail distributions systems can be harmfully affected by Demand Response that is bid into wholesale markets and, therefore, it permitted state utility commissions like the KCC to veto participation of retail Demand Response in wholesale markets. This intended aspect of Order 719 defeats the claim of Sierra Club and Vote Solar that the KCC has no role in determining whether Demand Response of Kansas retail customers can take place in the SPP marketplace.

49. In fact, the authority to ensure the safety and reliability of Evergy's distribution grid for Kansas retail customers is vested exclusively in the KCC under the Federal Power Act (FPA). In pertinent part, the FPA provides:

[FERC] shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce.<sup>70</sup>

FERC has no constitutional or common law existence or authority, but *only* the authority conferred upon it by Congress.<sup>71</sup>

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<sup>70</sup> 16 U.S.C.A. §824(1).

<sup>71</sup> *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C.Cir.2001).

50. Therefore, as it is pertinent to this docket, FERC recognized the need to allow states to protect retail electric utility customers in connection with potential bids of retail customers in wholesale markets in Order 719.<sup>72</sup> In these regards, FERC stated:

We are mindful of the comments that allowing ARCs to bid into the wholesale energy market without the relevant electric retail regulatory authority's express permission may have unintended consequences, such as placing an undue burden on the relevant electric retail regulatory authority.<sup>73</sup>

Clearly, FERC did not intend Order 719 to interfere with state utility commission authority to control utility distribution systems so as to maintain safe and reliable utility service.<sup>74</sup>

51. Indeed, the U.S. Supreme Court noted that FERC's approach to wholesale Demand Response in Order 719 is a program of cooperative federalism, in which the States retain the last word.<sup>75</sup> In its simplest form, cooperative federalism is a system of shared authority between the federal and state governments.<sup>76</sup> In Order 719-A, FERC clarified its intended approach to balance the elimination of barriers to Demand Response in wholesale markets with the need to protect state interests in retail distribution. FERC stated:

We recognize that demand response is a complex matter that is subject to the confluence of state and federal jurisdiction. The Final Rule's intent and effect are neither to encourage nor require actions that would violate state laws or regulations nor to classify retail customers and their representatives as wholesale customers....Nothing in the Final Rule authorizes a retail customer to violate existing state laws or regulations or contract rights. In that regard, we leave it to the appropriate state or local authorities to set and enforce their own requirements.<sup>77</sup> (Emphasis added.)

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<sup>72</sup> *Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 125 FERC ¶ 61,071 (2008), order on rehearing, Order 719-A, 128 FERC 61,059 (2009).*

<sup>73</sup> *Id.*, ¶155.

<sup>74</sup> *Federal Energy Regulatory Commission v. Electric Power Supply Association, 136 S.Ct. 760, 772 (2016).*

<sup>75</sup> *Id.*, p. 780.

<sup>76</sup> *Adelman, David E. and Engle, Kirsten H., "Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority," 92 Minn. L. Rev. 1796 (2008).*

<sup>77</sup> *Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 125 FERC ¶ 61,071 (2008), order on rehearing, Order 719-A, ¶54, 128 FERC 61,059 (2009).*

52. Essentially, Sierra Club and Vote Solar suggest that the KCC forfeit the right to regulate retail distribution systems that is clearly reserved to state utility commissions under Order No. 719. In these regards, it is noteworthy that most states in SPP have prohibited their retail customers from bidding into wholesale markets.<sup>78</sup> Kansas has not done so and the settling parties do not suggest otherwise. The settling parties seek only to have the KCC approve a mechanism designed to allow Kansas retail customers to bid Demand Response into the SPP marketplace without causing Evergy's retail distribution system to become unreliable or unsafe. The approach aligns with CURB's response to Staff's R&R, particularly, that Kansas is best served by a KCC regulatory mechanism that allows the benefit of Demand Response in the SPP IM, but protects Kansas retail customers from unnecessary costs and retail service risks associated with the same.

**c. Contrary to the arguments of Sierra Club and Vote Solar, the tariffs set forth in the Settlement Agreement are not aimed at issues that are regulated exclusively by FERC.**

53. Regarding Sierra Club and Vote Solar's third and final argument, there is no evidence in the record that supports their assertion that the pertinent tariff provisions are unlawfully aimed at matters that are regulated exclusively by FERC. CURB notes that in Hughes v. Talen Energy Marketing, LLC, 136 S.Ct. 1288 (2016), the U.S. Supreme Court stated:

States, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain (citations omitted). But States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates.<sup>79</sup>

Therefore, while this is an important issue, CURB believes that the pertinent tariffs are appropriately confined.

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<sup>78</sup> Forrester, Sydney P., et al., Lawrence Berkeley National Laboratory, "Aggregations in Opt Out States," NREL DER Interconnection Workshop 1 (December 15, 2022).

<sup>79</sup> Hughes v. Talen Energy Marketing, LLC, 136 S.Ct. 1288, 1290-91 (2016)

54. In CURB's response to Staff's R&R, CURB made clear that it believes that the KCC has authority to ensure that Evergy's distribution grid remains reliable and safe.<sup>80</sup> However, the KCC may not use the power granted to it in Order 719 to attempt to regulate wholesale markets. In other words, it is important that the tariffs in this docket be aimed specifically and narrowly at regulating the safety and reliability of Evergy's grid.

55. Based upon the fact that Evergy and Voltus were able to settle on the regulatory scheme set forth in the Settlement Agreement, CURB has confidence that the parties settled on provisions aimed at protecting ratepayers' interests in a safe and reliable energy retail distributions system while effectively allowing retail customers the opportunity to bid Demand Response into the SPP IM. To be sure, the Settlement Agreement has a three-year reporting period wherein the Demand Response bid into the SPP market place can be monitored.<sup>81</sup> CURB wanted such a reporting mechanism so that the KCC can determine how, if at all, the proposed tariff allows retail customers reasonable access to the SPP IM for Demand Response while protecting the integrity of Evergy's distribution system.<sup>82</sup>

56. To this point, evidence in this docket shows that Evergy's concern was clearly focused upon maintaining the safety and reliability of its distribution system. In fact, Darrin Ives testified that Evergy filed the application in anticipation of "increases in operational issues, such as rapid fluctuations in load in response to wholesale market pricing signals that could potentially disrupt distribution grid operations, particularly during periods of stress on the distribution system

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<sup>80</sup> Response of The Citizen's Utility Ratepayer Board to Staff's Report and Recommendation, July 7, 2023

<sup>81</sup> Settlement Agreement attached to Joint Motion to Approve Non-Unanimous Settlement Agreement, p. 12, August 10, 2023.

<sup>82</sup> Josh Frantz, Testimony in Support of Non-Unanimous Settlement Agreement, September 11, 2023, p. 8.

such as extreme weather events.”<sup>83</sup> Mr. Ives further testified that Evergy proposed the tariffs in its application to “support Evergy’s ongoing ability to manage operations, to engage in accurate load forecasting and resource adequacy planning, and to ensure just and reasonable cost allocation—all of which lie at the heart of Evergy’s ability to provide reliable and affordable retail electricity service to all Kansas retail electricity customers.”<sup>84</sup> This testimony evidences the intent of Evergy to solely address issues pertaining to its distribution system through the tariffs set forth in its application.

57. Staff fully understood the import of the need to revise Evergy’s tariffs as proposed in the Settlement Agreement. Justin Grady testified:

Given the lack of a regulated, structured, and coordinated environment to govern DR activities in Evergy’s service territory, Evergy currently addresses these issues in an ad-hoc and reactive manner, which increases the costs and administrative burdens placed on Evergy. Ultimately Evergy’s retail customers, including those who do not participate in DR activities within the SPP IM, end up bearing these costs.<sup>85</sup>

In Staff’s view the revised tariffs are necessary “to protect Evergy’s equipment and operations to ensure continued reliability and the provision of efficient and sufficient service.”<sup>86</sup> CURB witness Josh Frantz echoes this testimony. He testified that the revised tariffs were needed because “unbridled bidding of Demand Response into SPP markets could result in inefficiencies in the [Evergy] distribution system.”<sup>87</sup>

58. Essentially, this testimony shows that the tariffs set forth in the Settlement Agreement are aimed and understood to be aimed at maintaining Evergy’s distribution system,

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<sup>83</sup> Direct Testimony of Darrin R. Ives, p. 14

<sup>84</sup> Id., p. 26.

<sup>85</sup> Justin Grady, Testimony in Support of Non-Unanimous Settlement Agreement, September 11, 2023, pp. 11-12.

<sup>86</sup> Id., p. 12.

<sup>87</sup> Josh Frantz, Testimony in Support of Non-Unanimous Settlement Agreement, September 11, 2023, p. 7.



rather than at regulation of wholesale markets. Indeed, the tariffs address concerns raised by the KCC itself. In its comments before the FERC in Docket No. RM21-14-0000, the KCC expressed its concern that “...Current tariff structures and cost allocation procedures in place for Kansas utilities were not designed in contemplation of the participation of [DRAs].”<sup>88</sup>

59. Yet, it is also important that, notwithstanding the intent of the same, the tariffs do not impermissibly intrude on FERC’s authority over interstate wholesale rates. In these regards, Mr. Ives testified that the tariffs proposed in the Settlement Agreement will “advance Evergy’s goal of fulfilling responsibilities to all customers as a distribution utility while facilitating retail customers’ participation in the SPP IM as DR Resources.”<sup>89</sup> Further, Voltus witness Jon Wellinghoff testified that the Settlement Agreement “maintains the existing relationship among the appropriate retail jurisdictional entities: the Commission, the retail utility, and the retail customer.”<sup>90</sup> Importantly, as noted by Mr. Ives, retail customers are still allowed to bid Demand Response in the SPP IM.<sup>91</sup> The tariffs only provide Evergy with increased visibility into that bidding process, a matter protecting the reliability of Evergy’s distribution system for the benefit of all Evergy customers.<sup>92</sup> As noted by Staff, the regulatory scheme proposed by Evergy is merely a balanced middle ground approach versus a complete “opt out,” which is unequivocally allowed

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<sup>88</sup> The Kansas Corporation Commission’s Notice of Intervention and Initial Comments, Docket No. RM21-14-0000 (Acc. # 20210723-5203), p.13 (July 23, 2021).

<sup>89</sup> Darrin R. Ives; Testimony in Support of Settlement of Darrin R. Ives on Behalf of Evergy Kansas Central, Inc., Evergy Kansas South, Inc. And Evergy Kansas Metro, Inc., September 11, 2023, p. 10.

<sup>90</sup> Testimony of Jon Wellinghoff, Chief Regulatory Officer, Voltus, Inc. In Support of the Nonunanimous Settlement Agreement, September 11, 2023, p. 9.

<sup>91</sup> Darrin R. Ives; Testimony in Support of Settlement of Darrin R. Ives on Behalf of Evergy Kansas Central, Inc., Evergy Kansas South, Inc. And Evergy Kansas Metro, Inc., September 11, 2023, p 4.

<sup>92</sup> *Id.*, p. 10.

by RERRAs under Order 719.<sup>93</sup> Thus, based upon the evidence in the record, the tariffs do not intrude upon regulation of wholesale markets rates.

60. The evidence in this docket demonstrates that the tariffs are not unlawfully aimed at issues which are regulated exclusively by FERC. Therefore, CURB urges the KCC to reject the third and final argument posed by Sierra Club and Vote Solar. Indeed, KCC approval of the tariffs in the Settlement Agreement is authorized under Kansas law and permitted under federal law. Therefore, the Settlement Agreement satisfies the first factor of the KCC's five-point test.

**B. All parties have had a reasonable opportunity to be heard on their reasons for opposing the Settlement Agreement.**

61. Essentially, this factor requires the Commission to provide due process for all parties. Obviously, it requires compliance with the Kansas Administrative Procedure Act (KAPA). In *Suburban Medical Center v. Olathe Community Hosp.*, 226 Kan. 320, 597 P.2d 654 (1979), the Kansas Supreme Court summarized the procedures needed to comply with due process:

An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them....They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence.<sup>94</sup>

62. Sierra Club and Vote Solar have been provided opportunities to be heard. Sierra Club and Vote Solar were allowed to, and did, file comments and suggestions in response to Staff's R&R.<sup>95</sup> In addition, these opponents of the Agreement have the opportunity to file testimony in opposition to the Settlement Agreement, just as proponents are given the opportunity to file

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<sup>93</sup> Notice of Filing of Staff's Report and Recommendation, May 9, 2023, p. 11.

<sup>94</sup> *Suburban Medical Center v. Olathe Community Hosp.*, 226 Kan. 320, Syl. ¶ 4, 597 P.2d 654 (1979).

<sup>95</sup> Initial Comments of Sierra Club And Vote Solar, July 7, 2023.

testimony in support of it. However, Sierra Club and Vote Solar stated that the dispute they had with the Settlement Agreement was a question of its lawfulness, which they chose to address solely by legal briefs.<sup>96</sup> Therefore, Sierra Club and Vote Solar waived an evidentiary hearing. They, and any other opposing party, have the opportunity to file legal briefs. Thus, all parties have been provided opportunities to be heard as to the subject matter of this docket, and in particular, with respect to their opposition to the Settlement Agreement. Therefore, the Settlement Agreement satisfies Factor 2 of the KCC's five-point test.

**C. The Settlement Agreement is supported by substantial competent evidence in the record as a whole.**

63. The Agreement is supported by substantial and competent evidence on the record. As highlighted below, the record contains substantial documentation, comments, and testimony from qualified, competent witnesses. The need for changes to Evergy's tariffs are supported by the testimony of Darrin Ives and Staff's R&R. Witnesses on behalf of CURB, Staff, and Voltus filed testimony supporting the reasonableness and public interest of the Settlement Agreement.<sup>97</sup> Inasmuch as this testimony has been recited above, it will not be reiterated here. Suffice it to say that there is sufficient evidence in support of the terms of the Settlement Agreement.

64. Moreover, there is substantial and competent evidence demonstrating the need for the tariff revisions in the Settlement Agreement and the reasonableness of the same. Indeed, Darrin Ives testified that Evergy's application was brought about by FERC Order 719, issued on October

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<sup>96</sup> Letter from Sierra Club and Vote Solar re Objection to Non-Unanimous Settlement, September 11, 2023.

<sup>97</sup> Darrin R. Ives; Testimony in Support of Settlement of Darrin R. Ives on Behalf of Evergy Kansas Central, Inc., Evergy Kansas South, Inc. And Evergy Kansas Metro, Inc., September 11, 2023; Justin Grady, Testimony in Support of Non-Unanimous Settlement Agreement, September 11, 2023; Josh Frantz, Testimony in Support of Non-Unanimous Settlement Agreement, September 11, 2023; Jon Wellinghoff, Testimony of Jon Wellinghoff, Chief Regulatory Officer, Voltus, Inc. In Support of the Nonunanimous Settlement Agreement, September 11, 2023.

17, 2008, which required SPP to permit Demand Response aggregators to bid Demand Response loads directly into the SPP IM subject to a state opting out of allowing retail Demand Response Resources in pertinent wholesale markets.<sup>98</sup> Mr. Ives testified that Kansas did not opt out.<sup>99</sup> Because Kansas has not “opted-out” of retail Demand Response in the SPP IM, Evergy’s Kansas retail customers can participate in the SPP IM as Demand Response Resources.<sup>100</sup>

65. However, Mr. Ives testified that, with this participation, Evergy is encountering challenges in reviewing Kansas Demand Response Resource registration and customer participation in the SPP marketplace through DRAs, which are not sufficiently addressed by its tariffs and which poses risks to the safety and reliability of Evergy’s retail distribution system.<sup>101</sup> Evergy anticipates that as wholesale Demand Response participation increases, other issues will arise that could negatively affect all Evergy retail customers, including challenges associated with load-forecasting, operational challenges, resource planning challenges, and cost shifts.<sup>102</sup>

66. As highlighted above, the record contains evidence upon which the KCC can determine that retail Demand Response Resources being bid into the SPP IM are causing issues in Evergy’s distribution system that affect the reliability and safety of electric service to retail customers. That view is certainly supported by Staff’s R&R, which analyzes responses to certain data requests to conclude that the current tariffs put Evergy in a position of reactively responding to operational issues as they arise.<sup>103</sup> According to Staff’s analysis of Evergy’s responses to data requests, Staff noted various examples of problems that could arise without adequate visibility and

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<sup>98</sup> Direct Testimony of Darrin R. Ives, pp. 1-5.

<sup>99</sup> Id. p. 2

<sup>100</sup> Id.

<sup>101</sup> Id., p. 13.

<sup>102</sup> Joint Application, p. 4, citing Direct Testimony of Darrin R. Ives, p. 13, ln. 17-23; Id. at p. 14, ln. 1-9.

<sup>103</sup> Notice of Filing of Staff’s Report and Recommendation, May 9, 2023, p. 10.

awareness of load patterns on Evergy’s distribution system.<sup>104</sup> Likewise, CURB expressed concern that unbridled bidding of Demand Response into SPP markets could result in inefficiencies in the distribution system.<sup>105</sup>

67. There is also evidence supporting the aim of revisions to Evergy’s tariffs to address these issues. Mr. Ives testified that the revisions to Evergy’s tariffs, as submitted with the application, support a retail customer’s choice to participate in the wholesale electricity market as a Demand Response Resource without compromising Evergy’s ability to provide safe and reliable distribution utility and retail service to all of its customers.<sup>106</sup> He testified that by making these tariff revisions, Evergy seeks to strike an appropriate balance between facilitating certain retail customers’ participation with SPP and fulfilling Evergy’s distribution system and retail service responsibilities to all customers.<sup>107</sup> Staff supported these tariff revisions as reasonably addressing the distribution system issues outlined by Evergy, but was willing to consider other solutions.<sup>108</sup> Likewise, CURB was supportive of revising the tariffs, if only for additional transparency, but expressed a concern that the tariff should not be too burdensome as to effectively result in an “opt out.”<sup>109</sup>

68. The testimonies of Evergy, Voltus, Staff and CURB all support these tariff revisions as just and reasonable and in the public interest. Darrin R. Ives, on behalf of Evergy, testified that the “Settlement Agreement will implement an alternative process to advance

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<sup>104</sup> Id., pp. 10-12.

<sup>105</sup> Josh Frantz, Testimony in Support of Non-Unanimous Settlement Agreement, September 11, 2023, p. 7.

<sup>106</sup> Direct Testimony of Darrin R. Ives, p. 3.

<sup>107</sup> Id., p 15.

<sup>108</sup> Id., p. 12.

<sup>109</sup> Response of The Citizen’s Utility Ratepayer Board to Staff’s Report and Recommendation, July 7, 2023, pp. 12-13.

Evergy’s goal of fulfilling responsibilities to all customers as a distribution utility while facilitating retail customers’ participation in the SPP IM as Demand Response Resources.”<sup>110</sup> Justin Grady, for Staff, testified that “Staff supports the tariff changes at issue in the Agreement because they balance the desire to advance Demand Response activity in Kansas with the need to protect Evergy’s equipment and operations to ensure continued reliability and the provision of efficient and sufficient service.”<sup>111</sup> Josh Frantz testified for CURB on behalf of Kansas residential and small commercial ratepayers. He expressed his opinion that the Settlement Agreement “presents an appropriate middle-ground between a laissez-faire approach to allowing Demand Response into wholesale markets and a statewide opt out of participation.”<sup>112</sup> Finally, Jon Wellinghoff, for Voltus, testified that the Settlement Agreement “does result in just and reasonable rates because it ensures Kansas ratepayers will be able to participate in Demand Response programs that lower customer bills.”<sup>113</sup>

69. Substantial competent evidence is that evidence “which possesses something of substance and relevant consequence, and which furnishes a substantial basis of fact from which the issues tendered can reasonably be resolved.”<sup>114</sup> As shown by the above summary of the testimony and pleadings of the parties in this docket, the record as a whole supports a determination that the Settlement Agreement, including the tariffs therein, should be approved by the KCC. Therefore, the Settlement Agreement satisfies Factor 3 of the KCC’s five-point test.

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<sup>110</sup> Darrin R. Ives; Testimony in Support of Settlement of Darrin R. Ives on Behalf of Evergy Kansas Central, Inc., Evergy Kansas South, Inc. And Evergy Kansas Metro, Inc., September 11, 2023, p. 10.

<sup>111</sup> Justin Grady, Testimony in Support of Non-Unanimous Settlement Agreement, September 11, 2023, p. 12.

<sup>112</sup> Josh Frantz, Testimony in Support of Non-Unanimous Settlement Agreement, September 11, 2023, pp. 7-8.

<sup>113</sup> Jon Wellinghoff, Testimony of Jon Wellinghoff, Chief Regulatory Officer, Voltus, Inc. In Support of the Nonunanimous Settlement Agreement, September 11, 2023, p. 13.

<sup>114</sup> *Kansas Gas and Electric Co. v. State Corporation Commission of the State of Kansas*, 14 Kan. App. 2d 527 at 531, 794 P. 2d 1165 (1990).

**D. The Settlement Agreement will result in just and reasonable charges.**

70. The Settlement Agreement will result in just and reasonable charges. Although the policies effectuated through the Settlement Agreement do not set rates or charges directly, low-cost Demand Response Resources can have a beneficial impact upon wholesale electricity prices. During periods of peak demand, consumers who can respond by reducing consumption therein reduce the need to operate more expensive generation. However, unbridled bidding of Demand Response into SPP markets could result in inefficiencies in the distribution system, whereby eroding the aforementioned beneficial price impacts.

71. The Settlement Agreement presents an appropriate middle-ground between a laissez-faire approach to allowing Demand Response into wholesale markets and a statewide opt out of participation. (For context, 16 out of 19 states within the Midcontinent Independent System Operator and SPP regions have chosen to opt out of wholesale market participation.)<sup>115</sup> The Agreement provides an opportunity for the reduction of wholesale energy costs through Demand Response, but reasonably protects Evergy's distribution system by increasing transparency to the bidding process, thereby providing for just and reasonable energy charges. Therefore, the Settlement Agreement satisfies Factor 4 of the KCC's five-point test.

**E. The Settlement Agreement is in the public interest.**

72. The Settlement Agreement is in the public interest, primarily for the same reasons as stated above. The Agreement is signed by parties representing a wide range of interests: Evergy, Empire, and Southern Pioneer, representing electric public utilities; Sunflower, representing

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<sup>115</sup> Forrester, Sydney P., et al., Lawrence Berkeley National Laboratory, "Aggregations in Opt Out States," NREL DER Interconnection Workshop 1 (December 15, 2022).

electric distribution cooperatives; CURB, representing residential and small ratepayers; Voltus, a DRA; and Staff, representing the public, generally.

73. Moreover, the compliance reporting requirement of the Settlement Agreement is in the public interest because Evergy's reports will allow the KCC and other parties to monitor the initial effects of the Settlement Agreement on the number of new wholesale Demand Response registrations among Evergy's customers. Therefore, the Settlement Agreement satisfies Factor 5 of the KCC's five-point test.

## **CONCLUSION**

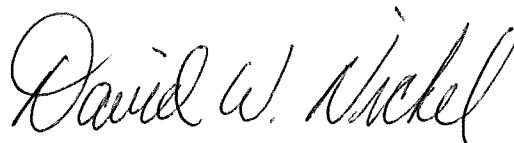
Evergy filed its application in this matter to be able to address challenges it is now encountering and that it expects to increase due to retail Demand Response being bid into the SPP IM. These challenges were brought about by deficiencies in Evergy's tariffs that failed to provide adequate transparency of the Demand Response transactions that occur in the SPP IM. The deficiencies in the tariffs could prove costly to Evergy's retail customers as they could lead to problems with Evergy's load-forecasting, additional operational challenges, resource planning challenges, and cost shifts. The reliability of Evergy's distribution system is at stake.

These challenges could have been resolved had the KCC elected to opt out under Order 719. However, the KCC has, justifiably, not elected to do so. Rather, Evergy sought to amend its tariffs to strike an appropriate balance between facilitating certain retail customers' participation with SPP and fulfilling Evergy's distribution system and retail service responsibilities to all customers. As noted by Staff, it is an appropriate middle ground between the KCC opting out under Order 719 and unbridled participation with its associated challenges.



Several parties intervened in this docket, all with their own perspectives on how to legally solve the issue. After a comprehensive settlement conference, all parties but Sierra Club and Vote Solar agreed upon tariff revisions that would address the above-described challenges in a satisfactory manner. Sierra Club and Vote Solar contend that the Settlement Agreement is unlawful based upon their assertion that the KCC does not have the authority to approve the tariffs set forth therein. However, as shown above, the Settlement Agreement accords with Kansas law and federal law, in particular FERC Order 719. Moreover, the Settlement Agreement meets the five-factor test that the KCC uses to determine whether to approve the same. Therefore, CURB urges the KCC to approve the Settlement Agreement.

Respectfully submitted,



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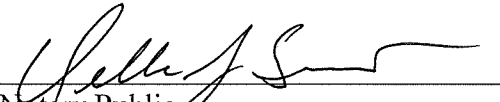
**VERIFICATION**

STATE OF KANSAS )  
 ) ss:  
COUNTY OF SHAWNEE )

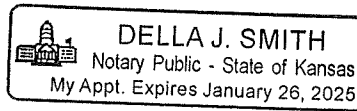
I, David W. Nickel, of lawful age and being first duly sworn upon my oath, state that I am an attorney for the Citizens' Utility Ratepayer Board; that I have read and am familiar with the above and foregoing document and attest that the statements therein are true and correct to the best of my knowledge, information, and belief.

  
David W. Nickel

SUBSCRIBED AND SWORN to before me this 22<sup>nd</sup> day of September, 2023.

  
Notary Public

My Commission expires: 01-26-2025.



## CERTIFICATE OF SERVICE

23-EKCE-588-TAR

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 22<sup>nd</sup> day of September, 2023, to the following:

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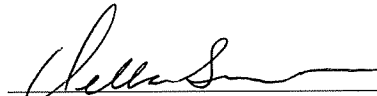
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