

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. )

**RESPONSE OF THE CITIZEN’S UTILITY RATEPAYER BOARD  
TO STAFF’S REPORT AND RECOMMENDATION**

COMES NOW the Citizens' Utility Ratepayer Board (“CURB”) and submits its response to Staff’s Report and Recommendation (“R&R”), filed by Kansas Corporation Commission Staff (“Staff”) with the Kansas Corporation Commission (“KCC” or “Commission”) in the above-captioned docket on May 9, 2023.

1. To summarize CURB’s response to Staff’s R&R, CURB generally concurs with Staff that there is a need to revise Evergy’s tariffs to provide reasonable protection for Evergy ratepayers against certain practices of Kansas retail customers and Demand Resource Aggregators (“DRAs”) that may detrimentally affect the reliability of Evergy’s system at significant costs. However, the revisions to Evergy’s tariffs cannot be so extreme as to unreasonably keep Kansas retail customers and DRAs from participation in the Southwest Power Pool (“SPP”) market.

2. As will be discussed below, CURB believes that the Commission can and will find the proper balance of the competing interests in this docket. In these regards, CURB believes that it is incumbent upon Evergy, as the applicant herein, to show that the specific provisions it proposes in its tariff are necessary to protect the reliability at reasonable operating costs of Evergy’s system for the benefit of its ratepayers. On the other hand, it is incumbent upon Voltus, Inc. (“Voltus”), and other stakeholders to show the Commission if and how Evergy’s proposals are so overbroad or overreaching as to effectively drive Kansas Demand Response (“DR”)

Resources out of the SPP marketplace. In short, CURB asks the Commission to find an appropriate middle ground between the parties herein that best allows Kansas DR Resources to reasonably participate in the SPP marketplace so as to help reduce wholesale prices and enhance reliability, but still protect Evergy's ratepayers from significant costs and operational unreliability. CURB does not have sufficient experience in the SPP marketplace to provide detailed solutions to the balancing issues presented in this docket, but like Staff, eagerly awaits the responses of the parties herein.

### **Abbreviated Procedural History**

3. On January 25, 2023, Evergy Kansas Central, Inc. and Evergy Kansas South, Inc. (collectively referred to as "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 with the KCC for approval of its proposed tariff changes related to wholesale DR Resource participation.<sup>1</sup> In its application, Evergy essentially alleges that it has encountered challenges in reviewing Kansas DR Resource registration and customer participation in the SPP marketplace through DRAs, which are not sufficiently addressed by its tariffs and which pose risks to the safety and reliability of Evergy's retail distribution system.<sup>2</sup> The application therefore seeks Commission 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").<sup>3</sup> Evergy alleges that these tariff changes are necessary to strike a balance between

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<sup>1</sup> Joint Application for Approval of Tariff Changes Related to Wholesale Demand Participation, Jan. 25, 2023.

<sup>2</sup> Id., at p.3.

<sup>3</sup> Id. at pp. 5-6.

facilitating retail customers’ desires to participate in SPP with DR Resources with the control that Evergy needs to be able to fulfill its distribution utility and retail service responsibilities in Kansas.<sup>4</sup>

4. On January 26, 2023, CURB filed a Petition to Intervene and Motion for Protective Order, Discovery Order and Order Assessing Costs.<sup>5</sup> The Commission granted the same on February 2, 2023.<sup>6</sup> In addition to granting CURB’s intervention, the Commission has granted intervention to Voltus, the Empire District Electric Company, Southern Pioneer Electric Company, Sunflower Electric Power Company, Sierra Club and Vote Solar.<sup>7</sup>

5. Prior to the intervention of the other parties in this docket, Evergy, Staff and CURB filed a Joint Motion for Approval of Proposed Procedural Schedule on March 15, 2023.<sup>8</sup> The Commission granted the joint motion on March 21, 2023.<sup>9</sup> In its March 21, 2023 Order, the Commission established the following procedural schedule:

Date and Time	Action
May 9, 2023, at 5:00 pm	Staff Report and Recommendation (R&R) due
June 23, 2023, at 5:00 pm	Responses to Staff R&R due
July 24, 2023, at 5:00 pm	Commission Order Due

6. Accordingly, Staff filed its R&R on May 9, 2023. Staff recommended that the Commission grant Evergy’s application. However, Staff noted that it would consider alternative solutions to those presented in Evergy’s application.<sup>10</sup>

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<sup>4</sup> Id., at pp. 9-10.

<sup>5</sup> Petition to Intervene and Motion for Protective Order, Discovery Order and Order Assessing Cost, May 4, 2022.

<sup>6</sup> Order Designating Presiding Officer; Granting CURB’s Petition to Intervene; Protective and Discovery Order, February 2, 2023.

<sup>7</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>8</sup> Joint Motion for Approval of Proposed Procedural Schedule, March 15, 2023.

<sup>9</sup> Order Setting Procedural Schedule, March 21, 2023.

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

7. Several pleadings have been filed by Evergy and Voltus with respect to the March 2023 procedural schedule adopted by the Commission, all of which have been addressed by the Commission.<sup>11</sup> These pleadings culminated in an Order Setting Procedural Schedule that the Commission issued on June 22, 2023.<sup>12</sup> Leaving the due date for the Staff’s R&R (which had already been filed), the Commission’s new order amended the previously approved procedural schedule, as follows:

Date and Time	Action
May 9, 2023, at 5:00 pm	Staff Report and Recommendation (R&R) due
July 7, 2023, at 5:00 pm	Responses to Staff R&R due
July 21, 2023, at 5:00 pm	Evergy Reply to Staff and Intervenors Due
Week of July 24, 2023	Settlement Conference
August 14, 2023, at 9:00 am	Commission Hearing
August 21, 2023, at 5:00 pm	Post-hearing Briefs Due
September 21, 2023, at 5:00 pm	Commission Order Due

**Background to the Application**

8. Evergy states that it filed the instant application in response to the steps taken by the Federal Energy Regulatory Commission (“FERC”) to expand organized wholesale market access for DR Resources.<sup>13</sup> Evergy defines DR as the reduction or shift of electricity consumption by a retail electricity consumer in exchange for some incentive.<sup>14</sup> Evergy refers to a resource capable of providing DR as a DR Resource.<sup>15</sup>

9. The steps taken by the FERC to expand organized wholesale market access for DR Resources include a Notice of Inquiry in Docket No. RM21-14-0000.<sup>16</sup> The Notice of Inquiry

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<sup>11</sup> Order Denying Voltus, Inc.’s Motion to Depose Evergy Witnesses, June 6, 2023.

<sup>12</sup> Order Setting Procedural Schedule, June 22, 2023.

<sup>13</sup> Direct Testimony of Darrin R. Ives, January 25, 2023, p. 4.

<sup>14</sup> Id., at p. 3.

<sup>15</sup> Id., at pp. 3-4.

<sup>16</sup> Participation of Aggregators of Retail Demand Response Customers I Markets Operated by Regional Transmission Organizations and Independent System Operators, Notice of Inquiry, 174 FERC 61,198 (2021).

arises out of the FERC's reconsideration of a Final Rule issued by the FERC in 2008. Particularly, on October 17, 2008, in Docket No. RM07-19-000, the FERC issued a Final Rule (commonly referred to as FERC Order No. 719, with an order on rehearing referred to as FERC Order 719-A) pertaining to wholesale competition in regions with organized electric markets.<sup>17</sup> In these orders ("Final Rule"), the FERC stated that DR Resources can provide competitive pressure to reduce wholesale power prices and can enhance reliability, among other benefits.<sup>18</sup> Therefore, the FERC intended its Final Rule to eliminate barriers to DR Resource participation in organized wholesale energy markets. In other words, the FERC intended the Final Rule to ensure that DR Resources are treated comparably to other (supply side) resources in these markets.<sup>19</sup>

10. Thus, if and as allowed by the Final Rule, a retail DR Resource can access the wholesale marketplace of a Regional Transmission Organization ("RTO") or Independent System Operator ("ISO").<sup>20</sup> These retail electric consumers can individually participate in wholesale markets or participate through a DRA or an Aggregator of Retail Customers ("ARC"). Evergy describes a DRA as an entity that aggregates the load of one or more retail customers for purposes of participation as a DR Resource in a wholesale market.

11. Importantly, in the Final Rule, the 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 electric retail regulation. Therefore, in the Final Rule, the FERC found that "an ARC may bid retail load reduction into Regional

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<sup>17</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>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> ("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).

Transmission Organization or Independent System Operator regional markets **unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate in this activity** [emphasis added].”<sup>21</sup> When a state does not permit a retail customer to participate in wholesale markets through DR, the state is said to “opt out” of participation. Kansas permits its retail DR Resources to access its affiliated RTO, being the SPP.<sup>22</sup>

12. It is important to note that most states in the SPP have opted out. Lawrence Berkeley National Labs has reported, in a December 15, 2022 publication, that sixteen of the nineteen states in the Mid-Continent ISO (“MISO”) and the SPP had opted out of wholesale market participation of retail customer DR.<sup>23</sup> As noted above, Kansas was one of the states that did not opt out.<sup>24</sup> Moreover, DR Resources in the SPP marketplace have only recently begun to develop. According to the SPP State of the Market report for 2021, there were 102 demand response resources in the SPP marketplace, representing 176.2 MW of nameplate capacity as of December 31, 2021.<sup>25</sup> Ignoring the DR Resources that were registered in 2014 and then withdrawn in 2015, there were no DR Resources registered in SPP until 2019.<sup>26</sup> In 2020, SPP DR Resources were only 34.2 MW of nameplate capacity, constituting 0.1% of peak demand.<sup>27</sup> Comparatively, MISO’s DR Resources were 13,024.0 MW of nameplate capacity, constituting 11.1% of peak demand in 2020.<sup>28</sup>

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<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Forrester, Sydney P., et al., Lawrence Berkeley National Laboratory, “Aggregations in Opt Out States,” NREL DER Interconnection Workshop 1 (December 15, 2022).

<sup>24</sup> Id.

<sup>25</sup> Southwest Power Pool Market Monitoring Unit, “State of the Market 2021,” pp. 49-51 (May 10, 2022).

<sup>26</sup> Id.

<sup>27</sup> Forrester, Sydney P., et al., Lawrence Berkeley National Laboratory, “Aggregations in Opt Out States,” NREL DER Interconnection Workshop 1, p. 63 (December 15, 2022).

<sup>28</sup> Id.

13. The Notice of Inquiry in FERC Docket RM21-14-0000, in part, pertains to whether states should still be allowed to prohibit retail DR Resources from accessing RTOs and ISOs. The KCC filed comments on the FERC’s notice of inquiry. Several other state utility regulators and other stakeholders also filed comments regarding the Notice of Inquiry, leaving a broad array of opinions concerning the issue.

14. In its comments regarding the Notice of Inquiry, the KCC recognized that the “aggregation of retail demand reductions can provide valuable and much needed demand response,” which, in turn, is a crucial component to the efficient functioning of competitive wholesale energy markets.<sup>29</sup> However, the KCC added:

...Current tariff structures and cost allocation procedures in place for Kansas utilities were not designed in contemplation of the participation of third-party aggregators. As such, they do not determine an aggregator’s “fair share” of system costs for utilizing distribution system infrastructure or any cost impacts from failure to perform. The opt-out provision affords states the needed time to carefully assess system costs and apply our normal stakeholder process to ensure that the distribution utility and its retail ratepayers do not bear the burden of increased system costs that are caused by others.<sup>30</sup>

Moreover, the KCC noted that the intent of the opt-out provision was to properly balance the FERC’s “goal of removing barriers to development of demand response resources in organized markets that [the FERC] regulate(s) with the interests and concerns of state and local regulatory authorities.”<sup>31</sup>

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<sup>29</sup> The Kansas Corporation Commission’s Notice of Intervention and Initial Comments, Docket No. RM21-14-0000 (Acc. # 20210723-5203), p.1 (July 23, 2021).

<sup>30</sup> Id., at p. 13.

<sup>31</sup> Id., at p. 6.

## **Evergy Joint Application**

15. As noted earlier, Evergy proposes revisions to its pertinent tariffs with respect to the participation of Evergy Kansas retail customers' DR Resources in the SPP marketplace. These revisions would: (1) require retail customers seeking to participate in the SPP marketplace to first provide a Customer Registration and Consent Form to Evergy and (2) allow retail customers to participate in the SPP marketplace only through a DRA that has a Distribution Utility - Demand Response Aggregator Agreement ("DU-Aggregator Agreement") with Evergy in place.<sup>32</sup> The proposed revisions are supported by the Direct Testimony of Darrin R. Ives who testifies why Evergy believes the proposed tariff revisions are just and reasonable and should be approved by the Commission.<sup>33</sup>

16. In these regards, Mr. Ives' testimony points out that Evergy's tariffs only minimally address wholesale DR participation in the SPP marketplace. He notes that Section 7.12 of EKC's GT&C merely provides:

Company's express written consent is necessary for a customer to participate in the SPP's Integrated Market or Demand response program regardless of the customer's service taken from the Company (i.e., firm or interruptible).<sup>34</sup>

There is no corresponding tariff provision in the EKM GR&R.<sup>35</sup>

17. The minimal provisions in these Evergy's tariffs have recently become a concern. Mr. Ives testifies that Evergy was notified of the first Evergy Kansas retail customer participating in the SPP marketplace in August 2020, but that since that time, additional Kansas retail customers have started participating in the SPP marketplace. Evergy receives notice of Kansas retail

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<sup>32</sup> Joint Application for Approval of Tariff Changes Related to Wholesale Demand Participation, Jan. 25, 2023.

<sup>33</sup> Direct Testimony of Darrin R. Ives, January 25, 2023, p. 3.

<sup>34</sup> Id., at p. 11.

<sup>35</sup> Id.



customers' participation in the SPP marketplace because DR Resources must be registered with SPP in order to participate in its market, and SPP protocols effectively provide Evergy and the KCC with a 45-day period within which to contest/express concerns about a DR Resource registration.<sup>36</sup>

18. According to Mr. Ives, when Evergy is notified that a retail electricity customer intends to register as a DR Resource with SPP, Evergy takes a number of steps within the allotted 45-day review period:

First, Evergy ensures the retail customer has consented to participation in SPP's markets through the DRA. Evergy also ensures that the customer has signed and submitted to Evergy a Customer Data Authorization form, which allows Evergy to share customer information with the DRA to facilitate the retail customer's participation in the wholesale market, if needed. Evergy ensures that the information submitted to SPP in the registration package reflects accurate information about the customer's service account(s), including the customer name, meter number, and account number. Evergy also coordinates with SPP to provide information on where the load asset is located on the electricity grid so that SPP can identify the correct SPP market pricing node for the load asset and confirm that the registration reflects an achievable level of demand response for each meter associated with the registration. Evergy also verifies that the customer does not participate under a retail tariff or program that would potentially conflict with wholesale market participation.<sup>37</sup>

19. Mr. Ives testifies that, with the growing number of DR registrations in SPP, Evergy has encountered a number of challenges.<sup>38</sup> These include customer education, inaccuracies in registration information submitted by retail customers to SPP, times when it is unclear whether the customer consented to the SPP registration process, and certain instances when a customer's SPP registration has not been discontinued after a customer has elected to discontinue participation in

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<sup>36</sup> Id., at pp. 10-11.

<sup>37</sup> Id., at p. 12.

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

the SPP marketplace.<sup>39</sup> Mr. Ives testifies that, with increased DR Resource participation in SPP, Evergy expects these challenges to become more acute, perhaps causing increased administrative costs to be imposed upon Evergy's customers, and he expects other challenges to arise that could negatively affect all Evergy customers.<sup>40</sup> Particularly, Evergy's ability to accurately forecast load patterns could be compromised as a result of Kansas DR Resource increases in the SPP marketplace, which could, in turn, affect the entire Evergy footprint.<sup>41</sup>

20. In his testimony, Mr. Ives recounts how Evergy's proposed changes in its tariffs help to alleviate these challenges. Without reciting this aspect of Mr. Ives' testimony at length, CURB notes with particular interest that Mr. Ives testifies that the DU-Aggregator Agreement requires the DRA to make certain affirmations:

(1) There are no double compensation, double counting, or compliance issues with such participation; (2) each retail load can be separately measured and its wholesale market performance can be verified; and (3) the DRA has complied with all other KCC, FERC, and SPP requirements for participation in the wholesale market.<sup>42</sup>

Moreover, CURB notes that the DU-Aggregator Agreement requires DRAs to provide to Evergy, on a quarterly basis, a summary-level operational performance report, which Mr. Ives testified will provide Evergy with visibility into the DRA's activities, and changes thereto.<sup>43</sup> Finally, CURB notes that Mr. Ives claims that the provision in the DU-Aggregator Agreement that Evergy may take any action that Evergy deems, in its sole discretion, necessary to lawfully maintain the safety and reliability of its grid is a critical aspect of the DU-Aggregator Agreement.<sup>44</sup>

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<sup>39</sup> Id., at pp. 13-14.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id., at p. 20.

<sup>43</sup> Id.

<sup>44</sup> Id., at p. 21.

21. Mr. Ives testifies that the proposed revisions to its tariffs are just and reasonable because they protect Evergy retail customers, as follows:

...by implementing a clear, transparent, and KCC approved process by which (1) retail customers will notify Evergy of their desire to participate in SPP's marketplaces through a DRA; (2) Evergy will be equipped to consider the technical and tariff issues associated with that registration in a timely manner and to consent to that participation, with such consent not to be unreasonably delayed or withheld; and (3) retail customers, Evergy, and DRAs have a shared understanding of their respective roles and responsibilities.<sup>45</sup>

Essentially, Mr. Ives testifies that the proposed tariff revisions strike an appropriate balance between Evergy Kansas retail customers who desire to participate as a DR Resource in the SPP marketplace with Evergy's obligation to provide safe and reliable service to all Evergy customers.<sup>46</sup>

### **Staff's R&R**

22. As filed on May 9, 2023, Staff's R&R generally supports Evergy's Application.<sup>47</sup> Staff reasons that "unmitigated, unregulated DR activity could result in inefficiencies in Evergy's operation of the distribution system, the costs of which would end up being borne by Evergy's retail customers, whether they are participating in DR activities or not."<sup>48</sup> Staff characterizes Evergy's proposed tariff changes as formalizing a "process for Evergy to provide consent prior to its customers participating in whole market DR activities."<sup>49</sup> In Staff's view, this process "will provide for advanced notice and coordination between Evergy, the DRA, and the customer, as well as a summary-level operational report filed quarterly by the DRA."<sup>50</sup>

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<sup>45</sup> Id., at p. 25.

<sup>46</sup> Id.

<sup>47</sup> Notice of Filing of Staff's Report and Recommendation, May 9, 2023.

<sup>48</sup> Id., at p. 4.

<sup>49</sup> Id.

<sup>50</sup> Id., at p. 4.

23. In its R&R, Staff extensively discusses the contents of the Customer Registration and Consent Form (Schedule 1) in the pertinent Evergy tariffs, and the provisions of the DU-Aggregator Agreement.<sup>51</sup> Moreover, Staff dedicates a large portion of its R&R to various Data Requests submitted to Evergy in this docket.<sup>52</sup> In fact, Staff attaches Evergy's responses as exhibits to Staff's R&R.

24. In CURB's view, the detailed recitation of the contract and the inclusion of Evergy's DR responses as exhibits to the R&R are intended to show why Staff perceives the revisions to Evergy's tariffs, as proposed by the application, to be a solid middle ground between an "opt-out" of Kansas DR Resources in the SPP marketplace and leaving Kansas DR Resources to be regulated solely by SPP protocols.<sup>53</sup> Nonetheless, Staff states that it is willing to listen to concerns and recommendations of other intervenors and reserves the right to modify its recommendations in the R&R, based upon information supplied by such intervenors.<sup>54</sup>

#### **CURB's Response to the Evergy Application and Staff's R&R**

25. CURB generally agrees with Staff's support for a middle ground between a complete opt-out of Kansas DR Resource participation in the SPP marketplace and "unmitigated, unregulated DR activity."<sup>55</sup> CURB perceives that such a middle ground is entirely consistent with the Commission's comments in RM21-14-0000 about "the lack of information sharing and coordination between DRAs and DUs, inefficiencies and possible costs shifting to retail customers, complications and negative implication for load forecasting and resource planning, lack of

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<sup>51</sup> Id., at pp. 5-7.

<sup>52</sup> Id., at pp. 8-11.

<sup>53</sup> Id., at p. 11.

<sup>54</sup> Id., at p. 3, pp. 11-12.

<sup>55</sup> Id., at p. 10.

standardized DR performance tracking, reliability challenges and negative impacts to distribution system operations.”<sup>56</sup>

26. Moreover, CURB agrees with Evergy that Evergy’s present tariffs should be revised given the potential for substantial growth of DR Resources in the SPP marketplace. In these regards, CURB generally believes it to be in the public interest and beneficial to Kansas residential and small commercial ratepayers to provide, in the pertinent tariffs, the terms and conditions by which the consent of Evergy can be obtained with respect to customer participation in the SPP marketplace through demand response.

27. First, detailed terms and conditions would add transparency to the process. Certainly, the process outlined in the application is considerably more transparent than the mere provision in the current EKC tariff:

Company’s express written consent is necessary for a customer to participate in the SPP’s Integrated Market or Demand response program regardless of the customer’s service taken from the Company (i.e., firm or interruptible).<sup>57</sup>

Second, specific terms and conditions in tariffs are subject to approval by the Commission, allowing the balance of interests in these matters to be determined and published. Third, the publication of specific terms and conditions governing a retail electric customer’s access to the SPP marketplace reduces significantly the chance that access to these markets could be handled unevenly between various customers.

28. In CURB’s view, the Commission’s July 23, 2021, comments regarding the FERC March 18, 2021, Notice of Inquiry in Docket No. RM21-14-0000 are very appropriate to the

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<sup>56</sup> Notice of Filing of Staff’s Report and Recommendation, at p. 11.

<sup>57</sup> Evergy Kansas Central, Inc. and Evergy Kansas South, Inc., Evergy Kansas Central Service Area General Terms and Conditions, Sec. 7.12.

questions in this docket. As noted earlier, the Commission acknowledged that there are benefits to DR Resource participation in wholesale markets, but “...Current tariff structures and cost allocation procedures in place for Kansas utilities were not designed in contemplation of the participation of third-party aggregators.”<sup>58</sup> The Commission’s comments stressed the need for time to allow Kansas to form appropriate tariffs, to protect against negative impacts to distribution system operations.<sup>59</sup>

29. CURB perceives that this docket presents a timely opportunity for the Commission to balance the benefit of allowing Kansas retail electric customers to participate through their DR Resources in the SPP wholesale market, particularly through reduced wholesale electricity prices and enhanced reliability, with the potential costs and risks to Kansas electric ratepayers at large, arising out of such participation. It also allows the Commission to determine the appropriate means to potentially mitigate these costs and risks, while ensuring that retail customers’ DR Resources have reasonable access to the SPP marketplace. Several stakeholders have intervened in this docket, each having different perspectives regarding that balance. CURB believes that the input of these stakeholders will be helpful in respect to that balance and toward achieving optimal mitigation measures.

30. Indeed, CURB believes that Kansas is best served by some state regulatory mechanism governing reasonable entry of DR Resources into the SPP marketplace. CURB perceives that access of DR Resources in SPP potentially benefits residential and small commercial ratepayers through the reduction of wholesale electricity costs. Conceptually, the benefit of DR

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<sup>58</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>59</sup> Id., at p.12.

Resource access to wholesale markets follows the same logic as energy efficiency in retail markets. They are both least-cost resources. Moreover, they both involve a cost of administration, and both must be effectively integrated into overall resource planning and distribution operations. In short, DR Resource access to wholesale markets must be workable, and if not, costs of administration may significantly outweigh benefits or, worse yet, reliability may be severely challenged.

31. Certainly, there is evidence that DR Resources can have a positive impact upon wholesale electricity prices and reliability. Consider the comments of the Illinois Commerce Commission in RM21-14-0000. It stated, in part, that the potential benefits of DR are many, including:

DR can reduce energy prices and improve the efficiency of electricity markets. Consumers that can respond to energy prices by reducing consumption reduce wholesale power prices by removing the need to operate more expensive sources of generation during periods of peak demand....The consumer awareness enabled through DR mitigates price spikes, reduces price volatility and in the long-term, reduces the need for construction of new generation resources. In simple terms, when allowed, DR has the potential to offer value for both consumers and grid operators.<sup>60</sup>

The value of DR must be considered in balancing the interests of the parties in this docket.

32. On the other hand, Evergy presents a valid case that the costs and risk associated with a laissez-faire approach to allowing DR into wholesale markets cannot be ignored. As noted earlier, Mr. Ives testified concerning several challenges that Evergy faces or could encounter. These include inaccuracies in registration information submitted by retail customers to SPP, and other challenges that adversely affect Evergy's ability to accurately forecast load patterns.<sup>61</sup> In

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<sup>60</sup> Comments of the Illinois Commerce Commission, Docket No. RM21-14-0000 (Acc. # 20210723-5138), pp.2-3 (July 23, 2021).

<sup>61</sup> Direct Testimony of Darrin R. Ives, January 25, 2023, p. 13.

Evergy's view, Evergy ratepayers should not bear unreasonable cost or risk associated with participation of Kansas DR Resources in the SPP marketplace.<sup>62</sup>

33. As Staff's R&R suggests, there is no easy or one-size-fits-all solution to the issue as to how states can regulate DR Resources to reasonably protect utility customers from the types of problems Evergy identifies in its application while providing reasonable access of these resources to wholesale markets. Indeed, the diverse comments made by various stakeholders in Docket No. 21RM-14-0000, concerning whether states should be able to opt their DR Resources out of RTO/ISO markets, is evidence of the difficulty of the issue. For example, in its comments in RM21-14-0000, the Arkansas Public Service Commission stated that the Final Rule's "state opt out is inconsistent with the objective to give end-use customers access to all technologies and business practices, whether wholesale or retail."<sup>63</sup> In its view, FERC should seek to re-establish the "bright line" separating state and federal jurisdiction on the basis of wholesale versus retail transactions.<sup>64</sup> On the other extreme, it bears noting that Kansas is among only three states out of the 19 states in the SPP and MISO regions that did not opt out under the Final Rule.<sup>65</sup>

34. Like Staff, CURB does not believe that the KCCs' role in DR Resource participation in the SPP marketplace has to be an "all or nothing" proposition. In these regards, CURB considered the comments of the Michigan Public Service Commission ("PSC") in RM21-14-0000. In its comments, the Michigan PSC noted that it initially opted out of DR Resource

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<sup>62</sup> Id.

<sup>63</sup> Comments of Ted Thomas, Chairman of the Arkansas Public Service Commission, Docket No. RM21-14-0000 (Acc. #: 20210723-5131), p.3 (July 23, 2021).

<sup>64</sup> Id., at p. 6.

<sup>65</sup> Forrester, Sydney P., et al., Lawrence Berkeley National Laboratory, "Aggregations in Opt Out States," NREL DER Interconnection Workshop 1, p. 61 (December 15, 2022).



participation in its RTOs.<sup>66</sup> However, as FERC rulings evolved, the Michigan PSC adopted a new DR framework and authorized DR aggregation for customers served by Michigan's choice suppliers.<sup>67</sup> Through a stakeholder process, Michigan attempted to establish a process for DR aggregation that aligned with federal requirements, as well as ensuring proper requirements were in place to avoid double counting and reliability issues.<sup>68</sup> While CURB recognizes that Michigan has retail choice, to which the framework applied, and Kansas does not, Michigan's stakeholder process provided (as could this hearing) a middle ground on DR aggregation in wholesale markets.

35. CURB also found Indiana's approach to the issue to have some appeal. The Indiana Utility Regulatory Commission noted in its comments in RM21-14-0000 that it has staked a middle ground between an opt-out under the Final Rule and unfettered access of DR Resources of Indiana customers to wholesale markets.<sup>69</sup> Like Kansas, Indiana is a state with traditional regulation of its utilities, wherein the utilities own generation, the regulation of which is under the jurisdiction of the Indiana Utility Regulatory Commission.<sup>70</sup> It stated:

The Indiana Commission found that demand response mechanisms are integrated into a utility's cost of service to customers and in short and long-term energy and capacity planning. The Indiana Commission also found that the benefits of demand response are best captured by permitting Indiana retail customers to participate in RTO demand response programs through their [Local Service Entity].<sup>71</sup>

36. It is noteworthy that the Supplemental Direct Testimony filed by Burton L. Crawford on behalf of KCP&L Greater Missouri Operations Company in Case No. ER-2018-0146

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<sup>66</sup> Notice of Intervention and Comments of the Michigan Public Service Commission, Docket No. RM21-14-0000 (Acc. #: 20210723-5094), p.3 (July 23, 2021).

<sup>67</sup> Id., at p. 4.

<sup>68</sup> Id., at pp. 4-5.

<sup>69</sup> Notice of Intervention and Comments of the Indiana Utility Regulatory Commission, Docket No. RM21-14-0000 (Acc. #: 20210723-5136) (July 23, 2021).

<sup>70</sup> Id., at p. 2.

<sup>71</sup> Id., at p. 4.

before the Missouri Public Service Commission cites the Indiana Model as an example of a mechanism utilized to enable DR Resource participation in RTO markets.<sup>72</sup> As described by Mr. Crawford, the Indiana Utility Regulatory Commission, under that model, precludes retail customers from entering real DR Resources directly into wholesale markets.<sup>73</sup> Rather, the retail customer or ARC enrolls the customer DR Resources in a regulated retail utility's wholesale market demand response tariff. The retail utility offers the DR Resources into the ISO/RTO market on behalf of the retail customer/ARC and communicates market bid acceptance and dispatch instructions to the customer/ARC.<sup>74</sup> In turn, the retail customer/ARC is compensated by the retail utility based upon actual DR Resource performance and market settlement rules. Like Evergy's proposal in this docket, the Indiana Model is a regulatory-approved mechanism by which DR Resources are offered into RTO/ISO regional markets through the participation of retail customers and ARCs.<sup>75</sup>

37. Moreover, CURB has found support among the literature for something other than an "all or nothing" approach. In fact, some of the literature points to several models that allow DR Resource participation by retail customers/ARCs in RTO/ISO wholesale markets.<sup>76</sup> The above-described Indiana Model is considered to be a "DR Feed-in Tariff," whereby the utility has a standard offer available through a tariff, under which it will purchase DR Resources that qualify for participation as resources in TRO/SAIO DR programs.<sup>77</sup> Another DR Resource procurement

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<sup>72</sup> Supplemental Direct Testimony of Burton L. Crawford on Behalf of KCP&L Greater Missouri Operations Company, Missouri Public Service Commission Case No. ER-2018-0146.

<sup>73</sup> *Id.*, at pp. 4-5.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See Dotson-Westphalen, Peter and Schisler, Kenneth D., "Regulating Demand Response and Aggregators in the Midwest While Safeguarding Local Jurisdiction: A Guide for State Regulatory Commissions, Electric Cooperatives and Municipal Electric Utilities" (December 2022).

<sup>77</sup> *Id.*, at pp. 14-15.

model is known as the ARC-Facilitated DR Program Administration model.<sup>78</sup> That model contemplates utilities entering contracts with ARCs to design, implement and administer DR programs within a utility's service territory. It is in use by several utilities in the Midwest.<sup>79</sup> Another DRA participation model is simply referred to as a conditional opt-in model.<sup>80</sup> That approach is for the Relevant Electric Retail Regulatory Authority to opt in to allow participation of ARCs in an RTO/ISO program but attach conditions to the opt-in to ensure that ARCs are subject to appropriate requirements.<sup>81</sup>

38. These models all have strengths and weaknesses relative to regulatory oversight, resource adequacy, and other priorities. CURB does not mean to imply that any of these models is preferable to the model proposed in the Evergy application. CURB merely suggests that there can be considerable flexibility in determining how and to what extent retail customers and DRAs can participate in RTO/ISO markets through DR. Therefore, CURB concurs with the approach recommended by Staff to remain open to the concerns and recommendations of other intervenors.

39. Evergy's application contemplates that regulatory control is achieved through a Customer Registration and Consent Form signed by the retail customer and a DU-Aggregator Agreement (when appropriate) between Evergy and the DRA as being required for a retail customer to participate in the SPP Integrated Marketplace ("SPPIM") through DR. There are numerous provisions in the DU-Aggregator Agreement. Staff's R&R generally summarizes these provisions. CURB will not restate such a summary herein.

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<sup>78</sup> Id., at p. 16.

<sup>79</sup> Id.

<sup>80</sup> Id., at p. 17.

<sup>81</sup> Id.

40. In CURB's view, the DU-Aggregator Agreement must provide an appropriate balance between the interest of DRAs and Evergy with respect to Kansas retail customers' participation in the SPPIM through DR. If the contract terms are too onerous or are unnecessary or insufficiently related to protecting Evergy's retail customers from DRA practices that are potentially harmful, then the Agreement may unreasonably chill DR participation in the SPPIM that could potentially benefit retail customers. On the other hand, CURB does not dispute that some contract terms may be necessary to protect Evergy's retail customers from DRA practices that are potentially harmful.

41. CURB will not interject itself into how specific contract terms are either necessary or not for the fair administration of Evergy's tariffs to allow DR to be reasonably offered in the SPPIM in Evergy's service territories. Rather, CURB generally urges the Commission to place the appropriate burden upon Evergy to provide sufficient justification that the contract provisions appropriately balance the interest of Evergy's customers to allow DR into the SPPIM with the need to obviate potential harm that could be caused by unreasonable practices of Kansas retail customers and DRAs in entering the SPPIM through DR. Further, CURB believes that Voltus and other intervenors in this docket are much better positioned to address this issue than CURB, given CURB's limited experience with the SPPIM and DRA business practices.

42. Nonetheless, there are some provisions of the contract that CURB wishes to call to the Commission's attention. CURB's mention of these provisions is not intended as a protest of inclusion of these provisions in the Agreement. Rather, CURB seeks clarification from Evergy as to the intent and necessity of the language of the provisions.

43. First, CURB wishes to call the Commission's attention to Subsection 4.6 of the Agreement. That provision reads:

4.6. In circumstances where a Retail Customer participating in the SPP wholesale market through the DRA discontinues that participation for any reason, the DRA shall provide notice in writing to Evergy as soon as practicable but not **less** than ten (10) business days following the date of such discontinuation. The notice shall provide the date of the discontinuation and the reasons for such discontinuation. (Our emphasis.)

In CURB's opinion, the language employed in this provision is not likely what was intended. CURB would ask for a revision of the timeframe for reporting discontinuations of a Retail Customer from participation in the SPP wholesale market through the DRA or an explanation of that timeframe.

44. Likewise, CURB seeks clarification of Section 4.7 of the Agreement. That provision reads:

4.7. If Evergy in its sole discretion reasonably determines that the DRA has not met the requirements set forth in this Section 4, Evergy may notify SPP and may contest the DRA's registration or continued market participation at SPP and may proceed under the informal or formal complaint procedures set forth under KCC rules.

In CURB's opinion, the language employed poses two distinct standards. One **allows** Evergy to determine whether the DRA has not met the requirements of Section 4 in its sole discretion, the other **requires** Evergy to reasonably determine that the DRA has not met the requirements of Section 4. The presence of both of these in one provision leads to confusion and vagueness of intent, making enforcement difficult. CURB believes clarifying the intent of Section 4.7 would be helpful to the DR Resource registration process.

45. CURB also has interest in the intent of Subsection 21.10 of the Agreement. That provision reads:

21.10 From time to time following the Effective Date, at the request of Evergy and without further consideration, the DRA shall execute and deliver to Evergy such instruments and documents and take such other action (but without incurring any material financial obligation) as Evergy may reasonably request in order to consummate more fully and effectively this Agreement.

In view of this provision, CURB wonders where the obligations of DRA may end. At the very least, the provision states that Evergy may request such instruments and documents or action in “order to consummate more fully and effectively this agreement.” Since a written contract typically is consummated upon execution of the same, CURB would appreciate Evergy’s explanation of the need for the open-natured aspect of this provision.

46. CURB also takes notice of Section 20 of the Agreement. Section 20 deals with audits of the records of a DRA and all of its subcontractors to verify the accuracy of data and information provided by the DRA under the contract. In connection therewith, Subsection 20.1 of the Agreement reads in part as follows:

20.1 In its sole discretion, Evergy may elect to review the accuracy of data and information provided by the DRA pursuant to this Agreement. In such case, Evergy may request the production of such documents as may be required to verify the accuracy of such data and information. Such documents shall be provided within ten (10) business days of such request....

Subsection 20.5 of the Agreement reads

20.5 This right to audit information or data provided in a report shall extend for a period of three (3) years following the date of the report. The DRA and its subcontractors shall retain all necessary records and documentation for the entire length of this audit period

With respect to Sections 20.1 and 4.7, CURB, as a consumer advocate, finds it natural to question why a regulator would ever give “sole discretion” to any monopoly. Nonetheless, given

the open-ended nature of what Evergy could require to verify the accuracy of such data and information submitted by the DRA under the contract, the three-year retention period of all potential records and information, and the obligation to provide all such documentation (even from subcontractors) within ten business days of a request for production from Evergy, these provisions seem very onerous. CURB is interested to learn why Evergy would need three years to conduct an audit of data and information provided by the DRA pursuant to the contract and if the types of information and data to be retained by the DRA and its subcontractors could be more clearly defined.

47. Although there are other provisions with potentially overbroad protections of Evergy in the Agreement, CURB also wishes to call the Commission's attention to Sections 9 and 10 of the Agreement, dealing with a "Limitation of Evergy's Liability" and Indemnification.

Section 9 reads:

#### **9. Limitation of Evergy's Liability**

Except where due to Evergy's willful misconduct or gross negligence, Evergy shall not be liable for any claims for loss, expense or damage (whether in contract, tort or strict liability) relating to or arising from any act or omission in its performance of this Agreement; provided, further, that in no event shall Evergy be liable under this agreement for consequential, indirect, incidental, special, exemplary, or punitive damages of any kind or nature whatsoever, or damages arising from or in connection with the DRA's loss of actual or anticipated profits or revenues, in each case, arising out of, relating to, or in connection with this agreement, regardless of whether any claim for such losses or damages is based on contract, warranty, tort (including negligence, strict liability or otherwise).

Section 10 reads:

#### **10. Indemnification**

10.1. To the fullest extent permitted by law, the DRA shall indemnify, save harmless and defend Evergy and its affiliates, and any directors, officers, agents, members, partners, shareholders, employees and other representatives of each against all claims, liabilities, demands, cost or expense, for loss, damage and injury

to persons or property incurred by or threatened against Evergy, in any manner directly or indirectly connected with, or arising out of this Agreement.

Under these contract provisions, it is unclear to CURB whether and to what extent Evergy could have any financial responsibility for its breach of the contract terms that would not be indemnified by the DRA. CURB would appreciate an explanation of why such a broad liability limitation and indemnification in the Agreement is necessary.

48. In short, CURB believes that the terms of the Agreement should not be so overly broad and burdensome on DRAs that no customer is willing to participate, which is effectively the same result as an opt-out under the Final Rule. However, CURB believes that, conceptually, an agreement mechanism seems appropriate to conditionally approve Kansas DRA participation in the SPP wholesale market. CURB notes that the Commission has exclusive jurisdiction to determine disputes arising under the Agreement. Therefore, CURB is satisfied that the Commission retains regulatory control of the parties' actions under the contract, except, perhaps, for areas where Evergy has sole discretion. However, to avoid burdensome cases before this and future Commissions on disputes, CURB believes it is incumbent upon Evergy and other intervenors to provide their analysis of the necessity and benefit of material contract terms in the Agreement.

### **Conclusion**

49. In regard to the above comments, CURB notes that its authority is tied to KCC dockets and Kansas legislation.<sup>82</sup> Thus, CURB's experience with SPP has generally been peripheral to its participation before these two governmental bodies. Although CURB is generally familiar with SPP governance and its integrated marketplace, it is not fully knowledgeable with

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<sup>82</sup> KSA 66-1223.



the details pertaining to how the SPP deals with DRAs and retail customers with respect to offers of DR into the market. Therefore, CURB's comments in this docket are general in nature.

50. Upon information, however, CURB believes that in the SPPIM a Load Responsible Entity ("LRE") accounts for a load modifying resource by reducing its peak demand by the amount of the load modifying resource. The reduction of the LRE's peak demand results in lowering the need for an LRE to acquire other capacity and planning reserves to meet the Resource Adequacy Requirement. LREs are required to provide documentation to SPP that demonstrate that the demand response programs can be deployed to the projected level of reduction claimed by the LRE.

51. Therefore, in conclusion CURB reiterates its perception that the potential availability of DR Resources in the SPP marketplace poses benefits to Kansas ratepayers, including residential and small commercial ratepayers, but it places burdens upon Evergy, as an LRE, to deal with them adequately. Thus, CURB perceives a potential need for some regulatory control through the KCC over the ability of retail customers and DRAs to participate in the SPPIM. Further, CURB perceives the sole existing provision in the tariffs of either EKC or EKM ("Company's express written consent is necessary for a customer to participate in the SPP's Integrated Market,") is not as informative and transparent as it perhaps should be. However, in revising those tariffs, access of DR Resources of DRAs and Kansas retail customers into the SPPIM should not become unreasonably onerous as to unnecessarily deprive Kansans of the benefit of DR Resources in the SPPIM.

WHEREFORE, CURB respectfully requests the Commission allow Evergy to amend its tariffs to balance the benefits that DR Resource participation in the SPP market can provide to ratepayers with the need to protect Kansas ratepayers, through appropriate regulation as proposed

by Evergy or as otherwise found by the Commission. In connection therewith, CURB asks the Commission to require Evergy, as the applicant herein, to show that the provisions it proposes in its tariff are necessary to protect the reliability and reasonable operating costs of Evergy's system for the benefit of its ratepayers. Likewise, CURB asks the KCC to require Voltus and other stakeholders to show the Commission if and how Energy's proposals are so overbroad or overreaching as to effectively amount to keeping DR Resources unreasonably out of the SPP marketplace. CURB believes that this approach will result in balanced regulation of Kansas DR Resources.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

23-EKCE-588-TAR

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