BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval of a Special Incremental Load Rate for a Steel Production Facility In Sedalia Missouri.	)))))	**Case No. EO-2019-0244**

STAFF'S BRIEF

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Brief,* states herein as follows:

Introduction:

This matter arose on July 12, 2019, when KCP&L Greater Missouri Operations Company ("GMO")[1] filed its *Application* for authority to serve Nucor, a steel producer, pursuant to a special incremental load rate under its proposed SIL Tariff. On July 31, 2019, the Commission issued its *Order Adopting Procedural Schedule,* pursuant to which the evidentiary hearing herein was set for October 3 and 4, 2019, later reset to October 17 and 18, 2019. GMO had filed its direct testimony with its *Application* and proposed tariff. Pursuant to the *Order Modifying Procedural Schedule*, rebuttal testimony was due on September 27, 2019, and surrebuttal testimony was due on October 7, 2019. No party filed either rebuttal or surrebuttal testimony in this case. The hearing was held as scheduled on October 17, 2019. The Commission heard the testimony of four witnesses and received seven exhibits.

Controversy arose concerning a *Non-Unanimous Stipulation and Agreement,* joined by GMO, Nucor, and Staff, and filed with the Commission on September 19, 2019.

[1] Now Evergy Missouri West, Inc.

While the Office of the Public Counsel did not either join or object, the Missouri Energy Consumers Group ("MECG") did object on September 24, 2019, thereby requiring that the Commission determine the case on the merits, after an evidentiary hearing.[2] MECG later withdrew its objection on October 28, 2019.

Argument:

ISSUE 1. Must the proposed special incremental load tariff and Nucor special contract be approved pursuant to Section 393.355, RSMo.? If not, under what statutory authority is the Commission approving the terms of the SIL tariff and the Nucor special contract?[3]

A. Must the Commission proceed under § 393.355, RSMo.?

The proposed special incremental load tariff and Nucor special contract need not be approved pursuant to § 393.355, RSMo. While that section authorizes a special rate for steel smelters, it nowhere provides that it is the *exclusive* means by which a steel smelter may obtain an economic development rate. Section 393.355, RSMo., provides:

> 1. As used in this section, the following terms shall mean:
>
> (1) "Electrical corporation", the same meaning given to the term in section 386.020, but shall not include an electrical corporation as described in subsection 2 of section 393.110;
>
> (2) "Facility", a:
>
> (a) Facility whose primary industry is the smelting of aluminum and primary metals, Standard Industrial Classification Code 3334;
>
> (b) Facility whose primary industry is the production or fabrication of steel, North American Industrial Classification System 331110; or

[2] Rule 20 CSR 4240-2.115(2)(D).

[3] This issue was proposed by MECG.

(c) Facility with a new or incremental increase in load equal to or in excess of a monthly demand of fifty megawatts.

2. Notwithstanding section 393.130 or any other provision of law to the contrary, the public service commission shall have the authority to approve a special rate, outside a general rate proceeding, that is not based on the electrical corporation's cost of service for a facility if:

(1) The commission determines, but for the authorization of the special rate the facility would not commence operations, the special rate is in the interest of the state of Missouri when considering the interests of the customers of the electrical corporation serving the facility, considering the incremental cost of serving the facility to receive the special rate, and the interests of the citizens of the state generally in promoting economic development, improving the tax base, providing employment opportunities in the state, and promoting such other benefits to the state as the commission may determine are created by approval of the special rate;

(2) After approval of the special rate, the commission allocates in each general rate proceeding of the electrical corporation serving the facility the reduced revenues from the special rate as compared to the revenues that would have been generated at the rate the facility would have paid without the special rate to the electrical corporation's other customers through a uniform percentage adjustment to all components of the base rates of all customer classes; and

(3) The commission approves a tracking mechanism meeting the requirements of subsection 3 of this section.

3. Any commission order approving a special rate authorized by this section to provide service to a facility in the manner specified under subsection 4 of this section shall establish, as part of the commission's approval of a special rate, a tracking mechanism to track changes in the net margin experienced by the electrical corporation serving the facility with the tracker to apply retroactively to the date the electrical corporation's base rates were last set in its last general rate proceeding concluded prior to June 14, 2017. The commission shall ensure that the changes in net margin experienced by the electrical corporation between the general rate proceedings as a result of serving the facility are calculated in such a manner that the electrical corporation's net income is neither increased nor decreased. The changes in net margin shall be deferred to a regulatory liability or regulatory asset, as applicable, with the balance of such regulatory asset or liability to be included in the revenue requirement of the

electrical corporation in each of its general rate proceedings through an amortization of the balance over a reasonable period until fully returned to or collected from the electrical corporation's customers.

4. Notwithstanding the provisions of section 393.170, an electrical corporation is authorized to provide electric service to a facility at a special rate for the new or incremental load authorized by the commission:

(1) Under a rate schedule reflecting the special rate approved by the commission; or

(2) If the facility is located outside the electrical corporation's certificated service territory, the facility shall be treated as if it is in the electrical corporation's certified service territory, subject to a commission-approved rate schedule incorporating the special rate under the contract.

5. To receive a special rate, the electrical corporation serving the facility, or facility if the facility is located outside of the electrical corporation's certified service territory, shall file a written application with the commission specifying the requested special rate and any terms or conditions proposed by the facility respecting the requested special rate and provide information regarding how the requested special rate meets the criteria specified in subdivision (1) of subsection 2 of this section. A special rate provided for by this section shall be effective for no longer than ten years from the date such special rate is authorized. The commission may impose such conditions, including but not limited to any conditions in a memorandum of understanding between the facility and the electrical corporation, on the special rate as it deems appropriate so long as it otherwise complies with the provisions of this section.

6. Any entity which has been granted a special rate under this section may reapply to the commission for a special rate under this section.

Because § 393.355, RSMo., is not exclusive, the Commission can proceed under other statutory grants of authority. The approval of economic development rates and special contracts through other avenues is not at all unusual. GMO itself has an economic development tariff providing for special contracts,[4] as do other utilities. Kansas City

[4] *See* P.S.C. Mo. No. 1, 1st Revised Sheet No. 141 through 1st Revised Sheet No. 143, "Special Contract Rate – Electric."

Power & Light Company[5] has both a Special Contract Service tariff and an Economic Development Rider.[6] In its *Report and Order* in Case No. ER-2014-0258, cited by MECG in its opening statement, the Commission discussed Ameren Missouri's *Economic Re-Development Rider* and its *Economic Development and Retention Rider.*[7] The Empire District Electric Company, while not having an economic development tariff or rider *per se*, does have a special transmission tariff and special contract for Praxair, Inc.[8] None of these provisions was adopted under the authority of § 393.355, RSMo., and none of them has ever been held to be unlawful.

Most immediately applicable is the load retention rate adopted by the Commission in Case No. ER-2014-0258 for the benefit of an aluminum smelter in the Bootheel section of Missouri, Noranda Aluminum, Inc.[9] Under significant financial pressure due to depressed aluminum prices and looting by its parent, Noranda, which was Ameren's largest single customer, repeatedly sought from the Commission a rate significantly lower than Ameren's fully allocated cost of service.[10] Convinced that Noranda was likely to cease operations otherwise, the Commission established for Noranda a special IAS Rate with a three-year term at a per MWh price in excess of the incremental cost of serving Noranda but significantly below the fully allocated cost of service.[11]

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[5] Now Evergy Missouri Metro, Inc.

[6] P.S.C. Mo. No. 7, Third Revised Sheet No. 29 and First Revised Sheet No. 32.

[7] ***In the Matter of Union Electric Co. doing business as Ameren Missouri,*** 25 Mo.P.S.C.3d 71, 151-153, 320 P.U.R.4th 330, ___ (2015) ("***Ameren Missouri***"); *see* Mo. P.S.C. Schedule No. 6, 2nd Revised Sheet No. 86 and Original Sheet No. 87.

[8] *See* P.S.C. Mo. No. 5, Sec. 2, 14th Revised Sheet No. 9.

[9] ***Ameren Missouri,*** *supra*.

[10] *Id.,* pp. 130-31.

[11] *Id.,* pp. 131-39.

Section 393.355, RSMo., is designed for both aluminum smelters and steel mills; yet, in its absence, the Commission adopted a load retention rate for Noranda. Certainly, the Commission may proceed under its general ratemaking authority in this case just as it did in Case No. ER-2014-0258 for Noranda.

B. Under What Authority May the Commission Proceed?

The Commission is authorized to take up, consider and approve both the proposed SIL Tariff and the Nucor special contract under its general ratemaking authority at § 393.150.1, RSMo., which provides in pertinent part:

> Whenever there shall be filed with the commission by any … electrical corporation … any schedule stating a new rate or charge, or any new form of contract or agreement, … the commission shall have, and it is hereby given, authority, … upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice . . . .

1. All Relevant Factors Need Not Be Considered.

As a new service offering, the proposed SIL Tariff and Nucor Special Contract need not be introduced in a general rate case. ***State ex rel. Sprint Spectrum L.P. v. Missouri Public Service Commission,*** 112 S.W.3d 20, 28-29 (Mo. App., W.D. 2003). The consideration of all relevant factors is not required. *Id.*

Missouri's prohibition against single-issue ratemaking bars the Commission from allowing a public utility to change an existing rate without consideration of all relevant factors such as operating expenses, revenues, and rates of return. ***State ex rel. Mo. Water Co. v. Pub. Serv. Comm'n,*** 308 S.W.2d 704, 718–19 (Mo. 1957); ***State ex rel. Util. Consumers Council of Mo., Inc. v. Pub. Serv. Comm'n,*** 585 S.W.2d 41, 56–58 (Mo. banc 1979) (***"UCCM"***). The rationale behind the single-issue ratemaking prohibition is to prevent the Commission from allowing a utility to "raise rates to cover increased costs

in one area without realizing there were counterbalancing savings in another area." ***State ex rel. Midwest Gas Users' Assoc. v. Pub. Serv. Comm'n of Mo.,*** 976 S.W.2d 470, 480 (Mo. App., W.D.1998). However, "[t]his rationale does not apply in the instant case because tariffs have never been established" for incremental load rates for steel smelters.[12] ***Sprint Spectrum,*** *supra.*

2. <u>Rates Must Be Just and Reasonable</u>.

Even a new service offering rate must be "just and reasonable," however. ***Sprint Spectrum,*** *supra,* 112 S.W.3d at 27-28. In the ***Sprint Spectrum*** case, the Commission's decision was reversed because the price set for the new service offering was entirely arbitrary. *Id.,* at 28: "The admitted 'arbitrary' nature of the surcharge compels us to conclude that it is neither just or reasonable. We reverse the Commission's approval of the $.02 adder because it is unsupported by competent and substantial evidence in the record."

What exactly are just and reasonable rates? The phrase originated in the Interstate Commerce Act of 1887. S. Hempling, **Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction** 219 (American Bar Association, 2013). Section 386.020, the lengthy definition section of the Public Service Commission Law, does not include a definition of "just and reasonable." "The primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." ***Gash v. Lafayette County,*** 245 S.W.3d 229, 232 (Mo. banc 2008).

[12] The proposed tariff is not limited to steel smelters. It is available to customers that "[h]ave a facility whose primary industry is the smelting of aluminum and primary metals, (Standard Industrial Classification Code 3334) or [h]ave a facility whose primary industry is the production or fabrication of steel (North American Industrial Classification System 331110) or [o]perate a facility with an increase in load equal to or in excess of a monthly demand of fifty megawatts." *See* Sch. DRI-1, p. 1.

The meaning of the plain language of a statute is found in the dictionary. ***Campbell v. County Commission of Franklin County,*** 453 S.W.3d 762, 768 (Mo. banc 2015). Turning to the dictionary, "just" means "legally right; lawful; equitable." ***Black's Law Dictionary*** 868 (7th ed., 1999). "Reasonable" means "fair; proper; moderate under the circumstances." *Id.,* 1272.

All rates must be just and reasonable. § 393.130.1, RSMo. Courts have, from time-to-time, provided guidance on the meaning of the phrase "just and reasonable rates." In doing so, the courts have emphasized the notion of bilateral fairness and a balancing of competing interests. ***Federal Power Commission v. Hope Natural Gas Co.,*** 320 U.S. 591, 603, 64 S.Ct. 281, 288 (1944): "The rate-making process under the Act, i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests." The courts have explained that the consumers' interest is that rates be no more than is sufficient to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested." ***State ex rel. Washington Univ. v. Pub. Serv. Comm'n of Missouri,*** 308 Mo. 328, 344-45, 272 S.W. 971, 973 (banc 1925). Put another way, a just and reasonable rate is "the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." ***Atlantic Refining Co. v. Pub. Serv. Comm'n of State of N.Y.,*** 360 U.S. 378, 388, 79 S.Ct. 1246, 1253, 3 L. Ed. 2d 1312, ___ (1959).

However, just and reasonable rates, the balance of investor and consumer interests with the public interest, is not a single point, but rather a range or zone. Hempling, *supra,* 220-221. "We begin from this basic principle, well established by decades of judicial review of agency determinations of 'just and reasonable' rates: an

agency may issue, and courts are without authority to invalidate, rate orders that fall within a 'zone of reasonableness,' where rates are neither 'less than compensatory' nor 'excessive.'" ***Farmers Union Cent. Exch., Inc. v. F.E.R.C.,*** 734 F.2d 1486, 1502 (D.C. Cir. 1984), *quoting* ***F.E.R.C. v. Pennzoil Producing Co.,*** 439 U.S. 508, 517, 99 S. Ct. 765, 771, 58 L. Ed. 2d 773, ___ (1979), *in turn quoting* ***In re Permian Basin Area Rate Cases,*** 390 U.S. 747, 797, 88 S. Ct. 1344, 1376, 20 L. Ed. 2d 312, ___ (1968). "The Commission may, within this zone, employ price functionally in order to achieve relevant regulatory purposes; it may, in particular, take fully into account the probable consequences of a given price level[.]" ***Permian Basin Area Rate Cases,*** *supra,* 390 U.S. at 797, 88 S.Ct. at 1376, 20 L. Ed. 2d at ___. The lower end of the zone within which the Commission may set rates is the point at which the rate becomes impermissibly confiscatory, ***UCCM,*** 585 S.W.2d at 49 ("However, the Commission must at least afford the utility an opportunity to recover a reasonable return on the assets it has devoted to the public service"); the upper end is the point at which the rate becomes impermissibly excessive. ***Zinermon v. Burch,*** 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100, ___ (1990) (internal quotation omitted) ("the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them").

The public policy considerations that inform the rate design process include economic development, fairness, affordability, simplicity, stability, avoidance of undue discrimination or preferences, efficiency, and conservation. L.E. Alt, Jr., **Energy Utility Rate Setting: A Practical Guide to the Retail Rate-Setting Process for Regulated Electric and Natural Gas Utilities,** 58-60 (LULU: 2006); J.C. Bonbright *et al.,*

Principles of Public Utility Rates, 85-179 (PUR: Arlington, VA, 2nd ed. 1988). When striking the balance of investor interests and consumer interests, the Commission must also balance these public policy interests. "Specifically, the Commission is not required to adhere 'rigidly to a cost-based determination of rates . . . we refused to invalidate as inadequate the Commission's proposal to provide special relief . . . ." ***F.E.R.C. v. Pennzoil Producing Co.,*** 439 U.S. 508, 517, 99 S.Ct. 765, 771, 58 L.Ed.2d 773, ___ (1979).

To summarize, a just and reasonable rate is bilaterally fair in that it balances the investors' interest in a reasonable return, the consumers' interest in the lowest possible price, and the public interest. The point of balance selected by the Commission must fall somewhere in a zone that is neither so low as to be confiscatory nor so high as to be excessive, guided by the principle that the rate should be the lowest reasonable rate consistent with the provision of safe and adequate service and the investors' opportunity to earn a reasonable return. The Commission may, in striking this balance, employ price functionally in order to achieve relevant regulatory purposes, among which is economic development.

3. <u>The Propriety of Economic Development Rates</u>:

In addition to being just and reasonable, rates cannot be either unduly discriminatory nor unduly preferential. § 393.130, 2 & 3, RSMo. The Commission has no authority to approve discriminatory rates. ***State ex rel. City of Joplin v. Public Service Com'n of State of Mo.,*** 186 S.W.3d 290, 296 (Mo. App., W.D. 2005). However, a discrimination as to rates is not unlawful where it is based upon a reasonable classification corresponding to actual differences in the situation of the consumers or the

furnishing of the service. ***State ex rel. Mo. Office of Pub. Counsel v. Mo. Pub. Serv. Comm'n,*** 782 S.W.2d 822, 825 (Mo. App., W.D. 1990). Whether a discrimination is unlawful and unjust or the circumstances are essentially dissimilar is usually a question of fact. *Id.*

At this point, the Commission's decision in ER-2014-0258 is again relevant. In that case, as already noted, the Commission created a load retention rate for Noranda. The Commission looked to ***State ex rel. Laundry v. Public Service Commission,*** 327 Mo. 93, 34 S.W.2d 37 (Mo. 1931), which held, "the principle of equality designed to be enforced by legislation and judicial decision forbids any difference in charge which is not based upon difference of service, and even when based upon difference of service must have some reasonable relation to the amount of difference, and cannot be so great as to produce unjust discrimination." *Supra,* 327 Mo. at 110; 34 S.W.2d at 44-45. The Commission also looked to ***Civic League of St. Louis v. City of St. Louis*****,** 4 Mo. P.S.C. 412, 446 (1916), a case cited by the ***Laundry*** Court, for the principle that "equality of rights does not prevent differences in the modes and kinds of service and different charges based thereon." Incidentally, in ***Civic League,*** the Commission invalidated a municipal economic development rate that was so much less than the actual cost of service as to be an "intolerable oppression upon the general metered water users[.]" *Supra,* 455, 460.

Both ***Laundry*** and ***Civic League*** relied on ***Western Union Tel. Co. v. Call Pub. Co.,*** 181 U.S. 92, 99–100, 21 S.Ct. 561, 564, 45 L. Ed. 765, ___ (1901), which held:

> Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a

> consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination.

Based upon these cases, the Commission determined that:

> the Commission may set preferential rates as long as the preference is reasonably related to the cost of service and is not unduly or unreasonably preferential. No party has identified any subsequent court decision that would go as far as proscribing all economic development or load retention type rates. Instead, the courts that have examined this issue have made fact-based inquiries about the statutory proscription against unjust and unreasonable rates and undue or unreasonable preference or disadvantage and this is what the Commission must do here.

Ameren Missouri, *supra,* 25 Mo.P.S.C.3d at 200.

The Commission then determined that, because Noranda was unique in that it used "much more electricity than any other Ameren Missouri customer . . . at a very high load factor," a special "rate for Noranda that is less than its fully allocated cost, but more than its incremental cost is just and reasonable within the meaning of Section 393.130, RSMo (Cum. Supp. 2013), and is not unduly or unreasonably preferential." *Id.* The Commission also emphasized two factual findings in making its decision: first, that "[a] rate below fully allocated cost of service and above incremental cost of service is only appropriate if the smelter will likely leave Ameren Missouri's system if not allowed a lower electric rate"; and second, that:

> In setting a rate for Noranda, it is important that the rate be set, and remain, above the incremental cost. Below that cost, Noranda would not be covering any part of Ameren Missouri's fixed costs. If Noranda is not making any contribution to fixed costs, there is no justification for allowing it to pay a reduced rate and other ratepayers would be better off if the smelter closed.

> But, so long as Noranda's rate remains above the incremental cost, Noranda will make a contribution to Ameren Missouri's fixed costs and other customers will pay a lower rate than they would if the smelter closed and went off Ameren Missouri's system.

Ameren Missouri, *supra,* pp. 121-22 (Findings of Fact 12 and 13). This reasoning may conveniently be referred to as the "Noranda Rule."

4. <u>Applying the "Noranda Rule" to Nucor</u>:

The same reasoning that the Commission applied in ***Ameren Missouri*** -- the "Noranda Rule" -- also applies here. Nucor, like Noranda was for Ameren, will be GMO's largest single customer.[13] Like Noranda, Nucor is expected to have a high load factor.[14] Under the reasoning applied by the Commission in ***Ameren Missouri,*** *supra,* a special rate for Nucor "that is less than its fully allocated cost, but more than its incremental cost is just and reasonable within the meaning of Section 393.130, RSMo (Cum. Supp. 2013), and is not unduly or unreasonably preferential." Unlike the rate invalidated in ***Sprint Spectrum,*** *supra,* the rate proposed for Nucor is not arbitrary, is more than GMO's calculated incremental cost of serving Nucor, and will yield an expected contribution to fixed costs in excess of $500,000, which means that GMO's other customers will be better off with Nucor on the system, even at a rate lower than its fully distributed cost of service.[15] In the absence of the special contract rate, Nucor will not locate its steel mill at Sedalia, Missouri.[16] Therefore, GMO's other customers will be better off if Nucor becomes a GMO

[13] Ives Direct, p. 8.

[14] The actual figure, at p. 8 of Ives Direct, is confidential.

[15] Ives Direct, p. 10 (confidential).

[16] Ives Direct, pp. 9-10.

customer, even at a rate that is less than its fully allocated cost of service. ***Ameren Missouri,*** *supra,* pp. 121-22.

Because all of the factors considered under the "Noranda Rule" are met in this case, an economic development rate for Nucor is just and reasonable and neither unduly discriminatory nor unduly preferential.

ISSUE 2. Should the Commission approve the SIL tariff proposed by GMO and the special contract rate proposed for Nucor subject to the customer protections and monitoring and reporting requirements recommended by Staff, Nucor and GMO?

Yes, the Commission should approve the SIL tariff proposed by GMO and the special contract rate proposed for Nucor, subject to the customer protections and monitoring and reporting requirements recommended by Staff, Nucor and GMO.

A. Approval will result in Significant Economic Benefits:

As demonstrated in the last section, Nucor qualifies for an economic development rate under the "Noranda Rule." That rate need not be approved under § 393.355, RSMo. As was also the case with Noranda, Nucor will bring significant economic benefits to Sedalia, Pettis County, and the state of Missouri.

The Nucor project was developed by a statewide team that included the Governor's Office, the Missouri Department of Economic Development, and other agencies that crafted an incentive package for Nucor. When completed, the Nucor mill will employ more than 250 people. These positions include highly technical, skilled, and correspondingly well-compensated positions, estimated at $65,000 in annual salary, on average. That represents almost 200% of the current average wage in Pettis County,

which is $33,564. Nucor has broken ground on the facility, has completed significant construction and installation of equipment, and plans to be fully operational by January 1, 2020. In order to meet this schedule, GMO has requested a decision by the Commission by December 1, 2019, so that the special incremental load rate contract can be effective by January 1, 2020.[17]

Nucor is expected to invest over $325 Million in new plant and equipment over the next 22 years, with the majority of that by the end of this calendar year, directly benefiting the tax base of the Sedalia area. Estimates also indicate further increase in the tax base as a result of the estimated addition of Nucor's $16,575,000 annual payroll to the Sedalia area. Not only will this new facility employ more than 250 direct employees and invest $250M directly, it will also have significant spinoff benefits. There are currently over 450 construction employees working at the site. These individuals are utilizing local lodging, eating and hospitality venues resulting in increased tax base and indirect jobs. Nucor has hired approximately 130 employees thus far and nearly half of those have moved here from outside the immediate area. This drives investment in Missouri's housing market and results in community growth.[18]

Nucor will serve as the anchor tenant for the new Sedalia Rail Industrial Park. This park will offer from 5 to 1,500 acres to industrial customers seeking rail-served sites to build new facilities. The commitment of capital investment and this new facility by Nucor allowed the City of Sedalia, Pettis County, and Sedalia Pettis County Community Service Corporation to establish a joint effort to build the infrastructure needed to establish the

[17] *Application,* ¶ 6; *Direct Testimony of Mark Stombaugh,* pp. 2-3; *Direct Testimony of Jessica L. Craig,* p. 2; *Direct Testimony of Kevin Van De Ven,* pp. 4-5; *Direct Testimony of Darrin Ives,* p. 3.

[18] *Direct Testimony of Jessica L. Craig,* p. 3; *Direct Testimony of Darrin Ives,* p. 4.

Sedalia Rail Industrial Park. When established, the Sedalia Rail Industrial Park will be the largest in the Midwest and on Union Pacific's service line throughout the United States, with the ability to grow to exceed 2,500 acres. The initial investment by Nucor will be leveraged to establish this new corridor of growth for Sedalia's next 10-30 years of development.[19]

Securing this tenant allowed the community to leverage significant additional federal funding through the Better Utilizing Investments to Leverage Development transportation grant program, which awarded just over $10,000,000 to match local strategic infrastructure investments. That was one of four awards made to the entire State of Missouri. That additional industrial and primary job growth will create many opportunities for supporting commercial and retail businesses to thrive and grow in and around Sedalia.[20]

B. <u>Approval will Not Result in Any Risk to GMO's Existing Ratepayers</u>:

Over the 10-year term of the special contract, GMO expects that revenues generated from the special contract will exceed the incremental cost to serve Nucor by a significant sum and, starting after GMO's next general rate case following approval of the *Non-Unanimous Stipulation and Agreement*, the amount by which such revenues exceed the incremental cost to serve Nucor would contribute to recovery of fixed costs that would otherwise be borne by all other customers. More specifically, as clarified in the *Non-Unanimous Stipulation and Agreement*, ratemaking for contracts under the proposed SIL Tariff is designed to ensure benefit for other ratepayers. At the time of a general rate

[19] *Application,* ¶ 17; *Direct Testimony of Mark Stombaugh,* pp. 3-4; *Direct Testimony of Jessica L. Craig,* pp. 2, 3.

[20] *Id.*

proceeding, detailed information about the specific costs and revenues for the Special Incremental Load Rate will be used to identify the net revenue impact to the Company. Any positive net revenue (i.e., revenue in excess of incremental cost to serve) received from the Special Incremental Load Rate during the test year of the rate proceeding will be identified in the revenue for the Company and would serve to reduce any increase in revenue requirement to all customers other than Nucor. In the event the revenues are deficient for the test year period, that is, revenues fall short of incremental cost to serve Nucor, an additional revenue adjustment covering the shortfall will be made to the revenue requirement calculation. This approach will serve to share the expected, positive benefit with all customers but will also provide protections to other customers if the revenues happen to be inadequate within the test year of the case.[21]

C. <u>Recommended Conditions</u>:

To ensure that GMO's other ratepayers would not experience any deleterious effects from the proposed SIL Tariff and Nucor Special Contract, Staff, GMO and Nucor negotiated additional protections as set out in the *Non-Unanimous Stipulation and Agreement.* Staff now recommends that the Commission adopt these provisions, set out below, as conditions to be imposed upon its approval of GMO's proposed tariff and special contract:[22]

7. **Cost and Revenue Tracking** – GMO will monitor and report to Staff and OPC whether the revenues received under the special contract rate cover the incremental cost of providing service to Nucor. This reporting will

[21] *Application,* ¶¶ 15, 16; *Direct Testimony of Darrin Ives,* pp. 10, 15-16.

[22] The numbering mirrors the numbering in the *Non-Unanimous Stipulation and Agreement.*

be submitted quarterly for the first year following the effective date of the SIL tariff and the associated contract with Nucor, bi-annually for the second and third year, and annually thereafter. The Company will solicit feedback from Staff and the Office of Public Counsel up to and including meetings to evaluate and assess the content of the reports and any changes that may be needed to Exhibit 1 as a result of that feedback. The reporting will be submitted within 15 days after each of Evergy's SEC 10-Q or 10-K filings are made and will detail Nucor-related transactions on a rolling twelve-month basis. GMO will uniquely identify and track for reporting and general rate case purposes all incremental costs associated with serving Nucor.

a. GMO will identify and isolate the plant costs to provide service to Nucor.

b. GMO will identify and isolate supply costs attributable to Nucor. At this time these costs are expected to consist of:

i. energy as obtained through the SPP integrated marketplace including applicable ancillary services and transmission costs, and all transactions associated with the renewable supply source obtained via a Power Purchase Agreement ("PPA").

ii. Incremental capacity costs acquired from third parties, including affiliates, will be determined annually in the assessment of GMO capacity requirements. The portion of GMO capacity acquired attributable to Nucor will be separately identified for inclusion in Exhibit 1. Similarly, if GMO constructs or acquires capacity during

the term of the contract rather than purchasing capacity, or otherwise modifies its capacity source, capacity costs to Nucor will be calculated annually using prices as follows and be separately identified for inclusion in Exhibit 1. The accredited capacity attributable to Nucor's share of the PPA, will be netted against the capacity requirements of the Nucor load, including the SPP reserve margin requirements, prior to pricing as described above for inclusion in Exhibit 1.

c. GMO will modify its Fuel Adjustment Clause ("FAC") accounting to ensure Nucor-related costs are not included in the FAC charge recovered from other customers. Exhibit 2 to this Stipulation details the expected modifications, including:

i. **Power Purchase Agreement Cost** – Costs to follow conventional PPA accounting, with Nucor portion tracked separately from other PPA transactions completed by the Company. Costs to be recorded to a SIL-specific 555 subaccount and identifiable to Nucor. These costs will be specifically identified in the FAC monthly reports submitted to the Commission.

ii. **Production Market Cost** – Revenue from the sale of the energy from the PPA will be tracked in a separate SIL-specific 447 subaccount and identifiable to Nucor. These revenues will be specifically identified in the FAC monthly reports submitted to the Commission. The net effect of the sale of PPA purchase and the

Nucor load are to be recorded within the SIL-specific 447 and 555 subaccounts and identifiable to Nucor.

iii. Transmission Market Cost – If occurring, costs would accompany the associated Southwest Power Pool ("SPP") sale or purchase transactions and are to be recorded within SIL-specific 561, 565, and575 subaccounts and identifiable to Nucor and created for the purpose of tracking these costs. These costs will be specifically identified in the FAC monthly reports submitted to the Commission.

Load purchased for Nucor will be calculated at the five minute level, aggregated to the hour, based upon GMO load node locational marginal price.

d. GMO will monitor Nucor operations and will identify additional SPP-related costs resulting from unexpected operational events. If actual Nucor load experiences a 25% deviation from the expected Nucor load for more than 4 hours and that load change is not reflected in the GMO day-ahead commitments, GMO will quantify the balancing relationship between the hourly and day-ahead prices to identify the effect of the unplanned load change to apportion any additional SPP balancing charges and will incorporate the effect attributed to Nucor into the tracking of Nucor costs. If the effect of this relationship increases costs to non-Nucor customers, the amount will be reflected in a subsequent FAC rate change filing and the portion attributed to Nucor will be identified with supporting work papers and

removed from the Actual Net Energy Cost prior to the calculation of the FAC rates.

For any incremental Nucor costs not specifically listed in Exhibit 1, including GMO internal costs attributable to Nucor, the costs will be uniquely recorded after they are incurred consistent with the cause of the cost and identified as contingency cost category within Exhibit 1.

8. **Ratemaking Treatment** – At the time of a general rate proceeding the portion of GMO's revenue requirement associated with the incremental costs net of PPA net revenues to serve Nucor consistent with Exhibit 1 shall be assigned to Nucor. Nucor's rate revenues shall be reflected in GMO's net revenue requirement. If Nucor's revenues do not exceed Nucor's costs as reflected in the revenue requirement calculation through the true-up period, GMO will make an additional revenue adjustment covering the shortfall to the revenue requirement calculation through the true-up period, to ensure that non-Nucor GMO customers will be held harmless from such effects from the Nucor service. In no event shall any revenue deficiency (that is, a greater amount of Nucor incremental costs compared to Nucor revenues) be reflected in GMO's cost of service in each general rate proceeding for the duration of Nucor service during the terms of the contract between GMO and Nucor (Confidential Schedule DRI-2 of GMO witness Darrin Ives).

9. **Section 393.1655 RSMo. treatment** – The Signatories agree that because Nucor's rate will be fixed for ten years and because the incremental cost to serve Nucor will be excluded from the revenue requirement of other customers:

(1) Nucor's average rate and kilowatt hours usage shall not be included in the rate limitation calculations performed under section 393.1655 RSMo.; (2) Nucor's rate shall not be affected by the rate limitation provisions of 393.1655, RSMo.; and (3) Nucor shall not be considered to be, in whole or in part, a member of GMO's large power service rate class under section 393.1655.7(4) RSMo.

10. **Operational Communications** – Under the terms of the contract between GMO and Nucor (Confidential Schedule DRI-2), Nucor is obligated to notify GMO of planned outages, including maintenance outages, to a designated representative (section 4.3). Nucor is also obligated under the contract to notify GMO of any changes or additions of equipment or operations that would result in a material changes to the Nucor facility's peak demand that could impact GMO's transmission system (section 4.4). GMO has designated and will retain for the duration of service to Nucor a Customer Solutions Manager to Nucor to receive these notices. Nucor commits to providing the above notifications and coordinating with GMO to execute planned outages to minimize the impact on the GMO system.

D. <u>Other Issues Raised By MECG</u>:

MECG raised certain other issues in its opening statement. Staff will demonstrate why each is a red herring.

1. <u>The § 393.355, RSMo., Tracker</u>:

A tracker, in utility regulatory parlance, is a deferral device. ***In the Matter of Kansas City Power & Light Company's Request for Authority to Implement a General Rate Increase for Electric Service,*** 509 S.W.3d 757, 769 n. 3 (2016).[23] Its

[23] "For the purposes of this discussion, the "tracking mechanism" we refer to is an accounting deferral mechanism that re-characterizes an income statement item ("revenues, expenses, gains, or losses") in a

purpose, as its name implies, is to keep track of certain amounts of money. Its less obvious purpose is to prevent property rights from attaching to that money so that it can lawfully be redistributed in some way.[24] Section 393.355.3, RSMo., provides for a "two-way tracker" as follows:

> Any commission order approving a special rate authorized by this section to provide service to a facility in the manner specified under subsection 4 of this section shall establish, as part of the commission's approval of a special rate, a tracking mechanism to track changes in the net margin experienced by the electrical corporation serving the facility with the tracker to apply retroactively to the date the electrical corporation's base rates were last set in its last general rate proceeding concluded prior to June 14, 2017. The commission shall ensure that the changes in net margin experienced by the electrical corporation between the general rate proceedings as a result of serving the facility are calculated in such a manner that the electrical corporation's net income is neither increased nor decreased. The changes in net margin shall be deferred to a regulatory liability or regulatory asset, as applicable, with the balance of such regulatory asset or liability to be included in the revenue requirement of the electrical corporation in each of its general rate proceedings through an amortization of the balance over a reasonable period until fully returned to or collected from the electrical corporation's customers.

This tracker is a "two-way tracker" because it can move money in either direction, either to the ratepayers from the company or to the company from the ratepayers. Its purpose is to ensure that the company neither makes money nor loses money on the special incremental rate the statute authorizes, regardless of the volatility of market prices, power usage by the favored facility, weather, or other factors. This tracker is supplemental to the direct subsidy created in § 393.355.2(2), RSMo., which requires that "[a]fter approval of the special rate, the commission allocates in each general rate

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current period as a balance sheet item ("regulatory assets" or "regulatory liabilities") that would be addressed in a future rate proceeding."

[24] Due process prevents any court or legislative body from taking the property of a public utility where that property consists of money collected from ratepayers pursuant to lawful rates. ***Lightfoot v. City of Springfield,*** 236 S.W.2d 348, 354 (Mo. banc 1951); ***Straube v. Bowling Green Gas Co.,*** 360 Mo. 132, ___, 227 S.W.2d 666, 671 (1950).

proceeding of the electrical corporation serving the facility the reduced revenues from the special rate as compared to the revenues that would have been generated at the rate the facility would have paid without the special rate to the electrical corporation's other customers through a uniform percentage adjustment to all components of the base rates of all customer classes[.]"

The two-way tracker required by § 393.355.3, RSMo., is evidently important to MECG. In the slides that accompanied Mr. Woodsmall's opening statement, it is asserted that, "MECG supports a contract for Nucor with an incremental cost rate and a term of 10 years IF done consistent with Section 393.355 including the tracker to ensure that GMO's 'net income is neither increased nor decreased.'" Slide 3. Why is this tracker important to MECG? Evidently, because MECG considers the Nucor Project to be an attempt by Evergy to evade the three-year rate moratorium applicable in Missouri due to its PISA election.[25] At Slide 7, MECG states its conclusion that "Evergy is looking for new sources of income."

This issue is a red herring because, even in the situation where rates are capped, any increase in the amount of electricity sold above the level assumed in setting customer rates necessarily results in an increase in revenue. Additionally, this argument is intended to distract the Commission. As will be explained in more detail below, as a new service, the proposed tariff is not subject to the rate freeze.

[25] *See* §§ 393.1400.5 and 393.1655.2, RSMo.

2. The Ten-Year Term:

How often we hear that old chestnut, the Commission cannot bind a future Commission, but we never hear it with a cite to controlling authority.[26] MECG raises this specter, citing to ***Ameren Missouri,*** *supra,* 25 Mo.P.S.C.3d at 204: "While a stipulation and agreement can be binding on its signatories for ten years, the Commission cannot bind future Commissions, nor can it preclude future litigants from presenting contrary positions in future rate cases, positions to which the Commission will need to give due consideration." Slide 10.

The fact is, the Commission *can* bind future Commissions and often does. Consider: the Commission is authorized to grant certificates of convenience and necessity (CCNs), § 393.170, RSMo., a power it regularly exercises. However, the Commission is not authorized to revoke CCNs, however much it may want to, no matter how ill-advised it may believe the original grant to have been. ***State ex rel. City of Sikeston v. Pub. Serv. Comm'n of Missouri,*** 336 Mo. 985, 997-98, 82 S.W.2d 105, 109 (1935).[27] Thus, by every CCN it grants, the Commission forever binds future Commissions.

In any event, the question actually before the Commission in this case is whether it can approve a special contract with a ten-year term. The answer is that it can, so long as the approval is based upon supporting evidence of record.

Section 393.150.1, RSMo., authorizes the Commission, "[w]henever there shall be

[26] The Commission itself has said this from time-to-time, e.g., ***Ameren Missouri,*** *supra,* 204 and 205, but has not cited controlling authority for the proposition.

[27] ""We hold that these conclusions of the commission are correct [i.e., that it cannot revoke a CCN], and that it does not have any such authority."

filed with the commission by any [utility] . . . any new form of contract or agreement . . . the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested [utility], but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice . . . ." This provision unmistakably authorizes the Commission to take up and consider the propriety of proposed new contracts, such as the Nucor special contract involved in this case. Necessarily, this authority extends to approving contracts in proper cases. Every contract has a term and nothing in the Public Service Commission Law imposes any explicit restriction or limitation on the Commission's authority to approve contracts of any particular term.

As a *caveat,* it is possible that changing conditions may require the Commission to revisit a contract before its term is up.

> Its (i.e., the Commission's) supervision of the public utilities of this state is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest. To rule otherwise would make § 393.270(3) of questionable constitutionality as it potentially could prevent alteration of rates confiscatory to the company or unreasonable to the consumers.

State ex rel. Jackson County v. Public Service Commission, 532 S.W.2d 20, 30 (Mo. banc 1975). Subject to its duty to respond to changing conditions, the Commission can approve a contract with a ten-year term.

3. <u>The PISA Election and Rate Moratorium</u>:

This red herring, raised by MECG on its Slides 11 and 12, has already been mentioned. It is without merit.

First, GMO is not seeking to change a rate in this case but to introduce a new service, an action that does not implicate the moratorium imposed by § 393.1655.2, RSMo. Why? Because that section by its plain language only applies to changes in rates, that is, *existing rates.* It cannot apply to a new service which did not yet exist "on the date new base rates were established in the electrical corporation's last general rate proceeding concluded prior to the date the electrical corporation gave notice under subsection 5 of section 393.1400." There is no need for GMO to rescind its PISA election.

Second, as already pointed out, even where rates are frozen, an increase in the volume of service sold necessarily will result in an increase in revenues. The introduction of a new service, although taken up by the Commission under its general ratemaking authority at § 393.150.1, RSMo., does *not* trigger a general rate case and all relevant factors need not be considered. ***Sprint Spectrum,*** *supra.*

4. <u>Exemption from RESRAM Charges</u>:

At Slide 13, MECG states, "[The] Special Contract seeks to exempt Nucor from RESRAM charges. Problem: Unlike MEEIA costs which have an opt out provision (Section 393.1075.7), there is no authority in the renewable energy standard statute (Section 393.1020 *et seq.*) or the Commission's RES rule (20 CSR 4240-20.100) to exempt any customer from RESRAM charges."

The RESRAM or Renewable Energy Standard Rate Adjustment Mechanism referred to by MECG is part of the "Renewable Energy Standard" enacted by initiative proposition in November 2008. Codified at §§ 393.1020, 393.1025 and 393.1030, RSMo., § 393.1030.2(4), RSMo., requires that the Commission provide by rule for the recovery

of compliance costs, and the pass-through of benefits, via rate adjustments between rate cases. The Commission has done so at 20 CSR 4240-20.100(6).

This is yet another red herring. Rule 20 CSR 4240-20.100(6) provides, "[a]n electric utility outside or in a general rate proceeding ***may*** file an application and rate schedules with the commission to establish, continue, modify, or discontinue a Renewable Energy Standard Rate Adjustment Mechanism (RESRAM) that shall allow for the adjustment of its rates and charges to provide for recovery of prudently incurred costs or pass-through of benefits received as a result of compliance with the RES; provided that the average annual impact on retail customer rates does not exceed one percent (1%) over a ten- (10-) year period as set out in subsections (5)(A), (B) and (G)" (emphasis supplied). The word "may" indicates that the RESRAM is voluntary, not mandatory; in fact, the recovery of RES compliance costs by an electrical corporation appears to be voluntary. Nothing in either the Renewable Energy Standard statutes or the Commission's rule at 20 CSR 4240-20.100 prevents an electrical corporation from complying with the RES at the shareholders' expense, in whole or in part. It follows that nothing prohibits the Commission from approving an economic development tariff that does not participate in the recovery of RES compliance costs through a RESRAM.

5. Confidentiality of the Incremental Rate:

At Slide 14, MECG states, "Section 393.140(11) calls for the Commission to 'keep open to public inspection schedules showing all rates and charges made.' Why are the Nucor rates kept secret?" MECG goes on to explain why it believes that keeping the rate confidential is not in the public interest.

As has already been established, special contracts are not unusual. They are the opposite of normal ratemaking practice, in which all similarly situated customers pay the same rate, based upon their cost of service. Special contract customers by contrast are few in number, generally unique or at least unusual in some way, and receive a special rate justified by economic considerations. Each special contract customer takes service under prices and conditions that are not generally available and this circumstance is permitted because it serves the public interest. Such contracts are authorized by a Commission-approved tariff that is available for public inspection. However, the special contract itself, which sets out the specific rate elements, is usually confidential.

The justification for keeping these contracts confidential is that each special contract customer has negotiated its special rate with the utility and these rates are not the same. Were they public, there would be no negotiations and each of these customers would receive the same rate. MECG's final point is also revealed to be a red herring.

Conclusion:

By the foregoing, Staff has shown that the Commission is authorized to approve the SIL Tariff and the Nucor Special Contract and that the Commission should approve both items, subject to the conditions negotiated by the signatories to the *Non-Unanimous Stipulation and Agreement.* Staff has further shown that the other concerns raised by MECG in its opening statement are without merit. For all of these reasons, the Commission should approve the proposed tariff and special contract forthwith.

WHEREFORE, Staff prays that the Commission will determine each of the issues presented by this case in accordance with Staff's positions, and approve the now unanimous *Stipulation and Agreement,* approve the SIL Tariff and the Nucor Special

Contract, and grant such other and further relief as is just and reasonable in the circumstances.

Respectfully submitted.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served electronically upon all parties of record or their representatives pursuant to the Service List maintained for this case by the Commission's Data Center **on this 1st day of November, 2019.**

/s/ Kevin A. Thompson