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 Rate for a Facility Whose Primary Industry is the Production or Fabrication of Steel in or Around Sedalia, Missouri.	)))))	File No. EO-2019-0244

EVERGY MISSOURI WEST'S INITIAL POST-HEARING BRIEF

COMES NOW, Evergy Missouri West, Inc. d/b/a Evergy Missouri West (f/k/a KCP&L Greater Missouri Operations Company) ("GMO" or the "Company")[1], and respectfully submits its *Initial Post-Hearing Brief* ("Brief") in this matter:

I. PROCEDURAL HISTORY

On July 12, 2019, the Company filed its Application requesting approval from the Missouri Public Service Commission for a special incremental load tariff and associated rate for a steel production facility in Sedalia, Missouri. The Company requested that the Commission enter an appropriate Order by December 1, 2019, approving the Schedule SIL ("Special Incremental Load") Tariff so that it is effective no later than January 1, 2020 and authorizing the Company to serve Nucor Steel Sedalia LLC ("Nucor") under the terms of a Special Incremental Load Rate Contract between the Company and Nucor dated July 11, 2019 ("Nucor Agreement").

A prehearing conference was held on July 23, 2019. At the prehearing conference, the Commission granted the intervention of the Midwest Energy Consumers Group ("MECG") [2] and subsequently granted the intervention of Nucor Steel Sedalia LLC ("Nucor").

[1] Effective October 7, 2019, Evergy Missouri West, Inc. d/b/a Evergy Missouri West adopted the service territory and tariffs of KCP&L Greater Missouri Operations Company.

[2] Mr. David Woodsmall is the incorporator, president and secretary of MECG, and a member of its three-person board of directors. See Staff's *Motion to Dismiss Purported Party*, ¶ 5 (filed September 24, 2019). He stated at the

On September 19, 2019, the Company, Nucor and the Commission Staff entered into a *Non-Unanimous Stipulation and Agreement* ("Stipulation") that recommends the approval of the Nucor Contract and the Special Incremental Load Tariff. The Office of the Public Counsel was not a signatory to the Stipulation, but it did not object to the Stipulation. However, Mr. David Woodsmall, on the behalf of MECG, filed the only objection to the Stipulation. After the October 17 evidentiary hearing was completed, MECG subsequently withdrew, without explanation, this objection on October 28, 2019. With MECG's withdrawal of its objection, the Commission may treat the stipulation and agreement as unanimous under 20 CSR 4240-2.115(2)(c) as explained below.

II. ARGUMENT

(1) SHOULD THE COMMISSION APPROVE THE SPECIAL INCREMENTAL LOAD ("SIL") TARIFF PROPOSED BY GMO AND THE SPECIAL INCREMENTAL LOAD RATE PROPOSED FOR NUCOR SUBJECT TO THE CUSTOMER PROTECTIONS AND MONITORING AND REPORTING REQUIREMENTS RECOMMENDED BY STAFF, NUCOR, AND GMO?

Yes. It is critical to the success of the Nucor Steel micro mill that the Commission approve the Nucor Agreement and SIL Tariff which will bring economic benefits to Sedalia, Missouri, and will promote the interests of the Company, its other customers, the Sedalia/Pettis County region and the State of Missouri.

---

prehearing conference on July 23, 2019, that he is not representing any customer of GMO, but only MECG as an incorporated entity:

> [Fischer]: We'd like to know who your customer is that you represent is?
> [Mr. Woodsmall]: We've never - - all the customers?
> [Fischer]: Yeah. Who you're representing in this particular case that has an interest in our application?
> [Mr. Woodsmall]: MECG, the Incorporated entity.
> [Fischer]: Is it Wal-Mart? Is it someone –
> [Mr. Woodsmall]: None of them. MECG. I do not represent Wal-Mart. I represent MECG Incorporated Association. They are an entity of themselves.
> [Fischer]: And does GMO have a customer that you're representing?
> [Mr. Woodsmall]: No. (Tr. 6-7)

A. ECONOMIC DEVELOPMENT AND CUSTOMER BENEFITS

Attracting Nucor to Missouri was a significant economic development "win" for the State. Missouri had a statewide team working with Nucor, including the Missouri Governor's office; the Missouri Departments of Economic Development, Natural Resources, Revenue and Transportation; Sedalia-Pettis County Economic Development; City of Sedalia; Pettis County; GMO; Liberty Utilities; Union Pacific Railroad; and Missouri Partnership. This statewide team crafted an aggressive and innovative incentive package for Nucor, using Missouri State Programs such as Missouri Works Training, Private Activity Bonds as well as sales tax exemptions (for building materials, machinery and equipment used in manufacturing and energy used in manufacturing processes). The City of Sedalia and Pettis County also partnered with the use of Chapter 100 Bond financing to obtain significant property tax savings to show Nucor why Missouri is the place for them to invest and grow their company. The local community also is offering Nucor Fast-Track Permitting and waiver of some permitting fees as well as an executive relocation package. Union Pacific Railroad worked diligently to ensure Nucor had the correct track configurations and best possible rates for their many rail cars that will service this new modern mini mill. (Ex. 2-P, Ives Direct, pp. 3-5)

The ability of Missouri and Sedalia to win the project over the competition from multiple other aggressive states exemplifies the public-private partnership approach to economic development taken in Missouri. This success is expected to have ripple effects for other projects considering locations in the State. Finally, the Nucor expansion to Sedalia will create a local opportunity for many businesses because retail business tends to follow jobs. (Id. at 3)

Nucor will invest approximately $250 million to build a steel bar micro mill in Sedalia, Missouri, a substantial portion of which is already complete. This is a new project to the State of

Missouri. When completed and commercially operational, it is expected that the new Nucor facility will create more than 250 well-paying jobs. These jobs are permanent full-time positions with an average annual wage of over $65,000, which is twice the current county average of Pettis County. (Id. at 3) Nucor broke ground on the Sedalia facility in late April 2018 and is expected to be ready to begin operations in the first quarter of 2020. (Tr. 93)

The Company participated in a competitive bidding process that included multiple other states to attract Nucor to the State of Missouri. The final bids were evaluated from proposals in Missouri, Kansas and Nebraska. As part of that process, the Company prepared indicative pricing and revenue justification to serve Nucor. When the Company representatives met with Nucor representatives after clearing an early round of the competitive bidding process, Nucor made the Company aware that Nucor had competitive alternatives necessitating the pricing reflected in the Special Incremental Load rate in order for Nucor to locate its facility in Sedalia. (Ex. 2-P, pp. 9-10)

The price of electricity comprises a substantial component of a steel manufacturer's operating and expense cost. Therefore, a competitive electricity rate is very important to a steel manufacturer like Nucor and represented a primary factor in their decision to locate in Sedalia. (Id. at 5; Tr. 40-41) Absent the special rate negotiated by the Company and Nucor, Nucor would not locate this facility in Missouri. (Ex. 4, Van de Ven Direct, p. 8)

B. PROPOSED CONTRACT RATE AND TERM OF AGREEMENT

Under the terms of the Agreement, the average incremental cost for GMO to serve Nucor over the 10-year life of the agreement is approximately **[redacted]** and the special contract rate for that period is fixed at an average rate of **[redacted]** Over the 10-year term of the

special contract, the Company expects to yield a profit, on average, of ** [redacted] ** or approximately ** [redacted] ** per year. (Ex. 2-C, Ives Direct, p. 10)

In addition to the level of profitability discussed herein that will contribute to recovery of the Company's fixed costs and therefore reduce rates paid by all other customers below the level that would exist if the Company did not serve Nucor, the Company's service to Nucor will produce additional benefits for other customers. These additional benefits include an increase in the number of residential customers that will result from the addition of approximately 250 new jobs at Nucor and the addition of other new jobs that will be created in the Sedalia area by businesses that provide service and supplies to Nucor. If one were to conservatively assume half of the new Nucor jobs plus half of the other 150 jobs created by area businesses all represent new residential customers to the area, the Company estimates these additional benefits to be approximately $261,000 in revenue to the Company annually. (Id. at 10)

C. CUSTOMER PROTECTIONS UNDER THE STIPULATION

On September 19, 2019, the Company, Nucor and the Commission Staff entered into a *Non-Unanimous Stipulation and Agreement* ("Stipulation") that recommends the approval of the Nucor Contract and the Special Incremental Load Tariff with additional customer protections. The Signatories have recommended that, based upon the competent and substantial evidence in the record, that the Commission approve the joint recommendation of the Company, Nucor, and the Commission Staff, as a resolution of the issues in this proceeding. (Ex. 5-P, Stipulation, pp. 1-9)

As explained by the Staff Position Statement, "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, after GMO's next general rate case, 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." (Staff Position Statement, p. 6)

Under the terms of the Stipulation, there will be regular monitoring and reporting of costs and revenues which will ensure that other Non-Nucor customers are not adversely affected by the Nucor contract and its operation. (Ex. 5-P, Stipulation, pp. 2-6; Tr. 114-16) The specifics of these protections are contained in Paragraphs 7 and 8 of the Stipulation. (Ex. 5-P, Stipulation, pp. 2-6) The Commission Staff and other parties will be kept informed through detailed and regular reporting. The anticipated reporting format is included in Exhibit 1 to the Stipulation and will include the following:

1. The Company will identify and isolate the plant costs to provide service to Nucor;

2. The Company will also identify and isolate the supply costs attributable to Nucor. These are expected to include energy as obtained through the SPP integrated marketplace and all transactions associated with the renewable supply source which will be provided by a Power Purchase Agreement ("PPA") from a designated Wind Facility. (Ex. 5-P, Stipulation, pp. 3-4) As a result, this special contract promotes the State's policy in favor of renewable energy as reflected in the Renewable Energy Statute, Section 393.1030.

The Company will monitor Nucor's operations and will identify additional SPP-related costs resulting from unexpected operational events. If these unexpected operational events would increase costs to Non-Nucor customers, then the amount of the increased costs will be identified and reflected in a subsequent FAC rate change filing and removed from the Actual Net Energy Cost prior to the calculation of the FAC rates, thereby holding harmless Non-Nucor customers from such increased costs. (Ex. 5-P, Stipulation, pp. 5-6) There will also be communications between Nucor and the Company related to planned outages, maintenance outages, and similar

operational details so that the Company will be in a position to carefully monitor the effects of Nucor's operations on the Company's electric system. (Ex. 5-P, Stipulation, p. 7)

At the time of a general rate case, the portion of the Company's revenue requirement associated with the incremental costs net of the Wind PPA revenues to serve Nucor will be assigned to Nucor, and the amount by which Nucor's rate revenues exceed the incremental cost to serve Nucor will be reflected in the Company's net revenue requirement reducing the overall revenue requirement borne by the Company's other non-Nucor customers. (Ex. 5-P, Stipulation, p. 6)

If Nucor's revenues do not exceed the incremental cost to serve Nucor, then the Company will make an additional revenue adjustment covering the shortfall to the revenue requirement. This will ensure that non-Nucor customers will be held harmless from the effects of serving Nucor. In other words, the Company expects the Nucor contract to be profitable to the benefit of all customers. But, in no event will any revenue deficiency from or incremental cost necessary for GMO's service to the Nucor operations be reflected in the rates of other customers. (Id. at 6)

The Signatories also agreed 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 Section 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. (Ex. 5-P, pp. 6-7; Tr. 116-17) This provision ensures the status quo regarding the ratemaking treatment under Section 393.1655.

D. LEGAL AUTHORITY FOR TARIFF AND CONTRACT APPROVAL

The Commission has often exercised its ratemaking authority to approve special contracts and related tariffs under Section 393.140(11)[3], 393.150(1)[4] RSMo., and its general ratemaking authority under Section 393.130.[5] Many special contracts have been approved by the Commission

[3] Section 393.140(11) states: The commission shall: (11) Have power to require every gas corporation, electrical corporation, water corporation, and sewer corporation to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such gas corporation, electrical corporation, water corporation, or sewer corporation; but this subdivision shall not apply to state, municipal or federal contracts. Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation, or sewer corporation in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations, to carry into effect the provisions of this subdivision, as it may deem necessary, and to modify and amend such rules or regulations from time to time. (emphasis added)

[4] Section 393.150(1) states: 393.150. Commission may fix rates after hearing — stay increase — burden of proof. — 1. Whenever there shall be filed with the commission by any gas corporation, electrical corporation, water corporation or sewer corporation any schedule stating a new rate or charge, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service or to any general privilege or facility, 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 gas corporation, electrical corporation, water corporation or sewer corporation, 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, and pending such hearing and the decision thereon, the commission upon filing with such schedule, and delivering to the gas corporation, electrical corporation, water corporation or sewer corporation affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agreement, rule, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation or practice goes into effect, the commission may make such order in reference to such rate, charge, form of contract or agreement, rule, regulation or practice as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective. (emphasis added)

[5] Section 393.130 states:

(1) Every gas corporation, every electrical corporation, every water corporation, and every sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just

utilizing such authority over the Commission's regulatory history.[6] The Company respectfully requests that it do so again.

In its *Report and Order*, In the Matter of a Demand Curtailment Agreement Between Kansas City Power & Light Company and Armco Steel Corporation, Case No. EO-78-227, 22 Mo.P.S.C.(N.S.) 260 (August 22, 1978), the Commission stated: "On March 24, 1978, Kansas City Power & Light Company (Company) filed a proposed Demand Curtailment Contract that it entered into with Armco Steel Corporation (Armco) pursuant to Section 393.140(11), RSMo. 1969, as a special contract rate schedule." The Commission found that over the five-year term of the proposed contract, the benefits of the contract should be approximately equal to the costs of the contract, at least as far as Company's Missouri's customers. 22 Mo.P.S.C.(N.S.) 260 (1978).

The Commission also approved special contracts in relation to KCP&L's Comprehensive Energy Plan approved in 2006. In *its Order Approving Proposed Rate Schedule And Special Contract*, Re Kansas City Power & Light Co., Case No. EO-2006-0193, 14 Mo.P.S.C.3d 281, 283 (March 16, 2006), the Commission stated:

> Furthermore, the Commission determines that under Sections 393.140(11) and 393.150.1, RSMo 2000, the Commission may authorize a contract for the provision of service by an electrical corporation. . . The special contract submitted as Appendix 2HC to the Application shows that the applicable industrial customer has unique load and usage characteristics that are

---

and reasonable. All charges made or demanded by any such gas corporation, electrical corporation, water corporation or sewer corporation for gas, electricity, water, sewer or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for gas, electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited.

[6] *See e.g.*, State ex rel. GS Technologies Operating Co. v. Public Service Comm'n, 116 S.W.3d 680, 685 (Mo.App.W.D. 2003); See also *Report and Order*, In the Matter of a Demand Curtailment Agreement Between Kansas City Power & Light Company and Armco Steel Corporation, Case No. EO-78-227, 22 Mo.P.S.C.(N.S.) 260 (August 22, 1978); *Report and Order*, Re Special Contract filed by Kansas City Power & Light Company, Case No. EO-95-181, 4 Mo.P.S.C.3d 233, 235-39 (November 22, 1995); *Order Approving Proposed Rate Schedule And Special Contract*, In the Matter of the Application of Kansas City Power & Light Company for Approval of a Rate Schedule Authorizing the Use of Special Contracts and Approval of a Specific Special Contract between KCPL and an Existing Customer, Case No. EO-2006-0193, 2006 WL 1134423 (March 16, 2006).

> appropriately addressed by the terms and conditions of the special contract and proposed rate schedule. The Commission finds that it is in the public interest and reasonable to approve the proposed rate schedule. The Commission further finds that it is in the public interest and reasonable to approve the terms and conditions of the special contract.

In its *Report and Order* in Re Special Contract Filed by Kansas City Power & Light Company, Case No. EO-95-181, 4 Mo.P.S.C.3d 233, 235 (1995), the Commission stated:

> Based upon the conclusions reached by the Commission in the conclusions of law below, the Commission finds that special contracts are lawful and are an appropriate way to establish rates as long as the statutory requirements are met. The Commission also finds, based upon the conclusions, that the protection of certain information with respect to special contracts from public inspection is reasonable and lawful and does not violate the provisions of Chapters 386, 393, or 610, RSMo. 1994.

More recently, in Re: Missouri-American Water Company for Approval of an Agreement with Premium Pork, L.L.C. for the Retail Sale and Delivery of Water, Case No. WT-2004-0192, the Commission approved Missouri-American Water Company's special contract with Premium Pork in St. Joseph, Missouri filed in accordance with Section 393.150 (Application, p. 1) stating:

> [T]he Commission finds, that the proposed Special Service Contract provides a reasonable contribution toward 'all other costs associated with the provision of service' and that this contribution will constitute a benefit to the other customers of the St. Joseph district because it will serve to reduce the revenue requirement of the district as a whole. No other customer's rates will increase because this Special Contract is approved. No detriments to either the state of Missouri or to the other water service customers in the St. Joseph district have been identified.

Clearly, the Commission has often exercised its authority to approve special contracts, pursuant to its statutory authority found in Sections 393.130, 393.140(11), and 393,150(1). It should do so again in this proceeding.

(2) MUST THE PROPOSED SPECIAL INCREMENTAL LOAD TARIFF AND NUCOR SPECIAL CONTRACT BE APPROVED PURSUANT TO SECTION 393.355 RSMO?

No. During the hearings, Mr. Woodsmall repeatedly suggested that the Commission could only approve the Nucor Agreement if the Commission utilized Section 393.355. (Tr. 58-73) This is not correct. As explained above, the Commission has approved special contracts on numerous occasions over the past 50 years under Sections 393.140(11), 393.150(1) and 393.310—long before the passage of Section 393.355.

Contrary to the arguments of MECG's counsel at the hearing, the Company is not required to utilize the provisions of Section 393.355 RSMo., a recently passed statute regarding special rate contracts for aluminum and steel producers or facilities resulting in incremental monthly load increases over 50 megawatts, outside a general rate proceeding. While this statutory tool is evidence of a regulatory and pricing climate that gave Missouri a distinct competitive advantage in attracting Nucor to Missouri (Tr. 44-45), this statute is not required to be utilized, is not applicable to the set of facts underlying the Nucor Agreement, and does not serve the financial needs of Nucor and the Company. In summary, Section 393.355 is simply not the exclusive authority for the Commission to utilize when approving special contracts.

During the evidentiary hearings, MECG did not present a witness, and Mr. Woodsmall stated that MECG is not opposed to the proposed special rate or the 10 year-term of the contract. (Tr. 57-58. 67)[7] However, he nevertheless argued that the Company and Nucor must utilize Section 393.355 RSMo., including a tracking provision that would foreclose any increase in the

[7] Mr. Woodsmall stated: "Just to be clear what our position is today, we believe that Nucor should be given the special rate in this case. Not only the special rate, but the ten-year term that is seeks." (Tr. 57-58)

Company's net income. This argument is nothing more than a red herring because the Company did not file its Application under the terms of Section 393.355.

While MECG is not opposed to the discounted rate or the 10-year term of the contract, MECG is opposing the Company's right to request the Special Incremental Load tariff and enter into a contract that provides the Company an opportunity to make a profit and ultimately provide an opportunity to share that profit with other customers in the future. (Tr. 58, 72-73) This effort to torpedo the contract, tariff, and customer protections should be rejected by the Commission.

A. STATUTES ON SIMILAR SUBJECTS MUST BE HARMONIZED BY THE COMMISSION.

There is nothing in Section 393.355 which indicates that it is the exclusive statutory authority for approving special contracts related to steel mills. It is merely another tool in the Commission's toolbox to promote the public interest and encourage economic development in the State. Section 393.355 is not in conflict with the Commission's traditional ratemaking authority contained in Sections 393.130, 393.140(11), or 393.150(1).

Under well-established case law, the Courts have stressed the need to harmonize statutes that deal with the same subject matter. It is well established that principles of statutory construction are "a precondition to" and do not apply unless an "irreconcilable conflict" between two statutes actually exists. Earth Island Inst. v. Union Elec. Co., 456 S.W.3d 27, 33 (Mo. 2015). When "two statutory provisions covering the same subject matter are unambiguous standing separately but are in conflict when examined together," the Commission should then "attempt to harmonize them and give them both effect." Id.

While it is generally true that "[w]hen the same subject matter is addressed in general terms in one statute and in specific terms in another, the more specific controls over the more general," it is crucial that "this rule applies only in situations where there is a 'necessary repugnancy' between

the statutes." Greenbriar Hills Country Club v. Director of Revenue, 47 S.W.3d 346, 352 (Mo. 2001). However, in the case of Sections 393.150(1), 393.140(11), and 393.130, there is no conflict with Section 393.355.

In *Greenbriar*, the Director of Revenue argued that the prevailing party's application for attorney's fees and expenses in a tax case was improperly filed under the more general statute Section 536.087, and should have instead been filed under a more specific statute, Section 136.315. However, the Supreme Court found that

> [t]here is no conflicting language between these two statutes, nor is there any language indicating intent by the legislature to make these statutes mutually exclusive. In the absence of such an express statement of intent, this Court will not interpret refund statutes as being exclusive. The legislature has clearly provided two remedies, and the taxpayer cannot be faulted for failing to seek an alternative statutory remedy which the legislature has provided, though the Director deems it preferential. See 47 S.W.3d at 352.

The Court also noted that the more specific statute was enacted six years after the first statute, and "[t]he legislature is presumed to know the existing law when enacting a new piece of legislation," so could have limited the more general statute but did not. Id. As in the case of Section 136.315, the legislature did not make Section 393.355 an exclusive remedy for obtaining the approval of special contracts involving steel production facilities.

Similarly, in *Earth Island*, The Empire District Electric Company ("Empire") claimed eligibility for the solar exemption in Section 393.1050. Earth Island filed a complaint with the Commission against Empire alleging that Section 393.1050 was irreconcilably in conflict with the later-enacted Section 393.1020 (Proposition C). Empire argued that because Section 393.1050 was the more specific statute (providing a specific exemption), it preempted the portions of the subsequently enacted Proposition C that would require Empire to meet its solar requirements. In ruling in favor of Earth Island, the Supreme Court stated that the "general/specific canon, however,

is not an absolute rule, but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction." See Earth Island Inst. v. Union Electric Company, 456 S.W.3d 27, 33 (Mo. 2015).

Earth Island also cited a 2007 case concluding that the "notwithstanding any other provision of law" phrase (which Section 393.355 contains) "does not create conflict, but eliminates the conflict that would have occurred in the absence of the clause." Id. at 33-34, citing State ex rel. City of Jennings v. Riley, 236 S.W.3d 630, 632 (Mo. banc 2007).

Finally, in State ex rel. Chicago, R. I. & Pac. R.R. v. PSC, 441 S.W.2d 742, 746 (Mo. App. K.C. 1969), the railroad argued that the PSC could only proceed under Section 389.640, a specific statute providing authority for it to order new installations at dangerous crossings, not the more general statute, Section 386.310. However, the Court of Appeals found that "where, as here, we have two separate statutes dealing with the same subject matter, the two must be read together and harmonized and force given to the provisions of each." The Court also held that Section 386.310 standing alone would clearly authorize the action of the Public Service Commission," whereas "Section 389.640 [the more detailed statute] does not ... specifically limit the authority of the Public Service Commission in such matters …". Id. at 746.

In conclusion, Section 393.355 is not an exclusive remedy for obtaining Commission approval of special rate contracts for steel mills that must be utilized in this case. The Commission is also empowered to approve such contracts under sections 393.130, 393.140(11) and 393.150(1), the traditional authority upon which the Commission has historically relied for several decades now in approving special contract rates.

B. SECTION 393.355 IS APPLICABLE ONLY TO CASES WHERE THE SPECIAL RATE IS NOT BASED UPON THE ELECTRICAL CORPORATION'S COST OF SERVICE FOR A FACILITY AND ITS USE WOULD BE PROBLEMATIC FOR NUCOR AND THE COMPANY.

According to express terms of Section 393.355(2), this statute is applicable to situations in which the special rate "is not based on the electrical corporation's cost of service for a facility. . ." (emphasis added) In the case of the Nucor special contract, the rate is based upon the cost of serving the Nucor facility. (Ex. 2-C, Ives Direct, pp. 10) The Company went to great lengths to ensure that the rate will cover the incremental cost of providing Nucor with electricity services over the 10-year term of the contract. (Ex. 2-P, Ives Direct, pp. 10, 15-16) Therefore, Section 393.355 would not be applicable in this case since the Nucor rate is based upon the cost of serving the Nucor facility in Sedalia.

Even if Section 393.355 might arguably be applicable to the Nucor Agreement (which it is not), significant elements of the Section 393.355 are problematic when applied to a special rate for a new facility requiring incremental investment to serve customers such as Nucor. (Ex. 2-P, Ives Direct, pp. 6-7) Section 393.355.3 describes a tracking mechanism to track changes in the net margin experienced by the utility serving the facility so that the utility's net income is not increased or decreased.

Mr. Ives testified that Section 393.355 was passed to deal with a factual situation similar to the one faced by Ameren Missouri and Noranda Aluminum in 2016. One driver behind Section 393.355 RSMo was an effort to re-open the Noranda Aluminum smelter plant and to generally make Missouri attractive to the aluminum and steel production industries. Prior to closing in March 2016, Noranda Aluminum, which took electric service from Ameren Missouri, was the largest employer in Southeast Missouri and the largest electricity user in the State of Missouri. While, by its terms (see Section 393.355.1(2)(c)), the statute also applies to facilities with new or incremental

increase in load equal to or in excess of a monthly demand of fifty MW, significant elements of the statute appear to be problematic or contradictory when applied to a special rate for a new facility requiring incremental investment to serve, such as Nucor, and unlike the situation with Noranda Aluminum (Ex. 2-P, Ives Direct, p. 6-7)

In the case of Noranda Aluminum, there were pre-existing facilities that would serve a new customer moving into those facilities. In a scenario with pre-existing customer facilities, there is no need for extensive investment to serve the customer. Therefore, it is realistic to assume that the utility's net income would not change as a result of providing a special rate to the facility. This tracking mechanism therefore serves to protect the interests of both the utility and the utility's other customers in a scenario where no new investment is required to serve the new customer or increase in load. (Id.)

However, in providing service to a new facility with new load that has never before been served by the utility, incremental cost would be necessary to connect that facility to the utility grid and provide electric service. In the case of Nucor, GMO is expending approximately $18-20 million to build the infrastructure need to serve Nucor's specialized load. (Ex. 2-P, Ives Direct, p. 13; Tr. 150-51) Under this scenario it would be reasonable to expect the utility would be able to recover its cost to install poles, wires, and equipment and earn a return on its rate base investment. In this situation involving new incremental load, the utility would need to increase its net income in order to recover the incremental cost of the investment, including a return on that investment, necessary to serve the new load. Therefore, the section of the statute requiring the use of a tracker to ensure that net income neither increases nor decreases (Section 393.355.3) appears to be contradictory or problematic to the statute's emphasis on incremental cost (Section 393.355.2(1)).

It is for these reasons that the Company did not request approval of the Nucor Agreement under Section 393.355, given the fact that the rate is based upon the cost of serving Nucor and the other apparent practical problems in the statute in a situation where incremental investment is required of the utility to serve the new customer. The Commission should instead utilize its traditional ratemaking authority to 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 the Company.

C. THE TEN-YEAR TERM OF THE NUCOR AGREEMENT SHOULD BE APPROVED.

As Michael Lavanga, counsel for Nucor, and Mr. Kevin Van de Ven, Vice-President and General Manager of Nucor Steel Sedalia LLC, explained during the hearings, the ten-year term is absolutely critical to Nucor's decision to locate this steel mill in Sedalia, and will promote economic development in Missouri. (Tr. 85, 100-01). Importantly, no party, including MECG, is opposing this 10-year term of the contract. (Tr. 57-58) With the passage of Section 393.355(5), the Missouri General Assembly expressed its legislative policy that special contracts with up to ten-year terms were reasonable and appropriate to promote economic development in the State. The Commission should recognize the ten-year contract term is a critical element of the Nucor Agreement which should not be modified or invalidated by the Commission.

Throughout the ten-year term of the Nucor Agreement, the Staff and OPC will have the opportunity to actively monitor and review the costs and revenues associated with the Nucor Agreement under the monitoring and reporting provisions contained in the Stipulation in Paragraphs 7 and 8. See also GMO Original Sheet No. 157.2, paragraph 4. Adjustments will be made to the revenue requirement, if appropriate and necessary, in each and every rate case filed by the Company during the ten-year term of the contract.

During the hearings, Mr. Woodsmall stated that MECG was not opposing the 10-year term of the Nucor Agreement. (Tr.57-58) However, he incorrectly argued that the Commission could not approve a 10-year contract term outside the context of Section 393.355. (Tr. 58) He relied upon the legal argument that *stare decisis* does not apply to the Commission, and the Commission's findings in the Noranda case (Case No. ER-2014-0258) that rejected a ten-year contract. (Tr. 89) While he is correct that *state decisis* does not apply to the Commission,[8] his concern is misplaced with regard to the Noranda case. In Noranda, the Commission was very concerned about the "precarious financial condition" of Noranda and the effect that the loss of Noranda's load would have on other ratepayers.[9] In the case at hand, Nucor is strong financially and is the largest steel maker in the United States. The Nucor Agreement is designed to cover the incremental costs and provide a meaningful contribution to the recovery of the Company's fixed costs which will reduce the rates of the other customers.

Unlike in the Noranda case, the Stipulation contains substantial monitoring and reporting requirements and commitments by the Company to absorb any possible revenue deficiencies in the future, in the unlikely event that Nucor's operations had an adverse impact on the revenue requirement of other customers. Under the Nucor Stipulation, the Commission will assess the relationship of revenues and incremental costs in each rate case during the term of the contract. Although Nucor's rate will not change as a result of those rate case reviews, if any of those reviews indicate that revenues from Nucor fall short of the incremental cost, then an adjustment will be made to the Company's revenues requirement to hold other customers harmless. (Ex. 5-P, Stipulation, p. 2-3) The Nucor related costs will appear in the FAC reporting, but will be excluded

[8] State ex rel. Aquila v. Public Service Commission, 326 S.W.3d 20, 31-32 (Mo.App. 2010).
[9] See *Report and Order*, Re Union Electric Company d/b/a Ameren Missouri's Tariff to Increase Its Revenue for Electric Service, Case No. ER-2014-0258, pp. 131-32 (April 29, 2015).

in the calculation of the FAC rates. The Nucor costs flow through the same FERC accounts as the Company's other fuel and fuel related costs. Account coding will allow the Company to separate and remove the Nucor costs. Future commissions will not be bound in any way that would prevent those commissions from protecting other customers. This is very different from the Noranda case. In Noranda, there was neither a contract between Ameren Missouri and Noranda nor the customer protections that are included in the Nucor Agreement and the Stipulation in this case.

MECG's arguments are exclusively designed to ensure that the Company does not profit from the Nucor Agreement and the Company will not provide future benefits to its other customers. As the Commission knows, the terms of a stipulation or an agreement are binding on the parties, but not on the Commission itself.[10] The Commission retains the police power to review all rates including contract rates if necessary to promote just and reasonable rates.[11]

The Company does not believe financial concerns will develop with relation to the Nucor Agreement. However, the fact that the Commission and the parties will have active monitoring and reporting of the incremental costs and revenues associated with serving Nucor, will provide additional customer protections to ensure that there are no adverse impacts upon other customers. These additional protections should alleviate any concerns about the term of the contract "binding any future commission." (Tr. 60, 67, 72) The Company therefore respectfully urges the

[10] See e.g., Order Approving Unanimous Stipulation and Agreement Resolving Ameren Missouri's MEEIA Filing and Approving Stipulation and Agreement Between Ameren Missouri and Laclede Gas Company, Re Union Electric Co. d/b/a/Ameren Missouri Filing To Implement Regulatory Changes in Furtherance of Energy Efficiency as Allowed by MEEIA, Case No. EO-2012-0142 (August 1, 2012)("The stipulation and agreement binds the signatory parties to support the inclusion of those costs in the company's revenue requirement in the future cases, but approval of the stipulation and agreement does not attempt to bind the Commission to approve those costs. Instead, the Commission remains free to fully consider and accept or reject any evidence and argument offered by any party regarding those costs.")

[11] See City of Fulton v. Public Service Commission, 204 S.W.386 (Mo. Banc 1918); State ex rel. City of Sedalia v. Public Service Commission, 275 Mo. 201 (Mo. 1918); State ex rel. Washington University v. Public Service Commission, 272 S.W.971 (Mo. 1925); Kansas City Power & Light Co. v. Midland Realty Co., 93 S.W.2d 954 (Mo. 1936).

Commission to approve the ten-year contract term as well as the rate contained in the Nucor Agreement.

D. THE SIL TARIFF PROPERLY EXEMPTS NUCOR FROM RESRAM; AND OTHER ISSUES RAISED BY MECG SHOULD BE REJECTED BY THE COMMISSION.

MECG suggested at the hearing that Nucor cannot be exempted from Evergy Missouri West's Renewable Energy Standard Rate Adjustment Mechanism ("RESRAM"). (Tr. 68) The proposed SIL tariff contains language that states "service under this tariff shall be excluded from projected energy calculations used to establish charges under Riders FAC and RESRAM . . ."(Ex. 5C, Stipulation, Ex. 4; GMO Original Sheet No. 157).

GMO's RESRAM collects solar rebate payments, contractor costs, renewable energy credits ("RECs"), St. Joseph landfill deferrals and carrying costs. The Company believes that Nucor is not required to be charged the RESRAM rider because over the ten-year term of the special rate, the energy supplied through a renewable resource will produce the RECs needed to cover this portion of renewable energy standard ("RES") compliance. The only cost not specifically accounted for under the proposed Special Rate would be the incidental cost of REC registration and retirement. That cost will be covered by contingency within the rate design. Within the Nucor agreement, the Company retains ownership of the RECs generated from the renewable resource used to serve Nucor and would retire them as needed to support RES compliance. In addition, a RESRAM would mean that Nucor's rate would not be a fixed amount since the RESRAM rider varies.

Section 393.1093.2(4) RSMo. provides that the Commission shall make rules that allow for the recovery outside the context of a regular rate case of prudently incurred costs and the pass-through of benefits to customers of any savings achieved by the electrical corporation in meeting

the statute's renewable energy standards. Rule 20 CSR 4240-20.100(6) created the RESRAM which GMO has since filed an application for a RESRAM rider. The proposed SIL tariff excludes Nucor from the RESRAM charge established under GMO's tariff and this exclusion is not prohibited under the RESRAM tariff or statute.

MECG also mentioned at the hearing that the Nucor Agreement and SIL tariff was invalid because the Company could not change rates outside of a rate case. (Tr. 67) Related to this claim, is MECG's claim that the Company cannot change its rates due to its plant in service election. (Tr. 68) These claims do not have merit as the Commission is not changing the Company's existing customers' rates. Rather, it is establishing a separate rate for Nucor, which it has done for other special contract customers on numerous occasions outside of a rate case as discussed in section (1)(D) above. As Mr. Kevin Thompson, Chief Staff Counsel, explained in the hearing, this is a new service offering which may be legally implemented outside the context of general rate case. (Tr. 48)

E. THE SPECIFIC TERMS OF SPECIAL CONTRACTS INCLUDING THE RATES AND IDENTITY OF CUSTOMERS HAVE HISTORICALLY BEEN PROVIDED TO THE COMMISSION AND PARTIES UNDER SEAL TO PROTECT THE COMPETITIVE NATURE OF THE CONTRACT.

During the hearings, Mr. Woodsmall also challenged the Commission's historic practice of reviewing the rates and terms of special contracts in *en camera* proceedings, and keeping the specific rate and terms of the special contract under seal. (Tr. 68) In some cases, the identity of the customers has also been treated as confidential and filed under seal. For example, in its *Order Approving Proposed Rate Schedule And Special Contract*, p. 1, Re: Application of Kansas City Power & Light Company for Approval of a Rate Schedule Authorizing the Use of Special Contracts and Approval of a Specific Contract Between KCPL and an Existing Customer, Case No. EO-2006-0193 (March 16, 2006), the Commission stated: "The identity of the customers and

the specific terms of the special contract attached to the Application as Appendix 2HC were designated as Highly Confidential." See also Re: Special Contract Filed by Kansas City Power & Light Company, Case No. EO-95-181, 4 Mo.P.S.C.3d 233, 241 (November 22, 1995).

Since special contracts have traditionally been approved by the Commission to meet competitive conditions facing the customer, the Commission has historically permitted the special contract and its rates to be filed under seal. The Commission, Staff, Public Counsel, and counsel for intervenors have been permitted to review such contracts and rates under the terms of Protective Orders and/or the Commission's rule dealing with Confidential Information.[12]

In the case at hand, Nucor and the Company have agreed to keep terms and rates contained in the Special Contract under seal to protect Nucor's competitive interests. The Commission should approve the Special Contract which has been filed under seal. It should not deviate from its long-standing practice of allowing the Special Contract and its terms, conditions and rates to be reviewed by the Commission *en camera* and under seal. This historic practice will promote the adoption of future competitively sensitive special contracts that will certainly promote economic development of the state, and ensure that other customers receive the benefits of the addition of new load from such large customers which face competitively sensitive situations.

III. WITHDRAWAL OF MECG'S OBJECTION TO THE STIPULATION

Given how late in this proceeding MECG waited before withdrawing its objection to the Stipulation and pursuant to the Commission's Notice Regarding Briefs issued on October 29, 2019, the Company has elected to file this initial brief. Nevertheless, pursuant to Commission rule (20 CSR 4240-2.115(2)(c)), MECG's withdrawal of its objection allows the Commission to treat the Stipulation as unanimous. The Company recommends that the Commission do so. In making this

[12] 20 CSR 4240-2.135.

recommendation, the Company would observe that MECG's unexplained withdrawal of its objection to the Stipulation demonstrates that MECG had no legitimate interest in this proceeding from the outset.

WHEREFORE, the Company respectfully submits its Brief and request that the Commission approve the Nucor Agreement and the Company's SIL Tariff, with the additional customer protections contained in the Non-Unanimous Stipulation and Agreement filed on September 19, 2019.

Respectfully submitted,

/s/ Roger W. Steiner

Robert J. Hack, MBN 36496
Lead Regulatory Counsel
Phone: (816) 556-2791
E-mail: rob.hack@evergy.com
Roger W. Steiner, MBN 39586
Corporate Counsel
Phone: (816) 556-2314
E-mail: roger.steiner@evergy.com
Evergy, Inc.
1200 Main – 16th Floor
Kansas City, Missouri 64105
Fax: (816) 556-2787

James M. Fischer, MBN 27543
Fischer & Dority, P.C.
101 Madison Street, Suite 400
Jefferson City, MO 65101
(573) 636-6758 (Phone)
(573) 636-0383 (Fax)
jfischerpc@aol.com

Attorneys for Evergy Missouri West, Inc. d/b/a Evergy Missouri West (f/k/a KCP&L Greater Missouri Operations Company)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic mail, or First Class United States Postal Mail, postage prepaid, on this 1st day of November 2019, to all counsel of record.

/s/ Roger W. Steiner
Roger W. Steiner