Exhibit No. 901

MECG – Exhibit 901
Evergy Brief in EO-2019-0244
File No. EO-2022-0061

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MIDWEST ENERGY CONSUMERS GROUP,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. WD83531
	)	
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, EVERGY MISSOURI WEST, INC. NUCOR SEDALIA, LLC.	)	
	)	
Respondents.	)	

BRIEF OF PARTY RESPONDENT EVERGY MISSOURI WEST, INC., d/b/a EVERGY MISSOURI WEST f/k/a KCP&L GREATER MISSOURI OPERATIONS COMPANY

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May 4, 2020

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JURISDICTIONAL STATEMENT

This case is before the Court on Midwest Energy Consumers Group's ("MECG")[1] appeal of the report and order[2] entered by the Public Service Commission of the State of Missouri ("Commission") in a case involving Evergy Missouri West, Inc.'s d/b/a Evergy Missouri West (f/k/a KCP&L Greater Missouri Operations Company)("EMW" or "Company")[3] request for approval of a contract between EMW and Nucor Sedalia, LLC ("Nucor"), and a special incremental load tariff. The case is properly before this Court

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[1] Mr. David Woodsmall, counsel for MECG in this appeal, is also the incorporator, president and secretary of MECG. See Staff's Motion to Dismiss Purported Party, ¶ 5 (filed September 24, 2019)(L.F. 177). He stated at the prehearing conference that he was not representing any customer of EMW in the matter underlying this appeal, but only MECG as an incorporated entity. (Vol. I Tr. 6-7)

[2] Report and Order, In re 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 (November 13, 2019)(L.F. 433-48)(attached in Appendix to Brief of Respondent at A1-A15).

[3] 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. ("GMO") Throughout the Commission's Report and Order, the Commission refers to the Company as Evergy Missouri West or EMV. (L.F. 434, fn. 1) (A2).

under Section 386.510, RSMo (2016)[4]. This case is not within the exclusive appellate jurisdiction of the Supreme Court of Missouri under Article V, Sec. 3 of the Missouri Constitution.[5]

STANDARD OF REVIEW

All orders of the Commission are prima facie lawful and reasonable until found otherwise, pursuant to Section 386.270. On review, an order of the Commission is presumed to be valid, and anyone seeking to set aside an order has the burden of showing that it is unlawful or unreasonable. State ex rel. Kansas City Power & Light Co. v. PSC, 76 S.W.2d 343, 350 (Mo. 1934); State ex rel. Midwest Gas Users' Assoc. v. PSC, 976 S.W.2d 470, 476 (Mo. App. W.D. 1998).

In reviewing an order of the Commission, courts use a two-part test. First, the court determines if the order is lawful, including whether there is statutory authority for

[4] Unless otherwise indicated, all statutory references are to the Missouri Revised Statutes (2016), as amended.

[5] References to the Record on Appeal filed February 27, 2020 by Respondent Missouri Public Service Commission: "L.F." - Legal File (Vol. I-III); "C.L.F." - Confidential Legal File (Vol. I); "Tr." - Transcript to Legal File (Vol. I-III); "Ex." - Exhibits by page numbers (*not* exhibit numbers); "C.Ex."- Confidential Exhibits; "A__" - Appendix to the Brief of Respondent Evergy.

its issuance. Second, the court must determine if the order is reasonable.[6] State ex rel. Ag Processing, Inc. v. PSC, 120 S.W.3d 732, 734-35 (Mo. en banc 2003); State ex rel. GS Tech. Operating Co. v. PSC, 116 S.W.3d 680, 687 (Mo. App. W.D. 2003). The court may determine whether the Commission exercised its discretion lawfully and without abuse; however, the court may not substitute its discretion or judgment for that of the Commission. Id. at 690-91.

Upon review, "the question to be inquired into is only that of the reasonableness or lawfulness of the order, and to warrant a reversal of the order upon the ground that the same is unreasonable, it must appear that the action of the Commission was arbitrary, capricious, and without reasonable basis . . . ." State ex rel. Anderson Motor Serv. Co. v. PSC, 134 S.W.2d 1069, 1076 (Mo. App. W.D. 1939), aff'd, 154 S.W.2d 777 (Mo. 1941). In reviewing the lawfulness of an order, "this Court exercises independent judgment and must correct erroneous interpretations of law." State ex rel. Sprint Missouri, Inc. v. PSC, 165 S.W.3d 160, 164 (Mo. banc 2005). In reviewing the reasonableness of orders, the courts must determine whether the Commission's order is supported by competent and substantial evidence upon the record as a whole, as required by Article V, Section 18 of the Missouri Constitution. State ex rel. Mo. Public Serv. Co. v. Fraas, 627 S.W.2d 882,

[6] In this case, the Appellant MECG "is solely challenging the lawfulness of the Commission's Report and Order." (MECG Br. at 5). As a result, the reasonableness of the Commission order is not an issue in this appeal.

886 (Mo. App. W.D. 1981); State ex rel. Alma Tel. Co. v. PSC, 40 S.W.3d 381, 387 (Mo. App. W.D. 2001).

STATEMENT OF FACTS[7]

The Commission is the state agency responsible for the regulation of public utilities in Missouri. (L.F. 6, 9). EMW is an electrical corporation subject to regulation by the Commission. (L.F. 6, 9). The Company is primarily engaged in the business of generating, transmitting, distributing, and selling electric energy in portions of western Missouri, including Sedalia. (L.F. 9, 437)

Nucor and its affiliates manufacture steel and steel products at over 60 facilities in the United States, including 21 steel mills that use electric arc furnaces to produce steel. Nucor is the largest producer of steel in the United States. (Ex. 41; L.F. 437) When operational, the Nucor steel plant in Sedalia will be the largest energy user within EMW's service territory. (Ex. 41-42; L.F. 437)

On July 12, 2019, the Company filed its Application requesting approval from the Commission for a special rate for a steel production facility in Sedalia, Missouri. (L.F. 9) 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 would be effective no later than January 1, 2020, and authorizing the Company to serve Nucor

[7] The Appellant MECG has accurately recited the Findings of Fact of the Commission in its Report and Order. (MECG Br. at 7-12) However, Respondent EMW will provide some additional information to provide a more complete Statement of Facts.

Steel Sedalia LLC ("Nucor") under the terms of a Special Incremental Load Rate Contract between the Company and Nucor dated July 11, 2019. ("Agreement" or "Contract")(L.F. 16)

EMW filed direct testimony with its Application. The direct testimony of Darrin R. Ives, Vice President—Regulatory Affairs for the Company, stated that the Company was not seeking approval of the Agreement and its rate under Section 393.355 because the statute was not appropriate under the circumstances of this matter. (Ex. 7-8, C.Ex. 8-9) EMW's Application and direct testimony did not seek to "bind the Commission" in any way. (L.F. 9-16, C.L.F. 1-9, Ex. 2-16, C.Ex. 3-17)

A prehearing conference was held on July 23, 2019. At the prehearing conference, the Regulatory Law Judge granted the intervention of MECG, and subsequently the Commission granted the intervention of Nucor. (Vol. I Tr. 10, L.F. 32, 59) Although the procedural schedule allowed for the filing of rebuttal and surrebuttal testimony, no such testimony was filed by MECG or any other party. (L.F. 436)

Following the prehearing conference, the Company, Nucor, and the Commission Staff entered into and filed with the Commission on September 19, 2019, a Non-Unanimous Stipulation and Agreement ("Stipulation") proposing to resolve all issues in the case. The Stipulation provides that the Commission should approve the contract between EMW and Nucor, including the contract rate, the ten-year term of the contract, and the accounting treatment of the costs and revenues associated with the Agreement. It also provides that the Commission should approve the modified Special Incremental Load Tariff to become effective on January 1, 2020. (L.F. 150, C.L.F. 6, L.F. 439-41)

The Office of the Public Counsel ("OPC") was not a signatory to the Stipulation, but OPC did not object to the Stipulation. (L.F. 289, L.F.441) On September 23, 2019, MECG filed an objection to the Stipulation. (L.F. 173, L.F. 436)

On October 17, 2019, the Commission held an evidentiary hearing. (Vol. III Tr. 20-153) After the evidentiary hearing concluded, MECG withdrew its objection to the Stipulation on October 28, 2019. (L.F. 322, 436)(A4)

Notwithstanding the fact that MECG had withdrawn its objection to the Stipulation and the Stipulation was unopposed, the Commission requested that the parties file briefs "on the question of whether the Commission has authority to accept the stipulation and agreement, and whether it has authority to grant the relief requested in the stipulation and agreement." (L.F. 323)

EMW, Nucor and the Commission Staff filed briefs pointing out that the Commission had the statutory authority under Sections 393.130 (A19), 393.140(11) (A24-25) and 393.150(1) (A27) to approve the Stipulation, and the relief requested in the stipulation and agreement. (L.F. 365-76, 395-98, 330-37). EMW also reiterated that it was not seeking approval of the Stipulation, the Agreement or the rate under Section 393.355. (L.F. 368-74) Notwithstanding the fact that MECG had withdrawn its objection to the Stipulation, MECG filed a two-page brief arguing the Stipulation should "be modified to be consistent with Section 393.355." (L.F. 407-08)

A. THE AGREEMENT.

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 Agreement in order for Nucor to locate its facility in Sedalia. (Ex. 17-18)

The price of electricity comprises a substantial component of a steel manufacturer's cost of production. 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. (Ex. 2-9)

As set forth in the Commission's Findings of Fact, "The contract between EMW and Nucor provides that EMW will supply electricity to Nucor at a fixed rate for a period of ten years. That fixed rate is expected to exceed EMW's average incremental cost to serve Nucor over that period, meaning the contract rate will contribute to recovery of EMW's fixed costs and thereby reduce rates paid by EMW's other customers below the level that would exist if EMW did not serve Nucor." (L.F. 438-39)(A6-A7)

In addition to the level of profitability 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 it was conservatively assumed that 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. (Ex. 18, C.Ex. 11)

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. 49-53; Vol. III Tr. 114-16) The specifics of these protections are contained in Paragraphs 7 and 8 of the Stipulation. (Ex. 49-53) The Commission Staff and other parties will be kept informed through detailed and regular reporting commitments. The reporting format is included in Exhibit 1 to the Stipulation (L.F. 160) 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 Southwest Power Pool ("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. 50-51) 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 fuel adjustment clause ("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. 52-53) 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. 54)

B. REPORT AND ORDER.

On November 13, 2019, the Commission issued its Report and Order (L.F. 433-48)(A1-A15) approving the Stipulation and the Nucor Agreement, and treating the Stipulation as unanimous in accordance with Commission rule 20 CSR 4240-2.155(2)(C).[8] In its Report and Order the Commission stated:

[8] Report and Order at 14 (L.F. 446)(A1-A15); S*ee also* 20 CSR 4240-2.115(2)(C) ("If no party timely objects to a nonunanimous stipulation and agreement, the commission may treat the nonunanimous stipulation and agreement as a unanimous stipulation and agreement.")(A40).

> The provisions of the unopposed stipulation and agreement, which the Commission will treat as unanimous, provide further protections to EMW's other ratepayers. In particular, the stipulation and agreement will protect those ratepayers from the risk of having to pay any under-recovery of EMW's incremental costs in a future rate case.
>
> Based on its findings of fact and conclusions of law described in this Report and Order, the Commission will approve the stipulation and agreement of the parties, and will approve the special contract between EMW and Nucor, as well as the tariff that will implement that agreement. (L.F. 446)(A14)

Even though MECG had withdrawn its objection to the Stipulation the Commission approved in its Report and Order, MECG filed a motion for rehearing (L.F. 449), claiming that the "non-unanimous stipulation . . . is contrary to economic development interest." (L.F. 450) In its motion for rehearing, MECG asserted that:

> 13. As indicated in footnote 3, it is unclear whether the Commission sought to approve the non-unanimous stipulation pursuant to Section 393.355 or through other statutory provisions. Indeed, the Commission repeatedly points to the authority provided by Section 393.355. That said, however, the Commission also claims to have other statutory authority to make the rate binding for a ten-year period. Given this uncertainty, MECG pleads this application for rehearing in the alternative depending on the authority that the Commission ultimately points to for issuing its Report and Order.
>
> A. <u>In the event that the Commission approved the special contract pursuant to Section 393.355</u>: The Report and Order is unlawful in that the Commission failed to implement the net income tracker mandated by Section 393.355.
>
> B. <u>In the event that the Commission approved the special contract pursuant to other alleged statutory authority</u>: The Report and Order is unlawful in that the Commission lacks statutory authority, outside of Section 393.355, to make the special contract rate binding on future commissions. (*Original emphasis*)(L.F. 454)

SUMMARY OF THE ARGUMENT

This appeal should be dismissed because MECG (1) waived its right to seek judicial review of the Commission's Report and Order approving the Stipulation when it withdrew its objection to the Stipulation; and (2) failed to properly preserve its point of error in its motion for rehearing under the requirements of Section 386.500.

The Report and Order is lawful because the Commission has the authority to approve rates for Nucor under Sections 393.130(1) (A19), 393.140(11) (A24-A25), and 393.150(1) (A27). The Commission has relied upon these statutory provisions many times in approving special contracts and rates outside the context of general rate cases.

Contrary to the arguments of MECG, the provisions of the Stipulation, including the 10-year fixed rate, are binding on the parties, but they are not binding on the Commission. Any order of the Commission continues in force for a period which may be designated by the order, or until it is changed or abrogated by the Commission in the future. See Section 386.490(2) (A16). The Commission has the authority to review such rates in the future if necessary to protect the public interest.

Despite the position of MECG, Section 393.355 (A29-A31) does not apply to this case because the Nucor contract rate was based upon EMW's cost to serve Nucor. Section 393.355(2) states: "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. . ." (*Id.*)(*emphasis added*)

The Commission also found that Section 393.355 would require the implementation of a tracker designed to prevent EMW from increasing its net income between rate cases as a result of serving Nucor under the special rate. (L.F. 444)(A12) The Commission further concluded that such a provision was unnecessary and would be unfair to EMW under the present circumstances as EMW must incur substantial costs to construct new infrastructure to serve Nucor. (L.F. 445)(A13) For these reasons, Section 393.355 is not the appropriate statutory authority for approving the Nucor Agreement, its ten-year fixed rate, and the tracking of the costs and revenues identified in the Stipulation.

POINTS RELIED ON

POINT I – MECG'S APPEAL SHOULD BE DISMISSED BECAUSE MECG WAIVED ITS RIGHT TO SEEK JUDICIAL REVIEW. (RESPONDS TO POINT I OF APPELLANT'S BRIEF)

Cases

Briggs v. Barber, 449 S.W.3d 421, 426-27 (Mo.App.2014);

Leasure v. State Farm Mut. Auto. Ins. Co., 757 S.W.2d 638 (Mo.App. W.D. 1988);

Segar v. Segar, 50 S.W.3d 844, 847 (Mo.App.W.D. 2001);

Stucker v. Stucker, 558 S.W.3d 119, 121 (Mo.App. E.D., 2018).

Regulations

20 CSR 4240-2.115(2)(C).

POINT II – MECG'S APPEAL SHOULD BE DISMISSED BECAUSE MECG FAILED TO PROPERLY PRESERVE ITS ISSUE ON APPEAL IN ITS MOTION FOR REHEARING UNDER THE REQUIREMENTS OF SECTION 386.500. (RESPONDS TO POINT I OF APPELLANT'S BRIEF)

Cases

State ex rel. Office of the Public Counsel v. Public Service Commission,

409 S.W.3d 522 (Mo.App. W.D. 2013);

State ex rel. Public Counsel v. Public Service Comm'n of the State of Missouri,

328 S.W.3d 347, 352 (Mo.App. W.D.2010).

Statutes

Mo. Rev. § 386.500.

POINT III – THE COMMISSION'S REPORT AND ORDER IS LAWFUL UNDER SECTION 386.510 IN THAT THE COMMISSION HAS THE STATUTORY AUTHORITY UNDER SECTIONS 393.130(1), 393.140(11), AND 393.150(1) TO APPROVE THE STIPULATION. (RESPONDS TO POINT I OF APPELLANT'S BRIEF)

Cases

State ex rel. GS Technologies Operating Co. v. Public Service Comm'n, 116

S.W.3d 680, 685 (Mo.App.W.D. 2003);

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, 1978 WL 36507 (Mo.P.S.C.)(August 22,

1978).

Statutes

Mo. Rev. § 386.490(2);

Mo. Rev. § 386.510;

Mo. Rev. § 393.130;

Mo. Rev. § 393.140(4) & (11);

Mo. Rev. § 393.150(1).

ARGUMENT

POINT I – MECG'S APPEAL SHOULD BE DISMISSED BECAUSE MECG WAIVED ITS RIGHT TO SEEK JUDICIAL REVIEW. (RESPONDS TO POINT I OF APPELLANT'S BRIEF)

On October 28, 2019, MECG filed its Withdrawal of Objection after the conclusion of the evidentiary hearings which withdrew its objection to the Stipulation.[9] (L.F. 322) In its Notice Regarding Reply Brief filed on November 8, 2019 in response to the initial briefs of the other parties, MECG again re-iterated its position that it did not oppose the Stipulation when it stated:

> Given that it [MECG] no longer opposes the non-unanimous stipulation, and in light of GMO's admission that the Commission and

[9] In its Withdrawal of Objection filed on October 28, 2019, MECG stated:

> 1. On September 19, 2019, Staff, GMO and Nucor filed their Non-Unanimous Stipulation and Agreement.
>
> 2. On September 24, 2019, MECG filed its Objection to the Non-Unanimous Stipulation and Agreement.
>
> 3. MECG hereby withdraws its objection. (*Emphasis added*)(L.F. 322)

> parties may consider the appropriateness of the Nucor special contract rate in future cases, MECG files this notice that it is not filing a reply brief in this matter. (*Emphasis added*)(L.F. 431)

The Commission relied upon MECG's representations, approved the unopposed Stipulation without condition or modification, as requested by the parties, and treated it as a unanimous stipulation, pursuant to Commission rule.[10] (L.F. 444-46)(A12-A14)

Paragraph 19 of the approved Stipulation stated:

> 19. If the Commission accepts the specific terms of this Stipulation without condition or modification, only as to the issues in these cases explicitly set forth above, the Signatories each waive their respective rights to present oral argument and written briefs pursuant to RSMo. §536.080.1, their respective rights to the reading of the transcript by the Commission pursuant to§536.080.2, their respective rights to seek rehearing pursuant to §536.500, and their respective rights to judicial review pursuant to §386.510. This waiver applies only to a Commission order approving this Stipulation without condition or modification issued in this proceeding and only to the issues that are resolved hereby. . . (*Emphasis added*.)(L.F. 157, C.L.F. 31, Ex. 56, and C.Ex. 121)

By withdrawing its objection to the Stipulation, MECG became a non-opposing party to the Stipulation, and as a result, was bound by the terms of the Stipulation upon its approval by the Commission without modification. More specifically, by joining in the Stipulation as a non-opposing party, MECG waived its right to seek judicial review of the Commission's decision to approve the Stipulation if the Commission approved the Stipulation without condition or modification (which it did).

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[10] See 20 CSR 4240-2.115(2)(c) (A40). The Commission also stated that Section 536.060 provides that a contested case before administrative agencies may be resolved by stipulation and agreement among the parties. (L.F. 442) (A10).

In Briggs v. Barber, 449 S.W.3d 421, 426-27 (Mo.App.2014), counsel for the appellant objected to the introduction of a land survey, and then subsequently withdrew her objection during the trial. The land survey was admitted into evidence after counsel withdrew her objection to the survey. Upon appeal, the appellant argued that the trial court erred "because there was no substantial evidence to determine the legal description . . . necessary to describe the land to be divided by the parties." Rejecting the appellant's argument, the court found that the land survey which had been objected to, and then the objection was withdrawn, constituted substantial evidence to support the trial court's decision. *Id.*

Similarly, MECG may not challenge on appeal the approval of the Stipulation because MECG had withdrawn its objection to its approval before the Commission relied upon its representation of "no objection" and approved the Stipulation without modification.

In Baker v. Ford Motor Co., 501 S.W.2d 11 (Mo. 1973), the Missouri Supreme Court held that the appellants were precluded from various claims on appeal by their failure to make proper objections in the trial court. In this case, MECG failed to preserve a proper objection to the Stipulation when it withdrew its objection the Stipulation. When the Commission approved the Stipulation, there was no pending objection to it by any party, including MECG.

In Leasure v. State Farm Mut. Auto. Ins. Co., 757 S.W.2d 638 (Mo.App. W.D. 1988), an insured who was struck from behind by an uninsured motorist who brought action against her own insurer could not complain on appeal that the court allowed the

uninsured motorist to withdraw from the case after permitting her to intervene. The Leasure court held that the insured did not object to the withdrawal of the intervention at trial. Therefore, the Court held that the appellant could not complain on appeal that the trial court had allowed the uninsured motorist to withdraw from the case.

Similarly, in this case, MECG failed to preserve a proper objection to the approval of the Stipulation before the Commission, and it may not now challenge the approval of the Stipulation on appeal.

In Stucker v. Stucker, 558 S.W.3d 119, 121 (Mo.App. E.D., 2018), Father and Mother entered into a stipulation resolving the final issues in the child custody case, the court approved the stipulation, as requested by the parties, and the trial was cancelled. When Father appealed, the court held that "the stipulation Father agreed to with Mother, which specifically 'pray[ed] that the Court enter its Second Amended Judgment,' results in the waiver of his right to appeal." *Id*.

As the *Stucker* court held:

> Indeed, it is generally held that a judgment, order, or decree entered by consent of the parties cannot be appealed, for it is not a judicial determination of rights, but a recital of an agreement. Henze v. Schallert, 92 S.W.3d at 319; State ex rel. and to Use of Fletcher v. New Amsterdam Cas. Co., 430 S.W.2d 642, 645 (Mo.App. 1968). So a party is estopped or is deemed to have waived his right to appeal when a judgment, order, or decree was entered at his request. *Id.*; Segar v. Segar, 50 S.W.3d 844, 847 (Mo.App.W.D. 2001). And where the appellant lacks statutory authority to appeal, we lack jurisdiction and must dismiss the appeal. *See* Cook v. Jones, 887 S.W.2d 740, 741-42 (Mo.App.S.D. 1994); Segar, 50 S.W.3d at 846; Hagen v. Rapid Am. Corp., 791 S.W.2d 452, 456 (Mo.App.E.D. 1990).

Since MECG withdrew its objection to the Stipulation, and the Commission treated it as a unanimous stipulation and adopted it without condition or modification, MECG cannot now appeal the Commission's order approving the same Stipulation. The Court should find that MECG waived its right to judicial review when it withdrew its opposition to the Stipulation and the Commission adopted it as requested.

Finally, a litigant must exhaust it administrative remedies before a court will assume jurisdiction over an appeal. Evans v. Empire Dist. Elec. Co., 346 S.W.3d 313, 317-18 (Mo. App. 2011). In this case, MECG did not exhaust all administrative remedies provided by law when it voluntarily relinquished its right to challenge the approval of the stipulation before the Commission. For these reasons, the Court should dismiss this appeal.

POINT II – MECG'S APPEAL SHOULD BE DISMISSED BECAUSE MECG FAILED TO PROPERLY PRESERVE ITS ISSUE ON APPEAL IN ITS MOTION FOR REHEARING UNDER THE REQUIREMENTS OF SECTION 386.500. (RESPONDS TO POINT I OF APPELLANT'S BRIEF)

Any issues not raised in a timely application for rehearing are not preserved for review in a subsequent appeal from the Commission's order. See Section 386.500(2) (A17); State ex rel. Office of the Public Counsel v. Public Service Commission, 409 S.W.3d 522 (Mo.App. W.D. 2013)("Pursuant to § 386.500.2, applications for rehearing of a PSC order must be filed prior to the effective date of the order, and any issues not raised in a timely filed application for rehearing are not preserved for review by the PSC or in a subsequent appeal from the PSC's order.") State ex rel. Ozark Border Elec. Co-op v. Public Service Commission, 924 S.W.2d 597 (Mo.App.1996); State ex rel.

International Telecharge, Inc. v. Missouri Public Service Commission, 806 S.W.2d 680, 687 (Mo.App.1991). Pursuant to Section 386.500, the Commission is entitled to hear the precise point of error in its decision so that it will have the opportunity to correct any errors before judicial review.[11]

In this appeal, MECG raises an issue which was not properly preserved for appellate review because MECG failed to raise the same issue in its motion for rehearing before the Commission. MECG is arguing in this appeal that the Commission "lacks the statutory authority to approve a 10-year fixed rate that is binding on future commissions without simultaneously approving the net margin tracker required by Section 393.355." (MECG Br. at 15) However, this point of error was not raised in its motion for rehearing. (L.F. 454) Instead, MECG raised alternative points of error as follows:

A. In the event that the Commission approved the special contract pursuant to Section 393.355: The Report and Order is unlawful in that the Commission failed to implement the net income tracker mandated by Section 393.355.

B. In the event that the Commission approved the special contract pursuant to other alleged statutory authority: The Report and Order is unlawful in that the Commission lacks statutory authority, outside of Section 393.355, to make the special contract rate binding on future commissions. (*Original emphasis*)(L.F. 454)

In this appeal, MECG has now abandoned its "application for rehearing in the alternative." (L.F. 454) MECG is attempting to modify its point of error by conflating its

[11] *Id.*

previous alternative positions in its motion for rehearing. (MECG Br. at 15-) In this appeal, MECG is challenging the Commission's "statutory authority to approve a 10-year fixed rate that is binding on future commissions without simultaneously approving the net margin tracker required by Section 393.355" without regard to the statutory authority relied upon by the Commission for approving the Stipulation.

In its motion for rehearing, however, MECG laid out alternative positions which depended directly upon which statutory authority the Commission relied upon to approve the Stipulation. Now, MECG is arguing that the Commission lacks any statutory authority to approve a 10-year fixed rate that is binding on future commissions unless it adopts a net income tracker included in Section 393.355. This new point of error is substantively different from either of the alternative points of error raised before the Commission. Therefore, the appeal should be dismissed since MECG failed to properly preserve its point of error in its motion for rehearing.

POINT III – THE COMMISSION'S REPORT AND ORDER IS LAWFUL UNDER SECTION 386.510 IN THAT THE COMMISSION HAS THE STATUTORY AUTHORITY UNDER SECTIONS 393.130(1), 393.140(11), AND 393.150(1) TO APPROVE THE STIPULATION. (RESPONDS TO POINT I OF APPELLANT'S BRIEF)

Despite the argument of MECG (MECG Br. at 15-23), the Commission has the statutory authority under Section 393.140(11) (A24-A25), Section 393.150(1) (A27), and its general ratemaking authority under Section 393.130 (A19) to approve the Stipulation, including the rate contained in the Agreement and the related tariff, without relying upon the provisions of Section 393.355. (A29-A31) In fact, the Commission has often exercised its ratemaking authority in the past to approve special contracts and related

tariffs. Many special contracts have been approved by the Commission utilizing such authority over the Commission's regulatory history.[12]

In Re Demand Curtailment Agreement Between Kansas City Power & Light Company and Armco Steel Corporation, Case No. 78-227, 22 Mo.P.S.C. (N.S.) 260, 1978 WL 36507 (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

[12] *See*, 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 Re 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, 1978 WL 36507 (Mo.P.S.C.)(August 22, 1978); Re Special Contract filed by Kansas City Power & Light Company, Case No. EO-95-181, 4 Mo.P.S.C.3d 233, 235-39, 1995 WL 789407 (Mo.P.S.C.)(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).

be approximately equal to the costs of the contract, at least as far as Company's Missouri's customers.

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, 2006 WL 1134423 (Mo.P.S.C.)(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 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 WL 789407 (Mo.P.S.C.)(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, 2003 WL 22910245 (Mo.P.S.C. Nov. 20, 2003), 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 approved special contracts, pursuant to its statutory authority found in Sections 393.130 (A19), 393.140(11) (A24-A25), and 393.150(1) (A27). The Court should find that the Commission's exercise of its statutory authority in this case was lawful since it is authorized by these statutes.

Despite the arguments of MECG (MECG Br. at 15-23), the Commission is not required to utilize the provisions of Section 393.355. (A29-A31) Although this statute is evidence of a regulatory and pricing climate that gave Missouri a distinct competitive advantage in attracting Nucor to Missouri (Vol. III Tr. 44-45), this statute is not required to be utilized in this instance because it is not applicable to the set of facts underlying the Agreement, it does not serve the financial needs of Nucor or the Company, and it is not in the best interest of the Company's customers. In summary, Section 393.355 is not the exclusive authority for the Commission to utilize when approving special contracts. (MECG Br. at 15-23)

During the evidentiary hearings, MECG did not present a witness, and counsel for MECG stated that MECG is not opposed to the proposed special rate or the 10 year-term

of the contract which clearly indicated that they were not based on the provisions of Section 393.355. (Vol. III Tr. 57-58. 67)[13] However, MECG nevertheless argued subsequently that the Company and Nucor must utilize Section 393.355, including a tracking provision that would foreclose any increase in the Company's net income in connection with providing service to Nucor. This argument is a red herring because the Company did not file its Application under the terms of Section 393.355 (L.F. 442-46) (A29-A31) and the Commission's Report and Order is not based upon an approval under Section 393.355.[14] (Id.)

Despite the arguments of MECG (MECG Br. at 18-19), the Commission possesses the statutory authority to approve the 10-year fixed rate set forth in the Nucor Agreement without relying upon Section 393.355. (A29-A31) Sections 393.140(11) (A24-A25), 393.150(1) (A27), and 393.130 (A19) provide the necessary statutory authority for the approval of such a term. In fact, the Commission has previously

[13] As MECG's counsel stated during the evidentiary hearing: "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." (Vol. III Tr. 57-58)

[14] MECG acknowledged that the EMW did not file for approval of the contract and rate under Section 393.355. (MECG Br. at 11)

approved numerous special contracts with terms of 10 years or more without relying upon Section 393.355.[15]

While MECG indicated to the Commission that it is not opposed to the ten-year fixed rate, MECG is now opposing the approval of the accounting treatment of the costs and revenues identified in the unopposed Stipulation which the Commission approved which gives EMW an opportunity to make a profit and ultimately share that profit with other customers. (Vol. III Tr. 58, 72-73) The unopposed Stipulation included approval of the accounting treatment of the costs and revenues associated with the Stipulation. (L.F. 150-54; C.L.F. 24-28) The Commission has statutory authority to establish the such accounting treatment for public utilities under its jurisdiction, pursuant to Section 393.140(4)[16]. (A21-A22)

[15] See e.g., *Order Approving Stipulation and Agreement,* p. 3, In Re Union Electric Company, Case No. EA-2005-0180, 2005 WL 636581 (Mo.P.S.C.), 239 P.U.R.4th 519 (Mar. 20, 2005)(Noranda/Ameren Missouri proposed LTS Tariff and power supply agreement for Noranda with a fifteen-year term); *Order Approving Agreement, Granting Waiver of Tariff Provisions, and Approving Tariff,* p. 4, Re: Missouri-American Water Company, Case No. WO-2009-0043 (Sept. 3, 2008) (A33-A39)(L.F. 418)(Nestle Purina Pet Care/Missouri-American Water Company contract term "in excess of ten years and may be renewed.").

[16] Section 393.140(4) (A21-A22) states:

A. STATUTES ON SIMILAR SUBJECTS MUST BE HARMONIZED.

Nothing in Section 393.355 indicates that it is to be construed as 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 under specific circumstances. Section 393.355 is not in conflict with the Commission's traditional ratemaking authority contained in Sections 393.130 (A19), 393.140(11) (A24-A25), or 393.150(1) (A27).

Under well-established case law, the courts have stressed the need to harmonize statutes that deal with the same subject matter. It is also 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

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(4) Have power, in its discretion, to prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations, electrical corporations, water corporations and sewer corporations engaged in the manufacture, sale or distribution of gas and electricity for light, heat or power, or in the distribution and sale of water for any purpose whatsoever, or in the collection, carriage, treatment and disposal of sewage for municipal, domestic or other necessary beneficial purpose. It may also, in its discretion, prescribe, by order, forms of accounts, records and memoranda to be kept by such persons and corporations . . ."

examined together," the Court 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. (*Id.*)

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. 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 § 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, this Court 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 (A29-A31) is not the exclusive statutory authority that must be utilized in order to approve a special rate. Sections 393.130 (A19), 393.140(11) (A24-A25) and 393.150(1) (A27), the traditional authority of the Commission for approving special contracts, may be invoked as has been done by the Commission for many years.

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. IN THIS CASE, THE RATE IS BASED UPON EMW'S COST OF PROVIDING SERVICE TO THE NUCOR FACILITY.

According to express terms of Section 393.355(2) (A29), 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. (C.Ex. 11, Ex. 17) 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. 17) Therefore, Section 393.355 does not apply in this case because the Nucor rate is based upon EMW's cost of serving the Nucor facility in Sedalia.

Even if Section 393.355 might arguably apply to the Agreement (which it does 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. 14-15) Section 393.355.3 (A30) 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 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)) (A29), 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. 14-15)

In the case of Noranda Aluminum, there were pre-existing electric distribution facilities that would serve a new customer moving into those facilities. In a scenario with pre-existing electric distribution 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 by installing electric distribution facilities and provide electric service. In the case of Nucor, EMW is expending approximately $18-20 Million to build the infrastructure need to serve Nucor's specialized load. (Ex. 21; Vol. III 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) (A30) appears to be contradictory or problematic to the statute's emphasis on incremental cost (Section 393.355.2(1) (A29). For these reasons, the Company did not request approval of the 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 concluded that Section 393.355 gives the Commission authority to approve a special electric rate under specific circumstances, but its terms do not limit any other authority the Commission has to approve a special electric rate under more general authority granted by other statutory provisions. (L.F. 444) (A12) The Commission instead utilized its traditional ratemaking authority to approve the Schedule SIL (Special Incremental Load) Tariff proposed by the Company 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. (L.F. 442-46) (A10-A14)

C. THE STIPULATION BINDS THE PARTIES TO THE STIPULATION WHILE THE COMMISSION RETAINS AUTHORITY TO REVIEW THE RATES IN THE FUTURE, PURSUANT TO THE TERMS OF THE STIPULATION, SECTION 386.490(2), AND THE POLICE POWER OF THE STATE.

During the hearings, counsel for MECG stated that MECG was not opposing the 10-year term of the Agreement. (Vol. III 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. (Vol. III Tr. 58) MECG argues in this appeal that the Commission lacks the statutory authority to approve a 10-year fixed rate that is binding on future commissions without simultaneously approving the net margin tracker required by Section 393.355. (MECG Br. at 14-23)

The Commission reviewed and rejected MECG's argument that EMW and Nucor must proceed under Section 393.355 to approve the ten-year term of their contract in its Report and Order:

> It was suggested that EMW and Nucor must proceed under section 393.355 if they are to ensure the ten-year term of their contract because of the provision in section 393.356 that prevents the Commission from modifying a contract approved under section 393.355 during its approved term. That provision would provide an extra measure of assurance to of the contract presented by Nucor and EMW.
>
> The provisions of the unopposed stipulation and agreement, which the Commission will treat as unanimous, provide further protections to EMW's other ratepayers. In particular, the stipulation and agreement will protect those ratepayers from the risk of having to pay any under-recovery of EMW's incremental costs in a future rate case. (*Emphasis added*)(L.F. 445-46, A13-A14)

The Commission recognized that the Stipulation contains provisions requiring 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. The Commission also implicitly recognized in that portion of the order that it has more flexibility to review the terms of the Stipulation (and its customer protections) and rates under its traditional ratemaking authority than under Section 393.355 which prohibits the Commission from changing the contract rate during the term of the contract, but that conclusion did not prevent the Commission from approving the Stipulation in this case under its traditional ratemaking authority.

MECG points to the Commission's findings in the Union Electric case involving a rate for Noranda Aluminum (Case No. ER-2014-0258) that rejected a ten-year contract. (MECG Br. at 20-21; L.F. 20-21) MECG's reliance on the *Noranda* case is misplaced. The Commission itself distinguished the facts in the *Noranda* case from the facts at hand, noting that the parties "had not presented an agreed-upon contract to the Commission for approval. (L.F.440-41) Rather the Report and Order established a rate devised by the

Commission after a hotly contested rate case." (L.F. 441) (A9) In *Noranda*, the Commission was very concerned about the "precarious financial condition" of Noranda and the effect that the loss of its load would have on other ratepayers.[17] In the case at hand, Nucor is a large steel maker with over 60 facilities in the United States. (L.F. 437) (A5) 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. (C.Ex. 11; Ex. 18)

Unlike the *Noranda* case, the Stipulation approved by the Commission in this case contains very substantial monitoring and reporting requirements and commitments by the Company to absorb any possible revenue deficiencies in the unlikely event that Nucor's operations had an adverse impact on the revenue requirement of other customers. Under the 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. 49-53) The process mandated by the Stipulation will give the Commission and the public an

[17] 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, 320 P.U.R 4th 330, 2015 WL 1967858 (Mo.P.S.C.,April 29, 2015).

extra measure of assurance that the rates to all customers will be just and reasonable in the future.

The Nucor related costs will appear in the FAC reporting, but will be excluded 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. (*Id.*) Future commissions will not be bound in any way that would prevent them from protecting other customers. This is very different from the Noranda case which did not have a contract with Ameren or the extensive customer protections included in the Nucor Agreement and the Stipulation in this case.

In this case, the paragraphs 16 and 17 of the Stipulation specifically states that the Stipulation is binding on the parties to the agreement, but the Stipulation does not bind the Commission in any way:

> 16. This Stipulation embodies the entirety of the agreements between the Signatories in this case on the issues addressed herein, and may be modified by the Signatories only by a written amendment executed by all of the Signatories.
>
> 17. If approved and adopted by the Commission, this Stipulation shall constitute a binding agreement among the Signatories. The Signatories shall cooperate in defending the validity and enforceability of this Stipulation and the operation of this Stipulation according to its terms. (L.F. 156, C.L.F. 30, Ex. 55, and C.Ex. 120)

The Commission has long recognized that the terms of a stipulation or an agreement are binding on the parties to the stipulation or agreement, but not on the

Commission itself.[18] Section 386.490(2) (A16) specifically recognizes this principle when it states that the Commission order's remain in effect "until changed or abrogated

[18] 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, 2012 WL 3544981 (Mo.P.S.C.)(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). See also Re Union Electric Company d/b/a Ameren Missouri's Filing to Implement Regulatory Changes in Furtherance of Energy Efficiency as Allowed by MEEIA, 2014 WL 6388297, at *4 (Mo.P.S.C.,2014)("First, the 2012 stipulation and agreement specifically states that it is an agreement between the signatory parties, not a contract with the Commission…") Re Union Electric Company d/b/a Ameren Missouri's 3rd Filing to Implement Regulatory Changes in Furtherance of Energy Efficiency as Allowed by MEEIA, 2018 WL 6724242, at *2 (Mo.P.S.C., 2018)("This Commission's decision is not binding on a future Commission . . .")

by the commission . . . "[19] (A16) Nor does the legal principle of *stare decisis* apply to the Commission,[20] and the Commission retains the police power to review all rates including contract rates, if necessary, to promote just and reasonable rates.[21]

[19] Section 386.490(2) (A16) states:

> Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission, unless such order be unauthorized by this law or any other law or be in violation of a provision of the constitution of the state or of the United States. (*emphasis added*).

[20] State ex rel. Aquila v. Public Service Commission, 326 S.W.3d 20, 31-32 (Mo.App. 2010); State ex rel. AG Processing, Inc. v. Public Serv. Comm'n, 120 S.W.3d 732, 736 (Mo. banc 2003).

[21] 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).

CONCLUSION

For the above-stated reasons, the Report and Order is lawful. As a result, the Commission's order should be affirmed.

May 4, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served utilizing the court's electronic notification system, on this 4th day of May 2020 upon the following parties:

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CERTIFICATE PURSUANT TO RULE 84.06(c) AND 84.06(g)

I hereby certify that the foregoing Brief of Respondent Evergy Missouri West complies with the limitations contained in Rule 84.06(b) and Western District Rule 41 and, according to the word count of the word-processing system used to prepare the brief (excepting therefrom the cover, the table of contents, the table of authorities, certificate of service, this certificate, the signature block, the table of appendices, and the appendix), contains 9,540 words.

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