Exhibit No. 902

WD83531

IN THE MISSOURI COURT OF APPEALS

Western District

MIDWEST ENERGY CONSUMERS GROUP,

Appellant

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, *ET AL*.,

Respondents.

On Appeal from the Missouri Public Service Commission
Case No. EO-2019-0244

BRIEF OF RESPONDENT NUCOR STEEL SEDALIA, LLC

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JURISDICTIONAL STATEMENT

This case is before the Court on Midwest Energy Consumers Group's ("MECG") appeal of the Report and Order entered by the Public Service Commission of the State of Missouri ("Commission") in Case No. EO-2019-0244 (A001-A015), which addresses the request of Evergy Missouri West, Inc. d/b/a Evergy Missouri West (f/k/a KCP&L Greater Missouri Operations Company) ("Evergy") for approval of a contract for electric service between Evergy and Nucor Steel Sedalia, LLC ("Nucor") and a related special incremental load tariff. Subject to the argument in Point One below, the case is properly before this Court under Section 386.510, RSMo (2016).[1] This case is not within the exclusive appellate jurisdiction of the Supreme Court of Missouri under Article V, Sec. 3 of the Missouri Constitution.[2]

STANDARD OF REVIEW

"An order from the PSC is presumed to be valid, and the burden of proof is on the party challenging the order, by clear and satisfactory evidence, to show that the order is either unlawful or unreasonable." *In re Kansas City Power & Light Co.'s Request for*

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

[2] References in this brief to the Record on Appeal filed February 27, 2020 by Respondent Missouri Public Service Commission are as follows: "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 Nucor Steel Sedalia, LLC.

Auth. to Implement a Gen. Rate Increase for Elec. Serv. v. Pub. Serv. Comm'n, 509 S.W.3d 757, 763 (Mo. App. W.D. 2016) (*citing* Section 386.430 and *In re Laclede Gas Co.*, 417 S.W.3d 815, 819 (Mo. App.W.D.2014)).

In reviewing a Commission order, courts apply a two-part test. First, the court determines if the order is lawful, including whether there is statutory authority for its issuance. Second, the court must determine if the order is reasonable. *State ex rel. Ag Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734-35 (Mo. banc 2003); *State ex rel. GS Techs. Operating Co. v. Pub. Serv. Comm'n*, 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.

In this case, MECG solely challenges the lawfulness of the Report and Order, claiming the Commission acted outside the scope of its statutory authority. Appellant's Brief at 5. Accordingly, the reasonableness of the Report and Order is not an issue in this appeal.

This Court, in considering the powers of the Commission, must give "full consideration to the policy objectives of the legislature." *State ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979). The statutes conferring authority on the Commission "are remedial in nature, and should be liberally construed in order to effectuate the purpose for which they were enacted." *Id.* While the Court reviews legal issues *de novo*, the "interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." *Laclede Gas Co. v.*

Office of Pub. Counsel, 417 S.W.3d 815, 819 (Mo. App. W.D. 2014) (citing *State ex rel. Office of Pub. Counsel v. Pub. Serv. Comm'n*, 331 S.W.3d 677, 683–84 (Mo. App. W.D. 2011)).

STATEMENT OF FACTS

On July 12, 2019, Evergy filed an Application requesting that the Commission approve a special rate for a steel production facility in Sedalia, Missouri. (L.F. at 9) Evergy requested that the Commission enter an appropriate Order by December 1, 2019, approving the Schedule SIL (Special Incremental Load) Tariff ("SIL Tariff") so that it would be effective no later than January 1, 2020, and authorizing Evergy to serve Nucor Steel Sedalia, LLC under the terms of a Special Incremental Load Rate Contract between the Company and Nucor dated July 11, 2019. ("Nucor Contract") (L.F. at 16).

Nucor Corporation is the nation's largest steel maker. (Ex. at 41). Nucor Corporation has facilities engaged in the manufacture of steel and steel products located throughout the country. Among these facilities are twenty-one steel mills that employ electric arc furnaces to melt and recycle scrap steel into new steel products. (*Id.*; L.F. at 437) (A005). In addition to being the largest steelmaker in the United States, Nucor is also the largest recycler in North America, recycling more than 17 million tons of scrap steel in 2018. (Ex. at 41).

Nucor will invest approximately $250 million to build the Nucor Sedalia facility, a "micro mill" utilizing an electric arc furnace to produce steel rebar. (Ex. at 41-42; L.F. at

437) (A005). Nucor expects to invest a total of $325 million in the Sedalia facility over the next twenty-two years. (Ex. at 5).

As Jessica Craig, the Executive Director of Economic Development Sedalia-Pettis County, testified, Nucor's decision to build its new plant in Sedalia "represents the single largest economic development success for the state in over 10 years, relative to capital investment." (Ex. at 4). Nucor Sedalia will create more than 250 permanent, full-time jobs with an average annual wage of over $65,000, which is twice the current county average of Pettis County. (Ex. at 4; L.F. at 438) (A006). In addition to the direct jobs at the plant, the Sedalia facility is expected to draw additional industrial, commercial, and retail businesses to the region. (Ex. at 4). Further, Nucor will serve as the anchor tenant for the new Sedalia Rail Industrial Park, which will offer from five to 1,500 acres to industrial customers seeking rail-served sites for new facilities. (Ex. at 4-5).

Nucor conducted a multi-state search for its new Midwest micro mill, and attracting Nucor to Missouri was a significant economic development win for the state. (Ex. at 11, 42). Missouri had a statewide team working with Nucor, including the Governor's office; the Missouri Departments of Economic Development, Natural Resources, Revenue and Transportation; Sedalia-Pettis County Economic Development; the City of Sedalia; Pettis County; Evergy; Liberty Utilities; Union Pacific Railroad; and Missouri Partnership. (Ex. at 12). This statewide team crafted an aggressive and innovative incentive package for Nucor. (Ex. at 12-13).

Electric arc furnace steel production requires the use of a tremendous amount of electricity, which is among the highest variable cost components at a steel mill. (Ex. at

44). Therefore, a competitive electric rate was a primary factor in Nucor's decision to locate in Sedalia. (Ex. at 46; L.F. at 438) (A006). As part of the statewide team working with Nucor, Evergy was aware that Nucor had competitive alternatives, and committed to provide Nucor power supply with the rate and term that met Nucor's needs. (Ex. at 17-18). But for the availability of a special rate, Nucor would not have chosen to locate a plant and commence steelmaking operations in Sedalia. (Ex. at 46; L.F. at 438) (A006).

The Nucor Contract addresses various general terms, conditions, operational provisions, and pricing issues, and has an initial term of ten years, with the opportunity to negotiate an additional ten-year extension. (Ex. at 19). The special incremental load rate attached as a schedule to the Nucor Contract is a three-part rate including a customer charge, demand charge, and an energy charge. (Ex. at 19-20; C.Ex. at 111-12).

The Nucor rate is designed to recover the incremental cost to serve Nucor over the ten-year term of the agreement and to make a contribution to the fixed cost of the Evergy system, providing a positive benefit to non-Nucor customers. (Ex. at 20; L.F. at 438-39) (A006-A007). In addition, in the unexpected event that the revenues from the Nucor rate do not cover the cost of service to Nucor, then non-Nucor customers will be held harmless. (Ex. at 23-24; L.F. at 439-40) (A007-A008).

In developing the Nucor rate, all costs, including infrastructure investment, were estimated for the ten-year term of the agreement. (Ex. at 20; L.F. at 440) (A008). The rate was designed to recover the expected costs to serve the Sedalia facility, including infrastructure costs, administrative costs, and the cost of energy supply to the facility,

including actual energy, power pool costs, energy management costs, and supply support costs. (Ex. at 20).

Following the filing of the Application, a prehearing conference was held on July 23, 2019, at which the Regulatory Law Judge granted the intervention of MECG. Subsequently the Commission granted the intervention of Nucor. (Tr. Vol. I at 10, L.F. 32, 59-60). 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).

On September 19, 2019, the Commission Staff, Evergy, and Nucor entered into a Non-Unanimous Stipulation and Agreement ("Stipulation") proposing to resolve all issues in the case. The Stipulation recommended that the Nucor Contract and rate be approved as proposed, adopted detailed provisions related to cost and revenue monitoring and reporting, explained how costs and revenues of the Nucor Contract will be treated for purposes of ratemaking, and reaffirmed the operational communications commitments contained in the Nucor Contract. (L.F. at 149-68; C.L.F. at 23-42).

The Office of the Public Counsel ("OPC") was not a signatory to the Stipulation, but OPC did not object to the Stipulation. (L.F. at 289, 441). MECG filed an objection to the Stipulation on September 24, 2019 (L.F. at 173, 436) but, as described below, MECG later withdrew its objection.

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

withdrawn its objection to the Stipulation and the Stipulation was now 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. at 323).

Following the filing of briefs by the parties, on November 13, 2019, the Commission issued its Report and Order (L.F. at 433-48) (A001-A015) approving the Stipulation and the Nucor Contract, and treating the Stipulation as unanimous in accordance with Commission rule 20 CSR 4240-2.115(2)(C). The Commission concluded that the "evidence shows that a special contract for Nucor is in the public interest." (L.F. at 444) (A012). The Commission held further:

> The provisions of the unopposed stipulation and agreement, which the Commission will treat as unanimous, provide further protections to [Evergy's] other ratepayers. In particular, the stipulation and agreement will protect those ratepayers from the risk of having to pay any under-recovery of [Evergy'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 [Evergy] and Nucor, as well as the tariff that will implement that agreement. (L.F. at 446) (A014).

Although MECG had withdrawn its objection to the Stipulation the Commission approved in its Report and Order, MECG filed a motion for rehearing claiming that the "non-unanimous stipulation . . . is contrary to economic development interest." (L.F. at 449-50). On December 30, 2019, the Commission issued an order denying MECG's application for rehearing. (L.F. at 519-20).

SUMMARY OF THE ARGUMENT

This appeal should be dismissed because MECG 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 the Commission subsequently approved the Stipulation without change or modification.

If the Court decides this appeal on the merits, the Court should affirm the Commission. The Report and Order is lawful because the Commission has the authority to approve the Nucor Contract and the SIL Tariff under its traditional ratemaking authority as embodied in Sections 393.130.1, 393.140(11), and 393.150.1. (A021, A024, A026). The Commission has approved many special contracts and rates under this traditional ratemaking authority. The Commission can, and did, approve the Nucor Contract under its traditional ratemaking authority.

MECG asserts that, if the Commission approved the contract under its traditional ratemaking authority (as opposed to under Section 393.355), the Commission erred by approving a ten-year contract for Nucor that is "binding on future commissions." Appellant's Brief at 13. This argument is meritless because in approving the Nucor Contract, the Commission did not state that it was binding future commissions. Generally, when the Commission approves a stipulation, that stipulation is binding on the parties to the stipulation but not on the Commission itself. It is possible that changing conditions might require the Commission to revisit a contract or rate before its term is up, if the public interest requires. There is nothing inconsistent between the Commission's authority to approve a ten-year contract and the general proposition that the Commission

may not bind future commissions. Further, the question of when and if the Nucor Contract may be reopened in not a ripe issue in this case.

MECG relies exclusively on *In the Matter of Union Electric Co. d/b/a/ Ameren Missouri's Tariff to Increase its Revenues for Elec. Serv.*, Case No. ER-2014-0258, 2015 WL 1967858 (Mo.P.S.C.), 320 P.U.R.4th 330 (Apr. 29, 2015) ("*Noranda*") (Ex. 75-100) for its argument that the Commission cannot approve a ten-year contract outside of Section 393.355 (A027-A028). But *Noranda* does not stand for the proposition that the Commission may never approve a contract or rate with a ten-year term. Approval of the ten-year Nucor Contract under the facts of this case is consistent with the Commission's holding in *Noranda*.

Although MECG questions what authority the Commission relied on in approving the Nucor Contract and Stipulation, it is evident that the Commission approved the Contract and Stipulation under its traditional ratemaking authority, and not under Section 393.355. Therefore, MECG's complaint that the Commission approved the contract and rate without the net margin tracker required under Section 393.355 is meritless. Section 393.355 is a new statutory mechanism to facilitate certain economic development contracts and rates, but it is not the exclusive means to approve a special contract or rate, so the Commission's approval of the Nucor Contract under its traditional ratemaking authority was lawful. Finally, Section 393.355 is problematic in many respects when applied to a new industrial facility with incremental load such as Nucor Sedalia, so approval of the Nucor Contract and rate under the Commission's traditional ratemaking

authority was more appropriate under the facts of this case than proceeding under Section 393.355.

ARGUMENT

POINT ONE

MECG'S APPEAL SHOULD BE DISMISSED BECAUSE MECG WITHDREW ITS OBJECTION TO THE STIPULATION THAT WAS APPROVED BY THE PUBLIC SERVICE COMMISSION AND THEREBY WAIVED ITS RIGHT TO CHALLENGE THE PROVISIONS OF THE STIPULATION (RESPONDING TO APPELLANT'S POINT ONE)

On October 28, 2019, MECG withdrew its objection to the Stipulation recommending approval of a ten-year power supply contract between Evergy and Nucor and the underlying SIL Tariff. (L.F. at 322). On November 13, 2019, the Commission issued its Report and Order approving the Stipulation and the Nucor Contract. (L.F. at 433-448) (A001-A015). In approving the Stipulation, the Commission treated the Stipulation as unanimous, consistent with 20 CSR 4240-2.115(2)(C).[3] (L.F. at 446) (A010). The Commission also recognized that Section 536.060 provides that a contested case before administrative agencies may be resolved by stipulation and agreement among the parties. (L.F. at 442) (A010, A029).

Under 20 CSR 4240-2.115(2)(B), MECG waived its right to challenge the provisions of the Stipulation when it withdrew its objection. That rule provides that failure to file a timely objection to a nonunanimous stipulation and agreement "shall

[3] 20 CSR 4240-2.115(2)(C) provides: "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." (A037).

constitute a full waiver of that party's right to a hearing."[4] (A037). Nevertheless, MECG has brought this appeal to challenge a Commission decision approving a Stipulation to which MECG does not object. The features of the Stipulation that MECG questions in this appeal – including the ten-year term of the Nucor Contract, the establishment of the Nucor Contract and SIL Tariff outside of Section 393.355 and the omission of the Section 393.355 tracker mechanism – were all key elements of the Nucor Contract and the SIL Tariff as presented in Evergy's Application, which in turn are reflected in the Stipulation. Importantly, the Commission did not alter or modify these elements, or any of the features of the Stipulation, in any way in it its Report and Order.

In cases before the Commission, stipulations are recognized in statutory and regulatory framework as a resolution to a contested case. *See* Section 386.210.5; 20 CSR 4240-2.115(1). (A018; A037). MECG withdrew its objection to the Stipulation and thereby waived its rights to challenge the Stipulation before the Commission. Since the Commission subsequently approved the unopposed Stipulation without change or modification, it follows that MECG also waived its right to appeal the Commission's decision approving that Stipulation. *See, e.g., Stucker v. Stucker*, 558 S.W.3d 119, 121 (Mo. App. E.D. 2018) (holding that a party's agreement to a stipulation settling issues in the trial court resulted in waiver of that party's right to appeal the stipulation); *Henze v. Schallert*, 92 S.W.3d 317, 319 (Mo. App. E.D. 2002) (a judgment entered pursuant to a stipulation is not a judicial determination of rights and cannot be appealed; a party is not

[4] By withdrawing its objection, MECG waived its right to a hearing on the merits. Still, MECG asked for rehearing of a hearing to which it was not entitled at the outset.

aggrieved by a judgment entered pursuant to an agreement of the parties); *Foger v. Johnson*, 362 S.W.2d 763, 764-765 (Mo. App. 1962) (a party is not aggrieved by a judgment or order made with the express or implied consent of the party and, thus, he may not appeal from the judgment). Accordingly, the Court can and should dismiss MECG's appeal.

POINT TWO

THE COMMISSION DID NOT ERR IN APPROVING THE NUCOR CONTRACT WITH A TEN-YEAR TERM BECAUSE THE COMMISSION'S DECISION WAS LAWFUL IN THAT THE COMMISSION HAS THE STATUTORY AUTHORITY TO APPROVE SUCH A CONTRACT UNDER ITS TRADITIONAL RATEMAKING AUTHORITY (RESPONDING TO APPELLANT'S POINT ONE)

A. The Commission's Approval of the Nucor Contract Under its Traditional Ratemaking Authority Derived from Sections 393.130, 393.140(11) and 393.150 Was Lawful

1. The Commission's authority to approve contracts is deeply rooted in statute and case law

The Commission has broad discretion to set just and reasonable rates. *State ex rel. Capital City Water Co. v. Pub. Serv. Comm'n*, 850 S.W.2d 903, 910–11 (Mo. App. W.D. 1993) (citing *State ex rel. Util. Consumers Council, Etc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979)). The Commission's authority to set just and reasonable rates is derived from Section 393.130.1. (A021). That section provides:

> Every . . . electrical corporation . . . shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such . . . electrical corporation . . . for . . . electricity . . . 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 . . . electricity . . . 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.

In addition, the Commission's traditional ratemaking authority includes Section 393.140(11) (A024) and Section 393.150.1 (A026). Section 393.140(11) states that the Commission shall:

> [h]ave power to require every . . . electrical 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 and 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 . . . electrical corporation[.]

Section 393.150.1 provides (emphasis added):

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

Specifically, with respect to Section 393.150, this court has previously stated: "Section 393.150, RSMo Supp.1985, authorizes the Commission to fix…rates after a formal hearing. The statute neither prescribes nor limits the methodology that the Commission may use in determining rates. The complexities inherent in a rate of return determination necessarily require that the Commission be granted considerable discretion." *See State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 706 S.W.2d 870, 879–80 (Mo. App. W.D. 1985). The complexities inherent in economic development tariffs and projects requires similar discretion.

As the courts and the Commission have recognized in numerous cases, the Commission has the authority to approve economic development tariffs. *See, e.g.*, *In re Union Elec. Co.*, Case No. EA-2005-0180, 2005 WL 636581 (Mo.P.S.C.), 239 P.U.R.4th 519 (Mar. 20, 2005) (approving service from Ameren to Noranda under a new LTS rate schedule, "for a minimum term of fifteen (15) years"); *In Re Missouri-Am. Water Co.*, No. WT-2004-0156, 2003 WL 22340581 (Oct. 2, 2003) (approving an economic development tariff proposed by Missouri-American Water Company relating to a pork processing facility in St. Joseph.); *In Re Union Elec. Co. d/b/a Ameren Missouri's Revised Tariff Sheets*, No. ET-2019-0149, 2019 WL 4017494 (July 10, 2019) (regarding Ameren Missouri economic development riders). The Commission also has authority to approve contracts between utilities and individual customers, like the Nucor Contract in this case. *See, e.g., State ex rel. GS Techs. Operating Co. v. Pub. Serv. Comm'n*, 116 S.W.3d 680 (Mo. App. W.D. 2003).[5]

Several of the contracts the Commission has previously approved have included terms of ten years or longer. In 1995, KCPL sought Commission review of a proposed contract and tariff sheet. The contract at issue was for a ten-year term and the evidence showed that "the rates established in the special contract will recover incremental costs plus a contribution to KCPL's fixed costs." *In re Kansas City Power & Light Co.*, No.

[5] This Court explained that "[t]o acquire electric service at an advantageous price, GST entered into a special contract with KCPL, which was approved by the Commission." *Id.* at 685. GST was KCPL's largest single-point retail customer and under the contract, GST paid significantly less for electricity than it would have paid under KCPL's general service tariffs. *Id.*

EO-95-181, 1995 WL 789407 (Nov. 22, 1995) at 4. The Commission specifically addressed questions concerning the lawfulness of special contracts, holding that "special contracts are recognized both historically and in the statutes and are a lawful method of providing service to customers of regulated utilities." *Id*. at 5. The Commission found that Sections 393.130 and 393.140 authorize the Commission to set rates by either tariff rate or contract as long as similarly situated customers are charged the same rates. *Id*. "The Commission's primary concerns in this area are to ensure that other ratepayers do not pay for costs for which the customers receiving the special rates should pay, and that KCPL does not discriminate among its own customers in providing the special contracts." *Id.* at 4. Because the contract rates recovered KCPL's incremental cost plus provided a contribution to fixed costs, the Commission determined the rates were just and reasonable and approved the special contract. *Id. See also Matter of Demand Curtailment Agreement*, No. EO-78-227, 1978 WL 36507 (Mo.P.S.C.), 22 Mo. P.S.C. (N.S.) 260 (Aug. 22, 1978) (The Commission approved a five-year contract between KCPL and Armco Steel Corporation where it found the benefits of the contract should approximately equal the costs, with the strong probability of additional benefits); *In re Kansas City Power & Light Co.*, No. ER-83-49, 1983 WL 909352 (Mo.P.S.C.), 55 P.U.R.4th 468 (Jul. 8, 1983) (KCPL entered into an agreement with Mobay Chemical Corporation).

In *Re Missouri-Am. Water Co.*, the Commission approved a special service contract and tariff sheets related to Premium Pork (now Triumph Foods). *See In Re Missouri-Am. Water Co.*, No. WT-2004-0192, 2003 WL 22910245 (Nov. 20, 2003). The

project was projected to include an investment of approximately $130 million and add 1,000 jobs. *Id*. at 4. According to the Commission, "Premium Pork and Missouri-American . . . negotiated an agreement that, if approved by the Commission, will provide water service at a competitive rate for a period in excess of ten years." *Id.* at 5. The record showed that net benefits would accrue to the State of Missouri as a result of increased annual payroll. *Id.* at 6. In addition, the record showed that the contract would result in a reasonable contribution toward costs sufficient to reduce the revenue requirement as a whole and that no other customer's rates would increase as a result of the contract. *Id.* Based on the record, the Commission approved the proposed tariff sheets and the "Special Service Contract."

In 2008, Missouri American Water presented an Agreement and Tariff sheets related to Nestle Purina Pet Care for Commission approval. Case No. WO-2009-0043. Nestle was undertaking an expansion of its canned pet food products plant located in St. Joseph; the total investment was expected to be $26 million and create 30 additional jobs. *In re Missouri-American Water Co.*, Case No. WO-2009-0043, Order Approving Agreement, Granting Waiver of Tariff Provision, and Approving Tariff (Sept. 3, 2008) (unpublished). (A033). The Commission found net benefits would accrue to the State of Missouri as a result of increased annual payroll. (A034). The Commission explained, "Nestle and Missouri-American have negotiated an agreement that, if approved by the Commission, will provide water service at a competitive rate for a period of ten years." (A033). It also found (1) a reasonable contribution to costs that will serve to reduce the revenue requirement of the district as a whole; (2) no other customer's rates will increase

because of the Special Contract; and (3) no detriments to the State or other water service customers. (A034). Based on this evidence, the Commission approved the special service contract and the tariff. (A035).

The SIL Tariff and the Nucor Contract fit comfortably within the parameters the Commission has established for approving contracts under its traditional ratemaking authority, as reflected in the examples cited above. The Commission explicitly referred to its authority under Sections 393.130.1, 393.140(11), and 393.150.1 in approving the Nucor Contract. (L.F. at 506-07) (A010-A011). The Nucor Contract will recover the incremental costs to serve Nucor and will also benefit other customers by making a contribution to Evergy's fixed costs. (L.F. at 509) (A013). There will be no risk of other customers subsidizing the Nucor rate. (L.F. at 510) (A014). Benefits will accrue to the state of Missouri because the rate reflected in the Nucor Contract facilitates the opening of a new steel production facility in Sedalia, which will provide many direct and indirect jobs and associated economic development benefits. (L.F. at 508) (A012). Finally, the rate is non-discriminatory because the SIL Tariff allows Evergy to negotiate additional incremental cost contracts with other similarly situated customers.

2. In approving the Nucor Contract, the Commission did not bind future Commissions

MECG makes several exaggerated or demonstrably false claims about the Report and Order in an attempt to justify its appeal. For example, MECG states that "[a]s envisioned by the Order, that rates [sic] . . . would be binding on future commissions." Appellant's Brief at 14. MECG implies that the Commission's basis for approving the

Stipulation is unclear, claiming that the Commission only "hints" that its decision is not grounded in the authority provided in Section 393.355. *Id*. Finally, MECG states that "the Commission fails to provide any statutory references that permit it to take the actions contained in its Order." *Id*. As will be shown, these claims are unsupported by the Report and Order, and amount to little more than an attempt to manufacture issues out of nothing.

MECG implies there are several actions that the Commission took in approving the Nucor Contract and Stipulation that would be unlawful if the Commission proceeded outside of Section 393.355. Appellant's Brief at 17. Notably, however, MECG raises only a single issue to be decided by this Court, assuming the Commission approved the contract under its traditional ratemaking authority: whether the Commission has the authority to approve a contact that "binds future commissions" under its traditional rate making authority (rather than under Section 393.355). In fact, MECG's argument on this issue – that the Commission erred by approving a ten-year contract that binds future commissions – is based on a flawed premise. The Commission said nothing about binding future commissions in its Report and Order.

Generally, when the Commission approves a stipulation, that stipulation is binding on the parties to the stipulation, but is not binding on the Commission itself. *See, e.g., In the Matter of Union Elec. Co. d/b/a Ameren Missouri's Filing to Implement Regulatory Changes in Furtherance of Energy Efficiency As Allowed by MEEIA*, No. EO-2012-0142, 2012 WL 3544981 (Aug. 1, 2012). In other words, a Commission order serves as precedent, but does not bind future Commissions to follow that order. It is possible that

in certain situations, changing conditions might require the Commission to revisit a contract or rate before its term is up, if the public interest requires. *State ex rel. Jackson County v. Pub. Serv. Comm'n*, 532 S.W.2d 20, 30 (Mo. banc 1975). In short, there is nothing inconsistent with: (i) the Commission having the authority to approve a contract or rate of any particular term, as long as that rate is just and reasonable, and (ii) the general proposition that a Commission may not bind future Commissions. In deciding whether to approve the Nucor Contract containing a ten-year term there was no need for the Commission to speculate on what it might do if the contract or rate is challenged at some point in the future. The question of when and how a contract approved by the Commission can be examined or re-opened at some date in the future is not ripe for this Court's determination. *See Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 26 (Mo. 2003) (*citing State ex rel. Kan. Power & Light v. Pub. Serv. Comm'n*, 770 S.W.2d 740, 742 (Mo. App. 1989) ("In order that a controversy be ripe for adjudication, a 'sufficient immediacy' must be established. Ripeness does not exist when the question rests solely on a probability that an event will occur." (internal citations omitted))). How the Commission applies its precedents related to examining or re-opening the Nucor Contract need be addressed only when and if circumstances warrant in a future case.

3. The Commission's decision in the case below is consistent with *Noranda*

MECG relies exclusively on the *Noranda* case to argue that approving a ten-year contract for Nucor, as well as making that rate binding on future commissions, "are both legally problematic." Appellant's Brief at 20. As discussed above, MECG's claim that

the Report and Order somehow "binds" future Commissions can be readily dismissed. On the question of whether the Commission may approve a ten-year rate for Nucor, there is nothing inconsistent with the Commission's decision to approve the ten-year Nucor Contract and the Commission's decision in *Noranda*. In that case, the Commission refused to approve a ten-year rate for an aluminum smelter. Instead, the Commission approved a three-year rate. The Commission stated that:

> [W]hile a stipulation and agreement can be binding on its signatories for ten years, the Commission cannot bind future Commissions, nor can it preclude future litigants from presenting contrary positions in future rate cases, positions to which the Commission will need to give due consideration. (Ex. at 92).

This passage, which MECG relies on to support its argument that the Commission may not approve a ten-year contract under its traditional ratemaking authority (Appellant's Brief at 21), simply restates the long-standing precedent noted above. This passage does not suggest that the Commission may not approve a ten-year rate because it lacks the authority to do so under its traditional ratemaking authority, nor did the Commission express that view anywhere else in the *Noranda* decision. In fact, there is nothing in the Commission's decision to suggest that the Commission could not have approved a ten-year rate for Noranda if the Commission determined such a rate was just and reasonable, just as it approved a three-year rate in that case. (Ex. at 92). Taken to the extreme, MECG's argument is that the Commission cannot approve a contract of <u>any</u> term under its traditional ratemaking authority. This is plainly contrary to Section 393.150.1 (A026), which authorizes the Commission to approve contracts.

The courts have recognized that whether a particular rate violates the statutory proscription against unjust and unreasonable rates and undue or unreasonable preference or disadvantage is a fact-based inquiry. *State ex rel. City of Joplin v. Pub. Serv. Comm'n*, 186 S.W.3d 290 (Mo. App. W.D. 2005). The Commission similarly made clear that it's decision to deny Noranda a ten-year rate was based on the unique facts of that case. (Ex. at 88). The Commission approved a shorter rate in that case because it determined that approving a ten-year rate for Noranda would not be just and reasonable and in the public interest. The facts of this case, however, are very different from the facts in *Noranda*.

For example, in *Noranda*, the Commission was specifically concerned about possible harm to Ameren's other ratepayers and noted that the market for electricity may look very different in ten years, and that setting a rate at that distance would not be prudent. (Ex. at 92). There are no similar concerns with the Nucor Contract because Evergy has committed to hold non-Nucor customers harmless from any under-recovery of the cost to serve Nucor. (L.F. at 446) (A014). In addition, the SIL Tariff and Stipulation detail extensive monitoring and reporting commitments on the part of Evergy to ensure that Nucor's costs and revenues are isolated and non-Nucor customers are protected. (L.F. at 150-55; 167).

In *Noranda*, Ameren's other customers had to pay extra to make up for the lower rate given to Noranda (Ex. at 91), but in this case, customers will not pay more to support the Nucor rate. (Ex. at 19 (noting that as the Sedalia facility is new load, "revenues will increase as a result of serving Nucor. There is no need to socialize any reduction of revenues, or shortfall of cost recovery, uniformly to other customers.")). In fact, the

Nucor rate is expected to lower costs to other Evergy customers. (L.F. at 445) (A013). Also in *Noranda*, the evidence showed the Commission was dealing with a company in a "precarious financial situation" which was facing the possibility of plant closure and job losses. (Ex. at 90). By contrast, no similar concern was raised here. Nucor is the largest steel maker in the United States, and its $250 million investment in the plant at Sedalia demonstrates that the company is on strong financial footing and committed to Missouri for the long term. (Ex. at 41, 45).

Finally, the *Noranda* case addressed a rate change that Noranda sought to achieve over the objection of Ameren and several other parties. (Ex. at 79). Indeed, there was no contract between the utility and customer at issue in that case at all. By contrast, this case addresses a contract that resulted from extensive, good faith negotiations between Nucor and Evergy, and a Stipulation which all parties to the case (including MECG) either support or do not oppose.

To summarize, the *Noranda* decision does not stand for the proposition that the Commission may not approve <u>any</u> proposed ten-year contract or rate for electric service without some new statutory authority such as Section 393.355, as MECG asserts. The Commission concluded that based on the particular facts of that case, a ten-year rate for Noranda was not just and reasonable. The facts in this case are very different, as the Commission recognized in approving the Nucor Contract. (L.F. at 445) (A013). *Noranda* does not preclude the Commission from approving a ten-year contract and rate for Nucor under its traditional ratemaking authority.

B. The Commission's Approval of the Nucor Special Contract and Rate Schedule Under its Traditional Ratemaking Authority Rather Than Under Section 393.355 Was Reasonable

1. The Commission approved the Stipulation pursuant to its traditional ratemaking authority, not Section 393.355

In order to create the impression that the Commission relied on Section 393.355 in approving the Nucor Contract, or at least to suggest that the statutory authority the Commission relied on is uncertain, MECG points to several places in the Report and Order where the Commission mentions Section 393.355. *See* Appellant's Brief at 16-19. However, it is clear that the Commission approved the Stipulation under its general ratemaking authority, and not under Section 393.355.

To begin with, the Commission clearly recognized in its Report and Order that Evergy was not requesting approval of the Nucor Contract and rate under the provisions of Section 393.355. (L.F. at 440) (A008). Accordingly, the tariff does not include the net margin tracker mechanism required by that section. (Ex. at 14-15). The Commission could not have approved the Stipulation under Section 393.355 without requiring modifications to the Stipulation and rate schedule to make it comply with that section. That the Commission approved the Stipulation without modification is strong evidence that the Commission approved the Stipulation under its general ratemaking authority, as the parties to the Stipulation requested and intended all along, and as evidenced by the Application.

This interpretation is supported by the language of the Report and Order itself. In approving the Stipulation, the Commission held that a "rate for Nucor that is less than its

fully allocated cost, but more than its incremental cost, is just and reasonable within the meaning of Section 393.130, RSMo 2016, and is not unduly or unreasonably preferential." (L.F. at 445) (A013). The Commission also explained why it was not approving the Stipulation under Section 393.355:

> Questions have been raised about why EMW chose not to seek a special rate under the provisions of section 393.355, RSMo. That statute seems to have been designed to address the conflict between Noranda and Ameren Missouri, and consequently contains provisions that do not fit well with the cordial and cooperative relationship between EMW and Nucor. If the Commission is to approve a special rate under the authority granted by section 393.355, the statute requires that it must allocate the revenue difference between the special rate and the utility's applicable standard rate to all other customers. EMW does not want that benefit, and such an allocation would not be in the best interest of EMW's other customers.
>
> Further, 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. Such a provision is unnecessary and would be unfair to EMW, as it will incur substantial costs to construct new infrastructure to enable it to serve Nucor. (L.F. at 445) (A013).

Despite MECG's attempt to create ambiguity about the statutory basis on which the Commission based its Report in Order, it is clear that the Commission approved the Stipulation under its traditional ratemaking authority and not under Section 393.355. MECG's suggestion that the Commission may have approved the Stipulation under Section 393.355 is baseless. Similarly, MECG's admonition that "the Commission is not permitted to modify statutes on its own to fit the situations as it perceives them" and the cases MECG cites in support (*see* Appellant's Brief at 22-23 and accompanying footnotes) have no relevance in this case, since the Commission did not approve the Stipulation under Section 393.355, and therefore did not "modify the statute" by

approving a rate without a net margin tracker. MECG reads Section 393.355 as repealing the existing, long-standing, and express authority the Commission has under Sections 393.130, 393.140(11) and Section 393.150.1. The legislature could have repealed such authority when it enacted Section 393.355, but it did not. It is MECG's position, rather than the Commission's Order, that seeks to modify existing statutes.

2. Section 393.355 did not alter the Commission's authority to approve special contracts under existing statutes

Section 393.355 creates a new statutory mechanism for approving certain special rates (A027-A028), but it is not the exclusive means by which the Commission can approve the Nucor Contract and SIL Tariff. As discussed above, the Commission has always had the authority to approve special contracts under Sections 393.130, 393.140(11) and 393.150. (A021, A024, A026). Section 393.355 did not amend those statutes or curtail the Commission's long-standing authority to approve special contracts for customers under those statutes in any way. Nothing in the plain language of Section 393.355 indicates that the legislature intended it to be the exclusive means by which the Commission could approve a ten-year contract, and MECG's brief pointed to no such language. If the legislature had intended this, it would have so stated.[6] For example, in *Greenbriar Hills Country Club v. Dir. of Revenue*, 47 S.W.3d 346, 352 (Mo. banc 2001),

[6] *See, e.g.*, Section 386.515, RSMo ("With respect to commission orders or decisions issued on and after July 1, 2011, the review procedure provided for in section 386.510 continues to be exclusive . . . . " (emphasis added)) (A020); Section 386.135.3 ("The commission shall only establish technical advisory staff and personal advisor positions . . . if there is a corresponding elimination in comparable staff positions . . . ." (emphasis added)). (A016).

the Director of Revenue argued that an application for attorney's fees and expenses in a tax case that was filed under a more general statute should have been filed under a more specific statute. The Supreme Court rejected this argument, finding:

> There 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 statues 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.' *Id*.

This Court recently addressed arguments concerning the exclusivity of statutes in *In re Application of Union Elec. Co. v. Pub. Serv. Comm'n,* 591 S.W.3d 478 (Mo. App. W.D. 2019). In that case, the Court rejected an argument that the PISA statute was the exclusive mechanism under which an electric corporation could recover depreciation expenses, finding the argument "entirely unavailing." *Id*. at 487. The Court explained that "[w]here two statutory provisions covering the same subject matter are unambiguous standing separately but are in conflict when examined together, a reviewing court must attempt to harmonize them and give them both effect." *Id*. at 485 (citing *S. Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. Banc 2009)).[7] The Court, in looking at the plain language of the PISA statute noted that there was nothing in the statutory text that "indicate[d] an intention to curtail or limit the RESRAM mechanism" nor did the statute indicate "it [was] the only means to adjust rates for depreciation." *Id*. at 486 (emphasis added).

[7] *See also, Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 33 (Mo. banc 2015).

There is nothing in Section 393.355 that indicates that it is the only means for the Commission to approve any contract, much less the ten-year contract for Nucor at issue here. If Section 393.355 were interpreted as somehow superseding the Commission's general ratemaking authority, the practical effect would be to create a "one size fits all" special contract mechanism for large industrial customers, and the Commission's authority to consider and approve rates tailored to meet the unique needs and circumstances of particular industrial customers (authority which, as explained above, the Commission has exercised for decades) would be dramatically reduced. This would be a detriment to Nucor, Evergy and its other customers, and ultimately the State because, as explained further below, the Section 393.355 mechanism, even if it could be applied in the case of the Nucor Contract, has significant shortcomings when applied in the case of electric service to a new industrial facility such as Nucor Sedalia.

3. It would be unreasonable to utilize Section 393.355 under the circumstances of this case

As the Commission recognized in the Report and Order, Section 393.355 was designed to address the situation in the *Noranda* case. (L.F. at 445) (A013). Section 393.355 is a poor mechanism to use in the case of Nucor Sedalia, a new facility requiring significant new investment on the part of Evergy to serve. The very fact that the Section 393.355 mechanism is clearly designed to address the *Noranda* situation is an indication that the legislature did not intend to supersede the Commission's long-standing authority to approve special contracts under its traditional ratemaking authority.

To begin with, Section 393.355 appears to be inapplicable on its face to the Nucor Contract, since that statute applies only in situations in which the special rate "is not based on the electrical corporation's cost of service for a facility." Section 393.355.2 (emphasis added). (A027). In the case of the Nucor Contract, the rate is based on Evergy's incremental costs to serve Nucor. (Ex. at 18; C.Ex. at 11; L.F. at 445) (A013). By its terms, Section 393.355 does not appear to be designed to facilitate the type of rate included in the Nucor Contract.

Further, the record includes substantial, unrebutted evidence explaining why the net margin tracker mechanism that MECG seeks to impose is reasonable in the Noranda situation, but unreasonable in the case of the Nucor Contract. The Section 393.355 tracking mechanism is intended to track changes in the net margin experienced by a utility serving an existing or re-opened facility, so that the utility's net income is neither increased nor decreased. (Ex. at 14-15). In a scenario with a pre-existing customer facility such a Noranda, there is no need for extensive investment on the part of the utility to serve the customer, and it is realistic to assume that the utility's net income would not change as a result of a special rate to such a facility. (Ex. at 15). In such a case, the tracking mechanism would serve to protect both the utility and the utility's other customers where no investment is required to serve the customer. (*Id.*).

In the case of providing service to a new load such as the Sedalia facility, the utility would need to incur incremental costs to connect the facility to the grid and provide electric service. (*Id.*). Under this scenario, it is reasonable for the utility to be allowed to recover its incremental cost to serve the new customer and earn a return on its

rate base investment. (*Id.*). However, the Section 393.355 tracker mechanism would prevent the utility from recovering the incremental cost of its investment and a return. This is problematic from Evergy's perspective, since it incurred incremental costs of roughly $18 million to serve Nucor. (L.F. at 440) (A008). In fact, the Section 393.355 mechanism would be a poor mechanism to encourage new economic development in general, since a utility would seem to have little incentive to attract new industrial customers if it could not earn a return on the investment the utility would have to make to serve such customers.

Finally, proceeding under Section 393.355 would preclude Evergy's commitment under the SIL Tariff and the Stipulation to hold Evergy's other customers harmless, and potentially could require other Evergy customers to subsidize the Nucor rate at some point in the future. Although Evergy does not expect the Nucor rate to produce a revenue shortfall over the term of the contract, the hold harmless provision provides protection to Evergy's other customers in the event something unexpected happens that changes the economics of the contract, thereby shielding customers from any potential negative rate impacts from the contract for the full ten-year term. (Ex. at 23-24). This hold harmless provision is unique, particularly in the context of an economic development rate. As Staff's counsel observed at the hearing:

> It is a remarkable thing when a utility proposes a new venture in which the risk of loss is borne by the shareholders. It is even more remarkable when that occurs in an economic development context in which the ratepayers are generally expected to provide a subsidy in order to allow some worthwhile venture to go forward. Tr. Vol. III at 46.

The hold-harmless provision of the SIL Tariff, however, could not be implemented if the contract was done under Section 393.355 because that statute specifies that if the rate does not recover the utility's incremental cost to serve the special rate customer, that difference is made up by the utility's other customers. Specifically, Section 393.355.2(2) provides that in each general rate proceeding, the utility must allocate "the reduced revenues from the special rate as compared to the revenues that would have been generated at the rate the facility would have paid without the special rate to the [utility's] other customers through a uniform percentage adjustment to all components of the base rates of all customer classes." (A027).

For these reasons, the Section 393.355 mechanism, even if it could be applied in the case of the Nucor Contract, is a bad fit under the facts of this case. The Commission's decision to approve the Nucor Contract and Stipulation under its general ratemaking authority was just, reasonable, and in the public interest.

CONCLUSION

For the reasons discussed above, the Commission's Report and Order is lawful and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document and the appendix were served on counsel of record through the Court's electronic notice system on May 4, 2020.

This brief complies with the limitations contained in Supreme Court Rule 84.06 and Local Rule 41. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 8,374, excluding the cover, table of contents, table of authorities, signature block, appendix, and this certificate. The font is Times New Roman 13-point type. The electronic copies of this brief were scanned for viruses and found to be virus free. Pursuant to Rule 55.03, the undersigned further certifies the original of this brief has been signed by the undersigned.

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