

Exhibit No. 900

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

<p>Midwest Energy Consumers Group</p> <p style="text-align:center">Appellant, v.</p> <p>Public Service Commission of the State of Missouri, et al.,</p> <p style="text-align:center">Respondents,</p>	<p>Case No. <u>WD83531</u></p>
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**BRIEF OF RESPONDENT PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI IN RESPONSE TO
BRIEF OF APPELLANT MIDWEST ENERGY CONSUMERS GROUP**

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Jurisdictional Statement

This case is before the Court on Midwest Energy Consumers Group’s appeal of the Public Service Commission’s order approving a stipulation and agreement and special incremental load tariff establishing a special rate for a new customer of Evergy Missouri West. The case is properly before this Court under Section 386.510, RSMo (2016) (Supp. 2019). None of the issues on appeal are within the exclusive jurisdiction of the Supreme Court of Missouri under Article V, sec. 3 of the Missouri Constitution.

Statement of Facts

Parties

Appellant Midwest Energy Consumers Group (MECG) was permitted to intervene in the proceedings before the Commission. (LF 436).

Evergy Missouri West (Evergy)¹ is an investor-owned electric corporation and public utility regulated by the Public Service Commission. (LF 437). Evergy provides retail electric service in western Missouri. Its service territory includes Sedalia. (LF 437).

Nucor Steel Sedalia, LLC (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. (LF 437). Nucor was permitted to intervene in the proceedings before the Commission. (LF 436).

Respondent Public Service Commission of the State of Missouri (Commission) is the state agency responsible for the regulation of investor-owned utilities in the state.

The Commission employs a staff (Staff) of technical experts. Staff is a party to all cases before the Commission, unless it files a notice that it does not intend to participate in a particular case. 20 CSR 4240-2.010(10). Staff participated in this case before the Commission. Staff is not a party to any appeal.

Public Counsel is responsible for representing the public in proceedings before the Commission and on appeal from Commission orders and decisions. Section 386.710,

¹ Evergy Missouri West was formerly known as KCP&L Greater Missouri Operations Co.

RSMo (2016). Public Counsel participated in this case, although it did not take a position on the stipulation and agreement and special incremental load tariff.

Commission Proceedings

On July 12, 2019, Evergy filed an application with the Commission seeking approval of a special incremental load (SIL) tariff to serve the Nucor steel production facility in Sedalia, Missouri. (LF 435). The application stated that Evergy and Nucor have entered into a contract establishing the rate and terms of service under which Evergy intends to provide electric service to Nucor. (LF 435). Evergy filed the SIL tariff along with the application. (LF 435-6). The tariff had an effective date of January 1, 2020. (LF 436). Evergy also filed written direct testimony in support of the application. (LF 436). No written rebuttal or surrebuttal testimony was filed. (LF 436). An evidentiary hearing was held on October 17, 2019. (LF 436). After the hearing, the parties filed initial and reply briefs. (LF 436).

Stipulation and Agreement

Evergy, Staff, and Nucor filed a non-unanimous stipulation and agreement on September 19, 2019. (LF 436). The stipulation and agreement was intended to resolve all issues between the signatories. (LF 436). Public Counsel did not sign the stipulation, but did not oppose it. (LF 436). MECG filed a timely objection to the stipulation and agreement. (LF 436). Because of MECG's objection, the stipulation and agreement was treated as the position statement of the signatory parties at the evidentiary hearing. (LF 436). After the hearing but before the briefs were filed, MECG filed written notice withdrawing its objection to the stipulation and agreement. (LF 436).

The Commission's Findings of Fact

Evergy is an electric corporation authorized to provide electrical service in Missouri, including in Sedalia. (LF 437). Nucor and its affiliates manufacture steel and steel products at more than 60 plants in the United States, including 21 steel mills that use electric arc furnaces to produce steel. (LF 437). Nucor is constructing a steel rebar producing micro mill in Sedalia. (LF 437). The plant will use an electric arc furnace to

recycle scrap steel into steel rebar. (LF 437). At full production, the plant will produce about 380,000 tons of steel rebar annually. (LF 437).

When operational, the plant will be the largest user of energy in Evergy West's service territory. (LF 437). The mill will take electricity with a high load factor. (LF 436). The facility will take power directly from a newly constructed substation at 13,800 volts. (LF 437).

At the time of the hearing, construction of the mill was approximately 90% complete. (LF 437). Nucor expected to begin commercial steel production in the first quarter of 2020. (LF 437). Nucor needed to have its electric rate tariff approved and in place before beginning commercial operation. (LF 438).

When complete, the Nucor project will encompass more than \$250 million of private investment and will create 250 new job opportunities. (LF 438). The newly created positions will include highly technical, skilled, and well-compensated positions. (LF 438). The positions have an estimated average annual salary of \$65,000, which is nearly double the current average wage in Sedalia. (LF 438). The plant will benefit the Sedalia area by expanding its tax base. (LF 438).

Nucor accepted Sedalia and Missouri's bid to host the steel production plant after a competitive bidding process that included proposals from other states. (LF 438). Competitive electric rates are very important to Nucor and were a primary factor in its decision to locate its plant in Sedalia. (LF 438). Without the availability of a special rate, Nucor would not have chosen to locate its plant in Sedalia. (LF 438).

The contract between Nucor and Evergy sets out that Evergy will provide electricity to Nucor for a fixed price for a term of ten years. (LF 438). The fixed rate is expected to exceed Evergy's average incremental cost to serve Nucor over that period. (LF 438). The contract rate is above the average incremental cost because it will contribute to the recovery of Evergy's fixed costs and will reduce rates paid by Evergy's other customers below the levels that would exist if Evergy did not have Nucor as a customer. (LF 438-9).

Evergy will obtain the power necessary to serve Nucor by entering into a power purchase agreement (PPA) for the delivery of wind power. (LF 439). The PPA will allow the incremental cost of serving Nucor to be more easily isolated from other Evergy supply sources. (LF 439). Evergy will track the costs of serving Nucor separately from the energy costs incurred to serve other customers, and those costs will not be considered as a component in the calculations associated with Evergy's fuel adjustment clause. (LF 439).

The stipulation and agreement provides that the Commission should approve the contract between Evergy and Nucor and that the Commission should approve the SIL tariff to go into effect by January 1, 2020. (LF 439). Staff also supported the approval of the stipulation and agreement and the SIL tariff. (LF 441).

The stipulation and agreement includes provisions to protect Evergy's other customers from any adverse effects of the contract between Evergy and Nucor. (LF 439). Evergy expects that the overall aggregate revenues it receives from Nucor over the ten year period of the special contract and rate will exceed Evergy's incremental cost to provide that service. (LF 439). Evergy acknowledges that on a month-to-month view, conditions could fluctuate enough to produce an under-recovery of incremental costs in a specific month or months of the test year used to establish rates in a future general rate case. (LF 439). The stipulation and agreement addresses this possibility by providing that no such revenue deficiency would be reflected in Evergy's cost of service during the term of the contract and special rate. (LF 439-40).

Evergy's shareholders, not its ratepayers, would be responsible for any revenue shortfall resulting from the contract. (LF 440). The special rate is not designed to allow recovery of a revenue shortfall from other ratepayers. (LF 440). Because Nucor will represent new load, Evergy's revenues will increase by providing service to Nucor. (LF 440). Because revenues will increase, there is no need to allocate any reduction of revenues or shortfall of cost recovery to other ratepayers. (LF 440).

Evergy will incur substantial capital costs to provide service to Nucor, including approximately \$18 million to construct a new substation to serve the mill. (LF 440). All such incremental costs are included in the calculation of the special rate. (LF 440).

Evergy is not requesting approval of a special rate under Section 393.355, RSMo (2016) (Supp. 2018) and Section 393.356, RSMo (2016) (Supp. 2018). (LF 440). Those statute permits the Commission to approve a special rate for steel production facilities for a set period of time. (LF 443). Nucor would qualify for a special rate under Section 393.355. (LF 443). The Commission found that the statute was not the only source of authority for the approval of the stipulation and agreement. (LF 445-6).

The Commission found that the stipulation and agreement and SIL tariff should be approved. (LF 445). The Commission found that the stipulation and agreement and the SIL tariffs have benefit to the public and to Evergy's other customers. (LF 445-46). The public will benefit from the economic and job development of the plant. (LF 445). Evergy's other ratepayers will benefit because Nucor will contribute to Evergy's fixed costs. (LF 445-6). The Commission found that a tracking mechanism like the one required by Section 393.355 is not appropriate or necessary in this case because the ratepayers will not be required to make up any revenue shortfall resulting from the contract, but any shortfall would be absorbed by Evergy's shareholders. (LF 445). The Commission also found that the kind of tracking mechanism required by Section 393.355.3 would be unfair to Evergy because of the large capital investment Evergy will have to make to provide service to Nucor. (LF 445).

The Commission noted that it is unable to modify or change a rate approved under Section 393.355 during the term of the special rate. (LF 445). The Commission found that, while the statute would have provided the parties an extra level of protection for the ten year term of the contract, they were not required to seek approval under the statute and the decision to not use the statute did not prevent the Commission from approving the stipulation and agreement and special rate. (LF 445). Because MECG had withdrawn its objection, the Commission treated the stipulation and agreement as unanimous. (LF 441).

MECG filed a timely application for rehearing. (LF 449). The Commission denied the application for rehearing. (LF 490). This appeal followed. (LF 493).

Standard of Review

Judicial review of the Commission’s orders and decisions is governed by Section 386.510, RSMo (2016) (Supp. 2019). The Commission’s orders and decisions have a presumption of validity. *Office of Pub. Counsel v. Pub. Serv. Comm’n*, 409 S.W.3d 371, 375 (Mo.banc 2013). The burden is on the party challenging the order or decision to prove by “clear and satisfactory evidence” that the challenged order is unlawful or unreasonable. Section 386.430, RSMo (2016).

Commission orders and decisions are affirmed on judicial review if they are lawful and reasonable. Section 386.510, RSMo (2016) (Supp. 2019). Orders and decisions are lawful if the Commission acted within its statutory authority. *Matter of Mo.-Am. Water Co.*, 516 S.W.3d 823, 827 (Mo.banc 2017). The Commission’s legal decisions are reviewed *de novo*. *Id.* Commission orders and decisions are reasonable if they are supported by substantial and competent evidence on the record as a whole. *Id.* Reasonable orders and decisions are not arbitrary and capricious, and they are not an abuse of the Commission’s discretion. *Id.*

Argument

- I. The order approving the stipulation and agreement and SIL tariff must be affirmed because it is lawful and reasonable within the meaning of Section 386.510 in that the Commission had the statutory authority to approve the contract and special rate between Evergy and Nucor and the approval is supported by competent and substantial evidence on the record as a whole. (Responds to Appellant’s point relied on).**

Whether or not the Commission has acted lawfully depends on whether the Commission has acted within its statutory authority. *Mo.-Am. Water*, 516 S.W.3d at 827. The Commission has the authority to determine what rate is “just and reasonable.” Section 393.130.1, RSMo (2016). When a new rate or contract is filed with the Commission, the Commission is authorized “. . . to enter upon a hearing concerning the

propriety of such rate, charge, form of contract or agreement. . .” Section 393.150.1, RSMo (2016). After the hearing, the Commission is authorized to make an order regarding the rate or contract. *Id.* It is possible for the Commission to have more than one statutorily authorized and lawful method of adjudicating a matter before it. *Matter of Rate Increase Request for Liberty Util., LLC*, 592 S.W.3d 82, 89 (Mo. Ct. App. W.D. 2019) (affirming the Commission’s use of its small utility rate procedure rule to resolve rate cases for small utilities).

The Commission’s approval of the contract at issue in this case was lawful because it was authorized by statute. The Commission had the statutory authority to review the contract between Evergy and Nucor, hold a hearing on Evergy and Nucor’s request for approval of the stipulation and agreement regarding their contract and special rate and to approve the stipulation and agreement and SIL tariff between Evergy, Nucor, and Staff. For the reasons discussed more fully below, the Commission’s reliance on its general ratemaking authority to approve the stipulation and agreement and SIL tariff was a lawful and reasonable alternative to applying the provisions of Sections 393.355 and 393.356 to the stipulation and agreement and SIL tariff negotiated by the parties.

A. The Commission approved the stipulation and agreement and SIL tariff under the statutes governing its general ratemaking authority and not under the provisions of Section 393.355 and Section 393.356.

Section 393.130.1, RSMo (2016) authorizes the Commission to set rates that are “just and reasonable.” The Commission has the authority to approve rate schedules under Section 393.140(11), RSMo (2016). The Commission also has the authority to approve contracts under the procedures set out in Section 393.150.1, RSMo (2016). This is the authority the Commission relied on to approve the stipulation and agreement and SIL tariff in this case. (LF 442-3). This general authority is the authority that Evergy and Nucor relied on in making the request to the Commission for the approval of the stipulation and agreement and SIL tariff. (LF 445-6).

In addition to this general authority, the Commission is authorized to approve a special rate for steel production facilities outside of a general rate case subject to certain

requirements if it makes several determinations. The statute is designed to provide a ratemaking treatment for service to a steel production facility at a rate below the cost to serve the facility. Section 393.355, RSMo (2016) (Supp. 2018). The statute provides for the allocation of those costs to the utility's other ratepayers and ensures that the utility's net margin will not increase or decrease as a result of providing the service. Section 393.355.2(1), RSMo (2016) (Supp. 2018). The statute requires the implementation of a tracking mechanism that would allow for money associated with the provision of the service to be deferred between rate cases and to flow between ratepayers and utilities during a general rate case. Section 393.355.3, RSMo (2016) (Supp. 2018). The special rate cannot be modified or eliminated for the term of the special rate awarded according to the statute. Section 393.356, RSMo (2016) (Supp. 2018).

The Commission must determine that the special rate is in the interest of the state, taking into account the utility's ratepayers, "the incremental cost of serving the facility to receive the special rate," and the interests of the citizens generally in promoting economic development in Missouri, improving the state's tax base, job creation, and other benefits identified by the Commission. *Id.* After a special rate is approved, 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" is allocated between the customers of the utility's other rate classes. Section 393.355.2(2), RSMo (2016) (Supp. 2018).

If the Commission approves a special rate under the statute, it must also approve a tracking mechanism. Section 393.355.2(3), RSMo (2016) (Supp. 2018). The tracking mechanism must be designed to "track changes in the net margin experienced by the electrical corporation serving the facility. . ." as of the date of the utility's most recent general rate case. Section 393.355.3, RSMo (2016) (Supp. 2018). The statute is intended to ensure that the net income of the utility is neither increased nor decreased between

general rate cases and to account for the revenues and expenses tracked under the statute in the revenue requirement² of the utility's next rate case. *Id.*

The statute assumes circumstances that are not present in this case. Those circumstances provide the reasons that the parties did not seek approval of the contract under that statute and the reasons that the Commission did not rely on the statute to approve the contract and the special rate. (LF 444). Section 393.355.2(1) allows for the approval of a rate that does not allow the utility to recover the cost of service to steel production facilities under a special rate. The statute assumes that the utility's other ratepayers will have to pay higher rates to make up the shortfall to the utility. But the rate approved in this case is not such a rate. (LF 446). The rate negotiated between Evergy and Nucor is sufficient to cover the incremental cost of service to Nucor. (LF 445). The rate is sufficient to cover a portion of Evergy's fixed costs to serve Nucor. (LF 445).

MECG's assertion that the only authority available to the Commission in this case is found in Section 393.355 is incorrect. (App. Br. 14). Section 393.355 is not the only source of Commission authority. It was not necessary for the Commission to approve the stipulation and agreement and SIL tariff under that statute. (LF 444). The parties did not seek approval under that statute. (LF 440). The order approving the stipulation and agreement and SIL tariff does not rely on Section 393.355. (LF 444). The order approving the stipulation and agreement and SIL tariff is lawful under the Commission's authority to set just and reasonable rates after proper procedures are filed, as set out in Sections 393.130.1, 393.140(11), and 393.150. (LF 442-3). The order approving the stipulation and agreement and SIL tariff is also reasonable under the facts of this case.

MECG's arguments about the tracking mechanism and the term of the contract fail because they are premised on the faulty assumption the Commission did not have any statutory authority to approve the stipulation and agreement and SIL tariff other than the authority contained in Sections 393.355 and 393.356. MECG also fails to cite to the most

² A utility's revenue requirement is the amount of revenue it needs to collect to recover its expenses, cost of debt, taxes, and authorized return.

relevant case law and misuses a 2015 dispute between Ameren Missouri and Noranda Aluminum to support its argument. Each error will be addressed in turn.

B. The order approving the stipulation and agreement and SIL tariff contains sufficient protections for ratepayers apart from the tracking mechanism specified in Section 393.355.

MECG incorrectly argues that the order approving the stipulation and agreement is unlawful because it does not contain a tracking mechanism to create regulatory assets or regulatory liabilities to track changes in Evergy's net margin as a result of its contract with Nucor. (App. Br. 17). A tracking mechanism is not required for approval of this stipulation and agreement and SIL tariff under the Commission's general authority. Only Section 393.355 contains a provision for a tracking mechanism. Section 393.355.3, RSMo (2016) (Supp. 2018). The tracking mechanism is intended to ensure that the utility's net margin is neither increased nor decreased during the existence of a special rate approved under the statute. Section 393.355.3, RSMo (2016) (Supp. 2018).

Under the tracking mechanism of Section 393.355.3, the accounting for revenues and expenses associated with the provision of service to the facility with the special rate could be deferred. Those revenues and expenses would be recorded on the utility's balance sheet so that they could be considered in the utility's next general rate case. *Id.* The deferred amounts would be added to the utility's revenue requirement in its next general rate case. *Id.*³

MECG incorrectly argues that the stipulation and agreement is invalid because it lacks the type of tracking mechanism in Section 393.355.3. (App. Br. 17). The stipulation and agreement approved by the Commission contains other protections for the ratepayers.

³ Regulatory assets and liabilities are a deferral accounting mechanism that allow specific revenues and expenses to be tracked separately from other revenues and expenses for consideration in a future proceeding. The revenues and expenditures are recorded on the utility's balance sheet rather than appearing on the income statement for the period in which they occurred.

(LF 446). Section 393.355 permits the Commission to approve a special rate for a steel production facility that is below the facility's cost of service. Section 393.355.3, RSMo (2016) (Supp. 2018). Under that statutory framework, the utility's other ratepayers would make up the revenue shortfall caused by the special rate. *Id.* The change in net margin is to be tracked in a regulatory asset or regulatory liability account to be included in the utility's revenue requirement in its next general rate case. *Id.*

There are several reasons that the tracking mechanism in Section 393.355.3 is not appropriate in this case. The rate negotiated in this case was the result of a negotiation that happened outside of a rate case. (LF 443). Nucor is a new customer, and was not previously receiving service from Evergy. (LF 440; LF 443). Under Section 393.355.3, RSMo (2016) (Supp. 2018), the utility's other customers' rates will be designed to allocate any difference between the cost of serving a facility receiving a special rate and the special rate between the utility's other customer classes.

In contrast, the rate and SIL tariff approved in this case are expected to generate enough revenue on an aggregate basis to cover Evergy's incremental cost to serve Nucor over the term of the contract. (LF 439). The Commission found that a tracking mechanism like the one required under Section 393.355 would be inappropriate here because the terms of the contract make the type of revenue tracking required by the statute unnecessary. (LF 445). Any shortfall caused by the contract rate would be absorbed by Evergy's shareholders and would not be allocated to ratepayers. (LF 440). The Commission also found that such a tracking mechanism would be unfair to Evergy because of the large capital investment Evergy has to make to undertake service to Nucor. (LF 445). The cost of the wind power contracts used to serve Nucor will be tracked separately and also will not be included in the amount that the utility recovers from ratepayers through its fuel adjustment clause. (LF 439).

The Commission found that the stipulation and agreement is beneficial to the public and to Evergy's other ratepayers. (LF 445-6). The Commission found that it could approve the stipulation and agreement and the SIL tariff without doing so under Sections 393.355 and 393.356. (LF 445). The Commission's decision is lawful because it is

authorized under Section 393.130, Section 393.140(11), and Section 393.150.1. The Commission's decision to approve the stipulation and agreement and SIL tariff without a tracking mechanism is reasonable in light of the substantial and competent evidence in the record showing that such a mechanism is not necessary under the terms of the agreement. The order approving the stipulation and agreement and SIL tariff is lawful and reasonable and should be affirmed on this point.

C. The order approving the stipulation and agreement and SIL tariff does not abrogate the Commission's authority to set just and reasonable rates during the term of the contract.

Section 393.356, RSMo (2016) (Supp. 2018) provides that a special rate approved under Section 393.355 cannot be eliminated or modified by the Commission for the term of its existence. But the stipulation and agreement in this case was not reached under the provisions of Section 393.355. (LF 445-6). MECG's argument about the Commission's supposed inability to approve a contract with a ten-year term overstates what the Commission did in this case. (App. Br. 18). The Commission did not "bind itself" to the ten-year term of the contract. (LF 445-6). The Commission has the authority to approve a contract between a utility and its customer. Section 393.150.1, RSMo (2016). But the Commission also retains the authority to change or abrogate a contract between a utility and its customers in some circumstances, as demonstrated by several examples in case law.

Utility rates are ultimately set by the Commission, not by private contracts between utilities and their customers. *May Dept. Stores Co. v. Union Elec. Co.*, 107 S.W.2d 41, 49 (Mo. 1937). A utility must obtain the approval of the Commission for any rate that it wants to charge to any customer. *Id.* The approval must be obtained before the utility begins to provide the service. *Id.*

Every correctly took the approach outlined in *May Dept. Stores*. Because Nucor is a new customer, a rate had to be established for service to its facility. (LF 443). Every sought Commission approval for the rate it negotiated with Nucor. (LF 435). The utility requested the Commission's approval before it began to provide service to Nucor. (LF

437). The Commission also granted the approval of the rate before the commencement of service as contemplated by *May Dept. Stores*. (LF 446).

Prior approval of a contract by the Commission does not prevent the Commission from revisiting the contract in a future case. *State ex rel. Capital City Water Co. v. Pub. Serv. Comm'n*, 850 S.W.2d 903, 911 (Mo. Ct. App. W.D. 1993). In *Capital City Water Co.*, the appellant utility argued that the Commission could not invalidate a contract because it had previously approved the contract and had allowed the contract to remain in effect through five rate cases. *Id.* at 909. The Court of Appeals rejected the utility's argument. *Id.* at 911. Because the Commission has an ongoing duty to protect ratepayers, ". . .the Commission cannot commit itself to a position that, because of varying conditions and occurrences over time, may require adjustment to protect the ratepayers." *Id.* That level of flexibility must be available to the Commission to allow it to respond to changing conditions. *Id.* "As a result, contracts between public utilities and their customers cannot limit the ratemaking authority of the Commission." *Capital City Water Co.*, 850 S.W.2d at 911. Public utilities do not have the ability to make contracts that cannot be modified or revoked. *Id.*

The order entered by the Commission does not violate these principles. The Commission acknowledged that the contract has a term of ten years and that the parties intend for the SIL tariff to be in effect for that length of time. (LF 438). The Commission also recognized that the cost of electricity is a major expense for Nucor and that the existence of the SIL tariff for an extended period of time was an important factor in the negotiations between Evergy and Nucor. (LF 438). Without the long term nature of the contract, Nucor would not have chosen to locate its facility in Sedalia. (LF 438). The Commission found that the facility was to the benefit of the state and the public. (LF 444-5). The Commission also found that the terms of the contract between Evergy and Nucor contains protections for ratepayers that are intended to insulate them from any adverse result of the contract. (LF 445).

However, while the Commission approved the stipulation and agreement, it is not a party to the contract. A contract cannot negate the Commission's authority to set just

and reasonable rates. The Commission's order approving the stipulation and agreement and the SIL tariff does not bind a future commission as MECG alleges. (App. Br. 18; LF 445-6).

The Commission retains the authority to revisit the contract in the future as contemplated in *Capital City Water*. If circumstances change such that the contract is no longer in the interest of ratepayers, the Commission retains the authority to modify or revoke it. If the contract rate is challenged at some point in the future, the Commission will have the authority to determine whether the rate approved in this case continues to be just and reasonable and in the interest of the ratepayers. MECG's characterization of the report and order as an attempt by the Commission to limit its own authority to consider changed condition at some point in the future is inaccurate. (App. Br. 18-9). The order approving the stipulation and agreement and SIL tariff noted that Section 393.356 would have provided additional assurance that the agreed-upon rate would remain in effect for the entire length of its term, but also noted that the parties chose not to proceed under that statute. (LF 445).

The Commission revoked the contract in *Capital City Water* because it deemed that the contract was no longer in the interest of ratepayers. 850 S.W.2d at 908. The Commission has also invalidated a previously approved stipulation and agreement when it was determined that it was harmful to the utility. *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 328 S.W.3d 329, 343 (Mo. Ct. App. W.D. 2010). In that case, the Commission terminated a previously approved agreement that limited the utility's ability to have all of its fuel and purchased power costs considered in a rate case. *Id.* The Commission terminated the agreement because it determined that excluding consideration of the utility's full fuel costs in rates would not result in a just and reasonable rate for the utility. *Id.* at 345. The Commission's decision to terminate the agreement was upheld on judicial review. *Id.* The termination of the agreement was permissible even in light of the existence of a new statute that prohibited the termination of "performance based plans" during the life of the plan. *Id.* The court held that the statute did not prevent the

termination of the agreement because the agreement was not reached under the statute. *Praxair, Inc.*, 328 S.W.3d at 345.

The Commission found that the stipulation and agreement and the SIL tariff has economic and social benefits to the public and will contribute to Evergy's fixed costs, which benefits ratepayers. (LF 444-5). However, there is no guarantee that circumstances will remain the same indefinitely. As in *Praxair*, the Commission could review the agreement and SIL tariff in the future. If the Commission determined that continuation of the stipulation and agreement and SIL tariff was harmful to Evergy, the Commission retains the authority to modify or revoke the agreement. MECG's brief completely disregards the relevant case law on this point. (App. Br. 13). As a result, MECG reads a result into the Commission's order approving the stipulation and agreement and SIL tariff that the order itself does not require. (App. Br. 18-9).

The order approving the stipulation and agreement and SIL tariff is lawful because it is supported by the applicable statutes and the case law applicable to Commission authority regarding contracts between utilities and their customers. It is reasonable because it is supported by the substantial and competent evidence about the intention of the parties to proceed under statutes other than Sections 393.355 and 393.356 in the record. The order approving the stipulation and agreement and SIL tariff should be affirmed on this point.

D. The case law relied on by MECG does not support its position.

While MECG's brief does not cite to or rely on any of the case law regarding contracts between utilities and their customers, the brief does rely on a Supreme Court of Missouri case that is not relevant to the situation present in this case. (App. Br. 13). The principal case MECG relies on is *State ex rel. Utility Consumers Council of Mo. v. Pub. Serv. Comm'n*, 585 S.W.2d 41 (Mo.banc 1979) (*UCCM*).

In *UCCM*, the court held that the Commission did not have the statutory authority to approve a fuel adjustment clause tariff. 585 S.W.2d at 59. The circumstances in *UCCM* are not analogous to this case. *UCCM* involved an adjustment to previously-approved rates for existing customers outside of a general rate case. *UCCM*, 585 S.W.2d at 47. The

Commission has no authority to make such adjustments without statutory authorization. *Id.* at 59. Here, Nucor is a new customer. (LF 438; LF 440). It did not have a previously approved rate that was being changed outside of a general rate case. (LF 438; LF 440; LF 443). It was necessary for a new rate to be established for Nucor. (LF 438). Under *May Dept. Stores* and Section 393.150, the rate could be established through a contract that was approved by the Commission before Evergy began to provide service to Nucor under the terms of the contract. Evergy applied to the Commission for approval before it began providing service to Nucor. (LF 438). The order approving the stipulation and agreement and SIL tariff does not change or affect any previously established rate. (LF 440; LF 443).

The order approving the stipulation and agreement is lawful and reasonable and must be affirmed on this point because *UCCM* does not compel a result other than the one reached in this case, and the order approving the stipulation and agreement and the SIL tariff is consistent with the relevant statutes and case law as discussed more fully above.

E. The 2015 dispute between Noranda Aluminum and Ameren Missouri is not analogous to this case.

The Commission is not bound by its own prior decisions. *State ex rel. Ag Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo.banc 2003). A court will not reverse a Commission decision on judicial review simply because it may be inconsistent with a prior decision. *State ex rel. Aquila, Inc. v. Pub. Serv. Comm'n*, 326 S.W.3d 20, 32 (Mo. Ct. App. W.D. 2010). Such a decision would only be reversed on judicial review if it is otherwise unreasonable. *Id.* MECG does not allege that the order on review is unreasonable. (App. Br. 5).

During a rate case for Ameren Missouri in 2015, a disagreement arose between Ameren Missouri and its largest customer Noranda Aluminum (Noranda). (LF 440-1). The parties to the rate case did not agree on the terms of the provision of a special rate for Noranda. (LF 440-1). The Commission established a special rate for Noranda, but declined to make the rate permanent for the ten year period Noranda requested. (LF 440).

After the Commission did not establish the rate for the time period that Noranda requested, the legislature enacted Sections 393.355 and 393.356. (LF 445).

The Commission found that this case was unlike the Noranda case in many ways (LF 445). Nucor was not an existing customer of Evergy. (LF 440). A rate had to be established for service to the facility. (LF 443). Unlike Ameren Missouri and Noranda, the parties collaborated on the negotiation of a rate for service. (LF 440-1; LF 445). The rate that the parties agreed to is unlike the rate that Noranda requested in 2015, which was below Noranda's cost of service and allocated the resulting shortfall to Ameren Missouri's other ratepayers. (LF 445).

The negotiated rate in this case is not a rate that is below the incremental cost Evergy will incur to serve Nucor. (LF 445). Because the rate will allow the utility to recover a portion of its fixed costs, Evergy's other ratepayers will benefit from the contract. (LF 445). The rate approved in this case does not affect the rates set for other ratepayers in Evergy's most recent rate case. (LF 443). The contract between Evergy and Nucor instead insulates the ratepayers from any losses that Evergy may experience as a result of the contract because ratepayers will not have to make up for any losses in a future rate case. (LF 446). Any losses sustained by Evergy as a result of the special rate will be absorbed by the utility's shareholders. (LF 439-40).

The Commission found that the differences between this case and the 2015 dispute between Noranda and Ameren Missouri were an important consideration in whether or not to approve the stipulation and agreement and SIL tariff outside of Sections 393.355 and 393.356. (LF 439-40; LF 445-6). The Commission rejected MECG's argument that the outcome of the Noranda case dictated the outcome of this case. (LF 439-40; LF 446). The Commission found that approval of the stipulation and agreement and the SIL tariff was appropriate in light of the facts presented in the stipulation and agreement. (LF 446).

The Commission was not bound by its decision not to adopt the term proposed by Noranda in the 2015 Ameren Missouri rate case. This Court should not disturb the Commission's order based on the outcome of that rate case. This case is factually distinct from the 2015 rate case, and the facts in this case warrant the differing outcomes. The

Commission's decision is both lawful and reasonable under the statutes applicable to this case and under the factual circumstances underlying the stipulation and agreement and the SIL tariff. The order approving the stipulation and agreement and SIL tariff are lawful and reasonable and should be affirmed on this point.

Conclusion

For the above reasons, the Commission respectfully requests that the order approving the stipulation and agreement and SIL tariff be affirmed in its entirety. The Commission requests such other relief as the Court deems just and proper.

Respectfully submitted,

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Certificate of Compliance and Service

I hereby certify that the foregoing Respondent’s Brief of the Public Service Commission of the State of Missouri complies with the limitations contained in Rule 84.06(c) and that:

1. The signature block above contains the information required by Rule 55.03;
2. The brief complies with limitations contained in Rule 84.04(b);
3. The brief contains 6,279 words, as determined by the word count feature of Microsoft Word.

I further certify that copies of the foregoing have been served by means of electronic filing to all counsel of record this 4th day of May, 2020.

/s/ Jennifer Heintz
Jennifer Heintz