

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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

POST HEARING BRIEF OF NUCOR STEEL SEDALIA, LLC

/s/ Stephanie S. Bell
Stephanie S. Bell
Ellinger & Associates, LLC
308 East High Street
Suite 300
Jefferson City, MO 65101
(573)750-4100
sbell@ellingerlaw.com

/s/Michael K. Lavanga
Peter J. Mattheis
Michael K. Lavanga
Stone Mattheis Xenopoulos & Brew, PC
1025 Thomas Jefferson Street, N.W.
Suite 800 West
Washington, D.C. 20007
(202)342-0800
pjm@smxblaw.com
mkl@smxblaw.com

Attorneys for Nucor Steel Sedalia, LLC

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COMES NOW, Nucor Steel Sedalia, LLC, a Division of Nucor Corporation (“Nucor”), and respectfully submits its post hearing brief in this proceeding.

I. INTRODUCTION

In 2017, Nucor Corporation, the largest steel maker in the United States, announced plans to build a new steel “micro mill” in Sedalia, Missouri. Nucor will invest over \$250 million to construct the Sedalia plant and, when completed, the plant will provide over 250 full-time jobs at an average pay more than double the average for Pettis County. Bringing Nucor to Sedalia was a significant economic development win for Missouri and was achieved through the efforts of a public-private partnership including the Governor’s Office, numerous state, county, and local agencies, and private companies such as Evergy Missouri West, Inc., (f/k/a/ KCP&L Greater Missouri Operations Company) (referred to herein as “Evergy” or “GMO”).

The steel making process is incredibly energy intensive, and electric energy is typically among the highest variable costs at a Nucor steel mill. Therefore, it is critical that Nucor have access to a fixed, long-term, and competitive electric rate to serve the plant. Evergy committed to provide a rate that met Nucor’s needs, and without this commitment, Nucor would not have chosen Sedalia as the site to build its new facility. In this proceeding, Evergy and Nucor request Commission approval for the power supply contract and rate to serve the Sedalia facility.

The Commission Staff, Evergy, and Nucor have entered into a Stipulation and Agreement (“Stipulation”) in this case recommending approval of the Nucor contract and rate and including more details on monitoring and reporting commitments by Evergy and other customer protections. The Office of Public Counsel (“OPC”) does not oppose the stipulation. Although the Midwest Energy Consumers Group (“MECG”) initially objected to the stipulation, MECG has since withdrawn that objection. Therefore, the Stipulation is currently unopposed.

As discussed in more detail in this brief, there is strong evidence on the record in this case supporting Commission approval of Evergy’s Application, as modified by the Stipulation. The testimony by Evergy and Nucor witnesses supporting the Special Rate for Incremental Load Service Schedule (“SIL Tariff”) and the Nucor Contract is un rebutted. Further, all parties, including OPC and MECG, are on record supporting the Nucor rate.

On the legal question of what statutory authority the Commission can rely on to approve the contract, Nucor’s position is that the Commission has the authority to approve the contract pursuant to its traditional ratemaking authority under Sections 393.130, 393.140(11), and 393.150(1). The Commission has previously approved many special contracts, including contracts with a ten-year term, pursuant to such authority. Although the newly enacted Section 393.355, RSMo, is one tool the Commission can use to approve an economic development contract, it is not the only vehicle to approve a ten-year agreement and does not proscribe or supersede the Commission’s traditional ratemaking authority. Section 393.355 is problematic where significant new utility investment is needed to serve a new customer, as is the case with service to the Sedalia facility. Further, using Section 393.355 would impose more risk on non-Nucor customers because those customers would be required to subsidize any difference between Nucor’s incremental cost rate and the otherwise applicable rate, in contrast to the proposal in this

case, where non-Nucor customers are held harmless by Evergy from any under-recovery. It is unreasonable to unnecessarily place risk on other customers where, as here, there are other suitable options.

For these reasons, and as discussed further below, the Commission should approve the Nucor contract and rate in this case as proposed, subject to the additional protections and commitments contained in the Stipulation.

II. PROCEDURAL HISTORY

On July 12, 2019, Evergy filed an application seeking approval of: (i) a new SIL Tariff and (ii) an Incremental Load Rate Contract for electric service between Nucor and GMO, which includes the specific rate schedule to serve Nucor (“Nucor Contract”).¹ Evergy requested that the Commission approve Schedule SIL and the Nucor Contract by December 1, 2019, so that the rate schedule could be effective no later than January 1, 2020.

A prehearing conference was held on July 23, 2019, where the Commission granted the intervention of MECG. The Commission subsequently granted Nucor’s intervention.

On September 19, 2019, Evergy, Staff, and Nucor entered into a Stipulation that recommends the approval of the SIL Tariff and the Nucor Contract. OPC was not a signatory to the Stipulation, but it did not object to the Stipulation. MECG filed an objection to the Stipulation. As a result, the Stipulation became the joint position of Evergy, Staff, and Nucor, and the case proceeded to hearing. The evidentiary hearing was held on October 17, 2019.

On October 28, 2019, MECG withdrew its objection to the Stipulation.

¹ The rate schedule that will apply to Nucor, Confidential Schedule SIL-1, is included as an attachment to the Nucor Contract. Ex. 2, Ives Direct at Confidential Schedule DRI-2.

III. ARGUMENT

A. **Should the Commission Approve the Special Incremental Load (“SIL”) Tariff Proposed by GMO and the Special Incremental Load Rate Proposed for Nucor Subject to the Customer Protections and Monitoring and Reporting Requirements Recommended by Staff, Nucor, and GMO?**

Yes. Approving the SIL Tariff and the Nucor Contract will ensure Nucor gets the electricity pricing and term it needs, provide protections and affirmative benefits to other Evergy customers, and provide significant economic development benefits to Sedalia, Pettis County, and the state of Missouri.

1. **Overview of the Nucor Sedalia Project**

Nucor Corporation is the nation’s largest steel maker. Headquartered in Charlotte, North Carolina, Nucor Corporation has facilities engaged in the manufacture of steel and steel products located throughout the country. Among these facilities are 21 steel mills that employ electric arc furnaces to melt and recycle scrap steel into new steel products.² In addition to being the largest steel maker in the United States, Nucor is also the largest recycler in North America, recycling more than 17 million tons of scrap steel in 2018.³

The newest steel mill in Nucor’s fleet is nearing completion in Sedalia, Missouri. Nucor will invest approximately \$250 million to build the Nucor Sedalia facility, a “micro mill” that will produce steel rebar for use in the construction industry in Missouri, Kansas, and the surrounding region.⁴ Nucor expects to invest over \$325 million in the Sedalia facility over the next 22 years, with the majority of that investment made by the end of this calendar year.⁵

² Ex. 4, Van de Ven Direct at 3.

³ *Id.*

⁴ *Id.* at 3-4; Ex. 1, Craig Direct at 2; Ex. 3, Stombaugh Direct at 4.

⁵ Ex. 1, Craig Direct at 4.

As Jessica Craig, the Executive Director of Economic Development Sedalia-Pettis County, explains, 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.”⁶ When completed, Nucor Sedalia will create more than 250 jobs at the plant. These jobs will be permanent, full-time positions with an average annual wage of over \$65,000, which is twice the current county average of Pettis County.⁷ 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.⁸ Further, Nucor will serve as the anchor tenant for the new Sedalia Rail Industrial Park, which will offer from 5 to 1,500 acres to industrial customers seeking rail-served sites for new facilities.⁹

Nucor conducted a multi-state search for a site for its new Midwest micro mill,¹⁰ and attracting Nucor to Missouri was a significant economic development win for the state. Mark Stombaugh, the Director of the Regional Engagement Division for the Missouri Department of Economic Development, testifies that attracting Nucor to Sedalia “showcased the full teamwork necessary for economic development successes, a true public-private partnership including: state and local economic development teams, workforce training and education providers, utility

⁶ *Id.* at 3.

⁷ *Id.*

⁸ *Id.* at 3, 5.

⁹ *Id.* at 3-4. In 2018, the City of Sedalia was awarded a U.S. Department of Transportation Better Utilizing Investments to Leverage Development grant in the amount of \$10.09 million to construct the rail infrastructure to serve Phase 1 of the park. *Id.* at 4. The Sedalia Rail Industrial Park will be the largest such park in the Midwest and on Union Pacific’s service line throughout the United States and will have the ability to grow to exceed 2,500 acres. *Id.*

¹⁰ Ex. 4, Van de Ven Direct at 4.

providers, and local and state elected officials and legislative bodies.”¹¹ This statewide team crafted an aggressive and innovative incentive package for Nucor.¹²

2. The Electric Rate Included in the Nucor Contract Meets Nucor’s Needs and was a Critical Factor in Nucor’s Decision to Build the Plant in Sedalia

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.¹³ As such, a competitive electric rate was a primary factor in Nucor’s decision to locate in Sedalia.¹⁴ As part of the statewide team working with Nucor, Evergy prepared indicative pricing and revenue justification to serve Nucor.¹⁵ 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.¹⁶ As Kevin Van de Ven, the Vice President and General Manager of Nucor Steel Sedalia testifies, “[b]ut for the availability of a special rate, Nucor would not have chosen to locate a plant and commence steelmaking operations in Sedalia.”¹⁷

An overview of the Nucor Contract is provided the testimony of Darrin Ives, Evergy’s Vice President of Regulatory Affairs. The agreement 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.¹⁸ The special incremental load rate

¹¹ Ex. 3, Stombaugh Direct at 3. The statewide team working with Nucor included 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, KCP&L, Liberty Utilities, Union Pacific, and Missouri Partnership. *Id.* at 4.

¹² *Id.* at 5; Ex. 2, Ives Direct at 4-5.

¹³ Ex. 4, Van de Ven Direct at 6.

¹⁴ *Id.* at 6-8.

¹⁵ Ex. 2, Ives Direct at 9.

¹⁶ *Id.* at 9-10.

¹⁷ Ex. 4, Van de Ven Direct at 8.

¹⁸ Ex. 2, Ives Direct at 11.

attached as a schedule to the contract is a three-part rate including a customer charge, demand charge, and an energy charge.¹⁹ The demand and energy charges are seasonally differentiated, consistent with the approach used in other GMO commercial and industrial rates.²⁰ The demand charge includes provisions to incentivize off-peak usage, allowing Nucor to exceed on-peak demand in off-peak hours and not be billed for that off-peak demand.²¹ Other features of the rate include a minimum monthly demand to provide Evergy with a minimum level of cost recovery through the demand component of the rate and a reactive demand charge.²² Importantly, aside from the Tax and License Rider, other riders, including the Fuel Adjustment Clause, would be excluded from the Nucor rate.²³ Not subjecting Nucor to these variable riders was critical in ensuring that Nucor's rate would be fixed for the full term of the contract.²⁴

As explained by Mr. Van de Ven, the Nucor Contract meets Nucor's needs with respect to price, term, and rate design:

The [Nucor Contract] will provide Nucor with a relatively long-term arrangement with known rates, terms, and conditions. We expect that the rates . . . will produce reasonable and competitive electricity costs. Also, seasonal and time of use elements . . . will give us the flexibility to adjust our electric usage in response to price signals and market conditions. The long-term nature of the agreement . . . coupled with the flexibility built into the Rate Schedule, will allow Nucor to plan for the future and be better positioned to adapt to changes in the steel rebar market. In short, the [Nucor Contract] and Rate Schedule will help ensure the long-term viability of the Sedalia Plant. This, in turn, means that the plant should continue to provide economic benefits both locally and state wide for many years to come.²⁵

¹⁹ *Id.* at 11-12.

²⁰ *Id.* at 12.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 14. At the hearing, MECG took issue with Nucor being exempted from paying Evergy's Renewable Energy Standard Rate Adjustment Mechanism ("RESRAM") charge. Tr. Vol. III at 68. However, nothing in the RESRAM statute or rule prevents a special contract from being exempt from RESRAM charges. See 393.1030.2(4), RSMo. and 20 CSR 4240-20.100(6).

²⁴ Tr. Vol. III at 127-28.

²⁵ Ex. 4, Van de Ven Direct at 7.

While it is clear that the parties to the Stipulation in this case recognize the benefits of the proposed rate, it is also worth noting that both OPC and MECG have expressed support for the proposed rate as well.²⁶

3. The Rate is Designed to Recover the Incremental Cost to Serve Nucor and Will Provide Non-Nucor Customers Protection Against any Under-Recovery

The un rebutted evidence in this case demonstrates that the Nucor rate is designed to recover the incremental cost to serve Nucor over the ten-year term of the agreement, that the Nucor contract will make a contribution to the fixed costs of the system, providing a positive benefit to non-Nucor customers and, in the unexpected event that the revenues from the Nucor contract do not cover the cost of service to Nucor, then non-Nucor customers will be held harmless.

In developing the Nucor rate, all costs, including infrastructure investment, were estimated for the ten-year term of the agreement.²⁷ Based on Nucor’s estimated loads, the rate was designed to recover the expected costs to serve the facility, including infrastructure costs (including the approximately \$18 million that GMO spent to build the infrastructure needed to serve Nucor’s load), administrative costs, and the cost of energy supply to the facility, including actual energy, power pool costs, energy management costs, and supply support costs.²⁸

To facilitate the Nucor rate, GMO will enter into a power purchase agreement (“PPA”) for wind energy to serve the Nucor facility.²⁹ The PPA will be for wind power delivered to the

²⁶ See Tr. Vol. III at 53 (noting that the OPC “does support the special rate for Nucor.”); *id.* at 57-58 (stating that MECG believes “Nucor should be given the special rate in this case. Not only the special rate, but the ten-year term that it seeks.”).

²⁷ Ex. 2, Ives Direct at 12.

²⁸ *Id.* at 12-13.

²⁹ *Id.* at 13.

GMO node, and the use of the PPA will enable the incremental costs of serving the Sedalia facility to be fixed and more easily isolated from other GMO energy supply sources.³⁰ GMO plans to obtain a PPA for 75 MW of energy, which exceeds Nucor's expected load, but will provide more kWh production to support Nucor on an annual basis.³¹ To manage the hour to hour variation between Nucor's load and the PPA production, GMO is adding Market Adjustment costs to the PPA, which will account for the expected production and transmission market exposure of the variation on an annual basis.³² GMO is also adding administration and sufficient contingency costs to address managing the energy resource.³³ GMO will track the costs to serve Nucor separately from the energy costs incurred to serve other customers.³⁴ Nucor's costs will also be tracked outside the GMO fuel adjustment clause and will not be a component in the calculation of the Fuel Adjustment Clause.³⁵ Since Nucor is being served by a dedicated energy resource separate from the resources used to serve other customers, the Fuel Adjustment Clause will not apply to Nucor.³⁶

GMO will monitor the costs and revenues associated with Nucor to evaluate the cost/revenue relationship each month.³⁷ While on a monthly basis, costs and revenues could fluctuate enough to produce an under-recovery in certain months, GMO expects that overall aggregate revenues from Nucor will cover the incremental costs to serve Nucor in the aggregate for the ten-year contract term.³⁸

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 14.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 15.

When the test year for a general rate review proceeding is set, the data being tracked from the Nucor contract will be incorporated into the general rate review.³⁹ All positive revenues (*i.e.*, revenues in excess of the incremental cost to serve Nucor) will serve to reduce the overall revenue requirement for the case.⁴⁰ If revenues are deficient for the test year period (*i.e.*, revenues fall short of the cost to serve Nucor), an additional revenue adjustment covering the shortfall will be made to the revenue requirement calculation.⁴¹ GMO's approach will serve to share the expected, positive benefit of the Nucor Contract with all customers, but will provide protections to GMO's other non-Nucor customers if revenues happen to fall short of incremental cost in the test year of the case.⁴²

4. The Nucor Contract Complies with the Requirements of the SIL Tariff

Evergy proposes that the Nucor Contract be approved under the SIL Tariff, a new tariff designed to be consistent with Section 393.355 in purpose but one that is designed to be a better fit for new incremental load such as the Sedalia facility.⁴³ The SIL Tariff, as modified, is included as Attachment 4 to the Stipulation. The Nucor Contract complies with the requirements of the SIL Tariff, and additional supporting documentation required by the SIL Tariff is provided in un rebutted testimony in this case.⁴⁴

5. The Stipulation Recommends that the Nucor Contract and Rate be Approved and Provides Additional Detail on GMO Monitoring and Reporting Commitments and Other Customer Protections

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 15-16.

⁴³ *Id.* at 7-8.

⁴⁴ *Id.* at 7-11.

Staff, Evergy, and Nucor entered into the Stipulation on September 19, 2019. OPC did not sign on to the Stipulation, but OPC did not object. Although MEEG initially objected to the Stipulation, MEEG has since withdrawn that objection.⁴⁵ The key features of the Stipulation include the following:

- Recommends that the Nucor Contract and rate be approved as proposed.⁴⁶
- Adopts detailed provisions related to cost and revenue monitoring and reporting.⁴⁷
- Explains how costs and revenues of the Nucor Contract will be treated for purposes of ratemaking.⁴⁸
- Explains how the Nucor Contract will be treated for purposes of Section 393.1655, RSMo.⁴⁹
- Reaffirms the operational communications commitments contained in the Nucor Contract.⁵⁰

In short, the Stipulation recommends that the Nucor Contract be approved and also provides additional details and commitments on the part of Evergy to ensure that other customers will benefit from Nucor's presence in Sedalia but will in no case subsidize the Nucor rate. The Stipulation protects customers, is in the public interest, and represents a reasonable resolution to this proceeding.⁵¹

⁴⁵ Case No. EO-2019-0244, Withdrawal of Objection (October 28, 2019).

⁴⁶ Ex. 5, Stipulation at 1.

⁴⁷ *Id.* at 2-6.

⁴⁸ *Id.* at 6.

⁴⁹ *Id.* at 6-7.

⁵⁰ *Id.* at 7.

⁵¹ Tr. Vol. III at 117-18.

B. Must the Proposed Special Incremental Load Tariff and Nucor Special Contract be Approved Pursuant to Section 393.355, RSMo? If Not, Under What Statutory Authority is the Commission Approving the Terms of the SIL Tariff and the Nucor Special Contract?

The SIL Tariff and the Nucor Contract need not be approved pursuant to Section 393.355, RSMo. The Commission may approve the SIL Tariff and the Nucor Contract under its traditional ratemaking authority and, under the facts of this case, that would be the most reasonable course.

1. The Commission May Approve the SIL Tariff and the Nucor Contract Under its Traditional Ratemaking Authority

The Commission has broad discretion to set just and reasonable rates.⁵² The Commission's authority to set just and reasonable rates is derived from Sections 393.130, 393.140(11) and 393.150, RSMo. As the courts and the Commission have recognized on numerous occasions, this authority includes the authority for the Commission to approve economic development tariffs⁵³ and special contracts between utilities and individual customers, like the Nucor Contract in this case.⁵⁴ Further, several of the contracts the Commission has approved have included terms of ten years or longer.

⁵² *State ex rel. Capital City Water Co. v. Mo. 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)).

⁵³ *See, e.g.*, Case No. EA-2005-0180 Order Approving Stipulation and Agreement (Mar. 10, 2005) (approving service from Ameren to Noranda under a new LTV rate schedule); Case No. WT-2005-0156, Order Approving Tariff (Oct. 2, 2003) (approving an economic development tariff proposed by Missouri-American Water Company relating to a pork processing facility in St. Joseph.); Case No. ET-2019-0149, Order Granting Expedited Approval of Tariff Sheet (July 10, 2019) (regarding Ameren Missouri economic development riders).

⁵⁴ *See, e.g., State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n*, 116 S.W.3d 680 (Mo. App. W.D. 2003). The 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.*

In 1995, KCP&L sought Commission review of a proposed special 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.”⁵⁵ 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.”⁵⁶ 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.⁵⁷ “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.”⁵⁸ Because the special 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.⁵⁹

In *Case No. WT-2004-0192*, the Commission approved a special service contract and tariff sheets related to Premium Pork (now Triumph Foods).⁶⁰ The project was projected to include an investment of approximately \$130 million and add 1,000 jobs. According to the Commission “Premium Pork and Missouri-American . . . negotiated an agreement that, if approved by the

⁵⁵ *In re Kansas City Power & Light Co.*, No. EO-95-181, 1995 WL 789407, at *4 (Nov. 22, 1995).

⁵⁶ *Id.* at *5.

⁵⁷ *Id.*

⁵⁸ *Id.* at *4.

⁵⁹ *Id.*; see also *In re Kansas City Power & Light Co.*, Report and Order, Case No. EO-78-227, 22 Mo.P.S.C. (N.S.) 26 (1978) (Armco Steel Corporation) (The Commission approved a five-year contract between KCP&L 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.*, Case No. ER-83-49, Report and Order, 26 Mo.P.S.C.(N.S.) 104, 139-40 (1983) (KCP&L entered into an agreement with Mobay Chemical Corporation).

⁶⁰ See Case No. WT-2004-0192, Order Concerning Agreement and Tariffs, Application to Intervene, and Motions to Suspend Tariffs at 12 (Nov. 20, 2003).

Commission, will provide water service at a competitive rate for a period in excess of ten years.”⁶¹ The record showed that net benefits would accrue to the State of Missouri as a result of increased annual payroll. 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.⁶² 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.⁶³ 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.⁶⁴ The Commission found net benefits would accrue to the State of Missouri as a result of increased annual payroll. 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.”⁶⁵ 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

⁶¹ *Id.* at 9.

⁶² *Id.* at 12. In 2009, OPC requested “review” of the Triumph special contract. *See* Case No. WO-2009-0303. The EDR Tariff provided that “after the initial five years of the contract” the Staff or OPC could request a Commission review of the contract. *See* Case No. WO-2009-0303, Order Denying Public Counsel's Request for a Review of a Contract for Retail Sale of Water at 2 (May 21, 2009). The EDR Tariff also specifically provided under what conditions the Commission could adjust the rate conditions or direct the Company to terminate the contract. *Id.* The Commission ultimately denied the request by OPC noting that “Triumph had not yet received the five-year benefit contemplated by the contract.” *Id.* at 4.

⁶³ Case No. WO-2009-0043.

⁶⁴ Case No. WO-2009-0043, Order Approving Agreement, Granting Waiver of Tariff Provision, and Approving Tariff at 4 (Sept. 3, 2008).

⁶⁵ *Id.* at 4 (emphasis added).

detriments to the State or other water service customers.⁶⁶ Based on this evidence, the Commission approved the special service contract and the tariff.⁶⁷

The SIL Tariff and the Nucor Contract fit comfortably within the parameters the Commission has established for approving special contracts under its traditional ratemaking authority, as reflected in examples cited above. 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. There will be no risk of other customers subsidizing the Nucor rate. Benefits will accrue to the state of Missouri because the rate reflected in the Nucor Contract will facilitate the opening of a new steel production facility in Sedalia, which will provide many direct and indirect jobs and associated economic development benefits. The rate is non-discriminatory because the SIL Tariff would allow Evergy to possibly negotiate additional incremental cost contracts with other similarly situated customers. The Commission can, and should, approve the SIL Tariff and the Nucor Contract under its traditional ratemaking authority.

2. Section 393.355, RSMo, Is Not the Exclusive Means by Which the SIL Tariff and the Nucor Contract May be Approved

Section 393.355 is not the exclusive means by which the Commission can approve the proposed SIL Tariff and the Nucor Contract. As discussed above, since its inception, the Commission has had the authority to approve special contracts under Sections 393.130, 393.140(11) and 393.150, RSMo. Section 393.355 did not amend those statutes in any way. If the Legislature intended to revoke the power previously given to the Commission under those statutes, it would have amended those sections.

⁶⁶ *Id.* at 5.

⁶⁷ *Id.* at 6.

Nothing in the plain language of Section 393.355, RSMo, indicates the legislature intended it to be the exclusive means by which the Commission could approve the special contract at issue here. Section 393.355 does not in its plain language suggest it is an exclusive procedure. If the Legislature desired it to be exclusive, it would have so stated.⁶⁸ The legislature could have also indicated Section 393.355, RSMo was the “only” way for a steel company to obtain an economic development rate.⁶⁹ It did not do so.

The Court of Appeals recently addressed arguments concerning the exclusivity of statutes in *Union Electric Company v. Missouri Public Service Commission*.⁷⁰ In that case, OPC argued that the PISA statute was the exclusive mechanism under which an electric corporation could recover depreciation expenses.⁷¹ The court found OPC's argument "entirely unavailing."⁷² The court explained:

Where 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.⁷³

The court, in looking at the plain language of the PISA statute noted 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.”⁷⁴ Similarly, in this case, there is nothing in Section 393.355 to indicate that it is the only means for the Commission to approve a special contract for a steel mill.

⁶⁸ 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)).

⁶⁹ See, e.g., Section 386.135.3, RSMo (“The commission shall only establish technical advisory staff and personal advisor positions . . . if there is a corresponding elimination in comparable staff positions” (emphasis added)).

⁷⁰ --- S.W.3d. --- (2019), 2019 WL 5382251.

⁷¹ *Id.* at *5.

⁷² *Id.* at *6.

⁷³ *Id.* at *5 (citing *S. Metro. Fire Prot. Dist. v. City of Lee’s Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009)).

⁷⁴ *Id.* at *6 (emphasis added).

At the hearing, counsel for MECG asserted that the Commission could approve the Nucor Contract only under the Section 393.355 mechanism.⁷⁵ In support of that argument, MECG relied on the *Noranda* case, where the Commission refused to approve the ten-year rate requested by Noranda, but instead approved a three-year rate.⁷⁶ Nowhere in the *Noranda* decision does the Commission say that it may not approve a ten-year rate. Instead, the Commission explained that based on the facts of that case, a ten-year term for Noranda was too long.⁷⁷ The Commission was specifically concerned about harm to other rate payers, 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.⁷⁸ In the case of the Nucor Contract, those concerns would not apply because Evergy has committed to hold non-Nucor customers harmless from any under-recovery of the cost to serve Nucor, and the SIL Tariff and the 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.

There are other important differences between *Noranda* and this case – in *Noranda*, Ameren's other customers had to pay extra to make up for the lower rate given to Noranda.⁷⁹ In this case, Evergy's other customers will not pay more to support the Nucor rate.⁸⁰ In *Noranda*, the Commission was faced with the potential loss of jobs, not with a new investment in Missouri and the addition of several hundred jobs.⁸¹ Also in *Noranda*, the Commission was dealing with a

⁷⁵ Tr. Vol. III at 58.

⁷⁶ Case No. ER-2014-0258, Report and Order (Apr. 29, 2015) ("*Noranda*").

⁷⁷ *Id.* at 133.

⁷⁸ *Id.* at 133.

⁷⁹ *Id.* at 132.

⁸⁰ Ex. 2, Ives Direct at 11 (noting that as 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.").

⁸¹ *Noranda*, at 135-36.

company in a “precarious financial situation” as a result of decisions made by a management firm’s decision to “milk massive amounts of cash out of the company” when Noranda was purchased in 2007.⁸² By contrast, Nucor is the largest steel maker in the United States, and its \$250 million investment in the Sedalia facility demonstrates that the company is on strong financial footing and committed to Missouri for the long term. In *Noranda*, Ameren Missouri and several other parties objected to the stipulation proposing the Noranda rate.⁸³ In our case, all parties either support or do not oppose the Stipulation.

The *Noranda* decision does not stand for the proposition that the Commission may not approve any proposed ten-year contract for an electric rate without some new, statutory authority such as Section 393.355.⁸⁴ Instead, the Commission concluded that under the unique facts of that case, a ten-year rate for Noranda (with the risk on Ameren's other customers) was not just and reasonable. It is not surprising, then, that the mechanism set forth in Section 393.355, which both Evergy and MECG recognize was passed in reaction to the *Noranda* decision,⁸⁵ seems tailored to address the Noranda situation, but is poorly suited to address Nucor’s situation.

3. Section 393.355, RSMo, is Not the Means by Which the Nucor Contract Should be Approved

⁸² *Id.* at 131.

⁸³ *Id.* at 120.

⁸⁴ At the hearing, MECG argued that the Commission was somehow precluded from approving a ten-year contract due to the Commission’s observation in *Noranda* that “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.” *Id.* at 133. There is nothing extraordinary about this statement, nor can it be reasonably interpreted as limiting the Commission’s ability to approve special rates of any particular term based on the facts of the given case. In that case the Commission approved a special rate with a term of three years for Noranda. *Id.* at 133. The Commission had previously approved the original proposed LTS Tariff for Noranda a fifteen-year term. *See* Case No. EA-2005-0180, Order Approving Stipulation and Agreement (Mar. 10, 2005). Under the facts of this case, it is reasonable for the Commission to approve a term of ten years for the Nucor Contract.

⁸⁵ Ex.2, Ives Direct at 6; Tr. Vol. III at 59-61.

Trying to fit the Nucor Contract into the Section 393.355 framework, which was designed primarily in response to *Noranda*, would be like trying to fit a square peg into a round hole. To begin with, Section 393.355 states that the statute applies to situations in which the special rate “is not based on the electrical corporation’s cost of service for a facility.”⁸⁶ In this case, the rate under Nucor’s special contract is based on the cost of serving the Sedalia facility.⁸⁷ Section 393.355, by its terms, is not targeted at the type of rate included in the Nucor Contract.

In his testimony, Mr. Ives further explains why Evergy is not seeking approval for the SIL Tariff and the Nucor Contract under Section 393.355, RSMo. Specifically, Mr. Ives explains that a key driver behind Section 393.355 was an effort to reopen the *Noranda* aluminum plant.⁸⁸ The statute includes a tracking mechanism to track changes in net margin experienced by a utility serving a new or re-opened facility, so that the utility’s net income is neither increased nor decreased.⁸⁹ Mr. Ives explains that, in a scenario with a pre-existing customer facility such as *Noranda*, there is no need for extensive investment 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 the facility.⁹⁰ In that 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.⁹¹

Mr. Ives further explains that, in the case of providing service to a new facility with 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.⁹² Under this scenario, it would be reasonable that

⁸⁶ Section 393.355(2) (emphasis added).

⁸⁷ Ex.2, Ives Direct at 10.

⁸⁸ Ex.2, Ives Direct at 6.

⁸⁹ *Id.* at 6-7.

⁹⁰ *Id.* at 7.

⁹¹ *Id.*

⁹² *Id.*

the utility would be allowed to recover its incremental cost to serve the new customer and earn a return on its rate base investment.⁹³ However, the tracker mechanism under Section 393.355 would prevent the utility from recovering the incremental cost of its investment and a return. This is problematic from Evergy's perspective, since it will incur incremental costs of roughly \$18 million to serve Nucor.⁹⁴ In fact, the 393.355 mechanism appears to 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.

Another problematic aspect of the Section 393.355 mechanism is that it would preclude Evergy's hold harmless commitment under the SIL Tariff and the Stipulation, and possibly would require other Evergy customers to subsidize the Nucor rate at some point in the future. 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."

Nucor wants a rate that covers Nucor's incremental cost, makes a contribution to the Evergy system fixed costs, and is not subsidized by other non-Nucor customers. That is exactly what the rate proposed in this case provides and, by proceeding outside of Section 393.355, Evergy is able to commit to holding other customers harmless in the event that the Nucor rate does not cover the incremental costs to serve Nucor. As Staff's counsel observed at the hearing:

⁹³ *Id.*

⁹⁴ Tr. Vol. III at 38.

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 ratepayers are generally expected to provide a subsidy in order to allow some worthwhile venture to go forward.⁹⁵

Staff's counsel further noted that the Evergy's proposal "is a win-win for GMO's ratepayers. They will share the benefits of success, but they will not share the risk of failure."⁹⁶

The hold harmless commitment is a key component of Evergy's proposal, and it highlights the factual differences between Nucor's new investment in the Sedalia facility and the *Noranda* case that gave rise to Section 393.355. The Section 393.355 mechanism is ill-suited to the facts of this case since it prevents Evergy from earning a return on its new investment to serve Nucor, and it also exposes other customers to the risk of having to subsidize the Nucor rate. The Commission should not tie its hands by deciding that 393.355 is the only vehicle for approving a ten-year contract such as the Nucor Contract. Instead, the Commission should approve the SIL Tariff and the Nucor Contract pursuant its traditional ratemaking authority under Sections 393.130, 393.140(11) and 393.150, RSMo.

C. The Nucor Contract Should be Remain Confidential

Consistent with the Commission's historic practice,⁹⁷ the Nucor Contract was filed in this case and designated as confidential. At the hearing, MECG questioned the need to keep the terms of the Nucor Contract confidential and suggested that they should be made public.⁹⁸ As discussed above, electric costs are a major cost in Nucor's production process, and, as such, the rate Nucor pays for power is competitively sensitive information. If made public, the rate

⁹⁵ Tr. Vol. III at 46.

⁹⁶ *Id.*

⁹⁷ See, e.g., *In Re Application of Kansas City Power & Light Co. for Approval of a Rate Schedule Authorizing the Use of Special Contracts and Approval of a Specific Contract Between KCPL and an Existing Customer*, Case No. EO-2006-0193 (March 16, 2006); *In Re Kansas City Power & Light Co.*, No. EO-95-181, 1995 WL 789407.

⁹⁸ Tr. Vol. III at 68-69.

information could damage Nucor's competitive position. Accordingly, Nucor respectfully requests that the Commission permit the Nucor Contract to remain confidential.

IV. CONCLUSION

Nucor urges the Commission to approve GMO's Application, the SIL tariff, and the Nucor Contract, including the rates as set forth in Schedule SIL-1, subject to the customer protections and monitoring and reporting requirements recommended in the Stipulation.

Respectfully Submitted,

/s/ Stephanie S. Bell
Stephanie S. Bell
Ellinger & Associates, LLC
308 East High Street
Suite 300
Jefferson City, MO 65101
(573)750-4100
sbell@ellingerlaw.com

/s/ Michael K. Lavanga
Peter J. Mattheis
Michael K. Lavanga
Stone Mattheis Xenopoulos & Brew, PC
1025 Thomas Jefferson Street, N.W.
Suite 800 West
Washington, D.C. 20007
(202)342-0800
pjm@smxblaw.com
mkl@smxblaw.com

Attorneys for Nucor Steel Sedalia, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all of the parties of record or their counsel, pursuant to the Service List maintained by the Data Center of the Missouri Public Service Commission on November 1, 2019.

/s/ Stephanie S. Bell
Stephanie S. Bell