

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

In the Matter of the Application of )  
KCP&L Greater Missouri Operations Company )  
For Approval of a Special Rate for a Facility ) File No. EO-2019-0244  
Whose Primary Industry is the Production or )  
Fabrication of Steel in or Around Sedalia, Missouri. )

**APPLICATION FOR REHEARING**

COMES NOW, the Midwest Energy Consumers Group (“MECG”), pursuant to Section 386.500 RSMo. and 20 CSR 4240-2.160, and for its Application for Rehearing respectfully states as follows:

1. As an initial matter, MECG states that it is in favor of economic development. As a representative of large commercial and industrial interests, MECG supports legislation and policies that seek to attract new customers to Missouri. Indeed, MECG, and not Evergy, testified in support of House Bill 1 that provided the initial incentive for Nucor to explore expanding to Missouri.

2. That said, however, MECG is also concerned about the affordability of electric rates for the large commercial and industrial customers already operating in Missouri. Furthermore, MECG is careful to take positions that comply with statutes enacted by the General Assembly. In this regard, MECG suggests that the General Assembly has created a procedure by which the Commission may provide an incremental cost-based rate to new customers. That procedure expressly provides that the net income benefits of any new customer must inure to the benefit of current customers and not to the electric utility. In the immediate case, the Signatories to the non-unanimous stipulation, and the Commission in its Report and Order, seek to transfer those net income benefits from current customers and give those benefits instead to Evergy.

3. MECG urges the Commission to take steps to provide Nucor all of the benefits to which it is entitled under Section 393.355. That is, as provided in that statutory section, the Commission should ensure that Nucor is provided an incremental cost-based rate and to make that

rate binding on future commissions for a ten year period. That said, however, the Commission should also ensure that remaining customers are also provided all of the benefits to which they are entitled. Specifically, any net income benefits should inure to the benefit of these other customers and not transferred to Evergy. Indeed, it is the non-unanimous stipulation, approved by the Commission, which is contrary to economic development interest. Specifically, unlike the MECG position which seeks to ensure that net income benefits are used to help address affordability concerns of hundreds of thousands of Evergy customers, the non-unanimous stipulation instead seeks to transfer those net income benefits directly to Evergy.

### **BACKGROUND**

4. In the context of Case No. ER-2014-0258, the Commission considered a request to establish a special rate for Noranda Aluminum. Specifically, Noranda asked that the Commission set a rate that is based upon incremental cost and to make that rate binding on future commissions for a 10 years period. Given the economic importance of Noranda to the southeast Missouri region, the Commission found that it was appropriate to set a rate based upon incremental cost. That said, however, the Commission found that it was powerless to make the rate binding on future commissions for a 10 year period.

[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.<sup>1</sup>

5. Given the Commission's stated inability to make the rate binding for a period of time, Noranda immediately set out to provide a legislative fix to this problem. During the first extraordinary session of the 2017 General Assembly, legislation was passed to fix this problem. The basic premise of that legislation, codified at Section 393.355, is that the Commission could grant an incremental cost-based rate to certain large customers, including aluminum smelters and

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<sup>1</sup> *Report and Order*, Case No. ER-2014-0258, issued April 29, 2015, page 133.

steel mills. That said, however, the section mandated that the Commission implement a tracker to ensure that the utility experiences no increase or decrease in net income. Therefore, any net income changes would instead be used to benefit current customers. Therefore, at the most basic level, the legislation provides that, while the new customer would receive a preferential rate and the utility held harmless, any income benefits would inure solely to other customers.

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6. On July 12, 2019, Evergy West (formerly known as KCP&L Greater Missouri Operations Company) filed its Application in this case. In that Application, Evergy sought Commission approval of the Schedule SIL tariff as well as a special rate for Nucor Steel Sedalia, LLC. (“Nucor”). As Evergy expressly indicated in that Application, while Section 393.355 has recently been enacted which allows for the approval of a 10 year special contract for steel mills, approval of the Nucor special rate was not sought pursuant to that statutory section. Rather, the requested relief is “significantly similar to Section 393.355 RSMo.”<sup>2</sup> Essentially, by seeking approval for a special rate outside of the express terms of Section 393.355, Evergy sought to retain any net income benefits for itself instead of transferring those financial benefits to other customers.

7. On September 19, 2019, Evergy, Nucor and Staff filed a non-unanimous stipulation and agreement. That stipulation sought commission approval of the Nucor special rate. In an effort to avoid the statutory requirement that any net income benefits inure to other customers, the stipulation rejected the net income tracker. Instead, the stipulation sought to pass those financial benefits directly to Evergy.

8. As expressed in the signatory parties’ position statements, approval of Schedule SIL and the Nucor special rate was not sought pursuant to Section 393.355. Rather, the Signatories

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<sup>2</sup> Indeed, in its Report and Order, the Commission expressly recognized that approval was not sought pursuant to Section 393.355. “EMW is not requesting approval of the special contract and special rate under the provisions of section 393.355, RSMo.”

pointed out within those position statements that approval was sought pursuant to Sections 393.130, 393.140 and 393.150. On September 24, 2019, MECG filed its objection to the non-unanimous stipulation. The primary objection was MECG's assertion that, if approved under Section 393.355, any net income benefits should be returned to customers through the utilization of a mandated net income tracker. In the alternative, if approved under other statutory provisions, then the special rate could not be binding on future parties or commissions.

9. During the opening statements and within the initial briefs, the Signatories clarified the non-unanimous stipulation. Specifically, while the stipulation sought to bind future commissions to the rate contained in the Nucor special contract, the Signatories recognized that, since approval was not sought under Section 393.355, future commissions could review the Nucor special contract rate. Based upon the representation that review of the Nucor special rate could occur in future rate cases, MECG withdrew its objection to the stipulation.

10. On November 13, 2019, the Commission issued its Report and Order. In that Report and Order, the Commission goes significantly beyond the terms of the non-unanimous stipulation that MECG did not oppose.<sup>3</sup> Specifically, while approval of the stipulation was not sought pursuant to Section 393.355, the Report and Order repeatedly relied upon that statutory section for approving the Nucor special rate. Included in the Report and Order, and contrary to the representations of the Signatories to the non-unanimous stipulation, is a provision that seeks to make the ten year term binding on future commissions.

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<sup>3</sup> It is unclear from the Report and Order whether the Commission sought to approve the stipulation pursuant to the terms of Section 393.355 or whether approval was granted pursuant to other statutory authority. Repeatedly the Order discusses the authority, granted by Section 393.355, to approve an incremental cost-based rate. That said, however, the Commission then claims to approve the terms of the stipulation even though the stipulation was premised on statutory authority outside of Section 393.355. Moreover, as further indicated in this pleading, the Commission claims that it has authority to make the rate binding on future commission outside of the provisions of Section 393.355. As will be discussed, MECG seeks rehearing under both possible scenarios. MECG suggests that, if the Commission relied upon Section 393.355, then it was required to implement the net income tracker. In the alternative, if the Commission relied upon statutory provisions outside of Section 393.355, then it is powerless to make that rate binding on future commissions. Bottom line, the Commission cannot both make the rate binding on future commissions and to forego the net income tracker.

It was suggested that EMW and Nucor must proceed under section 393.355 if they are to ensure the ten-year term of their contract because of the provision in section 393.356 that prevents the Commission from modifying a contract approved under section 393.355 during its approved term. That provision would provide an extra measure of assurance to Nucor and EMW, but it does not prevent the Commission from approving the ten-year term of the contract presented by Nucor and EMW.<sup>4</sup>

11. The Report and Order is legally problematic. While the Commission has statutory authority to approve a ten year term under Section 393.355, proceeding under that provision would mandate the implementation of a tracker to “ensure that the changes in net margin experienced by the electrical corporation between the general rate proceedings as a result of serving the facility are calculated in such a manner that the electrical corporation’s net income is neither increased nor decreased.”<sup>5</sup> If approved using statutory provisions outside of Section 393.355, the Commission is powerless to bind future commissions to the ten year term of the Nucor special contract rate.

12. As MECG has repeatedly indicated, it has no problem with the Nucor special contract rate. Approval of that special rate could theoretically occur in two different ways. First, the Commission could approve the Nucor special rate, including the ten year term, under Section 393.355. As mentioned, however, approval under that statutory section would require the implementation of the net income tracker mandated by Section 393.355.3. Second, the Commission could approval the Nucor special rate without the net income tracker. Approval under this alternative method, however, would preclude this Commission from binding future commissions to the special contract rate for a ten year term. Effectively, there is no statutory basis, as the Commission now attempts to do, to both: (1) bind future commissions for a ten year term and (2) forego the implementation of the net income tracker. Essentially, the Commission must choose, either it can approve the special contract for a 10 year term under Section 393.355 including the net income tracker OR, as the signatories seemingly propose, it can approve using

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<sup>4</sup> Report and Order, pages 13-14.

<sup>5</sup> See, Section 393.355.3.

other statutory authority and forego the net income tracker. This alternative means, however, that the rate would not be binding for ten years. MECG would not object to the Commission approving the special contract under either of these scenarios, but MECG does object and seeks rehearing for the Commission's attempt to order a ten year term while simultaneously foregoing the net income tracker.

### **POINT OF APPLICATION FOR REHEARING**

13. As indicated in footnote 3, it is unclear whether the Commission sought to approve the non-unanimous stipulation pursuant to Section 393.355 or through other statutory provisions. Indeed, the Commission repeatedly points to the authority provided by Section 393.355. That said, however, the Commission also claims to have other statutory authority to make the rate binding for a ten year period. Given this uncertainty, MECG pleads this application for rehearing in the alternative depending on the authority that the Commission ultimately points to for issuing its Report and Order.

- A. In the event that the Commission approved the special contract pursuant to Section 393.355: The Report and Order is unlawful in that the Commission failed to implement the net income tracker mandated by Section 393.355.
- B. In the event that the Commission approved the special contract pursuant to other alleged statutory authority: The Report and Order is unlawful in that the Commission lacks statutory authority, outside of Section 393.355, to make the special contract rate binding on future commissions.

WHEREFORE, MECG respectfully requests that the Commission grant rehearing in this case.

Respectfully submitted,

          /s/ David Woodsmall            
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**ATTORNEY FOR THE MIDWEST  
ENERGY CONSUMERS GROUP**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.

          /s/ David Woodsmall            
David L. Woodsmall

Dated: November 22, 2019