BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a AmerenUE for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area.	))))))	**ER-2008-0318**

RESPONSE OF NORANDA ALUMINUM, INC.
TO AMERENUE APPLICATION FOR REHEARING
AND ITS REQUEST FOR EXPEDITED TREATMENT

COMES NOW Noranda Aluminum, Inc. ("Noranda") and responds in opposition to the Application for Rehearing filed on February 5, 2009 by AmerenUE[1/] for the following reasons:

1. **The Application Represents a Breach of Contract and Collateral Attack on a Settlement Stipulation by AmerenUE.** What AmerenUE apparently wants to avoid is the offset of all off-system sales revenues in the calculation of the periodic FAC adjustment. Though it does not need defense at this point, that offset mechanism is reasonable, rational and consistent with good regulatory practice.[2/] This offset was indisputably compre-

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[1/] Noranda remains concerned that its dire situation seems not to have been observed by AmerenUE. Instead, AmerenUE seeks to make itself whole without regard to an important customer. Noranda continues to need relief, no less than AmerenUE, but timely sought rehearing of a Report and Order that we believe remains incorrect as a matter of fact and law. We comment in opposition to AmerenUE's efforts to preserve itself at its customers' expense without prejudice to our own situation.

[2/] It should not be forgotten that any offsettable off-system sales revenues would be the result of generation from

(continued...)

hended by the Non-unanimous Stipulation and Agreement on FAC Rate Design Issues ("FAC Stipulation") that was filed with the commission on December 12, 2008. *First*, paragraph 2(b)(i) of the FAC Stipulation states:

> i. The modeled fuel and purchased power costs ***less modeled revenues from off-system sales of energy*** used to calculate Net Fuel Costs as specified in paragraph 2 of the OSS Stipulation will be determined for Summer and Winter calendar months based on the monthly results of the Staff's production cost modeling runs attached to the OSS Stipulation as Appendix A thereto, which monthly results are attached hereto and incorporated herein by this reference as Appendix B. (Emphasis added).

Second, The FAC Stipulation references several attached sheets of a proposed tariff that is included in the FAC Stipulation. Paragraph 2(i) of the FAC Stipulation states:

> The Signatory Parties[3/] agree to the definitions of Factors CF, CPP and OSSR on the exemplar tariff sheets attached hereto.

The "exemplar tariff sheets" that were agreed to and were attached to the FAC Stipulation, in Sheet No. 98.2, contain the following formula:

$$FPA_{(RP)} = [[(CF+CPP-\mathbf{OSSR}-TS-S) - (NBFC \times S_{AP})] \times \_\_\_\% + I + R] / S_{RP}$$

(emphasis added), where OSSR is defined on Sheet 98.3 as follows:

> OSSR = Revenues from Off-System Sales allocated to Missouri electric operations.
>
> Off-System Sales shall include all sales transactions (including MISO revenues in FERC

[2/] (...continued)
ratepayer-provided assets using ratepayer-provided fuel and other resources.

[3/] "Signatory Parties" explicitly includes Union Electric Company d/b/a AmerenUE. FAC Stipulation, p. 1.

> Account Number 447), excluding Missouri retail sales and long-term full and partial requirements sales, that are associated with (1) AmerenUE Missouri jurisdictional generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission.

Third, the FAC Stipulation in Paragraph 6 makes it clear that the signatories, including AmerenUE, explicitly agreed to the following:

> 6. If the Commission unconditionally accepts the specific terms of this Stipulation and Agreement without modification, the Parties waive, with respect to the issues resolved herein: . . . (3) ***their respective rights to seek rehearing*** pursuant to Section 386.500, RSMo 2000 and (4) their respective rights to judicial review pursuant to Section 386.510, RSMo 2000. These waivers apply only to a Commission order respecting this Stipulation and Agreement issued in this above-captioned proceeding, and do not apply to any matters raised in any prior or subsequent Commission proceeding, or any matters not explicitly addressed by this Stipulation and Agreement. This Stipulation and Agreement contains the entire agreement of the Parties concerning the issues addressed herein. (Emphasis added).

This condition was satisfied. On December 30, 2008, the commission approved the FAC Stipulation in an Order in this proceeding specifically addressing the FAC Stipulation.

AmerenUE's effort to collaterally attack the FAC Stipulation is null and void and a breach of its contract obligations under the FAC Stipulation.

2. **The Application is Untimely**. The FAC Stipulation was submitted to the commission for its consideration on December 12, 2008. Notice of the filing was duly provided to non-signatory parties, none of whom objected or sought a hearing. The question of the acceptance of the FAC Stipulation was considered

by the commission and an Order approving it was issued on December 30, 2008.

Among other things, this December 30, 2008 Order stated:

> If, but only if, the Commission determines that AmerenUE should be permitted to use an FAC, ***this stipulation and agreement settles all known rate design issues related to AmerenUE's request to implement a FAC and terms and conditions of the FAC tariff*** [except for the sharing percentage].[4/]

The January 27, 2009 Report and Order authorized an FAC.[5/]

Section 386.500, in relevant part, provides:

> 2. No cause or action arising out of any order or decision of the commission shall accrue in any court to any corporation or the public counsel or person or public utility unless that party shall have made, ***before the effective date of such order or decision, application to the commission for a rehearing***. (Emphasis added).

[4/] ER-2008-0318, *Order Approving Stipulation and Agreement As To All FAC Tariff Rate Design Issues*, December 30, 2008, pp. 1-2 (emphasis added).

[5/] Of course, that decision remains in considerable dispute based on several *timely* filed applications for rehearing in this matter.

An *untimely* application for rehearing preserves nothing and presents nothing to the commission for consideration.[6/] It

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[6/] *Tolbert v. Kansas City Power & Light*, Case No. EC-2007-0407 (December 6, 2007); *Mark v. Southwestern Bell Telephone Company*, Case No. TC-2006-0354 (November 16, 2006)("Accordingly, the Commission is without statutory authority to consider Mr. Mark's untimely application for rehearing and must deny that application."); *Staff v. Officeplus Corporation of Missouri*, Case No. TC-2004-0409 (October 21, 2004)("Officeplus filed its motion on the order's effective date, not before the effective date. The motion is untimely. The Commission has no authority to accept and consider an untimely application for rehearing. [footnote omitted] The application must therefore be rejected."); *Staff v. AGL Networks*, Case No. TC-2004-0314 (July 22, 2004)("In this case, the application would have been untimely even if it had been filed when AGL intended for it to be filed on June 28, because the order became effective on June 27. In any event, the Commission has no authority to accept and consider an untimely application for rehearing [footnote omitted] regardless of the reason it was not timely filed. The application must therefore be rejected.").

In *In re: Missouri American Water*, Case No. WO-2002-372 (December 30, 2002) the commission stated:

> The Commission must deny Public Counsel's application for rehearing because it was untimely. Section 386.500.2, RSMo 2000, provides that "no cause or action arising out of any order or decision of the commission shall accrue in any court . . . unless that party shall have made, before the effective date of such order or decision, application to the commission for a rehearing." Missouri courts have provided ample guidance showing that an application for rehearing must reach the Commission not later than the day prior to the effective date of an order. In Alton Railway, the Missouri Supreme Court said:
>
> > We hold that the application for a rehearing was not 'made' to the commission, until the motion for a rehearing reached the commission; that a mere posting in Kansas City was insufficient; and that, if the effective date of the order was Monday, February 12, 1940, the filing of appellant's application for a rehearing on the same date, was not in time under the terms of the statute.

(continued...)

should be rejected or denied.

The commission's December 30, 2008 Order approving the FAC Stipulation became effective on January 8, 2009. AmerenUE's Application for Rehearing was filed on February 5, 2009, 29 days out of time. This deadline is statutory and is not subject to waiver by the commission.[7/]

3. **The Application is Inconsistent With Section 386.500**. AmerenUE incorrectly parsed Section 386.500(1). AmerenUE's Application stated: "Section 386.500(1) vests the Commission with broad discretion to grant rehearing respecting any issue 'if in its judgment sufficient reason therefore be made to appear.'" However, Section 386.500(1) *actually* states:

> 1. After an order or decision has been made by the commission, the public counsel or any corporation or person or public utility interested therein ***shall have the right to apply for a rehearing in respect to any matter determined therein***, and the commission shall grant and hold such rehearing, if in its judgment sufficient reason therefor be made to appear; if a rehearing shall be granted the same shall be determined by the commission within thirty days after the same shall be finally submitted. (Emphasis added)

The emphasized portion was not quoted by AmerenUE in its application and clarifies that the "broad discretion" noted is not quite as broad as AmerenUE asserts; the right to apply for a rehearing is statutorily limited "to ***any matter determined therein***". (Emphasis added).

[6/](...continued)
Therefore, the Commission can do nothing except deny Public Counsel's application.

[7/] *Id.*

In its January 27, 2009 Report and Order, the commission, at pages 6-7 stated the following:

> During the course of the evidentiary hearing, various parties filed two nonunanimous partial stipulations and agreements revolving several issues that would otherwise have been the subject of testimony at the hearing. No party opposed those partial stipulations and agreements. As permitted by its regulations, the Commission treated the unopposed partial stipulations and agreements as unanimous. [footnote omitted] After considering both stipulations and agreements, the Commission approved them as a resolution of the issues addressed in those agreements. [footnote noted below][8/] The issues that were resolved in those stipulations and agreements ***will not be further addressed in this report and order***, except as they may relate to any unresolved issues. (Emphasis added).

The only "unresolved issues" concerning the FAC that were determined in the January 27, 2009 Report and Order were (1) whether AmerenUE should be permitted to have a fuel adjustment clause; and (2) the appropriate sharing percentage to be inserted in the exemplar tariff if an FAC were authorized. The commission majority adopted AmerenUE's recommended 95/5 sharing proposal.[9/]

In its February 5, 2009 Application for Rehearing AmerenUE unilaterally seeks to change the agreed-upon terms and conditions that were approved by the commission on December 30, 2008. Inasmuch as those terms and conditions were not determined

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[8/] Footnote 6 to the January 27, 2009 Report and Order states:

> [6] The Commission issued an *Order Approving Stipulation and Agreement as to All FAC Tariff Rate Design Issues* and an *Order Approving Stipulation and Agreement as to Off-System Sales Related Issues* on December 30, 2008.

[9/] This point also remains subject to challenge in timely filed applications for rehearing.

in the January 27, 2009 Report and Order but were determined in the commission's approval of the FAC Stipulation, AmerenUE's Application for Rehearing seeks rehearing of a matter that was not determined in the January 27, 2009 Report and Order and has nothing to do with the January 27, 2009 Report and Order.

Therefore, even if AmerenUE's Application were not a breach of its contract with the signatory parties to the FAC Stipulation (which it is) and were otherwise timely (which it is not), it still should receive no consideration because it attempts to address a matter that was not determined in the January 27, 2009 Report and Order and is therefore not a proper subject of an application for rehearing under Section 386.500.1.

The foregoing analysis disposes of AmerenUE's Application for Rehearing. Although it is unnecessary to justify rejection of AmerenUE's Application, and further points ought not to be reached, Noranda will note several other points that also support rejection of AmerenUE's effort.

4. **Relief Cannot Be Provided Without a Hearing and Findings of Fact From a Hearing.** AmerenUE cites to 386.500(4), apparently to argue that circumstances arising since the original order may be considered for its Application. This is a bootstrap. The portion of Section 386.500.4 quoted by AmerenUE demonstrates that any such consideration occurs "***after*** a rehearing and a consideration of the facts." (Emphasis added). Accordingly, rehearing must first have been granted. Part of what

AmerenUE misses is that facts are not such because they are unilaterally declared to be "facts." Were the hearing reopened, full due process conventions and protection would extend to all parties, including, but not limited to discovery (in this context typically data requests), possibly even depositions, cross-examination, briefing and/or argument to establish "facts" including the matters raised in Noranda's timely Application for Rehearing, among others. This would not be a "one-sided" process.

And, of course, it follows that if AmerenUE were permitted to somehow breach its contractual commitments in the FAC Stipulation, the FAC Stipulation is destroyed and none of the other parties would be bound. Because none of the issues addressed by the FAC Stipulation have been litigated but were, rather, settled without litigation, the hearing would have to resume with respect to ***all*** these issues -- not just issues that one party might selectively wish to be reheard.

5. **Numerous Other Relevant Facts Would Need to Be Developed to Reestablish Rates If There Was No 500 mW Load To Serve.** Were it even possible to rehear a settled stipulation solely because one party would like to obtain relief from its provisions, the question would be presented that certainly more than one changed element would need to be considered. Loss, even temporary, of significant load would likely result in a new base level of revenues and plant loadings, a new fuel model or run from Staff, potential disruption of the existing and contested

rate design stipulation, reconsideration of the level of off-system sales and revenues, review and rework of retail revenues, and fuel and purchased power expenses, and the spread of the increase with a new starting revenue. It is possible that a new test year would be needed and certainly a new look at return on equity because the utility would no longer have a single, 500 mW load. All relevant factors would need to be identified and considered -- this amounts to an entire new rate case. Consideration of "all relevant factors" is mandated not only by well established Missouri precedent, but also Section 393.266 RSMo.

6. **AmerenUE's Application is Ironic and Illustrative of The Error In The AmerenUE Risk Analysis, But Is Likely A Harbinger of Future Controversies Under the FAC.** This controversy announces a precedent for utility operations under an FAC. Apparently an FAC is desirable so long as costs are rising and loads are steady. But if loads (or revenue expectancies) disappear for any reason including economic conditions, storms and the like, following this example we may expect the utility to return to the commission urging that its once-vaunted instrument of salvation needs some adjustment to produce the result that the utility desires.

Of course, at a certain level, this controversy validates the position of the Staff that AmerenUE did not need the FAC. A proper risk analysis, such as Staff proposed, considers the effects of various rates and revenues. Indeed it seems that

at this point AmerenUE might wish that the commission had rejected its request for a FAC altogether.

But AmerenUE's argument has no merit. The FAC as authorized allows AmerenUE to recover increasing costs, but as a consumer protection was designed to operate symmetrically. The design of the FAC was proposed by AmerenUE, and agreed to by AmerenUE. That design specified offsetting revenues from off-system sales against what would otherwise be fuel and purchased power costs passed through to the customers.

7. **A Reasonable Opportunity Still Exists for AmerenUE to Recover Its Cost of Service, But Not A Guarantee of Recovery.** AmerenUE appears to have momentarily forgotten that there is no absolute guarantee that it will recover its cost of service. As a result of the temporary loss of revenue from Noranda, AmerenUE may have to manage its operations more efficiently in order to earn its desired return.[10/] AmerenUE assumes in its request that all other things are equal, and is concerned only with the "mainstream" of regulation. But all is not equal and it is not "business as usual" for Noranda, on mainstreet in Missouri, or for the businesses, homes and thousands of Missourians who are confronting unprecedented economic dislocations, job losses and the evisceration of their retirement savings and 401K plans.

Noranda noted in our brief that AmerenUE seemed blind to what was going on in the economy. AmerenUE had deferred no

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[10/] Perhaps this circumstance provides AmerenUE an opportunity to explore whether its COLA could be sold.

capital projects and had not even considered addressing reductions in its O & M expenses in a manner responsive to the challenges that its customers face.

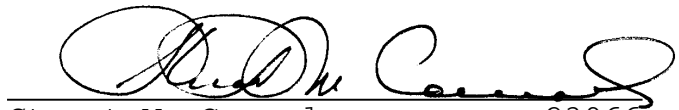
8. **Emergency Rate Relief Remains Available.** Missouri regulatory law contemplates the potential for emergency rate relief for utilities that are demonstrably imperiled. The test essentially requires demonstration of an inability to continue to provide safe and adequate service -- a financial condition that AmerenUE does not claim.

9. **The Substance of AmerenUE's Request Fails to Help the Party Most in Need.** Noranda is in extreme financial stress brought about by precipitous declines in the world-wide price of primary aluminum and its loss of 75% of its smelting capacity due to the loss of power supplies through AmerenUE and Associated Electric. Noranda still faces a significant increase in its power rates as a result of other decisions in this rate case. But service to Noranda seems to have no impact one way or the other on the AmerenUE proposal. Although Noranda remains willing to discuss the matter with other parties including AmerenUE, Noranda finds no solace in AmerenUE's present unilateral proposal. The result of that proposal is that AmerenUE is protected and others are sheltered while the party that is in dire need, Noranda, continues to suffer. Even if one considers AmerenUE's

Application to indicate a problem, the proposed solution does not help Noranda's plight.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



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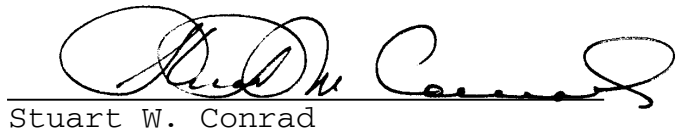
ATTORNEYS FOR NORANDA ALUMINUM, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by electronic means or by U.S. mail, postage prepaid, addressed to all parties by their attorneys of record as disclosed by the pleadings and orders herein.



Stuart W. Conrad

Dated: February 10, 2009