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**

APPLICATION FOR REHEARING
OF NORANDA ALUMINUM, INC.

COMES NOW Intervenor Noranda Aluminum Inc. (Noranda), and pursuant to Section 386.500 RSMo 2000, applies for rehearing of the January 27, 2009 Report and Order ("Order") on the following grounds:

1. The commission majority has not fully appreciated the current economic situation faced by many individual ratepayers and their employer businesses in the midst of a recession that, based on published analyses, may take years of recovery. It will do little public good, for example, for electric rates to be increased when the utility has, by its own admission, taken no steps to reduce or control its costs,[1/] when on the other hand employers such as Noranda have taken unprecedented steps simply to survive this economic downturn. Increasing electric rates in such a circumstance will be counterproductive, and it will damage the economic infrastructure of regions

[1/] Exhibits 759 and 760HC.

of Missouri that will take years to repair if they can even be repaired at all.

The commission majority's favoritism toward a utility that has a captive customer base and a monopoly service territory bespeaks disregard on the part of that majority for the economic welfare of the State of Missouri and for its citizens. The Order is, accordingly, unjust, unreasonable, and otherwise unlawful.

2. Noranda feels that it has been mislead through this process. Noranda modified its initial opposition to a fuel adjustment charge and lent conditional support for AmerenUE to have a fuel adjustment clause believing (based on the AmerenUE testimony as well as that of others), and given the current economic circumstances, that having a fuel adjustment charge would ***lower*** AmerenUE's costs of borrowing and equity which would redound in the form of lower rates to the benefit of all ratepayers including Noranda. To the contrary, the commission majority's "business as usual" Order has increased AmerenUE's rates to accommodate an ***increased*** cost of borrowing and equity that makes no sense in the current environment. The Order is, accordingly, unjust, unreasonable, and otherwise unlawful.

3. Faced with this dramatic economic turndown, AmerenUE witnesses testified that it was "business as usual" for AmerenUE. But it is not "business as usual" on mainstreet or for Missouri's manufacturing base. Utility rates should be established based on a test period or test year and reflect matching of costs and expenses. At the same time, rates should be estab-

lished with a view to the economic conditions in which those rates are reasonably expected to be in effect. Indeed, the bulk of the evidence used by AmerenUE to support its request for a fuel adjustment charge was a forward-looking view of a world with ever increasing costs. In the short span of the prosecution of this case the world changed dramatically. The need to consider the economic environment is no less important. Nothwithstanding the fact that it now cuts against AmerenUE, it is a world of stable to decreasing prices for the forseeable future. Current conditions require that all commercial operations reduce costs using all tools at their disposal simply to survive the current economic downturn. Noranda has taken steps such as unprecedented layoffs that our employees and investors consider severe; yet we find that AmerenUE has taken no actual steps to control its costs and, instead, proceeds in a "business as usual" fashion, even in the face of the world being on the verge of spiraling deflation. This is simply untenable. Indeed, when queried, and AmerenUE senior official stated:

> Q. Is it true that prices for copper and aluminum and steel have fallen significantly in the last six months?
> A. We haven't seen that, and I haven't -- I am
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> 00126
> not aware of that.
> Q. You're not aware of commodity prices for those items going down?
> A. I am not. What we paid for them as far as they relate into our price for cable and wire and transformers, we have not seen a reduction in cost in those areas, that I am aware of.[2/]

[2/] Transcript, pp. 125-26.

Noranda knows all too well the levels to which the world market for aluminum has sunk 54% and more. Mr. McPheeters testified that on December 23, 2008 the LME price for primary aluminum had sunk to $0.69/lb, a decline of 54%.[3/] Since then it has sunk further into the .60's. Indeed, on the eve of filing this application, we are advised that the Century - Ravenswood, West Virginia smelter is shutting down its operations, bringing the number of active United States aluminum smelters to 10. The commission majority, however, appears insouciant of these "precipitous" changes.[4/]

The impact of the economic downturn -- while severe to Noranda -- is not limited to Noranda. One need only turn to a current newspaper to find evidence of the pervasive impact that has occurred throughout the national, state and regional economies.

The commission majority fails in its responsibility to correct for this management failure to react. Worse yet, AmerenUE has not even looked at its level of operating expenses. Recognizing that current economic conditions are not "business as usual" would be a start in the right direction.

AmerenUE witnesses testified that they were "looking" at deferring capital projects but had made no commitments to

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[3/] Transcript, pp. 2083-84.

[4/] AmerenUE's Witness Morin characterized as "precipitous" a greater than 20 percent drop in price. Transcript, p. 444. The LME price for primary aluminum has dropped by over 60% in the last few months.

reduce or defer any projects. There is no mention of these activities in the Order nor is there recognition that "looking" at capital project deferrals does not equate to decisions such as those that Noranda and others in the community had to make to survive.

It will do little good to increase AmerenUE's rates while its customers no longer have jobs and businesses have to shutter their operations, resulting in rippling unemployment and other woes throughout the entire state economy, and raising the potential that the commission will have to deal with the utility management's failure to react to the current economic and financial circumstances in another proceeding.

AmerenUE received essentially all it sought in this rate case, indicatives of failure on the part of the commission majority to balance interests. Uncomfortably, this creates the appearance that these three commissioners decided to "help" AmerenUE at the expense of the customers rather than attempt to reach an equitable balancing of interests between ratepayers and utility investors -- based on the economic situation that one and all confront -- as evidenced by the record.

Noranda invites the commission to come to Noranda and see how bad the situation is. In the past few days, power supply to Noranda's New Madrid smelter was interrupted numerous times due to the ice storm in Southeastern Missouri. Although Noranda had full capability to continue 100% production throughout the storm, AmerenUE and Associated Electric's inability to maintain

the power supply, and concomittant ability to return power to the smelter in a timely fashion resulted in a loss of 75% of the smelter capacity. The smelter repair will take up to 12 months. Noranda continues to assess damage and the impact on its employees and customers. This outage has a dramatic impact on Noranda and provides even further challenges in an already difficult environment. This environment should not be made even worse by implementing an unjustifiable power rate increase at the same time that Noranda is incurring significant additional costs caused solely by a power outage.

Ironically, AmerenUE's new fuel adjustment clause will not help AmerenUE in this circumstance but will destabilize earnings and rates. Prior to adoption of the fuel adjustment clause, all revenues from off-system sales would have been retained by AmerenUE during the period between rate cases, but now only 5% of those revenues will be retained by AmerenUE.[5/] A larger sharing percentage would help to mitigate the adverse consequences while providing beneficial incentives for the future.

4. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is

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[5/] A 75% reduction in Noranda's load levels amounts to roughly 3,000,000 mWh on an annual basis while will be available for off-system sales until such time as Noranda capacity is restored.

arbitrary and capricious and is an abuse of discretion in that the commission majority has failed to consider the effect that the Order will have on ratepayers including businesses and manufacturers that provide employment to other ratepayers within the economy and on the public generally.

5. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the commission majority makes a finding as to the overall level of rate increase which is not supported by competent and substantial evidence.[6/]

6. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the commission, on the issue of capital structure, has unlawfully shifted the burden of proof from AmerenUE to ratepayers, OPC and its own Staff.

7. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is

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[6/] Report and Order at pages 4-5.

arbitrary and capricious and is an abuse of discretion in that the commission has made a finding that a downward return adjustment associated with the implementation of a fuel adjustment clause is not necessary despite the fact that each return on equity witness in this case testified that such an adjustment was appropriate. As such, the commission majority's resolution of this issue is not supported by competent and substantial evidence on the whole record.

All return on equity witnesses, including the AmerenUE witness, state that authorization of a fuel adjustment clause will reduce the cost of equity. Indeed, this was one of the predicates of Noranda's conditional support for the fuel adjustment charge. Instead, contrary to the evidence of record and without support by competent and substantial evidence of record, the commission majority authorizes a 20 basis point ***upward*** return adjustment purportedly to account for "increased" risk, even after selectively adjusting Mr. Gorman's ROE recommendation.

8. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the majority made a finding as to the risk level of "wires only" utilities that is not supported by competent and substantial evidence.[7/]

[7/] Report and Order at pages 18 and 25.

9. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the majority found that the results of the Constant Growth DCF model should be included in the calculation of a return on equity.

In two recent cases, the commission "discarded" the results of the constant-growth DCF methodology.[8/] Again, in a case decided six months later, the commission adopted the recommendation of a KCPL witness that "excluded" the results of the constant-growth DCF.[9/] Despite its own recent decisions to "exclude" and "discard" the constant-growth DCF analysis, the commission majority now inexplicably criticizes Mr. Gorman for his decision to discard the results of the constant-growth analysis.[10/] Contrary to its prior actions where the commission "excluded" or "discarded" a low constant-growth DCF result, the commission majority now claims that a high result should be averaged with the result of other analyses. The majority's selective and peripatetic approach to the constant-growth DCF suggests that the majority would readily "discard" an analysis

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[8/] See, Report and Order, *In re Aquila, Inc.*, Case No. ER-2007-0004, at page 62; Report and Order, *In re AmerenUE*, Case No. ER-2007-0002, at page 42.

[9/] Report and Order, Case No. ER-2007-0291, at page 17.

[10/] Report and Order at page 22.

that lead to a low return on equity, but would readily embrace the same analysis if it lead to a high return on equity.

10. The Order is unconstitutional, unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the commission engages in a patchwork of "cherry picking" from the testimonies of the various return on equity witnesses, picking components from one witness in disregard of that witnesses' overall and unified recommendation for a return on equity. It is arbitrary and capricious to selectively adopt pieces and parts return on equity witnesses' testimony while accepting none of the unified recommendations. Combining components from one witness with those of another while rejecting other portions that could not be selectively adjusted to achieve or support a predetermined result does not find support in competent and substantial evidence on the whole record and leads, instead, to the conclusion, that the majority appears intent upon reaching and justifying a particular result rather than analyzing the evidence of the various witnesses and their recommendations and following where that evidence leads. Making a determination of what a return that is claimed to be in the "mainstream," then selectively using components of various witnesses' testimony to justify or rationalize the selected result is "backward" reasoning, to be distinguished from the more strenuous intellectual

exercise of analyzing the evidence of the various witnesses and their recommendations and going where that evidence leads.

11. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the commission looks to a finding from a previous case as evidentiary support for the perceived difference in utility bond rating.[11/]

12. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the commission looks to a finding from a previous case as evidentiary support for the perceived difference in the use of a quarterly dividends DCF model.[12/]

13. The Order is unconstitutional, unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the commission majority finds that Section

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[11/] Report and Order at page 23.

[12/] Report and Order at page 24.

386.266 overturned the Supreme Court's constitutional decision in *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*.[13/] Recognizing that the Supreme Court found that the fuel adjustment clause represented an ***unconstitutional*** deprivation of due process,[14/] Section 393.266 [SB 179] could not lawfully overturn the Supreme Court's decision. Moreover, this Supreme Court decision is based, not only upon Missouri's Constitution, but the Constitution of the United States. Clearly SB 179 could not lawfully authorize the commission to perform an act unlawful under either of these charters.

14. The Order is unconstitutional, unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the Order purports to approve a fuel adjustment clause that, based upon the commission's rules, allows the utility to implement increased future rates to account for the past under-recovery of fuel and purchased power expense.[15/] Given the Supreme Court's decision in *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*,[16/]

[13/] 585 S.W.2d 41 (Mo. 1979).

[14/] *Id.* at 58.

[15/] The Commission expressly recognizes the retroactive effect of the implemented fuel adjustment clause. Report and Order at page 73.

[16/] 585 S.W.2d 41 (Mo. 1979).

such a mechanism necessarily constitutes an ***unconstitutional*** deprivation of ratepayers' due process rights that cannot be justified by relying upon a statute.

15. The Order is unconstitutional, unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the commission failed to recognize, through a decrease return on equity, AmerenUE's testimony that the implementation of a fuel cost mechanism would result in a positive change in AmerenUE's credit rating. It is arbitrary and capricious for the commission majority to provide an increase in return on equity to account for perceived differences in bond ratings,[17/] but then ignore evidence that the implementation of a fuel adjustment clause would eliminate those differences in bond rating.[18/]

16. The Order is unconstitutional, unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the commission majority's decision, as it pertains to the design of a fuel adjustment clause, fails to

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[17/] Report and Order at pages 28-30.

[18/] Report and Order at page 68.

properly balance the interests of shareholders and ratepayers. A 95/5 "sharing" plan fails to provide adequate incentives for the utility to control its costs. Moreover, the apparent notion that a 95/5 sharing ratio was necessary because rating agencies would think AmerenUE was held in a lower regard as compared to Aquila and Empire is pure speculation, finds no support in the record and is inconsistent with the competent and substantial evidence that is of record showing that there is a significant difference in generation mix between these companies. Testimony indicated that whether or not a utility had a fuel adjustment clause was a "yes/no" question for the rating agencies. The majority appears to suggest that rating agencies are incapable of distinguishing major differences between these companies, so all Missouri utilities must be treated with a "cookie cutter" approach.

17. The Order also ignores competent and substantial evidence of record that what AmerenUE considers to be an appropriate level of "incentive" or "at risk" component in its employee's compensation packages that is sufficient to encourage performance objectives from those employees varies from 90% to 40% "at risk" for employees having management responsibility.

18. The Order is unconstitutional, unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the commission engages in retroactive

ratemaking by allowing AmerenUE to recover, through an amortization, $12.4 million of MISO Revenue Sufficiency Guarantee repayments.

19. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is on record, is arbitrary and capricious and is an abuse of discretion in that, AmerenUE's proposed fuel adjustment clause is not "reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity." Even the evidence presented by AmerenUE proves that the fuel adjustment clause provides AmerenUE the opportunity to earn in excess of its authorized return.

The evidence noted by the commission suggests that AmerenUE earned a return on equity of 9.31% for the test year[19/] while being authorized a return of 10.2%. Accordingly, AmerenUE under-earned by 89 basis points[20/] or $44.5 million.[21/]

This shortfall, however, was the result of non-recurring, extraordinary events that occurred during the same peri-

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[19/] Report and Order, p. 66.

[20/] *Id.*

[21/] Report and Order at page 83. Because 24 basis points = $12 million, each basis point equates to $500,000. So 89 basis points works out to $44.5 million (10.2%-9.31%) x ($0.5M) = $44.5 million.

od.[22] If these extraordinary, non-recurring expenses are excluded, AmerenUE actually earned a return on equity of 10.24%, slightly above its allowed return, in its ongoing operations.[23]

But, if AmerenUE had a fuel adjustment clause like that now authorized by the commission majority, it would have recovered an additional $108 million for the January 1, 2007 coal cost increase,[24] resulting in an increase in return of 216 basis points,[25] or an earned return of 11.47%. We would hope that even proponents of SB179 would have trouble with this level of return and this level is untenable in the current economic circumstances.

20. The Order is unconstitutional, unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the commission engages in retroactive ratemaking by allowing AmerenUE to recover, through an amortiza-

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[22] $2.9 million (vegetation management) + $8.0 million (infrastructure inspection and repair) + $24.56 million (ice storm costs) + $12.0 million (MISO RSG repayment) = $46.46 million. See, Report and Order at pages 35, 42, 49 and 81).

[23] $46.46 million = 93 basis points. 93 basis points + 9.31% = 10.24%.

[24] Report and Order at page 65 (the coal cost increase was $114 million, but the authorized fuel adjustment clause allows AmerenUE to recover 95% of that increase from ratepayers ($114 *.95 = $108 million)).

[25] Each basis point equates to $500,000. Therefore, $108 million translates to 216 basis points.

tion, $2.9 million of excess vegetation management costs incurred between January 1, 2008 and September 30, 2008.

21. The Order is unconstitutional, unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the commission engages in retroactive ratemaking by allowing AmerenUE to recover, through an amortization, $8.0 million of infrastructure inspection and repair costs incurred between January 1, 2008 and September 30, 2008.

22. The Order is unconstitutional, unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the commission engages in retroactive ratemaking by granting an accounting authority order by which AmerenUE is permitted to defer any vegetation management expenses, in excess of $45 million, incurred between October 1, 2008 and February 28, 2009.

Taking account of conditions that are expected to be in play during the period that any rates established in this case are in effect so as to set up the allowance of vegetation management costs incurred after the test period is wholly inconsistent with the commission's insouciance regarding the current and

expected financial situation faced by the United States and by Missourians.

23. The Order is unconstitutional, unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the commission engages in retroactive ratemaking by granting an accounting authority order by which AmerenUE is permitted to defer infrastructure inspection and repair expenses, in excess of $23.9 million, incurred between October 1, 2008 and February 28, 2009.

24. The Order is unconstitutional, unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the commission engages in retroactive ratemaking by implementing a tracking mechanism by which differences in vegetation management and infrastructure inspection or repair costs are tracked for collection in future cases.

25. The Order is unconstitutional, unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of

discretion in that the commission engages in retroactive ratemaking by allowing AmerenUE to recover past costs associated with the January 2007 Ice Storm AAO.

26. Missouri law requires that a majority of the commission agree on one Report and Order for the same reasons. A separate concurrence, though attempting to ratify the decision of the other two commissioners, states separate rationalizations and justifications for the concurring commissioner's decision and thereby renders the Order void and of no lawful force or effect. Nor can compliance rates purportedly prepared in response to a void and ineffectual Order be lawful rates.

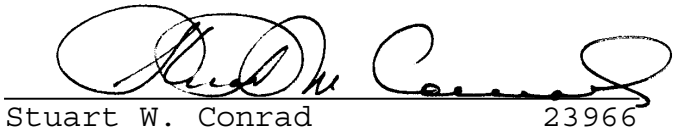
27. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is of record, is arbitrary and capricious and is an abuse of discretion in that the commission majority rejected the proposed adjustment to reconcile depreciation accounts to address a significant imbalance that has arisen in the reserve and to correct for an adjustment that should have been made in a earlier case. It is no answer to argue that depreciation reserves and depreciation expense should not reflect the a change of 20 years in the expected life of a major asset such as Callaway 1 and go unaddressed simply because no comprehensive depreciation study was done. Indeed to fail to do so significantly overcompensates the

utility at this time and results in unjust and unreasonable rates.

WHEREFORE Noranda prays that this Application for Rehearing be granted.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



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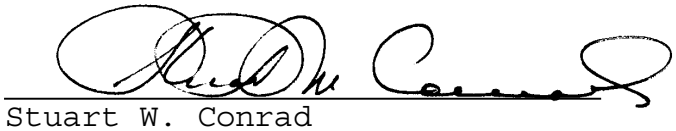
ATTORNEYS FOR NORANDA ALUMINUM, INC.

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 5, 2009