

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

In the Matter of the Cancellation of the Certificate of)
Convenience and Necessity Originally Approved in) File No. ED-2019-0309
File No. EA-2005-0180 and the LTS Rate Schedule)

RESPONSE OF CONSUMERS AND MOTION FOR ORAL ARGUMENT

COMES NOW the Office of the Public Counsel (“OPC”), the Missouri Industrial Energy Consumers (“MIEC”), and the Midwest Energy Consumers Group (“MECG”) (collectively referred to as the “Consumers”) and for their Response to the Pleadings of Ameren Missouri¹ and the Missouri Public Service Commission Staff (“Staff”) and Motion for Oral Argument² respectfully state as follows:

1. On June 5, 2019, the Consumers filed their Motion for Hearing in this matter. In that motion, Consumers detailed that Commission statutes and the standard implicated in this statute both mandated that the Commission conduct an evidentiary hearing in this matter. On June 17, Staff and Ameren filed their responses to the Consumers’ Motion. Both entities oppose the Consumers’ request for a hearing. In addition, Staff recommends that the Commission approve Ameren’s request to cancel the New Madrid smelter certificate.

2. On June 19, 2019, the Commission issued its Order asking the Consumers “to respond to Staff’s recommendation. In addition, the Commission will direct the

¹ In this pleading, the Consumers discuss the 15 year history of how Ameren came to serve the New Madrid smelter. Given the changes in the manner in which Ameren presented itself at various points in time during that 15 year period, Ameren may have been referred to as Union Electric, Ameren Missouri or simply Ameren. For purposes of this pleading, all designations refer to the same company.

² Consumers specifically ask for an oral argument. Consumers seek an oral argument for the purposes of the Commission considering legal argument regarding the need for an evidentiary hearing. Such a proceeding is entirely different than an evidentiary hearing. Consumers point this out in that, in previous cases, the Commission has engaged in a hybrid process by which they allow attorneys to call witnesses to answer more difficult questions. As with circuit and appellate court oral arguments, the Commission’s oral argument should be limited to the attorneys answering Commission question regarding the legal requirement for an evidentiary hearing in this matter.

Consumers to describe any facts they believe may be at issue in a hearing.” In general terms, the Consumers seek, through this pleading, to expand upon their argument that a hearing is required under Section 393.170.3. In addition, the Consumers also seek to refute Staff’s conclusion that the Commission should find that the cancellation of the New Madrid CCN is “not detrimental to the public interest.” In more specific terms, the Consumers address the following specific points:

3. **First**, while Staff’s pleading provides some of the history regarding the grant of the original CCN for the smelter location, Staff’s historical recitation is incomplete. Through this pleading, Consumers fill in these blanks so that the Commission may have a complete understanding of how the New Madrid smelter³ fell within Ameren’s certificated area. This history will also demonstrate that the New Madrid smelter was approved in order to avoid significant detriments underlying the transfer of the Metro East customer base. While the smelter is temporarily served by another entity,⁴ the Ameren request seeks to forever preclude the possibility that the smelter will be served as an Ameren retail customer. Thus, all of the detriments that the Commission sought to avoid through the Metro East transfer have suddenly been imposed again on Ameren retail customers.

4. **Second**, Consumers demonstrate that Ameren’s request to cancel the New Madrid certificate is contrary to the public policy of the state as reflected in Section

³ Similarly, the New Madrid smelter has been known by various names including Noranda, Noranda Aluminum and now M7M. For purposes of this pleading, all of these designations refer to the aluminum smelter located in New Madrid county.

⁴ The Consumers comfortably state that the smelter is “temporarily” served by another entity based upon its history of past electric service. Specifically, the smelter has changed electric providers 4 times in the past 15 years: prior to 2003, the smelter was served by Associated Electric. In 2003, the General Assembly enacted Section 91.026 and the smelter was served from a competitive wholesale entity at market rates. In 2005, the Commission approved the New Madrid CCN and the smelter was served by Ameren as a retail customer. In 2018, the smelter again began to be served by Associated Electric Cooperative.

393.355 – legislation sponsored in the Senate by current PSC Chairman Silvey. That statute recognized the economic importance of the New Madrid smelter and sought to implement statutory provisions to increase the flexibility of the smelter to receive competitive electric rates. In addition, the Consumers provide the affidavit of Senator Doug Libla to support the conclusion that Section 393.355 was designed to enhance the smelter’s ability to access reliable electric service at competitive rates. Through the current action, however, Ameren and Staff seek to reduce that flexibility and permanently eliminate the possibility of service through a discounted Ameren retail rate. As a result, the smelter’s options for electric service in the future have been reduced and the threat of Missouri losing the smelter has been heightened.

5. **Third**, Consumers provide legal authority that demonstrates that the Commission lacks specific statutory authority to cancel a certificate. Instead, the Commission’s authority only exists through the “clear implication” of Section 393.170.3. Recognizing that the authority is implied from Section 393.170.3, the Commission must abide by the procedure contained in that section including the necessity of an evidentiary hearing.

6. **Fourth**, as evidenced by the fact that Ameren and Staff both submitted affidavits to provide relevant facts, both entities inherently recognize that the Commission needs to garner the necessary evidence in order to apply the “not detrimental to the public interest” standard implicated by this statute.⁵ A Commission finding that the cancellation is “not detrimental to the public interest” must necessarily be based upon evidence. . . evidence that can only be adduced through an evidentiary hearing.

⁵ Staff specifically asks that the Commission “determine” that cancellation of the CCN is not detrimental to the public interest. *Affidavit of Sarah Lange*, page 3.

7. **Fifth**, it is important to realize that, in its determination of whether the cancellation of the New Madrid certificate is “not detrimental to the public interest” the public is not narrowly defined as the single customer located in the service area. Instead, the public is more broadly defined to include virtually all interests.

8. **Sixth**, appellate cases and previous Commission cases hold that, in applying the “not detrimental to the public interest” standard, the Commission must not only consider current conditions, but also potential future detriments. Those future detriments include the permanent elimination of the New Madrid smelter as a future Ameren retail customer thus providing a smaller customer base over which to spread current fixed costs as well as future environmental costs.

9. **Seventh**, in order to rebut Ameren and Staff’s claim that the cancellation of the New Madrid certificate is “not detrimental to the public interest”, the Consumers provide the affidavit of Dr. Geoff Marke. Dr. Marke’s affidavit considers both benefits and detriments upon a broader “public interest” than simply one single customer. Based upon his analysis, Dr. Marke concludes that the cancellation of the New Madrid certificate is “detrimental to the public interest.”

10. **Eighth**, the Consumers suggest that Ameren’s action to cancel the New Madrid certificate is not consistent with the actions of a rational company acting in the best interests of its customers. The best interests of the customers would dictate that Ameren preserve the ability to serve this customer thus increasing the number of billing units over which to spread the fixed costs. Indeed, Ameren has previously appealed a Commission order precluding it from providing service to a single traffic signal. Now, that same company that sought to fight the Commission over one traffic signal wants to

voluntarily forego its ability to serve a 470 MW, 98% load factor customer forever. In light of the fact that the New Madrid smelter has changed its electric provider four times in the last 16 years, it is possible, if not probable, that the smelter may eventually seek the discounted retail electric rate currently available under Section 393.355. Recognizing that Ameren's action in this case is not rational, Consumers suggest that Ameren's request to cancel the New Madrid smelter certificate is driven entirely by Ameren's desire to not confront the financial and political clout of the smelter in the future in either regulatory proceedings involving Ameren rates or in legislative proceedings involving potential legislation.

I. INTRODUCTION AND AMEREN RATES

11. As the following analysis indicates, in considering Ameren's request to cancel the certificate of convenience and necessity to serve the New Madrid smelter, the Commission must determine that the cancellation of the certificate is "not detrimental to the public interest." Given this standard, it is important that the Commission recognize that the **entirety** of the Ameren customer base, the very definition of the "public interest", concludes in this response that the certificate cancellation is detrimental. This pleading, and the accompanying affidavit, demonstrate that the permanent elimination of the New Madrid smelter will place upward pressure on Ameren's retail rates. Recognizing that, since 2006, Ameren's total retail rate has increased over twice as much as the national average rate (31.8% increase in the national average rate vs. 62.3% increase in the Ameren retail rate)⁶, the Commission should not acquiesce in Ameren and Staff's attempts to cancel the New Madrid smelter and permanently lose the opportunity to serve this significant customer.

⁶ According to EEI Typical Bills and Average Rates Report Summer 2006 and Summer 2018.

II. BACKGROUND OF SMELTER AS AMEREN CUSTOMER

12. Prior to 2003, Union Electric (d/b/a Ameren Missouri) had electric and gas operations both in Missouri as well as the Metro East portion of Illinois. Given its desire to separate its Missouri operations from its Illinois operations, Union Electric filed an application with the Commission to transfer certain Metro East related assets to its Illinois affiliate Central Illinois Public Service Company (AmerenCIPS).⁷ In large part these Metro East assets consisted of the Metro East customer base as well as related transmission and distribution plant. Noticeably, however, Union Electric did not propose to transfer any of the generation plant that was previously used to serve the Metro East load. Instead, all generation plant, including those plants physically located in Illinois, remained with the Missouri operations. Thus, 600 MWs of generation plant, and the related fixed costs, that were previously used to serve the Illinois load suddenly would become the rate responsibility of Missouri customers.

13. Union Electric's proposal to transfer the Illinois customer base and leave the related generation plant and fixed costs behind for Missouri customers met with immediate opposition from Staff, Public Counsel and related customer groups who all argued that the transfer of assets would be detrimental to the public interest. Of primary interest, these parties argued that certain generation fixed costs currently recovered from the Metro East customers would necessarily be shouldered solely by Missouri customers following the transfer of customers. These costs include future decommissioning costs associated with the Calloway nuclear plant as well as countless future environmental obligations associated with Union Electric's generating plants.

⁷ See, Case No. EO-2004-0108

14. On October 6, 2004, the Commission issued its Report and Order in that docket rejecting Union Electric’s assertion that the transfer would not be detrimental to Missouri ratepayers. Specifically, the Commission found that “the public interest will sustain a detriment on the order of \$9.5 million to \$12.5 million dollars annually.”⁸ The Commission recognized, however, that uncertainty of future impacts made its quantification of detriment uncertain. Importantly though, the Commission expressly recognized that it must consider detriments at a “worst case scenario level.”

The benefits itemized above are certain, while the detriments, for the most part, are not. UE expects that the benefits will actually be much greater than the level shown above, and the record shows that this expectation is not unreasonable. For example, UE expects that the JDA amendment it has offered will more likely yield \$24.0 million annually than \$7.0 million. Additionally, load-growth and high natural gas prices will both magnify the level of the benefits. Both of these conditions are so likely as to be nearly certain. However, *prudence requires that the Commission consider the benefits at a conservative level and the detriments at the “worst-case scenario” level.*⁹

Given its authority to protect the customer, the Commission imposed certain conditions that it found would allow it to approve the transfer of the Metro East customers. “The purpose of these conditions is to protect ratepayers by mitigating or avoiding the possible detriments.”¹⁰

15. Just three weeks after the Commission issued its Report and Order effectively rejecting Union Electric’s request to transfer the Metro East load, Ameren suddenly announced an agreement to provide service to the New Madrid smelter – “the largest energy user in Missouri.”¹¹

⁸ *Report and Order*, Case No. EO-2004-0108, issued October 6, 2004, at page 50.

⁹ *Id.* at pages 50-51 (emphasis added).

¹⁰ *Id.* at page 58.

¹¹ Ameren press release dated October 28, 2004, *Noranda Aluminum Selects AmerenUE as its Electricity Supplier Through First-of-its-Kind Agreement*.

16. Consistent with this announcement, Ameren subsequently filed an application for an “area” certificate of convenience and necessity to serve the New Madrid Smelter.¹² At the time, AmerenUE recognized not only the obvious importance of the smelter to the region, but also the importance of a competitively priced source of electricity to the smelter’s operations. Significantly, Ameren admitted that the provision of a competitive electric rate to the smelter is a matter of “public policy and interest”.

Noranda is a major employer in Southeast Missouri, employing more than 1,100 with an annual payroll of approximately \$57 million. It provides major economic support and stability to a 10-county region in Southeast Missouri. It, and its employees, pay substantial local and state taxes that support various operations in the region, including schools, local and regional governments, and public safety operations. Noranda utilizes many Missouri suppliers and purchases substantial goods and services from Missouri businesses. Noranda also generates substantial revenues which flow to Missouri from Noranda’s out-of-state customers. A safe, reliable, and adequate long term supply of electric power and energy is critical to Noranda’s energy-intensive operations, including its ability to continue competitive and cost-effective operation of its plant. Electricity is the largest cost incurred by Noranda to operate its plant. Moreover, the nature of operating an aluminum smelting facility means that Noranda in effect cannot afford to lose electric power; otherwise, the permanent, continued operation of its plant could be jeopardized because aluminum smelting plants cannot, as a practical matter, be started up, shut down, and then re-started without significant economic, and sometimes unalterable, impacts. Thus, Noranda requires assurance that it will have a proven, long term supplier of electric energy and power who is obligated to provide it safe and adequate service at just and reasonable rates. This long term assurance is critical to Noranda in order to allow Noranda to continue to make long term investments in its plant as necessary for its long term operations to continue. **Continuation of Noranda’s long term operations is critical to the region and indeed to the state of Missouri as a matter of public policy and interest**, as evidenced by the Missouri Legislature’s unanimous adoption of H.B. 208 (merged with S.B. 555 (codified as Section 91.026, RSMo.), which grants qualifying aluminum smelting operations (Noranda qualifies as such) the right to choose the supplier from whom it will obtain electric power and delivery services.¹³

¹² See, *Application*, Case No. EA-2005-0180, filed December 20, 2004, at page 3 (“[I]t is necessary for AmerenUE to obtain a certificate of public convenience and necessity for this area.”)

¹³ *Id.* at pages 6-7.

17. Just as important as Ameren was to the New Madrid smelter, Ameren recognized that the smelter was equally important to Ameren and its operations.

I would also note that Noranda is a good fit for AmerenUE because Noranda is a high load factor customer and AmerenUE is an electric utility with a large proportion of base load generation. As Mr. Voytas discusses in more detail in his testimony, this allows AmerenUE to more effectively operate its base load and peaking generation and to spread the fixed costs associated with it over more megawatt hours.¹⁴

Similarly. . .

The 470 MW Noranda load has a very high load factor and as such is not a difficult load to follow as compared to an arc furnace or other highly variable load which would introduce operational issues. The inclusion of the Noranda load in the AmerenUE control area can also be an operational benefit with respect to minimum generation dispatch requirements during off peak conditions.¹⁵

18. More important to the immediate case, however, it is clear that Ameren recognized that the service to the New Madrid smelter was intended to be a replacement for the Metro East customer base sought to be transferred in Case No. EO-2004-0108. Effectively, Ameren sought to replace the 597 MWs of Metro East load by instead serving the 470 MWs required at the New Madrid smelter¹⁶ and thus avert the significant detriments that would otherwise be imposed by transferring the Metro East customers without a replacement load. In fact, by proposing to serve the smelter, Ameren clearly sought to clear a path towards approval of the Metro East transfer.

AmerenUE's commitment to being Noranda's electric supplier is conditioned upon AmerenUE completing the transfer of the Metro East service area to AmerenCIPS by June 1, 2005. . .¹⁷

Q. You state that the subject transfers would need to be satisfactory as determined in the sole discretion of AmerenUE. Can you elaborate?

¹⁴ *Direct Testimony of Craig Nelson*, Case No. EA-2005-0180, filed December 20, 2004, at page 4.

¹⁵ *Direct Testimony of Edward Pfeiffer*, Case No. EA-2005-0180, filed December 20, 2004, at page 11.

¹⁶ *Id.*

¹⁷ *Id.* at page 6.

A. Yes. As the Commission is aware, AmerenUE has filed an Application for Rehearing with regard to the Metro East service area transfer. Though the Commission approved the transfer, there were a number of conditions attached. While I am not here to debate the merits of AmerenUE's Application for Rehearing or the Commission's order in the Metro East case, it suffices to say that the Metro East order as it now stands is an impediment to AmerenUE's ability to serve Noranda. In order for AmerenUE to proceed further with serving Noranda as a regulated customer, there needs to be a satisfactory resolution of the Metro East case, and then AmerenUE will be able to acquire the capacity it needs by, in effect, shedding the Metro East load which makes the generation currently serving Metro East available to AmerenUE and thus available to serve Noranda. That, in turn, allows the Pinckneyville and Kinmundy CTG transfers to occur which, together with shedding the Metro East load, provides AmerenUE with sufficient capacity to serve Noranda.

19. Just as Ameren represented that the New Madrid smelter load was intended to represent a replacement for the transferred Metro East load, the Staff also recognized that the two were inextricably linked and that the record in the Metro East docket should be reopened to allow for consideration of the Noranda load. "The development of Noranda Aluminum as a full requirements customer of AmerenUE is an additional reason for the Staff's recommendation that this record in this case be reopened and AmerenUE be directed to perform a proper least-cost analysis."¹⁸ In addition to the Staff, the Commission also recognized that the transfer of the Metro East load was now predicated on the introduction of the New Madrid smelter as an Ameren customer. On December 30, 2004, the Commission granted Ameren's pending Application for Rehearing¹⁹ and, in a concurrent order, ordered Ameren to provide a least cost analysis showing the impact on the economics of the Metro East transfer as a result of the addition of the Noranda load.²⁰

¹⁸ *Staff Response to AmerenUE's Application for Rehearing and Alternative Motion and Public Counsel's Application for Rehearing*, Case No. EO-2004-0108, filed November 12, 2004, at page 6.

¹⁹ *Order Granting Rehearing and Reassigning Case*, Case No. EO-2004-0108, issued December 30, 2004.

²⁰ *Order Directing Filing*, Case No. EO-2004-0108, issued December 30, 2004.

20. Over the course of the next month, Ameren and the other parties provided their analysis. Subsequently, the Commission, in the Metro East transfer case, issued its *Report and Order on Rehearing* in which it modified the conditions contained in its previous order.²¹ In addition, the Commission issued its order approving Ameren's application for an area certificate of convenience and necessity to serve the New Madrid smelter.²²

III. THE CANCELLATION OF THE SMELTER CERTIFICATE IS CONTRARY TO THE PUBLIC POLICY OF THE STATE

21. In 2017, Governor Greitens called an extraordinary legislative session to address electric rates for the New Madrid smelter. In that proclamation, Governor Greitens clearly recognized the economic importance of the New Madrid smelter as well as the critical nature that affordable electric rates play in maintaining the smelter. Relevant to the legislation that was ultimately enacted addressing the economic importance of the New Madrid smelter and its electric rates, that proclamation provided:

WHEREAS, the people of Missouri deserve more quality jobs; and

WHEREAS, the State of Missouri has a skilled workforce able to manufacture materials and products sold around the world; and

WHEREAS, the need to provide the Public Service Commission with flexibility to approve special electricity rates for steel works, aluminum smelting facilities, or other similar facilities, in order to attract new jobs in Missouri, is an extraordinary occasion envisioned by Article IV, Section 9 of the Missouri Constitution.

I HEREBY state that the action of said General Assembly is deemed necessary concerning each matter specifically designed and limited hereinafter as follows:

1. To enact legislation authorizing the Public Service Commission to approve a special electricity rate for an aluminum smelting

²¹ *Report and Order on Rehearing*, Case No. EO-2004-0108, issued February 10, 2005.

²² *Order Approving Stipulation and Agreement*, Case No. EA-2005-0180, issued March 10, 2005.

facility, a steel works facility, or other similar facility that is not based on the electrical corporation's cost of service . . .

Ultimately, the General Assembly enacted HB1 in that legislative session which was subsequently codified at Section 393.355. That section provides the Commission with the authority to grant a discounted rate to the New Madrid smelter in order to maintain the smelter operations.

22. Previously, in 2003, the General Assembly had enacted Section 91.026. That section provides the smelter with the unique authority among all Missouri electric customers to access the wholesale electric market to meet its electric needs. Furthermore, the smelter had the authority, as it is now exercising, to take electricity from Associated Electric Cooperative. Therefore, the enactment of HB1 in the 2017 extraordinary session was designed to provide further electric rate flexibility to the smelter.

23. Now just two years after it was enacted, Ameren and Staff seek to undermine the electric flexibility that the General Assembly intended to create by simply removing Ameren's obligation to serve the electric smelter entirely.²³ Rather than 3 electric options (discounted Ameren rates; wholesale market; and Associated Electric), the cancellation of the Ameren certificate would leave the New Madrid smelter with only two options (wholesale market and Associated Electric).

	With an Ameren CCN	Without an Ameren CCN
Associated Electric	Yes	Yes
Wholesale Market	Yes	Yes
Discounted Ameren Retail Rate	Yes	NO!!

²³ The approval of an area certificate of convenience and necessity creates an "obligation to serve". *Union Electric v. Public Service Commission*, 770 S.W2d 283 (Mo.App. 1989); *Harline v. Public Service Commission*, 343 SW2d 177 (Mo.App. 1960). By cancelling its area certificate for the New Madrid smelter, Ameren will no longer have any obligation to serve the smelter. More importantly, the Commission would be powerless to order Ameren to ever apply for such a certificate in the future.

Therefore, the elimination of a discounted Ameren rate as an electric option for the smelter needlessly threatens the financial viability of a customer that the Governor and General Assembly have previously found to be of critical importance to Southeast Missouri.²⁴

24. The Consumers' conclusion, that the elimination of the Ameren certificate is contrary to the express policy of Missouri as reflected in Section 393.355 is also supported by Senator Libla representing the smelter and the 25th District. As his attached affidavit indicates,

The current Ameren application to cancel the New Madrid smelter certificate undermines a significant purpose of the 2017 extraordinary legislative session and Section 393.355. Specifically, while the smelter is currently served by Associated Electric Cooperative, Ameren's proposed cancellation of the New Madrid smelter certificate would eliminate Ameren as a potential third electric provider for the smelter. Rather than three potential electric options, Ameren's proposed action would remove it as a future provider and leave only two options in the future. It is my opinion that such an action is directly contrary to the expressed policy of Missouri, as reflected in Section 393.355. As such, I urge the Commission to reject Ameren's application and maintain Ameren as a potential electric supplier for the New Madrid smelter.²⁵

25. In its application for a certificate of convenience and necessity Ameren previously recognized that the provision of a competitive electric rate to the smelter is a matter of "public policy and interest".²⁶ It is undisputable therefore that the cancellation of the certificate and the elimination of a potential competitive electric provider is contrary to the "public policy and interest" of the State of Missouri and should be rejected by the Commission.

²⁴ As pointed out previously (pages 8-9), Ameren itself has previously recognized the critical economic importance of the smelter and the jobs and payroll that it creates.

²⁵ See, Affidavit of Senator Doug Libla, paragraph 7.

²⁶ See, Application, Case No. EA-2005-0180, filed December 20, 2004, at page 7 ("Continuation of Noranda's long term operations is critical to the region and indeed to the state of Missouri as a matter of public policy and interest").

IV. AN EVIDENTIARY HEARING IS REQUIRED BY STATUTE

26. It is well established, from the very first appellate decisions involving the Public Service Commission, that the Commission is a “creature of statute”.²⁷ As a “creature of statute”, appellate courts will look for statutory authority for the Commission’s action. “Since it is purely a creature of statute, the Public Service Commission's powers are limited to those conferred by the above statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted.”²⁸

27. Importantly, however, the reviewing court will not simply condone the Commission’s efforts to create statutory authority simply because it believes that the existence of such authority would be logical. “[N]either convenience, expediency or necessity are proper matters for consideration in the determination of” whether or not an act of the commission is authorized by the statute.”²⁹ Rather, the Court demands that the Commission demonstrate the specific statute which provides “clear implication” for the action in question.³⁰

28. In the case at hand, the Staff readily admits that “[t]here is no specific statutory section of the Public Service Commission Law addressing the Commission granting an electrical corporation’s request that the Commission cancel the electric

²⁷ “The Public Service Commission, being a creature of the statute, can only exercise such powers as are expressly conferred on it; and the statute conferring such powers, to authorize action thereunder, should clearly define their limits.” *State ex rel. St. Louis Public Service Company v. Public Service Commission*, 34 S.W.2d 486 (Mo. banc 1930).

²⁸ *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979) (“UCCM”) (citing to *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo. banc 1958).

²⁹ *UCCM* at 49 (citing to *State ex rel. Kansas City v. Public Service Commission*, 257 S.W. 462 (Mo. banc 1923)

³⁰ The best example of a reviewing court demanding that the Commission provide specific authority or clear implication for its action is found at *UCCM*, pages 51-58.

corporation's CCN to serve that specific area / territory.”³¹ The Consumers agree. As such, the Commission must seek to find such authority through the “clear implication” of other statutes.

29. In its Response, Ameren implicitly agrees that there is no specific statutory authority to cancel a certificate, but claims that “the Commission’s authority to cancel a CCN is found in its general power over water, sewer, gas and electrical corporations in Chapter 386 and 393.”³² As the following indicates, however, Ameren’s suggestion that statutory authority can be magically created from general Commission authority has been roundly rejected by the Missouri Supreme Court.

30. In 1979, prior to the passage of the current fuel adjustment clause statute, the Missouri Supreme Court considered the authority for the Commission’s use of a fuel adjustment clause. As part of its review, the Court challenged the Commission to provide statutory authority for its use of the fuel adjustment clause. As in the current case, such statutory authority did not exist.

Respondents themselves have difficulty pointing to what provisions in the statutes give them authority to utilize a fuel adjustment clause. In their brief, as noted *supra*, they simply argue that “it is clear that the statutes and case law in Missouri authorize such provisions.” In oral argument, they admitted that it was hard to find specific sections authorizing an FAC...³³

31. Unable to point to explicit statutory authority, the Commission there, much as Ameren does currently, simply pointed to the general statutory authority contained in Chapters 386 and 393.

³¹ *Staff Recommendation*, page 19.

³² Ameren Response, page 3. Noticeably, Ameren points to Commission decisions for such a proposition, but fails to provide any appellate support for its contention.

³³ *UCCM* at 54.

Respondents argue application of the FAC to its residential rate structure is authorized because the commission carefully reviewed the legal basis for authorizing these rates, and because the commission and other states in the past permitted such rates. This information, of course, does not aid our inquiry into whether such rates are authorized. *Of no greater help is the summary statement that chapter 393, RSMo 1969, gives the PSC full authority over rates.*³⁴

32. Given that explicit statutory authority to cancel a certificate of convenience does not exist, the Commission must look to the remainder of its statutory authority to show that the power to cancel a certificate exists through “clear implication.” In the case at hand, Consumers would agree that the power to cancel a certificate does exist by clear implication. Specifically, just as Section 393.170.3 provides the Commission with the authority to approve a certificate of convenience and necessity, it is logical that the Commission should also be able to point to that statute for the notion that the power to cancel a certificate exists by “clear implication.” Importantly to the current issue, however, the authority to grant a certificate is expressly premised upon the Commission conducting an evidentiary hearing.

The Commission shall have the power to grant the permission and approval herein specific whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. (emphasis added).

Thus, while the Commission may find its authority to cancel a certificate through the “clear implication” of its authority to grant a certificate, the Commission must conduct a hearing. The Commission may not point to a statute for purposes of creating authority, but then ignore the process contained in that statute.³⁵ As such, the Consumers renew

³⁴ UCCM at 51.

³⁵ Alternatively, since the New Madrid smelter is currently served by a rural electric cooperative, it could also be argued that the power to cancel a certificate in this case is a “clear implication” of the Commission authority to approve a territorial agreement between an electric corporation, like Ameren, and a rural electric cooperative. Section 394.312 provides the Commission with express authority to approve such

their motion that the Commission schedule an evidentiary hearing to consider whether the cancellation of the New Madrid smelter certificate is not detrimental to the public interest.

**V. THE NOT DETRIMENTAL STANDARD NECESSARILY
CREATES A NEED FOR AN EVIDENTIARY HEARING**

33. While there is significant disagreement among the parties regarding the statutory requirement for an evidentiary hearing in this case, there appears to be agreement that the applicable standard to be applied in this case is whether the cancellation of the New Madrid smelter certificate of convenience and necessity is detrimental to the public interest.³⁶

34. The “not detrimental to the public interest” standard is necessarily a fact driven inquiry. Indeed, the reality of this fact-driven standard has resulted in Ameren and Staff both attaching Affidavits to their various pleadings in order to provide the Commission with the facts necessary for it to make a determination that the cancellation of the certificate is “not detrimental to the public interest.”

35. While Ameren and Staff’s conclusion is premised entirely on the fact that the one customer located within the New Madrid smelter area certificate is no longer served by Ameren, case law indicates that the “public” encompassed by the “not detrimental to the public interest” is much broader. Indeed, case law would indicate that the public interest would also include all of Ameren’s current ratepayers as well the

territorial agreements. As with Section 393.170.3, however, the authority to approve a territorial agreement is also premised on the Commission conducting an evidentiary hearing. Section 394.312.5 provides in pertinent part, “[t]he commission shall hold evidentiary hearings to determine whether such territorial agreements should be approved or disapproved, except that in those instances where the matter is resolved by a stipulation and agreement submitted to the commission by all the parties.”

³⁶ See, Staff Recommendation, page 32.

Missouri and regional economy.³⁷ Given this broader scope of the “public interest”, the Commission is incapable of making a simply summary determination of whether the cancellation of the certificate is “not detrimental.” Rather, the broader scope of the public interest dictates a deeper inquiry that is only satisfied through an evidentiary hearing.

36. Although an evidentiary hearing is mandated in this case by Section 393.170.3, the fact-intensive nature of the “not detrimental to the public interest” has consistently dictated an evidentiary hearing even in cases in which a hearing is not required by statute. For instance, the approval of a merger under Section 393.190 does not appear to mandate an evidentiary hearing. Nevertheless, given that the fact-intensive “not detrimental to the public interest” standard is applicable to mergers as well as here, the Commission has historically recognized that an evidentiary hearing is effectively mandated in those cases. For this reason, the Commission has scheduled evidentiary hearings in mergers involving Great Plains Energy / Westar³⁸; Great Plains Energy / Aquila³⁹; as well as when Union Electric and CIPSCO merged to form Ameren.⁴⁰ In those cases, as well as other cases involving the “not detrimental to the public interest”, an evidentiary hearing may not be required by statute, but is effectively required by the fact-intensive nature of the applicable standard.

³⁷ See, pages 19-20 for a discussion of the case law supporting the broader scope of the “public interest.”

³⁸ See, Case No. EM-2018-0012

³⁹ See, Case No. EM-2007-0374.

⁴⁰ See, Case No. EM-96-149.

**VI. THE “PUBLIC INTEREST” AFFECTED BY THE
“NOT DETRIMENTAL TO THE PUBLIC INTEREST” STANDARD
IS MUCH BROADER THAN ONE CUSTOMER**

37. In their analyses, the “public interest” considered by Ameren and Staff is unreasonably limited. Specifically, Ameren and Staff both focus entirely on the one customer previously served by Ameren and located within the geographic scope of the area certificate. Interestingly, however, neither Ameren nor Staff provides any legal citation to support such a narrow interpretation of the “public interest.” By limiting the “public interest” only to one former customer (the New Madrid smelter), Ameren and Staff both reach the faulty conclusion that the cancellation of a certificate for an area in which no current customers are located must by definition not be detrimental to the public interest. Neither Ameren nor Staff, however, considers a broader definition of the public interest which would include either all of Ameren’s ratepayers or the Missouri and regional economy.

38. Court cases and previous Commission cases do not limit the “public interest” in a restrictive manner. While the Courts have said that “the public interest is a matter of policy to be determined by the Commission,”⁴¹ the Commission has held that the “total interests of the public served must be assessed.”⁴²

39. Certainly in their limited analyses, neither Ameren nor Staff has considered the impact of the cancellation of the New Madrid smelter on the “total interests of the public served.” Rather, both parties have simply tried to cover up all of the detriments to the current Ameren ratepayers by simply focusing on one former customer. The applicable standard requires more and the Commission should schedule

⁴¹ *State ex rel. Public Water Supply District No. 8 v. Public Service Commission*, 600 S.W.2d 147 (Mo.App. 1980).

⁴² *Report and Order*, Case No. EO-93-259, issued September 17, 1993, at page 16.

an evidentiary hearing so that it can consider evidence on the detriment to the “total interests of the public served” rather than simply one former customer.

40. The need to consider a broader “public interest” in matters involving the New Madrid smelter has been previously recognized by the Commission. In Case No. ER-2014-0258, the Commission considered a special electric rate for the New Madrid smelter. There, the Commission specifically noted the “unique” nature of the smelter. “It [the smelter] uses much more electricity than any other Ameren Missouri customer. It uses that electricity at a very high load factor. It is so unique that it has had its own rate classification for many years.”⁴³ Given the “unique” nature of the smelter, matters involving the smelter naturally implicate a broader “public interest.”

In these circumstances, the public interest encompasses more than the economic interests of Noranda’s employees, the Bootheel, or even the state of Missouri. Specifically, and of greatest import to this Commission’s mandate, is the effect of Noranda’s closure on Ameren Missouri’s other customers.⁴⁴

41. Given that: (1) the General Assembly and Ameren have previously concluded that electric pricing to the smelter is a matter of “public policy and interest”; (2) the cancellation of the New Madrid smelter certificate will have a direct impact on the flexibility of the smelter to obtain competitive electricity in the future; (3) the inability of the smelter to obtain competitive electricity in the future may affect its ability to remain operational; and (4) the closure of the smelter will have a tremendous impact on employees, the Bootheel and the state of Missouri, it is narrow-minded for Ameren and Staff to needlessly limit their “not detrimental to the public interest” analysis.

⁴³ *Report and Order*, Case No. ER-2014-0258, issued April 29, 2015, page 129.

⁴⁴ *Id.* at pages 131-132.

**VII. THE NOT DETRIMENTAL STANDARD IS NOT LIMITED TO
CURRENT DETRIMENTS, BUT ALSO CONSIDERS FUTURE DETRIMENTS**

42. In addition to applying a broader scope for the “public interest” than that utilized by both Ameren and the Staff, the Commission also considers more than simply current benefits and detriments. In addition, the Courts and the Commission require the consideration of detriments that may occur in the future.

43. In 1999, Utilicorp United (“Utilicorp”) filed an application to acquire St. Joseph Light & Power Company (“SJLP”). Recognizing that Utilicorp paid in excess of the current stock price for SJLP, there was a concern that Utilicorp may eventually seek recovery of the acquisition premium. While the parties identified this potential detriment, the Commission sought to ignore this future detriment in its consideration of whether the acquisition was “not detrimental to the public interest.” There the Commission stated that “[t]he matter of the acquisition premium is also not properly before the Commission. It is a matter for a rate case. Therefore, the Commission will not address the matter of the acquisition premium in this case.”⁴⁵

44. On appeal, the Missouri Supreme Court held that it was unlawful for the Commission to simply ignore potential future detriments in the context of the “not detrimental to the public interest” analysis.

The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public. **The PSC's refusal to consider this issue in conjunction with the other issues raised by the PSC staff may have substantially impacted the weight of the evidence evaluated to approve**

⁴⁵ *Report and Order*, Case No. EM-2000-292, issued December 14, 2000, at page 41.

the merger. The PSC erred when determining whether to approve the merger because it failed to consider and decide all the necessary and essential issues, primarily the issue of UtiliCorp's being allowed to recoup the acquisition premium.⁴⁶

Thus, in undertaking a “not detrimental to the public interest” analysis, the Commission must consider all identified detriments, whether those detriment are current or future detriments.

45. Given this standard, the Commission analyzed numerous potential future detriments when it considered whether the transfer of the Metro East customer base was “not detrimental to the public interest.” For instance, the Commission discussed the potential future detriment associated with Missouri ratepayers incurring an increased level of future environmental compliance capital costs.

The proposed transfer will make available for UE’s Missouri customers an additional 6-percent slice UE’s existing generating capacity. Necessarily, with this extra capacity will come responsibility for an additional 6-percent of any associated future environmental liabilities. As noted above, Public Counsel calculated this additional burden at between \$5.1 million and \$7 million annually. For this reason, Kind testified that these coal-fired plants are not “low-cost” plants, as UE claims, but increasingly high-cost plants as increased environmental regulation takes hold in the near future.⁴⁷

46. Similarly, the Commission discussed the future risk of increased environmental costs associated with SO₂ emissions.

The forecasts in UE’s 10-K are possible levels of future capital expenditures for environmental purposes. It is by no means certain that these expenditures will ever actually be made. In any event, UE’s Missouri ratepayers will certainly bear the costs of over 90-percent of such expenditures as are actually made. What is at issue is an additional 6-percent share, or an annual increase of \$6.54 to each UE customer if the capital expenditures are actually as high as Public Counsel predicts, at a 10-percent ROE.⁴⁸

⁴⁶ *State ex rel. AG Processing, Inc. v. Public Service Commission*, 120 S.W.3d 732, 736 (Mo. banc 2003).

⁴⁷ *Report and Order*, Case No. EO-2004-0108, issued October 6, 2004, at page 33.

⁴⁸ *Id.* at page 34.

47. In that Metro East case, Staff also admitted that, in considering the “not detrimental to the public interest” standard, “the Commission must evaluate both the present and future impacts of a transfer at the time it makes its decision.”⁴⁹ Strangely, despite such an admission, Staff’s analysis in this case is completely devoid of any consideration of future public detriment associated with the fact that the cancellation of the New Madrid smelter certificate will forever rule out the possibility that the smelter will return as an Ameren retail customer. As such, just as Ameren and Staff’s analysis is faulty for its failure to consider a broader “public interest”, their analyses are also faulty for the failure to consider “future impacts” of the cancellation of the certificate.

VIII. THE CANCELLATION OF THE NEW MADRID SMELTER CERTIFICATE IS DETRIMENTAL TO THE PUBLIC INTEREST

48. As mentioned, in its Application and Response, Ameren limits its “not detrimental to the public interest” standard solely to the present impact on one former customer – the smelter. At no time does Ameren actually consider either: (1) the impact on its current customer base or (2) extend its analysis to consider future benefits or detriments. The entire scope of the Ameren analysis reflected in its Application is focused on the fact that the smelter is now served by Associated Electric. Staff’s analysis is equally lacking in that it focuses on the single former customer and provides no consideration of the potential present or future impact on the rest of Ameren’s customer base.

Only one entity continues to physically occupy and own the land that comprises the CCN which was the subject of Case No. EA-2005-0180. There has been and continues to be only one customer for the CCN which was the subject of Case No. EA-2005-0180. Since that entity which is owner of and customer in the total area comprising the CCN has lawfully switched electric suppliers through a multi-year contract and represents

⁴⁹ *Id.* at page 40 (emphasis added).

that it has no objection to the cancellation of the Ameren Missouri CCN, and no assets, expenses, or other agreements are in place that comprise utility investment or ongoing expenses or revenues related to service within the CCN area by Ameren Missouri, Staff recommends the Commission determine that cancellation of the CCN is not detrimental to the public interest.⁵⁰

49. Even if an analysis based upon the effect on the smelter was appropriate, Ameren and Staff's analyses is problematic in that it fails to consider the real possibility that the smelter may return as an Ameren retail customer with discounted pricing under Section 393.355. Prior to 2003, the New Madrid smelter was served by Associated Electric Cooperative. Based upon the authority provided by the General Assembly in Section 91.026, the smelter began to be served by a competitive wholesale entity at market rates in 2004. In 2005, the Commission approved the New Madrid CCN and the smelter was served by Ameren as a retail customer. In 2018, the smelter again began to be served by Associated Electric. Thus, in a period of just 16 years, the smelter has been served by 4 different providers. Given the flexibility provided by Section 393.355, it is not unreasonable to envision the smelter returning as an Ameren customer at a discounted electric rate in the future. Neither Ameren nor Staff's analysis, however, contemplates this possibility. Rather, both seek to undermine the purpose of Section 393.355 and forego the possibility of the smelter returning as an Ameren customer by simply cancelling the smelter certificate.

50. In its June 19, 2019 *Order Directing Response*, the Commission directed the "Consumers to describe any facts that they believe may be at issue in a hearing." Recognizing the deficient nature of the Ameren and Staff analyses (i.e., both analyses fail to consider Ameren customers within its definition of "public" and neither considers

⁵⁰ *Affidavit of Sarah S.K. Lange*, attached to Staff Recommendation, at page 3 of 7.

future detriments), the Consumers assert that they believe that the conclusion, that the cancellation of the smelter certificate is “not detrimental to the public interest” as well as the underlying facts upon which those conclusions are based would “be at issue in a hearing.”

51. While the Consumers believe that Section 393.170.3 requires a hearing and reserve the right to further evaluate the nature of both the current and future benefits and detriments associated with the cancellation of the New Madrid smelter certificate, the Consumers have nonetheless prepared a tentative analysis, reflected in the attached Affidavit of Dr. Geoff Marke. In that analysis, Dr. Marke concludes that the proposed cancellation is “detrimental to the public interest.”

52. As Dr. Marke indicates, the cancellation of the New Madrid smelter is expected to deliver very little in the terms of current or future benefits. On the other hand, the certificate cancellation is likely to result in significant future detriments to current Ameren customers, the smelter and its employees and to the Missouri and regional economies. The smelter has changed electric providers four times in the previously 16 years. Therefore, a return of the smelter as an Ameren customer is certainly a possibility that will be forever foreclosed by a cancellation of the certificate. Ameren customers are harmed by the loss of the opportunity for the smelter to return as an Ameren customer, even at a discounted rate. This eliminates the chance of lower rates for other customers because the smelter would be required to recover a portion of fixed costs. Moreover, the smelter is harmed because the cancellation of the area certificate reduces its future options to receive reliable electric service at a competitive rate in the future. Finally, the state and regional economy are harmed not only by the likelihood that

rates will be higher than they otherwise would be with the smelter as a customer, but also by the potential loss of the smelter, a significant employer in the Southeast Missouri region. For all these reasons, Dr. Marke concludes that these many detriments outweigh any benefits and make this cancellation “detrimental to the public interest.”

**IX. THE CANCELLATION OF A CERTIFICATE IS NOT A
RATIONAL ACTION BY A MISSOURI UTILITY**

53. Ameren’s voluntary decision to seek to cancel its area certificate for the New Madrid smelter and relinquish its ability to serve the smelter as a retail customer is not the action of a rational electric company. Historically Missouri utilities have zealously guarded their ability to serve customers. This desire to maintain the right to serve a customer is driven by two factors. First, since a portion of fixed costs have historically been recovered through energy sales, the sale of a greater number of kilowatt hours usually resulted in some level of increased profits. Second, an increased number of kilowatt hour sales results in a larger base to spread costs. As a result, customer rates are generally lower with a larger customer base.

54. The fact that Missouri electric utilities have zealously guarded their ability to serve customers is well established, regardless of the size of the customer. In 1987, for example the Commission considered a complaint filed by Cuivre River Electric Service Co. (“Cuivre River”) filed against Union Electric.⁵¹ In that Complaint, Cuivre River alleged that Union Electric was unlawfully serving a traffic signal that Cuivre River had the exclusive right to serve. The Commission agreed that, while Union Electric had an adjacent line certificate, that line certificate did not provide the right to serve the traffic signal.

⁵¹ See, Case No. EC-87-71.

The Commission determines that UE has no authority to extend service from its authorized line to the light signals in question. The Commission determines further that these signals are located within the certificated area of another utility and that said utility is the sole recipient of a franchise from the city in which the signals are located.⁵²

55. Unhappy with the Commission's decision precluding it from serving a single traffic signal, Union Electric appealed the Commission's decision. On appeal, the appellate court distinguished between area and line certificates and held out that only area certificates carry the obligation to serve customers. Pointing out that "Union Electric does not have an area certificate in the area which has now been incorporated by the City of Lake St. Louis", the Court affirmed the Commission's decision that Union Electric could no longer serve the traffic light.

56. Missouri electric utility efforts to preserve their right to serve customers have extended beyond simply regulatory cases. In 1991, Missouri utilities sought the enactment of legislation which permanently preserved their exclusive right to serve a structure. Section 393.106 provides in pertinent part:

Once an electrical corporation or joint municipal utility commission, or its predecessor in interest, lawfully commences supplying retail electric energy to a structure through permanent service facilities, it shall have the right to continue serving such structure, and other suppliers of electrical energy shall not have the right to provide service to the structure. . .

Clearly then, no matter the size of a customer, Missouri utilities have gone to great lengths to guarantee their continued opportunity to serve a customer.

57. In fact, a simple search of the Commission's electronic filing system indicates that, while utilities have agreed to territorial agreements, there is not a single instance in the past 30 years in which a utility has voluntarily sought to cancel its certificate to provide electric service to a customer.

⁵² *Report and Order*, Case No. EC-87-71, issued September 22, 1987, 29 Mo.P.S.C. (N.S.) 213, 217.

58. Given the efforts that Missouri utilities have taken generally and Ameren specifically has taken in the past to preserve the right to serve a customer, Ameren's current willingness to voluntarily seek to cancel a certificate is puzzling. As Ameren pointed out in its application for the New Madrid smelter, the smelter is a unique customer (470 MWs with a 98% load factor) that represents a "good fit for AmerenUE" that provides "operational benefits."

I would also note that Noranda is a good fit for AmerenUE because Noranda is a high load factor customer and AmerenUE is an electric utility with a large proportion of base load generation. As Mr. Voytas discusses in more detail in his testimony, this allows AmerenUE to more effectively operate its base load and peaking generation and to spread the fixed costs associated with it over more megawatt hours.⁵³

Similarly, Ameren pointed out:

The 470 MW Noranda load has a very high load factor and as such is not a difficult load to follow as compared to an arc furnace or other highly variable load which would introduce operational issues. The inclusion of the Noranda load in the AmerenUE control area can also be an operational benefit with respect to minimum generation dispatch requirements during off peak conditions.⁵⁴

59. Recognizing that Ameren has, in the past, fought to preserve its right to serve a small traffic signal, and has taken efforts to implement legislation to preserve its exclusive right to continue to provide electric service to a customer, the Consumers assert that Ameren's current actions are not rational. In fact, the Consumers suggest that Ameren's motivation in cancelling the New Madrid smelter certificate is based entirely on its desire to permanently avoid the smelter as a retail customer and, thus, avoid any future entanglements with the financial and political clout of the smelter both before the Public Service Commission as well as in the General Assembly. Each of the current

⁵³ *Direct Testimony of Craig Nelson*, Case No. EA-2005-0180, filed December 20, 2004, at page 4.

⁵⁴ *Direct Testimony of Edward Pfeiffer*, Case No. EA-2005-0180, filed December 20, 2004, at page 11.

Commissioners, as former legislators and policy makers in the Governor’s office, are well aware of the influence that the previous owner of the smelter (Noranda) has exerted in legislative matters in recent years. Not surprisingly, Ameren would like to avoid any of this influence being broad to bear against its political goals.

X. MOTION FOR ORAL ARGUMENT

60. As the Commission can easily conclude from the competing pleadings in this matter, there is a significant legal argument regarding the need for an evidentiary hearing in this matter. As such, the Consumers assert that it would be appropriate for the Commission to conduct an oral argument simply for purposes of attorneys presenting legal analysis on the need for an evidentiary hearing. Importantly, so that this truly remains an oral argument and not venture into an evidentiary hearing itself, the Commission should refrain from parties calling witnesses to provide evidence.

XI. CONCLUSION

61. The Consumers respectfully request that the Commission conduct an evidentiary hearing in this matter. Recognizing that there is no explicit statutory authority for the Commission to cancel a certificate, such authority must be clearly implied by other statutes. In this case, the authority to cancel a certificate is implied from Section 393.170.3 which allows the Commission to grant a certificate of convenience and necessity. That section, however, carries the express requirement that the Commission conduct an evidentiary hearing. Moreover, the need to conduct an evidentiary hearing is necessitated by the fact-intensive nature of the “not detrimental to the public interest” standard.

In its Order Directing Filing, the Commission ordered the “Consumers to describe any facts that they believe may be at issue in a hearing.” The Consumers assert that they believe that the ultimate conclusion, that the cancellation of the certificate is “not detrimental to the public interest”, as well as any facts supporting such a conclusion, would be “at issue in a hearing.” Supporting their assertion that the cancellation of the certificate is detrimental to the public interest, the Consumers point to the fact that the cancellation of the smelter certificate is directly contrary to the public policy reflected in Section 393.355 which sought to increase electrical service provider flexibility for the smelter. A cancellation of the certificate would, in fact, decrease the smelter’s flexibility. Furthermore, the Consumers assert that the conclusion that, cancellation is “not detrimental to the public interest” standard, is faulty because of Ameren’s failure to consider either a broader public interest or potential future detriments. As reflected in the attached Affidavit of Dr. Marke, the Consumers assert that the cancellation of the certificate delivers zero benefits and carries significant risk which is the definition of a transaction that is detrimental to the public interest.

WHEREFORE, the Consumers renew their Motion that the Commission schedule an evidentiary hearing in this matter and ask that the Commission deny Ameren’s Application to cancel the New Madrid smelter certificate.

Respectfully submitted,

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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.



David L. Woodsmall

Dated: July 1, 2019

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

In the Matter of the Cancellation of the Certificate of)
Convenience and Necessity Originally Approved in) File No. ED-2019-0309
File No. EA-2005-0180 and the LTS Rate Schedule)

AFFIDAVIT OF SENATOR DOUG LIBLA

1. My name is Doug Libla. I am the Senator for the 25th District of Missouri. This district includes all or a portion of Butler, Carter, Dunklin, Mississippi, New Madrid, Pemiscot, Shannon and Stoddard counties in Southeast Missouri.

2. The New Madrid smelter, currently operated by Magnitude 7 Metals is located on the Mississippi River in New Madrid County. As such, the New Madrid smelter is located in the 25th District and is represented in the Missouri Senate by me.

3. The New Madrid smelter is a critical economic component of both the Missouri and Southeast Missouri economies. At its maximum capacity, the New Madrid smelter employs approximately 900 individuals. This makes the smelter one of the largest employers in the Southeast Missouri region.

4. As a commodity aluminum provider, the New Madrid smelter cannot set the prices for its aluminum product. Rather, the price that it charges is largely set on a commodity market. For this reason, the financial viability of the smelter is largely dependent on its ability to control costs. Given the nature of the smelting operations, electricity is one of the smelter's largest cost components. Therefore, the ability of the smelter to receive reliable electricity at a cost that allows it to compete with other domestic and global smelters is critical to its ability to remain operational.

5. In 2017, Governor Greitens called a special session of the General Assembly for the purpose of enacting "legislation authorizing the Public Service Commission to approve a special electricity rate for an aluminum smelting facility." Ultimately, the General Assembly passed House Bill 1 which authorized the Commission to provide a "special rate" to the smelter. That legislation, sponsored in the Senate by current PSC Chairman Silvey, received broad bipartisan support. In fact, it is my recollection that, while Missouri Energy Development Association (MEDA) was disappointed that certain utility ratemaking provisions were removed from the bill, it nevertheless testified in support of the legislation. Importantly, as a trade association of the Missouri regulated utilities, MEDA's largest member is Ameren Missouri. House Bill 1 is now codified at Section 393.355.

6. Section 393.355 was intended to provide increased electric flexibility for the smelter and enhance the competitiveness of the smelter. Specifically, while the smelter had the option to receive electricity from Associated Electric Cooperative as well as at

wholesale market rates, Section 393.355 provided a critical third option for the smelter to receive electricity at a discounted retail rate from Ameren.

7. The current Ameren application to cancel the New Madrid smelter certificate undermines a significant purpose of the 2017 extraordinary legislative session and Section 393.355. Specifically, while the smelter is currently served by Associated Electric Cooperative, Ameren's proposed cancellation of the New Madrid smelter certificate would eliminate Ameren as a potential third electric provider for the smelter. Rather than three potential electric options, Ameren's proposed action would remove it as a future provider and leave only two options in the future. It is my opinion that such an action is directly contrary to the expressed policy of Missouri, as reflected in Section 393.355. As such, I urge the Commission to reject Ameren's application and maintain Ameren as a potential electric supplier for the New Madrid smelter.

AFFIDAVIT OF SENATOR DOUG LIBLA

State of Missouri)
) ss.
County of Butler)

COMES NOW Doug Libla and on his oath declares that he is of sound mind and legal age; that he contributed to the attached Affidavit; and that the same is true and correct according to his best knowledge and belief.

Further the Affiant sayeth not.

/s/ Doug Libla
Senator Doug Libla

JURAT

Subscribed and sworn before me this 1st day of July, 2019.

Notary Public

NOTE: EXECUTED AFFIDAVIT TO BE LATE FILED

MEMORANDUM

To: Missouri Public Service Commission Official Case File,
Case No. ED-2019-0309

From: Geoff Marke, Chief Economist
Office of the Public Counsel

Subject: OPC response to the Cancellation of CCN approved in EA-2005-0180 and the
LTS Rate Schedule (i.e., “the aluminum smelter rate”)

Date: July 1, 2019

Overview:

On April 12, 2019, Union Electric Company (d/b/a Ameren Missouri) filed an application asking the Commission to: (1) cancel the Certificate of Convenience and Necessity granted to it in Case No. EA-2005-0180 which authorized Ameren to provide electric service to the New Madrid Smelter and (2) to cancel the Large Transmission Service rate schedule that was used to serve the New Madrid smelter.

On June 5, 2019, Midwest Energy Consumers Group, Missouri Industrial Energy Consumers and the Office of the Public Counsel (“the Consumers”) filed a Motion for Hearing. On June 17, 2019, both Ameren and the Staff filed their pleadings opposing the Consumers’ Motion for Hearing and recommending that the Commission approve Ameren’s application. On June 19, 2019, the Commission ordered the Consumers to file a response “describing any facts they believe may be at issue in a hearing of this matter.”

Position:

As set forth in the accompanying Response as well as this affidavit, the Consumers believe that Ameren and Staff’s ultimate conclusion, that the cancellation of the New Madrid smelter CCN is “not detrimental to the public interest” is at issue in a hearing in this matter. More relevant to the Commission’s June 19, 2019 order, the Consumers believe that the current and future benefits and detriments on the public interest will be at issue in a hearing in this matter.

Given the standard at issue in this matter, whether or not the cancellation of the New Madrid smelter is detrimental to the public interest, I have prepared this affidavit providing my preliminary analysis of current and future benefits associated with the cancellation of the smelter as well as the current and future detriments. I conclude that the cancellation of the New Madrid smelter certificate is “detrimental to the public interest” and that the Ameren application should be rejected by the Commission.

Applicable Standard:

It is my understanding, based upon conversations with counsel, that the Commission has historically applied a “not detrimental to the public interest” standard to requests to abandon service / cancel certificates of convenience and necessity. This standard is logical in that the Commission reviews an application for a certificate of convenience and necessity based upon whether the certificate is “necessary or convenient for the public service.” Given that the cancellation request is the termination of a certificate, it should be evaluated based upon a similar public interest standard.

The Public Interest and the New Madrid Smelter:

For purposes of my analysis, I have defined the public interest as Ameren’s current customer base, the state of Missouri and Southeast Missouri economy (in particular).

Moreover, I have been informed by counsel that the scope of the public interest implicated by the “not detrimental to the public interest” standard is a “matter of policy to be determined by the Commission.” In its analysis, Staff focuses solely on the impact of the cancellation on the New Madrid smelter and not the “public” interest at large. That is, Staff’s analysis omits primary (other Ameren Missouri customers) and secondary (the Southeast Missouri economy) considerations in regards to its recommendation.

In 2015, the Commission noted the unique nature of the New Madrid smelter.

It [the smelter] uses much more electricity than any other Ameren Missouri customer. It uses that electricity at a very high load factor. It is so unique that it has had its own rate classification for many years.¹

In fact, the smelter consumes roughly as much power as the city of Springfield, Missouri when it is fully operational. Based upon its unique characteristics, the Commission pointed out that:

In these circumstances, the public interest encompasses more than the economic interests of Noranda’s employees, the Bootheel, or even the state of Missouri. Specifically, and of greatest import to this Commission’s mandate, is the effect of Noranda’s closure on Ameren Missouri’s other customers.²

Given this past history, as well as recent legislation (Section 393.355), and the fact that since 2003, the smelter has changed electric providers 4 times, I find that it would be detrimental to cancel the certificate and preclude the option of the smelter returning as an Ameren retail customer. Even though the smelter would likely return on a discounted rate, that rate must be above incremental cost. Therefore, the smelter would be making some contribution to fixed costs. Any fixed costs recovered from the smelter would be fixed costs that Ameren would not be recovering from the remaining Ameren customer base. Any additional customers, let alone a

¹ ER-2014-0258, Report and Order (issued April 29, 2015), p. 129.

² Ibid. p. 131-132.

customer with the load factor of the New Madrid smelter would be welcome in light of Ameren Missouri's current long capacity and expected capital investments.

Benefits of Cancellation of New Madrid Smelter Certificate

In its application, Ameren has not identified any benefits associated with the certificate cancellation. Instead, Ameren focuses entirely on the fact that the smelter is no longer served by Ameren. Therefore, the only benefit associated with the cancellation of the certificate is the minimal regulatory cost associated with maintaining the certificate and LTS rate schedule. A quantification of this benefit is difficult because there is essentially no monetary cost associated with maintaining the certificate and, therefore, no benefit associated with cancelling the certificate. Utilities frequently have rate schedules in their tariffs that are frozen or have no customers. As such, I conclude that there are no cost saving benefits associated with cancelling the certificate.

Detriments of Cancellation of New Madrid Smelter Certificate

The New Madrid smelter is in a unique situation among Missouri electric customers. Given its operating characteristics and economic stature in Southeast Missouri, the General Assembly has provided the smelter with options to receive electric service. Specifically, as long as the present Ameren certificate remains in place, the smelter has three options for electric service:

- (1) Associated Electric Cooperative;
- (2) Access through the electric market under Section 91.026; and
- (3) Ameren Missouri at a discounted retail rate under Section 393.355.

The cancellation of the certificate removes Ameren's obligation to serve and the smelter loses the option to be served by Ameren Missouri as a retail customer in the future. The cancellation of the Ameren certificate would eliminate one significant option and leave the smelter with only the options of receiving electricity from Associated Electric or the wholesale market. For a customer the size of the smelter, whose financial viability depends on its ability to access reliable electricity at competitive rates, the cancellation of the Ameren certificate eliminates a significant future option for electric service and threatens the economic viability of the smelter.

In addition to creating greater uncertainty for the smelter and Southeast Missouri's economy, the cancellation of the certificate also negates the option of potential future benefits for Ameren's customers.

Just as the future presence of the smelter has the effect of keeping Ameren's rates lower than they would otherwise be, this would have a positive effect on the Missouri and regional economy. Lower electric rates provide the ability for businesses to dedicate capital to other needs or hiring more employees. Similarly, lower electric rates frees money for individuals to spend on

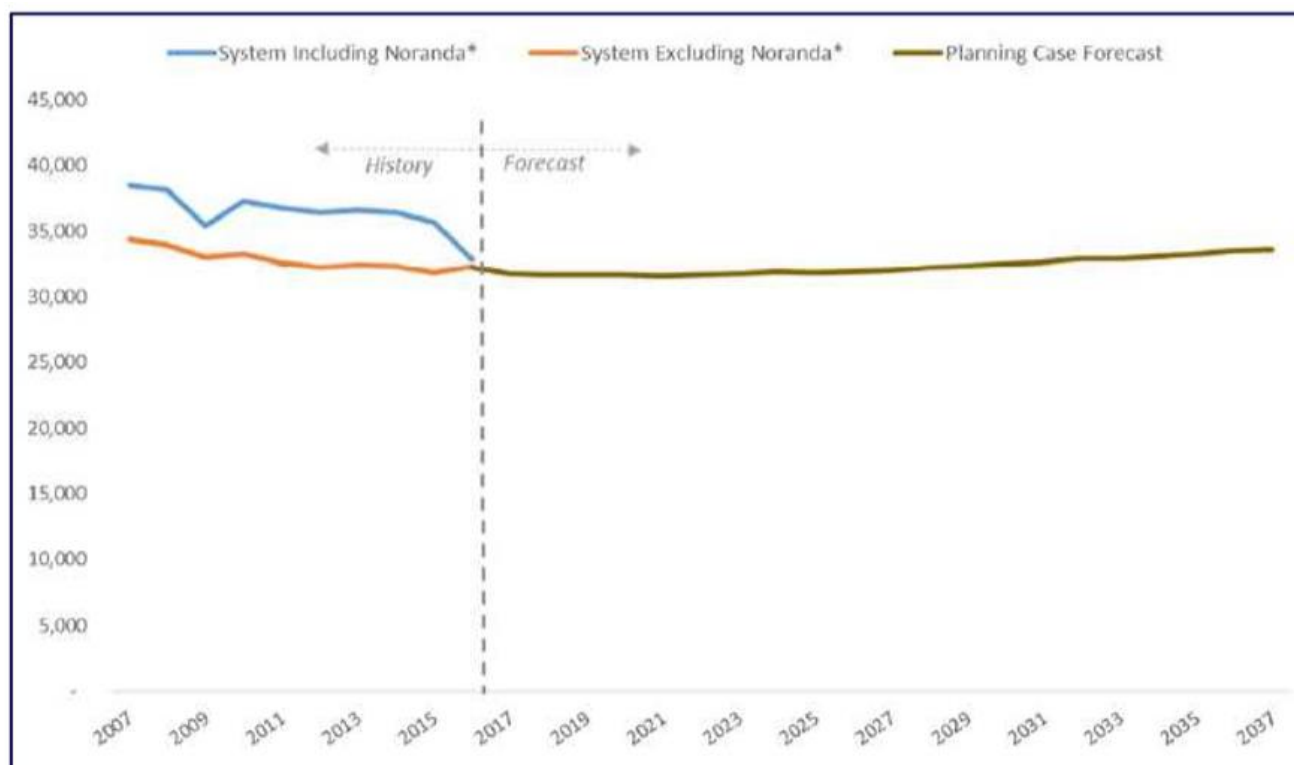
other needs. In any event, lower electric rates are beneficial to the state, regional economy and conform to the public interest standard.

Ameren Missouri load and capacity

Based on Ameren's most recently filed triennial IRP, the Company has sufficient current generating capacity to meet the needs of current customers as well as to potentially provide service to the smelter in the future if needed. As the following analysis details, Ameren's current generating portfolio greatly exceeds its native load. Moreover, given the effects of Ameren's MEEIA programs and the addition of wind resources, Ameren's reserve capacity and cost of service are both increasing.

Based on Ameren Missouri's most recently filed triennial integrated resource plan, Ameren Missouri's load has decreased considerably and is not forecasted to grow in the next decade. In fact, the loss of New Madrid smelter accounted for approximately 10% of Ameren Missouri's annual sales. The impact of which can be seen in Figure 1.

Figure 1: Ameren Missouri energy sales forecast with and without the New Madrid smelter³



Despite the stagnant customer demand, Ameren Missouri's existing capacity has largely been extended between its two most recently filed triennial IRPs. Table 1 shows Ameren Missouri's planned fossil fuel retirement dates in its 2014 and 2017 IRP filings respectively.

³ EO-2018-0038 Chapter 3, Load Analysis and Forecasting p. 31

Table 1: Ameren Missouri fossil fuel retirement changes between triennial IRP's^{4,5,6}

Site	Fuel Type	Retirement Date 2014 IRP	Retirement Date 2017 IRP	Retirement Change
Labadie	Coal	2042	2042	No
Meramec	Coal	2022	2022	No
Rush Island	Coal	2046	2045	Yes (-1 year)
Sioux	Coal	2033	2033	Yes (+4 years)
Kirksville	Natural Gas	2017	2021	No
Howard Bend	Oil	2015	Retired	Yes (+6 years)
Fairgrounds	Oil	2015	2021	Yes (+4 years)
Meramec CTG-1	Oil	2017	2021	Yes (+4 years)
Meramec CTG-2	Natural Gas	2020	2021	Yes (+1 year)
Mexico	Oil	2020	2023	Yes (+3 years)
Moberly	Oil	2020	2023	Yes (+3 years)
Moreau	Oil	2020	2023	Yes (+3 years)

To its current capacity, Ameren Missouri has also increased its capacity with recent projects as shown in Table 2

Table 2: Ameren Missouri new or publicly planned capacity additions

Site	Fuel Type	Size
High Prairie	Wind	400 MW
Brickyard Hills	Wind	157 MW
Outlaw	Wind	299 MW
Green Tariff	Wind	Up to 200 MW
BJC/Wash U.	Solar	1.8 MW
Lambert Airport	Solar	1 MW

⁴ EO-2018-0038 Chapter 4 Existing Supply-Side Resources, p 11-12 & EO-2015-0084 Chapter 4: Existing Supply-Side Resources, p.12-13.

⁵ This is not an exhaustive list of Ameren Missouri's supply side generation units. Furthermore, there may be more than one unit at a particular site; however, the Company has not indicated individual unit retirements for general sites.

⁶ Ameren acknowledges in its application that it no longer considers the smelter "as part of Ameren Missouri's Integrated Resource Planning and Ameren Missouri no longer has the permission of the Midcontinent Independent System Operator, Inc. ("MISO") to include the Smelter's load in Ameren Missouri's Network Integration Transmission ("NTS") agreement." With that in mind, my conclusions on the cancellation of the smelter certificate are conditioned, in part, on Ameren's current excessive reserve margin. Although current trends suggest otherwise, if Ameren were no longer to have its excessive reserve margin it would impact my recommendation. For now, however, Ameren easily has enough capacity to serve the smelter if and when the smelter returns as a customer. If this changes, then Ameren should file an application to cancel the certificate based upon the conditions that exist at that time.

In addition to the aforementioned projects:

- Ameren Missouri ratepayers will invest over \$300 million (conservatively) in MEEIA 3 costs over the next two-and-half years which should have the effect of limiting any customer demand growth; and
- There are potentially two additional utility-scale solar projects currently opened in EFIS (Case Nos: EA-2019-0371 and EA-2019-0209).

The Commission is also aware that Ameren Missouri is planning to make further capital investments over the next five-years through its “Smart Energy Plan” which includes over \$5 billion in expected costs increases on customer rates as seen in Table 3.

Table 3: Ameren Smart Energy Plan (SB 564 proposal)

Smart Energy Plan 5YR Total Capital Overview (Thousands \$)



A 5-year average of 37% of capital investments will go toward grid modernization

	2019	2020	2021	2022	2023	Grand Total
Smart, Reliable Grid Operations	\$335,042	\$451,058	\$406,117	\$391,472	\$360,506	\$1,944,195
Smart Meter Program	\$30,034	\$54,870	\$51,966	\$55,995	\$52,117	\$244,982
Non-Nuclear Generation & Environmental	\$186,348	\$176,756	\$182,326	\$196,643	\$226,609	\$968,682
Nuclear Generation	\$74,684	\$65,896	\$61,411	\$76,451	\$73,984	\$352,426
Hydro Generation	\$34,825	\$33,627	\$43,395	\$33,499	\$14,955	\$160,301
Renewable & Gas Turbine Generation	\$11,948	\$21,782	\$20,104	\$25,732	\$19,339	\$98,905
Secure & Reliable Transmission	\$141,184	\$135,658	\$153,958	\$148,264	\$154,070	\$733,134
Cyber & Technology Upgrades	\$88,542	\$89,955	\$89,849	\$89,877	\$89,873	\$448,096
Operational & Customer Support Facilities	\$54,393	\$96,518	\$58,560	\$50,817	\$53,505	\$313,793
Innovative Opportunities	\$14,302	\$9,064	\$5,799	\$4,947	\$3,852	\$37,964
Grand Total - Capital	\$971,302	\$1,135,184	\$1,073,485	\$1,073,697	\$1,048,810	\$5,302,478
Wind Asset Acquisition (two sites)		\$1,000,000				\$1,000,000
Grand Total, Including Wind	\$971,302	\$2,135,184	\$1,073,485	\$1,073,697	\$1,048,810	\$6,302,478

Costs associated with the plan will not include:

- Future environmental costs associated with compliance for the Coal Ash Residual Rules including ash pond costs (closure) and landfill cell costs that will be in service after 2023;
- Hundreds of millions of dollars in AMI investment that cannot be recovered through its Smart Energy Plan (Case No. EO-2019-0044); and
- Any potential environmental remediation costs related to Rush Island and Labadie Power Plants which have been estimated to costs between approximately \$4 billion to \$7 billion (see OPC comments in Case No. EO-2019-0314).

Conclusion:

To recap:

- The Commission and the General Assembly have recognized the importance of the New Madrid Smelter's load to current Ameren customers and to the Missouri economy at large;
- Since 2003, the New Madrid Smelter has switched electric providers four times;
- Currently, the New Madrid smelter has 3 options for procuring reliable electricity at competitive rates. The cancellation of the Ameren certificate will eliminate one future option and may have a detrimental impact on the future financial viability of the smelter.
- There are presently no direct costs incurred for keeping the tariff open and the certificate active. Therefore, there are no benefits associated with cancelling the certificate;
- Ameren Missouri lost approximately 10% of its energy sales following the Noranda bankruptcy and is otherwise forecasting no future load growth;
- Ameren Missouri is long on capacity and has extended the life of eight of twelve fossil fuel units in its most recent triennial IRP. Ameren is also anticipating approximately 1GW of planned renewable capacity investment;
- There is over \$5 billion in planned "smart energy plan" investments targeted over the next five years including additional investment (above and beyond the stated \$5 billion) for full AMI deployment; and
- Ameren Missouri potentially has billions in environmental compliance costs on the horizon.

Given the aforementioned facts, it would be irrational and detrimental to the public interest to take actions to actively discourage a future customer when there are virtually no costs associated with maintaining the certificate and tariffed rate. Canceling the certificate merely increases uncertainty for the smelter and the economic health of Southeast Missouri. Finally, it negates the potential that the New Madrid smelter could help mitigate future Ameren rate increases.


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

AFFIDAVIT OF GEOFF MARKE

STATE OF MISSOURI)
) SS.
COUNTY OF COLE)

COMES NOW GEOFF MARKE and on his oath declares that he is of sound mind and lawful age; that he contributed to the foregoing *Response of Consumers and Motion for Oral Argument* and that the same is true and correct according to his best knowledge and belief.

Further the Affiant sayeth not.




Geoff Marke
Chief Economist

JURAT

Subscribed and sworn before me, a duly constituted and authorized Notary Public, in and for the County of Cole, State of Missouri, at my office in Jefferson City, on this 1st day July, 2019.



JERENE A. BUCKMAN
My Commission Expires
August 23, 2021
Cole County
Commission #13754037



Jerene A. Buckman
Notary Public

My Commission expires August 23, 2021.