

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Application of Union Electric Com-)
pany for a Certificate of Public)
Convenience and Necessity authoriz-)
ing it to construct, install, own,)
operate, control, manage and main-)
tain electric plant, as defined in)
§ 386.020(14), RSMo. to provide)
electric service in a portion of)
New Madrid, County, Missouri, as an)
extension of its existing certifi-)
cated area)

Case No. EA-2005-0180

RESPONSE TO COMMISSION ORDER,
LEGAL MEMORANDUM AND COMMENTS OF
NORANDA ALUMINUM, INC.

I. INTRODUCTION.

On January 4, 2005, the Commission issued an Order Directing Filing (January 4 Order) directing interested parties to submit legal memoranda directed to the question:

whether or not a provider of energy to an aluminum smelter **pursuant to** a contract under Section 91.026, RSMo Supp. 2004, requires a certificate of convenience and necessity issued by this Commission.^{1/}

This issue was formulated following a discussion that, *inter alia*, the General Assembly had delegated the certificate power to the Commission, but could override that grant, and that the public interest in this matter had already been determined by the General Assembly through the passage of the statute and

^{1/} Order Directing Filing, EA-2005-0180, January 4, 2005, p. 5 (emphasis added).

posing the rhetorical question: "Under this new statutory regime, what remains for this Commission to do?"

The January 4 Order is a thoughtful and useful analysis of the matter before the Commission and Noranda appreciates the Commission's concerns. We certainly agree with the Commission's conclusion that the General Assembly has determined the public interest, and we trust that we understand the Commission's concern in what is correctly termed a matter of first impression. Noranda here offers the following comments and legal analysis on the question posed. We also respectfully offer brief additional comments that we hope will be helpful to the Commission in its analysis.

II. ANALYSIS.

A. The Statute Of Concern: Section 91.026 RSMo.

The analysis must start with the statutory language. Section 91.026 in relevant part states:

2. Notwithstanding any provisions of law to the contrary, any aluminum smelting facility **shall have the right** to purchase and contract to purchase electric power and energy and delivery services from any provider, wherever found or located, at whatever rates or charges as contracted for, and such periods or times as is needed or necessary or convenient for the operation of such aluminum smelting facility and for no other purpose, notwithstanding any past circumstances of supply. Any aluminum smelting facility purchasing or contracting to purchase electric power and energy pursuant to this section shall not resell such electric power and energy to any party except the original providers of such electric power and energy.

3. Notwithstanding the provisions of section 91.025, section 393.106, RSMo, and section 394.315, RSMo, to the contrary, any provider of such electric power and energy and delivery services, whether or not otherwise under Missouri regulatory jurisdiction, **shall have the right** to transact for and sell electric power and energy and delivery services to an aluminum smelting facility. Any transactions or contracts pursuant to this section for electric power and energy and delivery services shall not be subject to the jurisdiction of the commission with regard to the determination of rates.^{2/}

The key to the Commission's question, and thus to the analysis of the statute, is found in the words "pursuant to." In its question posed, the Commission articulates this phrase, albeit slightly differently, as: "**pursuant to** a contract under Section 91.026"

B. Section 91.026 Does Not Preclude Noranda Choosing Regulated Service.

The concern appears that Section 91.026 wholly deprives Noranda of the ability to chose a regulated environment and a regulated service. This is not correct. Section 91.026 gives Noranda the **right** to enter the unregulated marketplace to arrange supplies. But this is a **right**, not an obligation; a choice that was given by the legislation, but a choice **to be made by Noranda**. As with any right, it can be exercised or not.

We agree with the Commission's analysis: If this proposed transaction is "pursuant to" Section 91.026, neither a change in service territory is required to be approved, nor is

^{2/} Emphasis added.

approval of the contract terms required. But that is not this transaction. This transaction is not made "pursuant to" Section 91.026 because Noranda has not chosen to exercise its right under that statute to seek supplies from an unregulated source.

Section 91.026 is new and has no judicial construction to assist in its interpretation. But the section is not ambiguous in the basic change to Missouri law that it wrought. Its interpretation is, therefore, straightforward. Missouri courts hold that proper statutory construction starts with the words of the statute. In most cases, it ends there, as well.^{3/} In construing statutes, words are given their plain and ordinary meaning whenever possible. A court will stray from this rule only when the words' meaning is ambiguous or leads to an illogical result defeating the purpose of the legislature.^{4/}

After defining the terms used, Section 91.026 gives Noranda (or any similarly situated aluminum smelter) the right to contract for its electrical supply from any provider without regard to its prior supply arrangements. The proposed supplier is, correspondingly, given the right to provide service to Noranda without regard to its regulatory status.

^{3/} *In the Interest of M.D.R.*, 124 S.W.3d 469, 472 (Mo. 2004),

^{4/} *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo. en banc 1998).

C. Section 91.026 Does Not Deregulate Service To Noranda, Rather It Provides Noranda With An Option To Seek an Unregulated Supply.

We sense that the Commission is reasonably concerned whether the legislature intended to deregulate service to Noranda. We do not believe that was intended by the legislature and we think that the statute is unambiguous in that regard. Noranda is given the right -- not the obligation -- to purchase its supplies in the unregulated market. The legislature wanted to expand the options given to Noranda and thus gave Noranda the right to use this option, but it did not require that this option be used.

Noranda's has been granted this right by the General Assembly, but that the intended purpose of this grant was to support Noranda's continued operations in Missouri rather than to require that they be configured in a particular way. All canons of statutory construction are subordinate to the requirement that the court ascertain and apply a statute in a manner consistent with the legislative intent.^{5/} And thus, in the contract negotiated with AmerenUE, Noranda agrees -- for the period of the contract term -- not to exercise this right, but does not renounce it nor waive it on any permanent basis. The proposed contract is not brought to the Commission as a "contract under" or "pursuant to" Section 91.026. Rather, it is presented as a proposed expansion of AmerenUE's service territory to include

^{5/} *Williams v. Nat'l Cas. Co.*, 132 S.W.3d 244, 249 (Mo. 2004), quoting from *Budding v. SSM Healthcare System*, 19 S.W.3d 678, 682 (Mo. banc 2000).

Noranda and a tariffed service under which Noranda would be served.

D. The Statutory Purpose Was to Expand Noranda's Supply Options, Not Contract or Restrict Them.

Noranda has already once exercised the right given under Section 91.026. Mr. Swogger, Noranda's electrical manager, described in his testimony that upon the expiration of the supply arrangement that existed when the statute was enacted, Noranda contracted with a market-based power supplier Brascan, Inc., to provide a power supply for a two-year period while Noranda explored longer term options. That arrangement, unlike this one, was "pursuant to" Section 91.026.

There is an analog with which the Commission will be familiar. In *State ex rel. Jackson County v. Public Service Com.*, 532 S.W.2d 20, 29-30 (Mo. 1975), the Commission had sought in an earlier rate case to force a rate moratorium upon Missouri Public Service Company, by directing that the utility not file for further rate relief for a period of two years. But within that two year period, the utility filed again and the Commission's decision granting further relief was challenged. Upon review the court held that the Commission's jurisdiction was continuing and that it could not close its doors to a utility's request for rate relief. However, as is now common, the utility can **agree**, often as part of a rate settlement, that it will not seek further rate relief for an identified period. Under the law, the utility has the **right** to make rate filings, but can

voluntarily agree not to exercise that right for a period of time.

Noranda seeks, *first*, a long term supply source; *second*, a reliable power supply; and *third*, a cost-based rate. As described in Mr. Swogger's testimony, Noranda has for sufficient business reasons, satisfied those concerns and chosen to contract with AmerenUE in a long term relationship. Moreover, as Mr. Swogger's testimony notes, an arrangement with a Missouri utility such as AmerenUE is also consistent with his understanding of the sense of elected representatives that a Missouri source be used if that was possible. Mr. Swogger's testimony, filed on December 21, 2004, expands upon these three reasons underlying Noranda's choice. In so doing Noranda has chosen, for the duration of this arrangement, to accept a regulated price and regulated service under tariffs that (if approved) will be subject to this Commission's jurisdiction. Further, as Mr. Swogger has stated, Noranda will be treated as any regulated customer and would expect fair treatment in future AmerenUE rate cases regarding cost of service issues.

E. Although Section 91.026 Is Not Ambiguous and Does Not Require Statutory Construction to Derive Its Meaning, Were Such Necessary It Should be Considered In the Context of the Circumstance It Was Intended to Address.

An unambiguous statute does not require lengthy discussion of the legal principles of statutory construction including the overarching purpose to seek to do the will of the legisla-

ture.^{6/} While we do not believe that Section 91.026 is ambiguous, were it to be so considered, it would be appropriate to take account of the factual milieu that confronted the General Assembly.^{7/}

Noranda, a critical employer and economic component for Missouri, and certainly for the Southeast portion of Missouri, faced dire circumstances in the imminent loss of firm power supplies to continue its operations because of its expiring supplier's unwillingness for various reasons to continue that supply. While we would not attempt to speak for the General Assembly, Noranda's sense was that virtually all its elected members saw the wisdom and public benefit in a limited and narrowly structured statutory change that would permit Noranda to continue its operations but would not be a departure from Missouri's general policy on deregulation. The legislative action expanded Noranda's options rather than contracted them. It would be counter-intuitive now for those options to be constrained by a construction that the General Assembly intended to

^{6/} The primary rule of statutory construction is to give effect to legislative intent as reflected in the plain language of the statute. *State v. Grubb*, 120 S.W.3d 737, 739 (Mo. *en banc* 2003).

^{7/} If the words of the statute are unclear or ambiguous, the Court may review the earlier versions of the law, or examine the whole act to discern its evident purpose, or consider the problem that the statute was enacted to remedy. *Bachtel v. Miller County Nursing Home District*, 110 S.W.3d 799, 801 (Mo. *en banc* 2003), *quoted in*, *In the Interest of M.D.R.*, 124 S.W.3d 469, 472 (Mo. 2004).

constrict those option by precluding Noranda from accepting regulated service if it so chose.

Noranda is grateful for the committed public service demonstrated by the leadership of the executive and legislative branches for enabling this option for Noranda. Pursuant to that enabling legislation, Noranda was able to arrange short-term supplies to "bridge" the supply situation while more permanent arrangements could be made. Though the proposed arrangement is not "pursuant to" Section 91.026 in the narrow ambit of that statute, it is undeniable that the proposed transaction was made possible by the enactment of that statute and that, had legislative leadership and wisdom not prevailed, Noranda would likely have had to shutter its operations in Missouri.

F. The Proposed Service Tariff Is Also Plain On Its Face.

As a part of this matter, AmerenUE seeks approval of a tariff to serve Noranda. This tariff is also plain on its face. It differs in two respects from AmerenUE's existing LTS tariff. *First*, line losses involved in service to Noranda differ from those of other LTS customers; and *second*, Noranda requires no distribution services from AmerenUE and should not be charged the associated costs. While Noranda reasonably expects fair regulatory treatment in the future, by entering into this relationship, Noranda has agreed to accept changes to this regulated service through the Commission's processes. And so the proposed tariff

would be subject to revision in a future AmerenUE rate case just as would any tariff of the utility.

G. It Is Desirable To Address These Matters and Issues At This Time Instead of Later In a Rate Case.

There is an additional and practical point why the regulatory related issues that are presented by this case should be addressed now. The proposed supplier, AmerenUE, is regulated by this Commission. AmerenUE can adequately speak for its own interests, but Noranda has the sense that an important reason AmerenUE has insisted on the conditions to performing our contract are concerns that it will be "hindsight regulated" on this transaction. For example, AmerenUE may sense that, even if this arrangement had been proposed as an unregulated transaction under Section 91.026,^{8/} and the pricing, terms and conditions of service simply had been provided to the Commission without a request for approval, AmerenUE's next regulated rate proceeding would involve parties asserting that some aspect of the transaction was wrong, was priced incorrectly, or affected reliability in some manner. As in the claim that the agreed pricing was too low, AmerenUE would then run the risk that hypothetical "market" revenues would be imputed to the transaction in an effort to reduce what otherwise would be the purchased power component of its cost of service.

^{8/} Statutory citations are to RSMo 2004.

On its face, such concerns seem reasonable. The purchase of a non-regulated service from a supplier that is otherwise regulated will almost inevitably create a large number of regulatory issues, such as: a. the treatment of the non-regulated transaction in retail rate proceedings; b. allocation or imputation of costs, revenues or both so as to preclude recovery; c. review of the non-regulated service at all in the retail rate case; d. whether the utility should be left holding the baggage if regulatory treatment is not evenly aligned with the contractual agreement; e. whether the non-regulated service be left holding the baggage if regulatory treatment is uneven compared to the contractual agreement? and f. whether it is fair to regulated ratepayers to disallow any review.

But, whether or not Noranda agrees with these possible scenarios, we can certainly understand that as a business consideration, AmerenUE desires to address these regulatory issues "up front" rather than meet them after the fact. Our point for this pleading is to note that if the transaction is not subjected to some degree of regulatory scrutiny on the front, it will be subject to regulatory scrutiny on the back. In consideration of this regulatory fact, is not more straightforward to provide regulated service if both the customer and utility are amenable to that approach?

Moreover, a regulatory approach fundamentally aligns with Noranda's objectives: (a) Cost-based rates are the essence of regulated electricity service in Missouri; (b) reliability

is a cornerstone of regulated service; and (c) Long term commitments are arguably implicit in most regulated services and undeniably explicit in the Noranda contract. On the other hand, unregulated competitive markets are only beginning to develop. Electricity cannot be stored and these markets necessarily have a time dimension and current limited offerings are of shorter duration; pricing on the unregulated side is potentially volatile and terms and conditions for reliability are nonstandardized and there are no mandatory industry-wide reliability standards in place.

III. CONCLUSION.

Section 91.026 expanded Noranda's service options. It should not be read to preclude regulated service as one of those options. The statute gives Noranda the right, but not the obligation to seek unregulated service and also give possible suppliers the right, but not the obligation to provide unregulated service. Noranda may not chose to exercise that right. Although the Commission correctly has already found that the legislature has determined the public interest, because the transaction proposed here is a regulated transaction, the approval of the Commission is still needed for the expansion of

AmerenUE's service territory and the accompanying tariff to serve Noranda.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

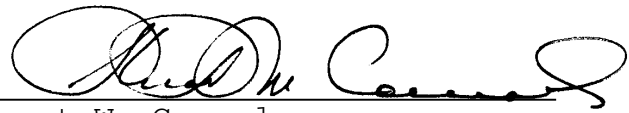


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ATTORNEYS FOR NORANDA ALUMINUM,
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CERTIFICATE OF SERVICE

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 and pending Applicants for Intervention by their attorneys of record as disclosed by the pleadings and orders herein.



Stuart W. Conrad

Dated: January 18, 2005