BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Noranda Aluminum, Inc., et al.,	)	
	)	
Complainants,	)	
	)	
v.	)	File No. EC-2014-0224
	)	
Union Electric Company, d/b/a Ameren Missouri,	)	
	)	
Respondent.	)	

AMEREN MISSOURI'S REPLY BRIEF

Thomas M. Byrne, #33340
Director – Asst. General Counsel
Wendy K. Tatro, #60261
Director – Asst. General Counsel
Ameren Services Company
P.O. Box 66149
St. Louis, MO 63166-6149
Phone (314) 554-2514
(314) 554-3484
Facsimile (314) 554-4014
amerenmissouriservice@ameren.com

L. Russell Mitten, #27881
BRYDON, SWEARENGEN & ENGLAND, P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102-0456
Phone (573) 635-7166
Facsimile (573) 634-7431
rmitten@brydonlaw.com

James B. Lowery, #40503
SMITH LEWIS, LLP
Suite 200, City Centre Building
111 South Ninth Street
P.O. Box 918
Columbia, MO 65205-0918
Phone (573) 443-3141
Facsimile (573) 442-6686
lowery@smithlewis.com

Attorneys for Union Electric Company d/b/a Ameren Missouri

NP

TABLE OF CONTENTS

NP

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Noranda Aluminum, Inc., et al.,	)	
Complainants,	)	
v.	)	File No. EC-2014-0224
	)	
Union Electric Company, d/b/a	)	
Ameren Missouri,	)	
Respondent.	)	

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Company" or "Ameren Missouri"), and for its Reply Brief states as follows:

INTRODUCTION

For all of the reasons stated in this brief and in the Company's Initial Brief, the relief requested by Noranda[1] should be denied. In this Reply Brief, we will address several legal issues, some of which have been raised before and some of which have only recently been injected into this case.

After addressing these legal issues, we will next address the non-legal issues that bear on the question of whether Noranda should obtain relief, explaining, in the context of the arguments raised by others in their initial briefs, why relief should not be granted.

ARGUMENT - LEGAL ISSUES

As outlined in the Company's Initial Brief, Noranda is asking the Commission to issue an unlawful order, because a $30 per megawatt-hour ("MWh") rate[2] justified solely by Noranda's claimed private business need would be unduly discriminatory, and also because changing the

[1] We sometimes herein refer to Noranda and the 37 individual complainants collectively as "Noranda."
[2] And avoidance of Noranda's fair share of fuel adjustment clause ("FAC") charges.

Company's rates cannot be done without considering all relevant factors.[3] The special rate Noranda seeks certainly cannot be granted based upon the only factor cited in the Complaint: Noranda's claims about its particular business and financial circumstances.[4] We will not repeat the arguments and authorities contained in our Initial Brief relating to those two legal issues, except as necessary in connection with other issues we address below.

Some parties have also now attempted to inject additional legal issues into this case, most notably the Office of the Public Counsel's ("OPC") unsupported, implausible and incorrect interpretation of several provisions of the Public Service Commission Law ("PSC Law") and its incorrect application of other general legal principles relating to the burden of proof in a complaint case. The Staff also raises certain new legal issues. In this section of our Reply Brief, we will first address OPC's arguments, then further address arguments relating to single-issue ratemaking and undue discrimination, and finally we will address some of the legal issues raised by the Staff. Thereafter, we will address the merits (or lack thereof) of Noranda's request, aside from the legal issues in the case.

1. Ameren Missouri has no burden of any kind in this case.

OPC argues that this is a case where Noranda "contested" Ameren Missouri's actions and that therefore, Ameren Missouri somehow acquired the "burden" to affirmatively prove, *in this case*, that its revenue requirement is still equal to what the Commission determined it to be about 18 months ago in File No. ER-2012-0166. Apparently OPC's theory is that if the Commission were to decide that it would be unjust and unreasonable to continue the current Large Transmission Service ("LTS") rate for Noranda, that decision would necessarily mean Ameren

[3] See pages 4 to 7 of our Initial Brief regarding why Noranda's request invites the Commission to do something it cannot do: approve unduly discriminatory rates; and pages 7 to 9 regarding why Noranda's request violates the prohibition against single-issue ratemaking.
[4] The "all relevant factors" requirement is sometimes called the prohibition against single-issue ratemaking.

Missouri has done something unlawful.[5] Under such a circumstance, OPC argues that without proof Ameren Missouri is "entitled" to continue to charge total rates designed to collect its entire Commission-approved revenue requirement,[6] the Commission would be free to lower the Company's LTS rate to $30 per MWh while leaving all other rates unchanged, thereby reducing Ameren Missouri's revenue requirement by nearly $50 million annually.

OPC's argument reflects a fundamental misunderstanding of the PSC Law, and also reflects a fundamental misunderstanding of the law governing who has the burden of proof in a complaint case.

a. <u>In charging the rates approved by this Commission, Ameren Missouri has not committed, and cannot commit, any act in violation of any law, order or decision.</u>

A central premise of OPC's argument is that sustaining the Complaint would mean Ameren Missouri has done something unlawful. But applicable law does not support that premise. The Complaint in this case is about one thing and one thing only – Noranda's claim that its rate is unreasonable because it is higher than the New Madrid smelter can afford to pay and still remain financially viable. There is no allegation anywhere in the Complaint that Ameren Missouri has violated any law, or any rule, decision, or order of the Commission.

The Commission's decision in *MCI Telecommunications Corporation, Inc. ["MCI"] v. Southwestern Bell Telephone Company, Inc.["SWBT"]*, 6 Mo. PSC 3d 482, 1997 Mo. PSC LEXIS 126 (Sept. 16, 1997) (Report and Order), is directly on point. In *MCI*, which also was a complaint case, MCI alleged that although SWBT was charging Commission-approved access rates, those rates were excessive. In rejecting MCI's complaint, the Commission recognized that

[5] An odd charge indeed, given that Ameren Missouri is charging the rates the Commission itself authorized.
[6] Which would have required the development of a full-blown revenue requirement in a case where, as the Staff puts it, the revenue requirement "determined in Ameren Missouri's most recent rate case is taken for granted." Staff's Initial Brief, p. 2.

the telecommunications counterpart to Section 393.130.1 (Section 392.200.1)[7] does not authorize a complaint as to the reasonableness of rates.[8] Consequently, OPC's claim that Sections 386.390.1, 393.130.1, and 393.140(5) operate *in pari materia* to authorize the Commission to set new rates is incorrect. As the Commission held in *MCI*, a complaint regarding the reasonableness of a rate can only be brought under Section 386.390.1, and only then if the complaint is filed by those parties given explicit standing under the statute.

In *MCI*, the Commission also explained that Section 386.390.1 authorizes two distinct types of complaints. One type is a complaint regarding the reasonableness of a utility's rates. The requirements for that type of complaint – which is the type of complaint Noranda filed – were discussed in the preceding paragraph. The second type is one that sets forth "any act or thing done or omitted to be done by any . . . public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission . . .." That type of complaint requires specific allegations by the complainant concerning violations, or claimed violations, of law or of a rule or order or decision of the Commission. No such allegations appear anywhere in the Complaint.

In *MCI*, the Commission determined that despite the fact the complainants alleged rates were too high (and that continuation of those rates would not be just and reasonable), the "complainants have not alleged any 'thing or act done or omitted to be done' by SWBT in violation of any provision of law or rule or order or decision of the Commission." *Id.* at *21. Consequently, as was the case in *MCI*, even if Noranda were to prevail on its Complaint,

[7] All statutory references are to the Revised Statutes of Missouri ("RSMo.") (2000), unless otherwise specified.
[8] Both Sections 393.130.1 and 392.200.1 establish the "just and reasonable" rate requirement. Section 393.200.1, like section 393.130.1, reads in pertinent part as follows: "All charges made and demanded by any telecommunications company for any service rendered or to be rendered in connection therewith shall be just and reasonable and not more than allowed by law or by order or decision of the commission." This language is identical to the just and reasonable language in Section 393.130.1, save its reference to "telecommunications" companies.

Ameren Missouri will not have been "guilty" of charging an unlawful, unjust or unreasonable rate because the rates it is charging today (and will charge unless and until the Commission changes those rates) are by definition lawful, just and reasonable.[9] Stated another way, even if Noranda prevails, it will not be because Ameren Missouri did anything "wrong."

A utility cannot commit a wrongful act by charging Commission authorized rates. The Missouri Supreme Court consistently has held that a complaint about the reasonableness of rates does not allege any wrongful act or omission by the utility, not only because of the terms of Section 393.130.1 but also because the utility does not set the rates in the first place. *See, e.g., May Dept. Stores v. Union Elect. Light & Power Co.*, 107 S.W.2d 41, 49-50 (Mo. 1937) (in which the court construed the very statutes that OPC misconstrues here). In discussing *May* decades later, the Supreme Court stated:

> In *May Department Stores Co. v. Union Electric Co., supra*, this court held: "These provisions [10] mean that a public utility may by filing schedules *suggest* to the commission rates and classifications which it believes are just and reasonable, and, *if the commission accepts them*, they are authorized rates, *but the commission alone* can determine that question and make them a lawful charge.

State ex rel. Jackson County v. Pub. Serv. Comm', 532 S.W.2d 20, 28 (Mo. *banc* 1975) (emphasis added) (*quoting May Dept. Stores*, 107 S.W.2d at 50). In summary, "'[t]he Commission has exclusive jurisdiction to establish public utility rates and may do so either by approval of rate schedules filed with it or by order after investigation or hearing.'" *Id.* (also quoting *May Dept. Stores*, 107 S.W.2d at 57). Unless and until the Commission authorizes a

---

[9] Section 393.130.1 itself makes this clear because it expressly contemplates that utilities can charge rates "allowed by law or by order or decision of the commission." There is no allegation in this case that the rates charged to Noranda are not allowed by law or by order or decision of the Commission (the rate order in File No. ER-2012-0166).

[10] Discussing the very statutes OPC cites, and misconstrues: Sections 393.140(11), 393.150, 393.270(3). 386.290 and 393.260. 532 S.W.2d at 24-28.

change in rates, a utility acts lawfully when it charges those approved rates. Indeed, it would be unlawful for a utility to charge any other rate.

The foregoing conclusively demonstrates that one of the central premises of OPC's recitation of its views on the PSC Law (among them, that this Complaint "concerns only the actions of that public utility [Ameren Missouri] and no other actor") is wrong. OPC Initial Brief, p. 3. The fact is the Complaint does not contest anything Ameren Missouri has done or failed to do; it only contests the rates this Commission set. As noted earlier, the Complaint was not brought under the first part of Section 386.390.1, which applies if the claim is a violation by the utility. Rather, it was brought under the second part, because it is a challenge to the reasonableness of rates the Commission set. Thus, the claim at issue in this case is whether rates the *Commission* set in Ameren Missouri's last general rate case – which involved the allocation of the revenue requirement among the Company's rate classes – should be changed prospectively to allocate a smaller portion of that revenue requirement to Noranda and a larger portion to all of Ameren Missouri's other customers. Without those changes, the Complaint alleges, Noranda's rate would be unreasonable on a going forward basis. That claim is premised on Noranda's contentions that (i) the New Madrid smelter cannot afford to continue to pay its currently approved rate, and (ii) Ameren Missouri's other rate classes would be worse off if Noranda closes its smelter. According to the Complaint, the only just and reasonable allocation of the Company's revenue requirement is one that lets Noranda pay a below-cost rate so that it can keep the smelter open. Notably, that claim has nothing to do with any action or inaction by Ameren Missouri.

OPC misses this distinction, citing specifically to the "act or thing done or omitted to be done" portion of Section 386.390.1[11] as support for its flawed argument, instead of apprehending that what is at issue here is something entirely different.

b. <u>The Complaint itself frames the only issue in this case and thereby limits the relief available in this case.</u>

We know that the currently-approved rate design (*i.e.*, the Commission's allocation of the revenue requirement among the rate classes) is the only thing at issue because the Complaint says so. For example, in paragraph 9, the Complaint states:

> This Complaint concerns the rate Ameren Missouri currently charges Noranda for the electricity and electrical service that Ameren Missouri sells to Noranda. Under the circumstances set forth below, that rate is now unreasonable. Electricity represents one third of the New Madrid Smelter's operating costs. Without the requested reduction in its electric rates, the New Madrid Smelter would have insufficient liquidity to remain viable and would be subject to closure **[redacted]**, resulting in the loss of all jobs at the facility.

The limited scope of the relief the Complaint seeks is also obvious from the prayer for relief. In its concluding paragraph, the Complaint requests the following relief, and only the following relief:

> [R]evise the electric rate charged Noranda for operation of the New Madrid Smelter to $30/MWh and adjust the electric rates of other ratepayers accordingly so that the relief requested herein is revenue neutral to Ameren Missouri.[12]

Ameren Missouri elected to contest the relief sought because it believes Noranda's request is unlawful, reflects poor public and regulatory policy, and is not justified by Noranda's

---

[11] OPC Initial Brief, p. 3 (indented quote).

[12] It is simply not true that the Complaint is "without legal import" or that Noranda is somehow "directing" how any relief the Commission might grant would be borne by other customers. OPC Initial Brief, p. 16. As explained above, the Complaint is a challenge to the *Commission's* rate design. The utility is, of course, the respondent on the Complaint, because if the Commission determines rates should be changed, it is the utility that must prepare and file compliance tariffs and charge its customers in accordance with the approved tariffs. In addition, the utility ought to have a say in a case that involves its rates. This does not mean that the utility is exposed to relief not asked for in the complaint. If OPC thought a complaint was justified on some other basis and if OPC wanted some other kind of relief, then OPC could have filed its own complaint as it is not required to get any other party to join it in order to do so. But OPC did not do any of these things.

evidence. However, the Company could have simply defaulted on the Complaint and just let the relief Noranda seeks be granted, if the Commission were so inclined. This is because the Complaint asks nothing of Ameren Missouri.

Well-established case law holds that the only relief that can be granted is that which has been pled. "[A] trial court [the Commission here] has the authority to grant relief only if (1) the relief is requested, and (2) issues are raised that support the granting of such relief." *City of Greenwood v. Martin Marietta Materials, Inc.*, 311 S.W.3d 258, 264 (Mo. App. W.D. 2010). Indeed, if a court issues a judgment that goes beyond the pleadings, the judgment is void. *Residential & Resort Assocs., Inc. v. Wolfe*, 274 S.W.3d 566, 569 (Mo. App. W.D. 2009).[13]

c. <u>There is only one burden of proof in this case – and it falls on Noranda alone.</u>

It follows then that Ameren Missouri was not required to raise an affirmative defense relating to the revenue requirement this Commission approved in the Company's last general rate case, that the Commission has not changed since then, and that the Commission has not been asked to change in this case. Nor did Ameren Missouri need to prove that relief (lowering the LTS rate while leaving all other rates unchanged) – relief Noranda *is not even seeking in this case* – should not be granted.

AG Processing, Inc. v. KCP&L Greater Missouri Operations Company, cited by OPC at page 9 of its Initial Brief, does not hold otherwise. To the contrary, that case <u>directly rebuts</u> OPC's position and demonstrates the flaw in OPC's legal analysis respecting the burden of proof in this case. *AG Processing* involved Kansas City Power & Light Company's ("KCP&L") appeal of a Commission complaint case filed by AG Processing. But unlike here, that complaint *did* seek redress for actions KCP&L is alleged to have taken. Put another way, the complaint in

[13] Even if there were an argument that these legal principles do not apply in Commission cases, it would not matter given that nothing that Ameren Missouri has done or failed to do is at issue, as we discuss herein.

AG Processing was not a challenge to the reasonableness of KCP&L's Commission-approved rates, but was instead a claim that KCP&L had done something wrong, brought under the first part of Section 386.390.1.

Specifically, AG Processing alleged that KCP&L had imprudently hedged more natural gas than it needed in a given period for its steam operations, and therefore KCP&L should bear the cost of the extra gas. In ruling against KCP&L on the complaint, the Commission placed the ultimate burden of proof (the burden of persuasion) on KCP&L, effectively requiring KCP&L to prove it was prudent instead of requiring AG Processing to prove that KCP&L was imprudent. KCP&L appealed, and the Court of Appeals reversed the Commission, holding as follows:

> AG Processing put Aquila's[14] imprudence at issue and, therefore, AG Processing should have had the burden of proving that claim. The Commission erred in placing the burden of proof on KCP&L and in ordering KCP&L to pay customer refunds because it failed to meet that burden. Granting relief without requiring AG Processing to prove the allegations in its complaint is reversible error.

385 S.W.3d 511, 516 (Mo. App. W.D. 2012).

Simply stated, the Court of Appeals held that in a complaint case the complainant bears the burden of going forward with evidence and the burden of persuasion (together – the "burden of proof") from start to finish. The utility bears no burden at all. OPC completely ignores that holding in an attempt to buttress its incorrect application of the PSC Law. OPC wrongly assumes that Ameren Missouri's conduct is at issue here. As demonstrated above, that is not true. But, more importantly, even if Ameren Missouri's conduct were at issue, the Company would still bear no burden of proof in this *complaint* case, because, as *AG Processing* teaches, the respondent in a complaint case never bears any burden. In *AG Processing*, KCP&L did not have to prove that its actions were prudent; AG Processing had to prove KCP&L's actions were imprudent. Consequently, in this case Ameren Missouri neither has to prove that the

[14] KCP&L was the party to this case after its acquisition of Aquila.

Commission-implemented rate design is appropriate nor that the Commission-implemented revenue requirement remains appropriate. To the contrary, Noranda has to prove the Company's existing rate design is not appropriate, and that the new rate design it proposes is.

OPC itself admitted this point in pleadings filed earlier in this case. The *Joint Response of Complainants, **Office of Public Counsel**, Missouri Retailers Association, Missouri Industrial Energy Consumers and Consumers Council of Missouri to Order Inviting Responses to Agenda Discussion* (emphasis added) states at page 1:"**[t]his case has no revenue impact on Ameren, the only party opposing the Jointly Proposed Schedule in this case"** (emphasis in original). In the same filing, at page 2, OPC and other signatories went on to state that "**Ameren is not affected by the Complaint"** (emphasis in original).[15]

OPC was right – the Complaint does not and cannot "affect Ameren" in the sense that it seeks no relief from Ameren Missouri. The Complaint only asks the *Commission* to do something – require that the LTS rate be lowered and that all other rates be raised. If the Commission grants that request, then Ameren Missouri would have to perform the administrative act of filing a tariff to comply with the Commission's order. But the Complaint does not seek to take a single dime from Ameren Missouri itself.

Even had the Complaint sought both rate design and revenue requirement changes, that would not require Ameren Missouri to assume any burden of proof. As the Commission has already recognized in File No. EC-2014-0223 (and as the Western District Court of Appeals recognized in *AG Processing*), in a complaint case where it is alleged current rates are unjust and unreasonable, it is the complainant that bears the burden to prove what a utility's prospective rates should be. So while it might be unwise for a utility, when confronted with a complaint that seeks to lower some or all of its rates (as is the case in File No. EC-2014-0223), not to put on evidence to rebut the complaint

---

[15] *Id.*, p. 2.

(Ameren Missouri has done so in that case), the law would permit it to do so. This is because if the complainant failed to meet its burden of proof, a rate reduction could not occur e*ven if the utility raised no affirmative defenses and put on no evidence whatsoever*.

Not only has OPC admitted this fact before (which completely contradicts its current legal theories), but OPC even admitted it again in its Initial Brief. OPC states (correctly this time) that if this were a case that sought to lower Ameren Missouri's rates (*i.e.*, if it were an earnings complaint like that at issue in File No. EC-2014-0223), Ameren Missouri would bear "no burden whatsoever."[16] What OPC is saying is that if a complainant attacks a utility's rates – asking that they be lowered – and thereby puts the utility on notice that rates may be lowered, the complainant bears the entire burden of proof. In such a case, the utility could sit on its hands and see whether the complainant could actually carry its burden of proof. But if, as in this case, the complainant does not attack the utility's rates as being too high – and thereby does not put the utility on notice that the complainant seeks to lower the utility's overall revenue requirement – then suddenly the utility assumes a burden to prove it is "entitled" to a revenue requirement the Commission has already approved? That argument makes no sense, and is contrary to law.

OPC also misstates the case law when it tries to use *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n*, 210 S.W.3d 330, 334-35 (Mo. App. W.D. 2006), as support for its theory that the Commission could reduce Ameren Missouri's revenue requirement in this case, claiming that this is so because there is no right to "revenue neutrality." That case had nothing to do with a challenge to the Commission's approved rate design in a complaint, and it did not involve changing a utility's revenue requirement. It stands only for the proposition that the Commission can adopt rules that might increase a utility's compliance costs and that the Commission is not required to adopt rules that are revenue neutral. We agree, just as certain costs can go up

[16] OPC's Initial Brief, p. 8.

between rates cases (e.g., wages, property taxes), or could go down (e.g., maintenance expenses, or supplies), or revenues could go up or down, so too could costs go up due to a new regulation, from the Commission or otherwise. Plenty of things can happen between rate cases that are not "revenue neutral." But the fact that the Commission can adopt new rules that could increase costs between rate cases provides no authority for *changing* the utility's rates without a consideration of all relevant factors in a rate case, whether it was initiated as a file and suspend case or as an earnings complaint case.

OPC (and Consumers Council, who apparently agrees with OPC[17]) is trying to have its cake and eat it too. One can easily imagine why OPC and Consumers Council would not want to endorse Noranda's request. OPC and Consumers Council are aware of the glaring holes in Noranda's evidence and the inconsistencies in its story, and they know how Noranda has been gutted (mostly by Apollo) of hundreds of millions of dollars of cash, even at the same time that Noranda cries poor before this Commission. But because OPC and Consumers Council appreciate Noranda's opposition to Ameren Missouri's positions in several cases over the past several years (as was explained at the hearing not only in Noranda's opening statement but by other parties in this case), they would like to help Noranda by not affirmatively opposing its proposal. Ameren Missouri can understand OPC's and Consumers Council's desires to take such a position, even if we do not like it or agree with them. But they can't ignore that the flip-side of Noranda's request is how it will negatively affect all of Ameren Missouri's other customers. If Noranda is to get relief in this case, then the consumers who OPC and Consumers Council represent are going to have to foot the bill. If OPC and Consumers Council don't want that result, then, on behalf of their clients, they should oppose Noranda's request.

[17] Consumers Council's Initial Brief, p. 2.

2. Ameren Missouri's revenue requirement cannot be changed in this case due to the single-issue ratemaking prohibition.

OPC (and apparently Consumers Council) now also claim that the Company's revenue requirement can be lowered in this case by the amount of the subsidy Noranda seeks, even though the Commission has not been asked to consider – and certainly has not considered – Ameren Missouri's rate base, expenses, taxes, or cost of capital. This argument is so far beyond the bounds of what Missouri law allows that one is tempted to ignore it, but we will endeavor to address it with relative brevity below.

It is hornbook law that the Commission cannot set rates without considering all relevant factors (*i.e.*, rate base, expenses, taxes, and cost of capital). That requirement is embodied in Section 393.270.4, and has been consistently recognized by the Commission and the courts. *State ex rel. Missouri Water Co. v. Pub. Serv. Comm'n,* 308 S.W.2d 704, 719 (Mo. 1957) ("[T]he phrase 'among other things' [in Section 393.270.4] clearly denotes that 'proper determination' of such charges is to be based upon *all* relevant factors" (emphasis added)); *State ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, *et al.*, 585 S.W.2d 41 (Mo. *banc* 1979) (Where the Supreme Court rejected (absent specific statutory authorization) the use of fuel adjustment clauses because they would allow rates to be changed without considering all relevant factors).

Both the Staff and Noranda agree that Ameren Missouri's revenue requirement cannot be changed in this case due to the single-issue ratemaking prohibition. How could it? Certainly the Company's rate base, expenses, revenues, and cost of capital, both now and as would be expected to exist during the period when new rates would be in effect, are highly relevant and essential factors that have to be considered.

It is the Staff's position that because only the allocation of the existing revenue requirement among the rate classes is at issue (*i.e.*, this is a complaint involving rate design only), the single-issue ratemaking prohibition does not apply here.[18] We disagree and believe the single-issue ratemaking prohibition does apply in a pure rate design case (we discuss this further below and discussed it in our Initial Brief). But for purposes of rebutting OPC's argument that Ameren Missouri's revenue requirement could be reduced without considering relevant factors relating to that revenue requirement, it doesn't matter.

Not only do Staff and Noranda agree that Ameren Missouri's revenue requirement cannot be changed in this case, OPC has agreed as well. OPC's March 27, 2014, *Response to Motion to Dismiss* states that OPC "agrees with the Chief Staff Counsel's analysis and conclusion that Ameren Missouri's motion to dismiss must be denied." OPC went on to state that the "Staff's Response is thorough, concise and articulate, and Public Counsel concurs with it *in its entirety*" (emphasis added). As noted, the Staff Response said Ameren Missouri's revenue requirement cannot be changed in this case, and explained why that is true.

In *Complainants' Suggestions in Opposition to Ameren Missouri's Motion to Dismiss*, Noranda stated essentially the same thing as the Staff, stating that because "this is a rate design case" where the complainants are "not seeking a change in Ameren Missouri's rate or return or revenue requirement," the prohibition on single-issue ratemaking does not apply.[19] Again we disagree, but for purposes of rebutting OPC's attempt to saddle Ameren Missouri with the consequences of the rate shift sought in this case, it doesn't matter.

Finally, the Commission reached the same conclusion, stating in its order denying Ameren Missouri's motion to dismiss that

> concerns about single-issue ratemaking do not apply to this complaint because this complaint is about rate design, not revenue requirement. In other words, the

[18] *Staff Response and Suggestions in Opposition to Ameren Missouri's Motion to Dismiss* filed in this docket on March 24, 2014, at pp. 7 to 10.
[19] *Complainants' Suggestions in Opposition to Ameren Missouri's Motion to Dismiss Complaint*, pp. 7-8, filed March 27, 2014.

> complainants are asking the Commission to change the balance by which the Company's revenue requirement is collected from the various customer classes. The overall amount collected by the company, its revenue requirement, would not be changed. Therefore, single-issue ratemaking is not a concern.[20]

It is quite obvious that OPC's analysis in its Initial Brief of the prohibition against single-issue ratemaking is just as flawed as its analyses of the nature of the relief sought in this Complaint, of the PSC Law provisions that dictate how rates are set, and of the law governing who bears the burden of proof – the entire burden of proof – in a complaint case.[21]

3. The prohibition against single-issue ratemaking does apply in this case because the statutes clearly require a consideration of all relevant factors for <u>any</u> rate change. The relevant factors the law requires the Commission to consider do not include the effect current rates have on Noranda's finances or its ability to remain viable.

We won't repeat our Initial Brief's analysis of the plain language of Section 393.270.4 and other provisions of the PSC Law that prove conclusively that the prohibition against single-issue ratemaking applies to <u>any</u> rate change, because no one has effectively explained why that analysis is not correct. Respectfully, those statutory provisions demonstrate that the Commission's conclusion (in denying Ameren Missouri's motion to dismiss) that there are no single-issue ratemaking concerns in a rate design case should be reconsidered.

---

[20] *Order Regarding Motion to Dismiss*, p. 3, April 16, 2014. As alluded to earlier and as discussed in detail in the Company's Initial Brief, we disagree that single-issue ratemaking is not a concern here, but for purposes of this discussion that disagreement does not matter. It's obvious that if the revenue requirement is going to change, then single-issue ratemaking has to be a concern because in that case *both* the rates *and* the revenue requirement are being changed, and only one factor (Noranda's claimed need) is being considered.

[21] Not only would lowering Ameren Missouri's revenue requirement without consideration of all relevant factors be unlawful as a violation of the prohibition against single-issue ratemaking, but it would also constitute an unconstitutional confiscation of Ameren Missouri's property because the Commission would be setting rates that are designed to produce less revenue than the revenues needed to cover the only Commission-approved revenue requirement that exists. Why? Because the revenue requirement hasn't even been examined or considered in this case. Nor would a confiscation claim by Ameren be foreclosed, for the reasons discussed earlier, because Ameren Missouri did not have to raise any defense (or any constitutional issue) since no relief is being sought from it and it has no burden. OPC's citation to two cases that stand solely for the proposition that a constitutional claim must be raised at the earliest possible moment (the *Land Clearance* and *Meadowbrook* cases cited at page 9 of OPC's Initial Brief) have nothing to do with this case, and are cited by OPC based on its erroneous application of the law governing the burden of proof.

There is a very good reason the statutes provide for a consideration of all relevant factors in <u>all</u> cases involving a rate change, and that reason is demonstrated by the facts of this case. As the Staff succinctly puts it, "while 'rate design does not alter the overall revenues received by the utility, [it] may dramatically change the rates paid by individual customers.'"[22] How could a case that may "dramatically change" customer rates be decided based on just one factor (one customer's claimed financial needs) to the exclusion of all else? It can't. And while Ameren Missouri contends that the Commission cannot change the allocation of the revenue requirement without first determining a new revenue requirement (because what new rates should be depends heavily on the very relevant consideration of what the revenue requirement actually is at the time the rate change is being made), even if that were not the case it cannot be true that the Commission can arbitrarily change the <u>allocation</u> of the prior revenue requirement without first considering factors obviously relevant to the allocation of the revenue requirement.

Of all those other relevant factors, what it costs to serve each rate class at the time the rate change is being made is perhaps the factor most relevant. Yet there is no class cost of service study from any party that provides the Commission information on what each class' cost of service currently is. Moreover, if the Commission is going to (improperly in our view) take into account Noranda's private financial needs in implementing a new rate design, it must also take into account the financial needs of other customers who are being asked to bear the burdens Noranda's proposed rate subsidy will place on them. For example, other businesses (or even residential customers) may have their own liquidity problems. In short, even if the

[22] Staff's Initial Brief, p. 14 (*quoting State ex rel. Fischer v. Pub. Serv. Comm'n*, 645 S.W.2d 39, 41 n.1 (Mo. App. W.D. 1982)). OPC cites to our argument in our motion to dismiss to the effect that in rate design cases where all relevant factors were not considered, but where a rate design change was approved via stipulation, this was only possible because no one challenged the rate design change on single-issue ratemaking grounds. OPC Initial Brief, p. 7, n.3. Contrary to OPC's statement, however, we do not agree that a rate design change in this case cannot result in a shift of those costs to other classes because of any burden Ameren Missouri would bear. To the contrary, as our motion to dismiss explained, it prevents a shift to the other classes *because of the prohibition against single-issue ratemaking.*

"consideration of all relevant factors" did not require consideration of what the Company's current revenue requirement should be, it most certainly requires consideration of all factors relevant to rate design. But because there is no class cost of service study and no evidence about other considerations that should inform the rate design decision Noranda asks the Commission to make here, the Commission cannot grant Noranda the relief it seeks.[23]

4. Contentions that approving Noranda's rate proposal would not constitute unlawful discrimination are incorrect.

Noranda and OPC claim that the rate Noranda seeks in this case would not be unduly discriminatory. In making that argument, both Noranda and OPC ignore controlling legal authority which demonstrates that the rate subsidy Noranda seeks does, indeed, constitute unlawful discrimination. Instead, they focus on past Commission decisions authorizing various electric, gas, and water utilities to implement economic development rates/riders ("EDR"). But this argument fails for at least two reasons.

First and foremost, Noranda's attempt to distinguish *Civic League* and *Laundry, Inc.*[24] fails. In attempting to distinguish those cases, Noranda initially points out that the Commission can create reasonable classifications and then place groups of customers in those classifications, as it has done in approving seven different rates for Ameren Missouri's seven different rate classes. This is necessary, because otherwise, if it costs a little more or a little less to serve each house in a subdivision or a town than it costs to serve every other house, a utility would have to have thousands, tens of thousands or even hundreds of thousands of different rates. Creating reasonable rate classes that do not exactly match "cost" for every house does not create "undue" discrimination, but the issue in this case has nothing to do with reasonable classifications.

[23] As outlined above, it was and is Noranda's burden to provide the evidence needed that would allow the Commission to consider all relevant factors – Noranda has not even attempted to do so.
[24] Cited in full in our Initial Brief, at p. 4.

Noranda is in its own rate class. The question here is whether the rate Noranda wants to pay differs from the rates applied to all of the other classes based upon some difference in the character of the service *between* its class and the *other* classes? Noranda admits that the answer to that question is "no." Instead, it is undisputed that the difference is based solely on Noranda's claimed ability to pay, which has nothing to do with the service Ameren Missouri provides to anyone.

After discussing the Commission's ability to create reasonable rate classes (which was never disputed), Noranda further attempts to distinguish these cases by reciting the basic facts in *Laundry, Inc.*, correctly quoting the Supreme Court's observation that since the character of the service taken by the two laundries who were denied service on the manufacturers rate was substantially similar to the character of the service taken by the manufacturers who qualified for the rate, it was unduly discriminatory not to give the laundries that rate. But from that discussion Noranda leaps to the incorrect (and unsupported) conclusion that *Laundry, Inc.*, does not prevent the Commission from granting Noranda the rates it wants because doing so "will not" result in discrimination because other customers "will benefit."

In the first place, as we discussed in our Initial Brief and discuss further below, there is no proof that other customers "will benefit," and Noranda did not even try to prove this is true. All Noranda did was try to prove that *in the past* (rather than for 10 years in the future) other customers would have benefitted with Noranda's rate at $30 per MWh versus Noranda not taking power at all. Staff and Ameren Missouri both agree that even that is not true. Second and even more important, however, is that whether other customers might benefit is not the test of an unduly discriminatory rate. We repeat – the test is as follows: "the principle of equality designed to be enforced by legislation [the PSC Law here] and judicial decision forbids any difference in charge which *is not based upon difference of service* and even when based upon difference of service must have some reasonable relation to the amount of difference…" (emphasis added). *Laundry, Inc.*, 34 S.W.2d at 44-45 (*citing Western Union Telegraph Co. v. Call Pub. Co.*, 181 U.S. 92, 100, 103 (1901)). All of the rate differential that has anything to do with a difference in service between the LTS class, under which Noranda takes service, and every other class, *has already been accounted for* in the current rate that Noranda pays. Consequently, because dropping Noranda's rate to $30 per MWh can have nothing to do with any difference in service, Noranda's request is *per se* unlawful.[25]

The foregoing makes Noranda's protracted discussion of EDR tariffs, which have been approved for every major investor-owned utility in Missouri, irrelevant. Consequently, although each of those tariffs are currently lawful in the sense that they took effect and now cannot be collaterally attacked,[26] it would be pure speculation to assume they would have been affirmed had they been challenged in court. Certainly there are significant differences between EDR-based rates and the rate subsidy Noranda seeks, but it is far from certain that a reviewing court would find those differences either legally significant or controlling. Neither the rate differences authorized by the EDRs nor Noranda's proposal in this case are based on or related to the utility's cost of service, nor do the differences bear any relationship to any difference in the service offered with or without the EDR rate. This may make the EDR tariffs legally suspect, particularly if any subsidy is borne by customers rather than by the utility (as discussed below, a number of such arrangements, including Ameren Missouri's EDR tariff, provide for the costs to be borne by the utility), but the case before this Commission now is not a challenge to (or

[25] Staff's Initial Brief speaks of "mitigation" of the "discriminatory aspects" of Noranda's proposal. Staff's Initial Brief, p. 4. There is nothing to "mitigate." The rate is not based upon any difference in service – it is unlawful.
[26] Section 386.550, RSMo.

affirmation of) EDR tariffs. To the contrary, the issue here is the lawfulness of *Noranda's particular* proposal.

Irrespective of questions regarding their legality, EDRs, and the special rates available under those tariffs, also differ materially from the rate subsidy Noranda seeks for the New Madrid smelter. This is clear from a simple comparison of Noranda's proposal to EDR tariffs the Commission has approved, including those cited in Noranda's and OPC's Initial Briefs. For example, while Noranda seeks a ten-year term for its proposed subsidy, no EDR rate arrangement extends beyond five years,[27] and under at least one EDR tariff the amount of the subsidy reduces by five percent each year the arrangement remains in effect.[28] Noranda's proposal also would limit future general rate case-related increases to two percent per case, and would exempt Noranda from periodic FAC-related rate increases. None of the EDR tariffs include any cap related to future rate cases and none exempt any customer from charges under an FAC or purchased gas adjustment clause.[29] Finally, at least two EDR tariffs require the utility's shareholders to absorb any revenue losses associated with special rates offered under those tariffs.[30] Noranda's proposal would require Ameren Missouri's other customers to bear the burden of any revenue shortfall attributable to the subsidy.

Ameren Missouri's own Economic Development and Retention Rider ("EDRR")[31] has many of the same features as the EDRs described above. The Company's EDRR is available to qualifying customers only at the Company's discretion; it limits the term of special rates

---

[27] *See, e.g., In the Matter of Atmos Energy Corporation's Tariff Revision Designed to Consolidated Rates and Implement a General Rate Increase for Natural Gas Service in the Missouri Service Area of Atmos*, Case No. GR-2006-0387 (approved tariff limits EDR-based rates to a maximum of 48 months).
[28] *In the Matter of Application of Missouri-American Water Company for Approval of an Agreement with Nestle Purina PetCare for Retail Sale and Delivery of Water*, Case No. WO-2009-0043 (EDR discount begins at 30 percent and reduces by five percent each year through the fifth and final year).
[29] *Id.*
[30] *See, e.g., Order Concerning Agreement and Tariffs, Application to Intervene, and Motions to Suspend Tariffs*, Case No. WT-2004-0192 (Nov. 20, 2003), pp. 10-11; *Report and Order*, Case No. GR-96-285 (Feb. 1, 1997), p. 65.
[31] Ex. 208.

available to five years; it limits eligibility to customers who are enrolled in and receiving benefits from local, regional, or state government economic development activities; it does not include any rate cap; and customers who receive the special rate are not exempt from FAC-related rate increases or similar surcharges. Ameren Missouri's tariff also limits the amount of the available discount to fifteen percent of the applicable tariff.

In addition, as noted by the Company's witness Terry Jarrett, the Commission order approving the Company's EDRR tariff, which was issued in Case No. ER-2007-0002, states that "[t]he EDRR is being funded by Ameren UE's shareholders, not ratepayers, so the Commission is willing to give the company more discretion in designing what it believes to be an appropriate economic development tariff."[32] These EDR tariffs are not designed to rescue a business in financial trouble but to incent financially healthy companies to remain in the utility's service territory. Mr. Jarrett testified that EDRs were never intended to bail out companies that are in financial trouble. "[T]hese were never meant to be giveaways. They were meant to, under certain limited conditions, with shareholder money, incent companies that have bona fide offers to leave to stay in Missouri."[33]

EDRs approved by the Commission for Ameren Missouri and every other major investor-owned electric, gas, and water utility operating in this state bear little resemblance to Noranda's rate subsidy proposal. Consequently, Noranda's and OPC's attempt to analogize Noranda's proposal to those EDRs, as well as their argument that because the Commission has approved EDRs it also has the legal authority to approve Noranda's proposal, are not supported by either the record in this case or by applicable law. Assuming the Commission has the authority to approve EDRs, the tariffs provide no support for the significantly dissimilar subsidy Noranda

[32] In fact, to the extent funded by shareholders, there is a strong argument that there is no issue of undue discrimination because other customers are simply unaffected by the EDR rate.
[33] Tr. P. 1015, l. 21 to 25.

seeks in this case. But, because neither Noranda's proposed rate subsidy nor the special rates authorized under approved EDRs are based on or related to differences in the cost of providing service, the Commission cannot simply assume the rates allowed under those EDRs would be found valid under Missouri law if challenged in court.

Noranda's Initial Brief also argues that "[t]he Commission has also approved rates that provide a subsidy for certain ratepayers for reasons other than economic development." But the case cited in support of that argument – *In the Matter of Missouri-American Water Company's Tariff Sheets Designed to Implement General Rate Increase for Water and Sewer Service Provided to Customers in the Missouri Service Area of the Company*, Case No. WR-2000-281 (Report and Order on Second Remand) (December 14, 2008) – is not a case where the Commission approved a specific rate subsidy that is comparable to the subsidy Noranda seeks here. Instead, that case involved a choice between single-tariff or uniform pricing, where all consumers within a particular customer class are charged the same rate regardless of the cost of service in the district in which the consumers reside, and district-specific pricing, where customers pay rates based solely on the actual cost of serving their community.

Both of these methods *base rates on the cost of providing service to customers*, and they reflect the kind of reasonable service classifications the courts have long held are appropriate. Put another way, as long as rates for all the members of a utility rate class are based on the costs to serve each class, there is no discrimination between the members of that class despite the fact that it actually costs the utility more to serve some customers in the class than it does to serve others (as is the case in the various homes in a subdivision example we mentioned earlier).

5. Other Legal Issues.

a. <u>The Commission's authority</u>.

The Staff claims the Commission has "ample authority" to require changes in the current rate design, citing several statutes in support of that claim. For the reasons discussed in our Initial Brief and in this Reply Brief, we disagree. We will address below the statutory provisions the Staff cites and why they do not give the Commission authority to grant Noranda the relief it seeks in this case.

The first citation, Section 393.140(2), clearly doesn't support the Staff's claim of "ample authority" in this case, as evidenced by the terms of the statute that the Staff itself emphasizes. All that statute says is that the Commission possesses certain powers to order a public utility to provide certain facilities – generators, poles, wires – so that it can provide service. It has nothing whatsoever to do with a utility's rates.

Section 393.140(3) similarly fails to provide authority for granting Noranda's request in this case. That statute simply gives the Commission certain authority to examine and investigate a public utility's plants and methods of delivering service. But it too has nothing to do with rates.

With respect to Section 393.140(5), while it does contain the Commission's general authority to prospectively change rates, the Commission remains bound by the requirement that rates not be discriminatory. The Commission has no legal authority to approve discriminatory rates,[34] and it also remains bound by the requirement that it not engage in single-issue ratemaking.

[34] *State ex rel. City of Joplin v. Pub. Serv. Comm'n*, 186 S.W.3d 290, 296 (Mo. App. W.D. 2005) (correctly cited to by the Staff for that proposition at p. 14 of the Staff's Initial Brief).

Section 393.140(11) is also irrelevant to what the Staff claims is the Commission's "ample authority," unless Staff is pointing to it as a reflection of the process that would have to be followed if the Commission ordered a rate change (*i.e.*, a tariff filing with 30-days' prior notice, unless the time is shortened for good cause shown). We agree that statute reflects one process that would be followed to change Ameren Missouri's rates, but it provides no "authority" to grant Noranda's request in this case.

Similarly, Section 393.270.2 only reflects the Commission's general power to set rates, which by its terms recognizes that power must be within "lawful limits" (e.g., no discrimination; no single-issue ratemaking). It is not applicable in any way to Noranda's request in this case.

b. <u>The Commission cannot reform Ameren Missouri's private contract with Noranda</u>.

The Staff also claims that the Commission can change the terms of Noranda's obligations to Ameren Missouri, although it is unclear exactly what that means. If the Staff is saying that the terms and conditions of the tariff can be changed, then certainly the Staff is correct. However, if the Staff is saying that the Commission can relieve Noranda of the private, contractual obligation it owes Ameren Missouri to provide no less than five years' notice if it desires to exercise its unique right to choose another supplier under Section 91.026, then the Staff is incorrect. Staff would also be incorrect if it is saying that this Commission can take away Ameren Missouri's private contractual right to provide five years' notice to Noranda that Ameren Missouri intends to seek to end the certificate that requires the Company to serve Noranda. As we argued in our Initial Brief, the Commission cannot reform a contract, including Ameren Missouri's contract with Noranda.[35]

[35] This is because, at a minimum, the Commission has no power to order reformation because it has no power to enforce any principle of law or equity. *Utility Consumers Council,* 585 S.W.2d at 47.

c. A complaint cannot be brought against Noranda to enforce any "commitment" Noranda might make.

Staff contends that Section 386.390.1 would authorize the Commission to hear a complaint against Noranda if it made commitments as part of receiving a subsidized rate and then failed to live up to those commitments. Indeed, the Staff goes so far as to claim that Noranda could be subject to "substantial penalties" as a result of such a complaint. But Staff misreads the governing statutes.

The Commission's jurisdiction is defined by Section 386.250. Its jurisdiction extends to "persons or corporations owning, leasing, operating or controlling" the "manufacture, sale or distribution of gas" or persons or corporations "owning, leasing, operating or controlling" "gas and electric plants." Section 386.250(1). Noranda does not own, lease, operate or control any such plants. The Commission's jurisdiction also extends to "public utility corporations and persons whatsoever *subject to the provisions of this chapter"* (emphasis added). And Section 386.010 makes clear that "this chapter" (Chapter 386) "shall apply to the public services herein described . . . and to the public service corporations, persons and public utilities mentioned and referred to in this chapter." Noranda neither provides any of the public services identified in the statute nor is it a public service corporation. We also know that even where a person or corporation owns something that, for example, might literally fall within the definition of the term "electric plant" (as defined in Section 386.020(14)), the Commission does not have jurisdiction over such a person or corporation if that person or corporation does not hold itself out to the general public to provide service. *State ex rel. M.O. Danciger & Co. v. Pub. Serv. Comm'n*, 205 S.W. 36, 40 (Mo. 1918). Noranda, of course, does not hold itself out as a provider of utility service to anyone, let alone to the general public.

It is clear, therefore, that the reference to "corporation, person or public utility" as the class of entities or individuals against whom a complaint could be brought before this Commission is a reference to the "public service corporations, persons and public utilities" that Section 386.010 and Section 386.250 make clear are the only such persons or entities within the Commission's reach.

The Staff's contention that a complaint can be brought against Noranda and that Noranda could be penalized is simply wrong. To the contrary, all the Commission could do to enforce any commitments Noranda makes would be to prospectively take away the subsidized rate. But it could only do that after it authorizes its Staff to file a complaint against Ameren Missouri regarding the reasonableness of the rate under which Noranda is served. Such a complaint would be a rate design complaint, like the one involved here, but it would seek the opposite relief. The Commission has no power whatsoever to compel Noranda to employ anyone, to invest in the smelter, to prevent Noranda from paying dividends or otherwise transferring wealth to Noranda's shareholders, and has no authority to ask a circuit judge to impose penalties on Noranda. And that is one of the reasons why the "commitments" Noranda has "offered" are meaningless.

d. <u>There is no authority or history of the Commission employing interim rates in the manner outlined by the Staff</u>.

Staff's brief, for the first time in this case, throws out the idea that the Commission could give Noranda some kind of relief (at least charge them the minimum rate Staff says would cover the avoided costs and provide the same level of benefit Noranda claims its proposal would provide) by establishing lower interim rates. However, Noranda is not asking for interim rates, and indeed, when the Presiding Officer suggested that the parties consider consolidating this case with Ameren Missouri's (then) upcoming rate case and that consideration be given to treating Noranda's request as an interim rates request, Noranda stated that "[t]his is not an interim rate case nor is it a proper case for interim rates."[36] Noranda chose the relief it says it wants and must have, and there is no justification for treating this case (after the evidentiary record is closed) as one seeking interim rates. We would also note that the courts have provided no guidance with respect to whether interim rates would be available in the context of a complaint case like this one. The cases cited by the Staff all involve an affirmation of interim rate authority in a general rate increase case initiated by a utility, the courts concluding that the justification for that authority is found in the need for the Commission to provide interim rate relief when it determines it appropriate to do so in order to ensure that the utility can discharge its service obligations to the public.[37] Those considerations do not apply here.

<u>ARGUMENT – NON-LEGAL ISSUES</u>

1. Noranda's entire case is contradictory.

Aside from the legal and policy flaws in Noranda's proposal is the fact that in order to accept it, one must be adept at engaging in "doublethink;" that is, one must simultaneously accept two mutually contradictory ideas (or here, must accept several pairs of mutually contradictory ideas).[38] That this is true is obvious simply from a review of Noranda's own evidence in this case, as proven by the following examples:

- Noranda justified its requested $30 per MWh rate – what it says it needs – using a financial *forecast* it developed for the next five years,[39] but Noranda then claims that it is improper to use a forecast of the impact of giving Noranda a $30 per MWh rate to test whether the $30 per MWh rate is reasonable (i.e., whether customers would be better off letting Noranda pay just $30 per MWh versus letting Noranda close the smelter, if in fact that would actually happen at all).[40] Consequently, the Commission must simultaneously believe that forecasts are reliable and provide appropriate justification for giving Noranda

[36] April 10, 2014 *Joint Response, supra,* p. 2.
[37] *See, e.g., Fischer,* 670 S.W.2d at 26 (Mo. App. W.D. 1984 (Discussing interim rate authority in the context of making sure the utility can "continue to serve the public.").
[38] *Webster's* defines doublethink as "a simultaneous belief in two contradictory ideas."
[39] Exhibit A to Ex. 1HC (Smith Direct).
[40] Ex. 14HC, p. 3, l. 13-14 (Dauphinais Surrebuttal).

a heavily-subsidized $30 per MWh rate, but also that they are unreliable and can't be examined to test whether that $30 per MWh rate is reasonable and actually supports Noranda's unproven theory that Ameren Missouri's other customers are better off subsidizing Noranda than they would be if Noranda went out of business.

- Noranda also based its requested $30 per MWh rate on what it claims is a 10-year "cycle" for aluminum prices, but Noranda can't tell us where it is in this "cycle."[41] Noranda only looked at a five year financial forecast, and except for Mr. Smith's statement that there is such a cycle, provided no proof that it actually exists. Thus, the Commission has to simultaneously believe that the cycle is for the next 10 years, but also believe that one cannot know where Noranda is in that cycle, which necessarily means we don't know if the current "cycle" will end next year, in three years, in five, or in ten.

- Noranda forecasted for Moody's financial results premised on it only investing about $75 million per year and realizing aluminum prices as forecast by CRU,[42] but simultaneously told the Commission that it had to invest about $100 million per year and that its realized aluminum prices would be much lower.[43] Thus, the Commission is being asked to simultaneously believe that both scenarios are true.

- Noranda's Moody's modeling and Mr. Smith's model that underlies his testimony (when conformed to the Moody's modeling assumptions) produce the same EBITDA, as Mr. Smith himself admits.[44] This requires the Commission to believe that two things that cannot simultaneously be true are both true: that "growth capital" isn't really for growth, but is instead for "retention," and that if business is retained, financial results will be no better than if the business is not retained.

- Noranda tells the Commission that CRU is reliable, thoughtful and well-regarded,[45] and indeed uses some CRU data in its own forecast[46] and also used it for its Moody's modeling, but simultaneously tells the Commission that CRU can't be relied upon in testing the reasonableness of the forecast Noranda gave to this Commission.

- Noranda tells its Board of Directors and investors that it has a "healthy balance sheet" and that its liquidity performance is "strong,"[47] but tells the Commission that its liquidity

[41] Tr. p. 304, l. 14 to p. 305, l. 3.
[42] Ex. 113HC; Ex.102HC, p. 14 (Table 3, summarizing the assumptions underlying the Moody's Presentation, including just $373.5 million of capital investment from 2014 to 2018 – $74.7 million per year) (Mudge Rebuttal).
[43] Ex. A to Smith Direct (Ex. 1HC) as compared to the Moody's modeling, which use the higher CRU price forecast. Ex.102HC, p. 16, l. 13 to p. 19, l. 3.
[44] *See* Ameren Missouri's Initial Brief, pp. 26-29; Tr. p. 296, l. 25 to p. 297, l. 25.
[45] Tr. p. 289, l. 8-16; 404, l. 21 to 405, l. 3.
[46] Ex. A to Smith Direct (Ex. 1HC).
[47] Tr. p. 258, l. 14 – 24.

is in crisis, including its 11th hour revelation that it **[redacted]** Thus, the Commission must simultaneously believe that what it is telling its Board and investors is true (strong liquidity and solid balance sheet), but that what it is telling the Commission **[redacted]** is also true.

2. Noranda has not credibly established that it is in a liquidity crisis and even had it done so, it has not credibly established that it, or its major investor, cannot solve it without resorting to an unwarranted long-run wealth transfer from Ameren Missouri's other 1.2 million customers.

(Responds primarily to Section III of Noranda's Initial Brief).

In our Initial Brief, we addressed most if not all of the issues raised in Section III of Noranda's Initial Brief. Here we will address some of Noranda's specific points.

a. <u>Noranda ignores its competitive position, and unfairly blames the cost-based power rates it pays in Missouri for its claimed "liquidity crisis."</u>

Just because Noranda claims something in its brief certainly does not make it true. At page 13 of its Initial Brief, Noranda claims that Mr. Fayne's unsupported opinion – that each closure of a smelter was "a result of the arrangement between the power supplier and the smelter" – is "unrebutted." That statement is false. As we discussed at pages 37 to 40 of our Initial Brief, the evidence (and this evidence *is* undisputed, save Mr. Fayne's ridiculous contention in his surrebuttal testimony that total production costs are "irrelevant") in this case shows that for 2013 Noranda's total production costs were **[redacted]**, and that even its electricity costs were only slightly higher (only **[redacted]**[48]) than average in 2013. Moreover, if Noranda got what it wanted in this case, this Commission would single-handedly vault Noranda to the position of **[redacted]** smelter in the United States by **[redacted]**.[49] Finally, the data – as opposed to Mr. Fayne's bald statements – shows that for the six U.S. smelters that most recently closed, non-electricity costs

NP

[48] Ex.102HC, p. 43, l. 18-20.
[49] Id, p. 44, Table 10

were much more consequential than electricity costs.[50] Moreover, some of the other smelters that arguably have lower electricity costs have electricity arrangements with strings attached that Noranda refuses to agree to. For example, for the Wenatchee smelter, Alcoa would pay a large penalty if it closed the smelter, and Hawesville and Sebree have contracts to take power at wholesale market prices, meaning they bear the risk that market power prices will increase.[51] It is thus misleading to claim that these smelters "have" lower prices, because they might or might not have lower prices, and in some cases there were *quid pro quos* required to obtain whatever price they are paying.

b. Noranda hasn't proven that its liquidity position as of **[redacted]** is reflective of its long-term position.[52]

As noted, Noranda sounds the alarm about **[redacted]** almost immediately after telling its Board and investors that its liquidity performance is strong and its balance sheet is healthy. Even Noranda hedges this argument in its Initial Brief, admitting that the alarmist statement **[redacted]** overstates the situation, and that its liquidity situation is **[redacted]**[53] That Noranda likely decided to advance significant payments on the rod mill on the eve of the hearings in this case, and to report the impact of that decision along with the normal mid-month reduction in liquidity

[50] Ex. 102HC, p. 50, l. 14 to p. 52, l. 9. The Staff, reciting just one side of the story (almost entirely from Noranda's pre-filed testimony, untested by cross-examination), appears to accept at face value much of what Noranda said about its financial condition and its cost structure. Staff admits that it conducted absolutely no investigation of those matters. Tr. p. 79, l. 6-12 (Chief Staff Counsel Thompson confirming that the Staff has not independently confirmed any of Noranda's financial claims).
[51] Ex. 102HC, p. 45, l. 9 to p. 47, l. 3.
[52] And the Staff's statement at pages 7 to 8 of its Initial Brief to the effect that nothing in Mr. Mudge's testimony refutes Mr. Smith's testimony that Noranda is in a liquidity crisis is just plain wrong. Again, it is apparent Staff paid no attention to Noranda's justification for the subsidized rate it seeks, choosing to focus instead on evaluating what Mr. Brubaker and Mr. Dauphinais had to say. Among the evidence that directly rebuts Mr. Smith is the fact that it is clear that if Noranda spends what it has historically spent on capital investments, it will maintain the liquidity Mr. Smith himself agrees it needs.
[53] Noranda's Initial Brief, p. 10-11.

that it admits it experiences each month,[54] should not convince the Commission that suddenly Noranda can go from outperforming its liquidity expectations as of the end of April this year (despite nearly $15 million of a one-time weather-related drop in segment profit during the first quarter[55]) to **[redacted]** without any options other than to obtain nearly $50 million per year of new capital in the form of a rate subsidy provided by Ameren Missouri's 1.2 million other customers over ten years. If the **[redacted]**[56]

The Commission has to evaluate the evidence in this case for itself, but the record in this case leaves no question but that Noranda has a track record of providing the Commission with extremely negative financial information while separately painting a different picture for others, and indeed behaving in a way that one would not expect if things were really so bad. Examples include Noranda's testimony in File No. ER-2010-0036, where it threatened a possible closure of the smelter without rate relief, only to pay approximately $150 million in special dividends in the year or two following its plea to this Commission for relief.[57] A similar situation can be seen in this case, as evidenced by its filing in this case versus what it told Moody's, and also as evidenced by the liquidity and balance sheet picture it is presenting to its Board and to investors versus the picture of those financial metrics that it is presenting to this Commission.

[54] Tr. p. 933, l. 19 to p. 934, l. 6; p. 954, l. 1 to p. 955, l. 8. Even Mr. Smith concedes that the **[redacted]** he sprung on the Commission during the hearings is driven in part by the rod mill. Tr. p. 189, l. 18-22.
[55] Tr. p. 270, l. 2 to 22.
[56] Tr. p. 301, l. 4-10.
[57] Ex. 120; Tr. p. 288, l. 3, to p. 289, l. 10 ($67 million special dividend October 2011); Ex. 115, p. 23 ($84.3 million special dividend in 2012)

NP

c. <u>Noranda's attempt to rationalize away every piece of data and information that is contrary to its story falls flat – Noranda has not justified the relief it seeks.</u>

Noranda has explained, and cannot explain, why it would provide Moody's with useless information.[58] Noranda has also failed to explain why Moody's can both "know Noranda" and thus "know" that Noranda really needs to invest $100 million per year, while at the same time Moody's is assuming investment levels in most of the next five years that are more in line with Noranda's history (around $75 million per year or less), a fact we addressed in our Initial Brief at pages 29 to 30. Noranda has not explained (and cannot explain) why the EBITDA in the two models (when Mr. Smith's model is conformed to use the assumptions Noranda used in its Moody's modeling) is the same, which cannot be correct if, as Mr. Smith claimed for the first time in surrebuttal testimony, "growth capital" is really "business retention capital."

Noranda has exaggerated elsewhere. In its Initial Brief, Noranda unqualifiedly tells the Commission that it estimates that it requires **[redacted]**[59] It just told investors, however, that the number was "$65 to $75 million.[60] While it is true that the number cited in its brief is within that range, it once again only argues to the Commission the number that most supports is claimed liquidity crisis. If the lower number is right, the difference over the five-year study period would by itself fund the rod mill.[61]

And as the evidence shows, Noranda has discretion over its level of capital spending.[62] A fair reading of the record in this case is that Noranda has at every turn pointed the Commission toward every fact it can that tends to show its liquidity is as bad as possible. It claims capital

---

[58] Tr. p. 300, l. 23 to p. 302, l. 10.
[59] Noranda's Initial Brief, p. 18.
[60] Ex. 111, p. 6.
[61] As Mr. Mudge testified, Noranda's issues, if they exist, are really more short-term in nature than long-term and getting capital for the rod mill (from, e.g., Apollo) would solve a lot of Noranda's issues. Tr. p. 927, l. 1 to 15.
[62] Tr. p. 248, l. 3 to 17.

expenditure needs that are inconsistent with Noranda's history and for which no documentation exists (save that developed three days before surrebuttal testimony was filed). Its claims of low aluminum prices are contradicted by current forecasts, including those Noranda itself uses. And, among other things, it highlighted for the first time at the hearings low, mid-month liquidity figures. Mr. Smith himself admitted that Noranda had exceeded its liquidity expectations in 2013 and had told its Board of Directors that its liquidity performance was strong in the first quarter and through April of this year (both positives, although they undermine Noranda's case), but he did not share those facts with the Commission when he filed direct or surrebuttal testimony, although he admitted that it would have been useful to the Commission had he done so.[63] In addition, in his surrebuttal testimony, Mr. Smith tries to buttress his claim that Noranda will spend $100 million per year on capital expenditures by pointing to a rectifier project. But what Mr. Smith did not tell the Commission is that the rectifier project has been under consideration for several years – at least back into 2011 and 2012, as Noranda's own documents show – but instead of funding it with available cash, Noranda paid more than $150 million of dividends in those two years. Yet it is here asking for a $50 million per year rate subsidy.[64]

When challenged, Noranda dismisses these facts. For example, Noranda dismisses the fact that over the past three to four years it has only invested about $71 to $75 million per year *total*,[65] by claiming that it rationed capital due to "economic conditions."[66] Was it due to economic conditions or was it instead due to the more than $150 million of dividends – most of

[63] Tr. p. 273, l. 15 to p. 274, l. 13. The Commission should also take with a large grain of salt Mr. Smith's claim in surrebuttal testimony that to be **[redacted]**. There are significant indications that this has to do with timing, mostly rod mill expenditures, and Mr. Smith admits Noranda does not need a **[redacted]** in order to be sustainable over the five-year period studied. Tr. p. 276, l. 19-23.
[64] Tr. p. 947, l. 10 to p. 948, l 8.
[65] Ameren Missouri's Initial Brief, p. 24.
[66] Noranda's Initial Brief, p. 19.

NP

them special dividends – paid to shareholders (the majority to Apollo) in 2011 and 2012, when "economic conditions" were poor? The record strongly suggests it was the latter.

Noranda exaggerates further when it claims its "capital needs" are "well established."[67] Developing a "hopper" of projects three days[68] before surrebuttal testimony is filed, after it was pointed out in rebuttal testimony that, despite being asked, Noranda could not document any capital needs beyond 2014,[69] hardly "establishes" capital needs. It certainly does not establish that Noranda needs to, and will, invest $100 million per year when its history is to invest 25 to 30 percent less.

Noranda also emphasizes what it characterizes as "depressed" aluminum prices, but as we explained in our Initial Brief (pages 32 to 35), Noranda exaggerates here as well. Indeed, Mr. Smith admits that forward aluminum prices are trending up,[70] and aren't expected to be depressed for an extended period of time, and he admits the prices he used were "conservative" (on the low side).[71] Noranda also put its thumb on the scale in a way that understates its liquidity by failing to properly account for tax depreciation in its modeling (doing so would improve liquidity), and by failing to credit its modeling with the financial benefits one would expect to be created by the "unidentified growth capital" Noranda claims it must invest.[72]

Noranda's attempt to paint Apollo as a savior, and to act as though Apollo and Noranda's Board will be looking out for Ameren Missouri's customers, is unconvincing and not supported

---

[67] *Id.*
[68] Tr. p. 284, l. 19-25.
[69] Ex. 114HC (showing the only documentation Noranda has for capital investments is a list of 2014 projects) and Ex. 130HC (showing that for the "hopper" Noranda developed on the eve of surrebuttal there is no documentation whatsoever that backs of the need or justification for that hopper of projects).
[70] Tr. p. 455, l. 11 to 16.
[71] Tr. p. 456, l. 22 to p. 457, l. 2; Tr. p. 479, l. 23-24.
[72] Tr. p. 889, l. 20 to p. 890, l. 12; Ex. 102HC, p. 29, n.31; p. 28, l. 4 to 9.

by the record.[73] We addressed all of the points Noranda attempts to make on these topics in our Initial Brief. In summary, it is not true that Apollo cannot effectively control Noranda's Board and thus Noranda.[74] Not only do Noranda's SEC filings establish that this contention is untrue, but so does Mr. Smith's own testimony given before Noranda scrambled to come up with a rationale for arguing that Apollo does not have control between the time Mr. Smith was deposed on June 9 and the date he testified one week later. Notably, when asked in his deposition, Mr. Smith admitted that Apollo still effectively controlled Noranda.[75]

Nor should the Commission give credit to Apollo for being a savior and thus deserving of its 340 percent internal rate of return on its 25-day investment in Noranda, and thus ignore the cash Apollo has extracted – and could extract in the future – if this subsidy is granted. It is also simply not credible, as Mr. Smith claims in his surrebuttal testimony that Apollo was the only viable buyer for Noranda in 2007. As the evidence shows, aluminum prices were quite high leading up to the purchase (no one knew the Great Recession of late 2008/2009 would occur), and that alone explains why Apollo might have made that investment.[76] Indeed, it looks like Apollo was very smart in making that investment given its spectacular returns.

Moreover, Noranda's attempt to reassure the Commission by its repeated references to "fiduciary duties" should provide no such reassurance, and in fact proves our point. Those duties, as Noranda admits, are owed to shareholders, including Apollo, the biggest one of all. If

---

[73] Noranda's Initial Brief, pp. 20-21. That Mr. Smith says that *he* credits Apollo with being a savior means little – he cites no evidence to back up this contention, and in fact conflated the timing of Apollo's leveraged buy-out in 2007 (which effectively cost Apollo nothing) with a 2009 ice storm, for which Noranda received approximately $67.5 million in insurance proceeds. Tr., p. 303, l. 22 to 25; p. 304, l. 6 to 13. It received not one dime from Apollo. Moreover, when asked to document how Apollo saved Noranda, Noranda could produce no documentation. Tr. p. 382, l. 1 to 9; Ex. 129HC.

[74] Ameren Missouri's Initial Brief, p. 60; Ex. 118.

[75] Tr. p. 267, l. 12 to p. 268, l. 7. Note also that Noranda's SEC filings do not include any qualification about a NYSE "rule," and indeed, nothing requires Noranda to be listed on the NYSE in the first place, even if there is such a rule. Make no mistake: Apollo does effectively control Noranda's Board of Directors and if Apollo wants to extract cash for shareholders (including the public shareholders as well as itself) it has the power to do so.

[76] Tr. p. 464, l. 14 to p. 466, l. 1.

Noranda can convince this Commission to in effect cause Ameren Missouri's 1.2 million other customers to donate nearly $50 million per year of capital into Noranda (for which they gain no interest in Noranda or anything else for that matter), there is absolutely nothing stopping Noranda from providing whatever value it wants to provide to its shareholders through dividends or other means. Indeed, there is no reason to believe that Noranda's Board will not provide value to its shareholders, and arguably those fiduciary duties mean that it must do so as a matter of law. It is simply not credible for Noranda to claim that the risk that Apollo will "inordinately benefit is almost non-existent."[77] We don't know what benefit Apollo will gain, but the "risk" of a substantial benefit certainly exists. Indeed, can there be any doubt but that a capital injection into Noranda of nearly $50 million per year from Ameren Missouri's other customers would benefit Apollo?

Noranda also ignores the facts when it claims that Apollo is not the kind of "lender it needs," and that an equity infusion from Apollo would be "unduly dilutive."[78] First of all, there is no evidence of record backing those points, and in any event, Noranda's claim in its brief is not what Mr. Smith testified to. What Mr. Smith said about the issue of Apollo lending Noranda money is that this is "not the business they [Apollo] are in,"[79] implying that Apollo would not *want* to make such a loan. Well, of course not, if Ameren Missouri's other customers can be required to provide a $50 million grant (every year) in lieu of funding from Apollo. The fact is that Apollo can be in whatever business it wants to be in and can make whatever loan or other capital investment it wants to make. As Mr. Mudge explained (and as we discussed this in detail at pages 42 to 42 of our Initial Brief), if Noranda does not get the Ameren Missouri customer-funded capital, Apollo has an incentive to provide the capital Noranda needs to protect and

---

[77] Noranda's Initial Brief, p. 21.
[78] *Id.*
[79] Tr. p. 483, l. 18 to p. 484, l. 5.

improve the value of its nearly $80 million worth of stock (for which on a net basis it paid nothing) in Noranda, including for the rod mill.[80] If it did so, this alone would solve the sudden **[redacted]”** Noranda announced on the first day of the evidentiary hearings.

Mr. Mudge’s testimony also rebuts the notion that an additional equity infusion would be “unduly dilutive,” a phrase not used by any witness in this case.[81] Mr. Mudge explained why increasing high value sales (such as those expected from the rod mill) may be accretive to earnings and thus on balance not dilutive.[82] And even if there were some dilution, so be it. Shareholders reaped very large dividends – at times far more than was being invested in the company. It may be time for shareholders to step up, rather than asking Ameren Missouri’s other customers to do so.

3. Noranda has failed to prove – and really did not attempt to prove – that Ameren Missouri’s other customers would be better off during the ten-year period during which Noranda seeks a heavily subsidized rate.

(Responds primarily to Section IV of Noranda’s Initial Brief)

a. <u>While all would agree that Noranda has a significant impact on the economy of southeast Missouri, that fact does not come close to showing that Ameren Missouri’s other 1.2 million customers, the vast majority of which are at most impacted by overall state taxes Noranda and its employees pay (which would benefit other Missourians as well) are better off providing a large rate subsidy to Noranda.</u>

In the first several pages of its Initial Brief Noranda, predictably, puts on prominent display of all of the benefits it claims it brings to the state as a whole, and in particular, to the Bootheel. As we discussed in our Initial Brief, the evidence in this case calls into question the actual magnitude of those statewide benefits. But in any event, we have never disputed that

[80] Mr. Smith admits that closing the smelter would cause significant harm to Apollo and its remaining approximately $80 million of stock. Tr. p. 276, l. 5-13. It follows that Apollo will make sure that Noranda has the cash it needs to build the rod mill and otherwise operate, particularly given the spectacular returns Apollo has already received and the prospect of cashing in on its remaining stock, for which on a net basis it paid nothing.
[81] Noranda’s Initial Brief, p. 21 (Mr. Smith spoke of “potential dilution.”).
[82] *See* discussion in Ameren Missouri’s Initial Brief, p. 43.

NP

Noranda does provide statewide benefits or that it is a very important economic engine for southeast Missouri and the Bootheel in particular. However, as we also explained, approximately 47 percent of the people who benefit most from Noranda's operations are not being asked to bear one dime of the large subsidy Noranda seeks,[83] while 97 percent of Ameren Missouri's customers who do not live or work in the region are being asked to bear the subsidy.[84] And not a single customer from any other investor-owned, municipal or cooperative utility – each of whom presumably benefits from the substantial state financial benefits Noranda witness Dr. Joseph Haslag claims to exist -- is being asked to pay anything.

Noranda is asking for an economic development package funded by a tax on Ameren Missouri's other customers. Regardless of how important Noranda may be to the region, whether it should receive such a package and on what terms is simply not something this Commission should be deciding. The proper place for such a decision is at the Missouri General Assembly.[85]

b. <u>Mr. Dauphinais' contentions do not establish that other customers would be better off with Noranda paying the heavily subsidized $30 per MWh rate versus leaving Ameren Missouri's system.</u>

While Noranda appears to concede that the Commission could not literally bind itself (and future Commissions) to fixing Noranda's rate at $30 per MWh for a ten-year period, with a two percent per rate case rate increase cap and with no responsibility for paying its fair share of FAC charges,[86] Noranda continues to claim that this is what it wants, needs and, as a practical matter, expects to receive if the Commission were to sustain its complaint in this case. And it is obvious that Noranda's hope is that it will succeed in putting such an arrangement in place,

[83] Ex. 100, p. 10, l. 13 to p. 11, l. 3 (Davis Rebuttal).
[84] *Id.*, p. 9, l. 12-23.
[85] We discuss the legal and policy reasons why this is true at pages 11 to 19 and 61 to 62, of our Initial Brief.
[86] Tr. p. 711, l. 16 to p. 712, l. 3.

thereby imposing a burden on any party that attempts to change the new status quo prospectively no matter what may happen. Even if at some point during the proposed ten-year period Noranda's fortunes were to improve, Noranda has made no commitments that would cause it to share any benefits in exchange for the risks adoption of its proposal would shift to Ameren Missouri's other customers. If, for example, aluminum prices turn out much better than Noranda's case has forecast (e.g., closer to the CRU forecast it shared with Moody's), or if Noranda for other reasons doesn't really need a large rate subsidy, Noranda has not proposed to share any of those benefits with the customers who would continue to provide them with subsidized rates for at least ten years. [87] In addition, Noranda will not agree to restrict dividends or other means of enriching shareholders during the period subsidized rates are in effect,[88] even if it did fail to meet the two "commitments" it has offered.

Let us be clear about Noranda's justification for its contention that customers would be better off bearing the cost of Noranda's $30 per MWh rate than they would be if Noranda closed the smelter. Noranda did not attempt– nor does it claim to have attempted– to evaluate the risks of its proposal to other customers over 10 years. As OPC witness Lena Mantle candidly noted, only Ameren Missouri looked at the risks of the proposal over the next 10 years.[89] Those risks are obvious. The cost to serve customers may and likely will increase substantially over ten years, and every dollar of cost increases that exceeds Noranda's two percent cap will be shifted to Ameren Missouri's other customers causing the rate subsidy to grow.[90] As fuel and fuel

---

[87] As we discussed in our Initial Brief, the tariff change Noranda proposes that would give it the unilateral right on two years' notice to leave the system or, as Noranda wrote it, to never give such notice with the subsidized rate to continue in perpetuity. Even if that were not true because of the Commission's ongoing oversight of the rate Noranda would pay, as a practical matter would it really be reasonable to think that Noranda could be charged at far-below-cost-of-service rates for 10 years, and then suddenly be moved back to cost of service? One can imagine the howls of financial ruin one would hear from Noranda then. Sch. MEB-1, p. 3 of Ex. 16 (Brubaker Direct).
[88] Tr. p. 216, l. 16 to 25.
[89] Tr. p. 830, l. 4 to 25.
[90] Ex. 100, p. 5, l. 21 to p. 9, l. 14.

transportation costs increase, other customers will bear those costs as well, while Noranda will totally avoid them. If power and/or capacity prices increase over time – and as explained in Mr. Michel's testimony there are substantial reasons to believe that they will – Ameren Missouri and its other customers will have to forego the benefit of those higher prices that would inure almost entirely (95%) to Ameren Missouri's other customers if Noranda were to leave the system.

Instead of evaluating the risks over the next ten years, Mr. Dauphinais' analysis simply compared *historical* energy costs and other costs to the rate that Noranda proposes to pay for the next ten years. Although it may be appropriate for the Commission to consider such historical costs when setting rates in the course of a rate case (particularly in conjunction with an historical test year), such historical costs are completely irrelevant to comparing the impact on customers of Noranda paying a heavily subsidized $30 per MWh rate for ten years versus Noranda being off Ameren Missouri's system over the same ten-year period. Information relevant to such a comparison would be projections of the costs and risks assumed by customers over that 10-year period. For example, projections of energy prices over the next ten years, similar to the projections in aluminum prices that Noranda provided, would be a relevant consideration. Since Mr. Dauphinais did not even attempt to provide such forward-looking information, and instead relied exclusively on historical data to perform his comparison, his analysis tells us nothing at all about whether customers would be better or worse off under Noranda's proposal. In contrast, Mr. Michels' analysis, which does examine projected future costs and shows that other customers would likely end up subsidizing Noranda to the tune of hundreds of millions of dollars, does provide information that is relevant for the Commission to consider in this case.

Finally, it bears noting that after the Company and the Staff debunked Mr. Dauphinais' claim that even historically Ameren Missouri's other customers would not have been better off with Noranda paying $30 per MWh with no FAC, Mr. Brubaker too apparently believed he had to come up with a new theory upon which to justify Noranda's request. What was it? That a $30 per MWh rate would cover the historical "average variable cost" (essentially all FAC costs components divided by sales[91]) to serve Noranda.

Mr. Brubaker's comparison of the $30 per MWh rate to the historical average variable cost is incomplete and inappropriate for several reasons. To begin with, the comparison is irrelevant for the same reason that Mr. Dauphinais' historical comparison is irrelevant. The issue is not what would have happened *in the past*. The issue is whether Noranda's proposal is reasonable *in the future* given the huge risks that would be transferred to all of Ameren Missouri's other customers if Noranda's proposal were adopted. Moreover, Mr. Brubaker never actually made the comparison of how average variable costs would differ between the two scenarios he purports to compare – one where Noranda continues to operate at $30 per MWh and one where it ceases operation – as evidenced by the absence of such a comparison in his surrebuttal testimony. But without that comparison we simply do not know what the impact on average variable cost would be if Noranda were to cease operations entirely (all Mr. Brubaker told us is what average variable costs were historically with Noranda operating). Would they be higher? Lower? And in either case, by how much? We simply do not know.

And, as the Staff points out in is Initial Brief, Mr. Brubaker's new theory in surrebuttal testimony is also unreasonable because even his historical average variable cost numbers are inappropriately calculated by offsetting the cost components in the FAC with off-system sales

[91] Ex. 17, p. 7, l. 1-2 (Brubaker Surrebuttal).

revenues. As Staff explains, off-system sales revenues do not reduce Ameren Missouri's costs, which are what they are.[92]

The foregoing shows that the claims Noranda makes in its brief are not borne out by the evidence. In summary, it has not been proven that keeping Noranda as a customer "even at the requested reduced rate, will benefit Ameren Missouri's other ratepayers."[93] As noted above, even if you accept Mr. Dauphinais' surrebuttal numbers, all he "proved' is that in the past this would have been true.[94] And it has not been proven, as Noranda claims, that Ameren Missouri would have to sell power not taken by Noranda "at a rate even lower than the reduced rate Noranda requests."[95] Energy prices alone (ignoring capacity and other revenues) for the 12-months ending April 30, 2014 were $33.89 per MWh.[96]

CONCLUSION

The relief Noranda seeks is unlawful. It is unlawful because it would reflect the adoption of unduly discriminatory rates, and because it would reflect changing the rates of all of Ameren Missouri's customers without considering all relevant factors.

The relief Noranda seeks reflects poor public and regulatory policy. If the state is going to pick winners and losers in the name of economic development or retention, the General Assembly should make that policy decision and decide how the citizens of the state should equitably pay for it, and what criteria and protections for those citizens should be included in any such package to ensure that the beneficiary's commitments are met, and that the state does not bear all of the risk of such a proposal. The Commission neither has the authority nor the tools to

---

[92] Staff's Initial Brief, pp. 32-33.
[93] Noranda's Initial Brief, p. 23.
[94] Staff and Ameren Missouri proved that this would not have been true even in the past.
[95] Noranda's Initial Brief, p. 23.
[96] Ex. 104, p. 19 (Table 3). That difference alone meant that for that 12-month period alone customers would have been better off by about $16 million, given Noranda's approximately 4.2 million MWh load.

provide such assurances, nor does it have any means to enforce the minimal commitments Noranda has offered, rendering them largely meaningless.

Finally, even if one sets aside these legal and policy considerations, the record in this case convincingly demonstrates that Noranda has failed to carry its heavy burden to justify the unprecedented rate shift it seeks, and that it and its largest shareholder Apollo do not deserve to receive the nearly $50 million annual capital infusion they seek from Ameren Missouri's customers.

We respectfully request that Noranda's request for relief be denied.

Respectfully submitted:

SMITH LEWIS, LLP

/s/ James B. Lowery

James B. Lowery, #40503
Suite 200, City Centre Building
111 South Ninth Street
P.O. Box 918
Columbia, MO 65205-0918
Phone (573) 443-3141
Facsimile (573) 442-6686
lowery@smithlewis.com

Thomas M. Byrne, #33340
Director - Asst. General Counsel
Wendy K. Tatro, #60261
Director - Asst. General Counsel

Ameren Services Company
P.O. Box 66149
St. Louis, MO 63166-6149
Phone (314) 554-2514
(314) 554-3484
Facsimile (314) 554-4014
AmerenMoService@ameren.com

L. Russell Mitten, #27881
BRYDON, SWEARENGEN & ENGLAND, P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102-0456
Phone (573) 635-7166
Facsimile (573) 634-7431
rmitten@brydonlaw.com

Attorneys for Union Electric Company d/b/a Ameren Missouri

Dated: July 16, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on all parties of record via electronic mail (e-mail) on this 16th day of July, 2014.

/s/James B. Lowery
James B. Lowery