BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Noranda Aluminum, Inc.'s Request For Revisions to Union Electric Company d/b/a Ameren Missouri's Large Transmission Service Tariff to Decrease its Rate for Electric Service.	))))	File No. EC-2014-0224

AMEREN MISSOURI'S MOTION TO DISMISS COMPLAINT

COMES NOW Union Electric Company, d/b/a Ameren Missouri ("Ameren Missouri" or the "Company") and pursuant to 4 CSR 240-2.070(7) and 4 CSR 240-2.116(4) hereby moves for dismissal of the Complaint filed in this case. In support hereof, Ameren Missouri states as follows:

Introduction

1. On February 12, 2014, Noranda Aluminum, Inc. ("Noranda")[1] filed a complaint (the "Complaint") seeking, effective July 31, 2014, to shift a substantial portion of Ameren Missouri's revenue requirement from Noranda to Ameren Missouri's other customers. According to the figures Noranda et al. cite in the Complaint, the cost shift would equate to approximately $48,000,000 annually – about one half billion dollars over the 10 year "term" proposed by Noranda.[2] The one-half billion dollar estimate is conservative because Noranda is also proposing to cap further rate increases, meaning other customers are likely to see larger rate increases than they would see but for Noranda's proposed cap, and Noranda is proposing to avoid paying fuel adjustment clause charges, even for fuel that has already been used to serve it. Noranda et al. do not allege that this massive cost shift is justified as of July 31, 2014. Indeed the Complaint, even if its averments are accepted as true and assuming *arguendo* that the

[1] Joining Noranda as complainants were 37 Ameren Missouri customers who, according to Noranda, can be "contacted through" Noranda's attorneys. Complaint, ¶ 2. For simplicity we will collectively refer to complainants as "Noranda et al."

[2] Determined by taking Noranda's demand (486 megawatts ("MW")), the difference between Noranda's current rate ($41.44 per megawatt-hour ("MWh")) and Noranda's load factor (98%), all as alleged in the Complaint.

Commission is authorized to approve the cost shift,[3] shows that the cost shift could not be justified even on the grounds Noranda et al. allege until years into the future.

2. For the reasons outlined herein, the Complaint should be dismissed because it fails to state a claim upon which relief can be granted in that (a) it constitutes an impermissible collateral attack on the Company's Commission-approved tariffs; (b) granting the relief sought by the Complaint would constitute unlawful single-issue ratemaking, (c) sustaining the Complaint would require the Commission to exercise authority it does not have– that is– to sanction a breach or reformation of Noranda's existing contract with Ameren Missouri; and (d) sustaining the Complaint would constitute unlawful, undue or unjust discrimination. Moreover, aside from the Complaint's failure to state a claim upon which relief can be granted, the Complaint should be dismissed for good cause pursuant to 4 CSR 240-2.116(4)[4] because the issues Noranda raises, and whether other customers should significantly subsidize Noranda or other businesses under certain circumstances, are matters that should be addressed by the Missouri General Assembly.

Applicable Legal Standards

3. "The Commission is purely a creature of statute, and its powers are limited to those conferred by statute, either expressly or by clear implication as necessary to carry out the powers specifically granted." *Public Serv. Comm'n v. Bonacker,* 906 S.W.2d 896, 899 (Mo. App. S.D. 1995). The Commission lacks the power to declare or enforce any principle of law or equity. *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission,* 585 S.W.2d 41, 47 (Mo. *banc* 1979). For an electrical corporation, complaints are governed by

[3] We do not agree the Commission is authorized to approve such a cost shift, as we discuss further herein below.
[4] "A case may be dismissed for good cause found by the commission after a minimum of ten (10) days' notice to all parties involved."

Section 386.390, RSMo.[5] Utility tariffs have the force and effect of law. *Midland Realty Co. v. Kansas City Power & Light Co*., 300 U.S. 109, 114 (1937), *aff'g* 93 S.W.2d 954 (Mo. 1936). Such tariffs cannot be collaterally attacked absent proper allegations of a substantial change in circumstances. Section 386.550. Single-issue ratemaking is unlawful.[6] Section 393.270.4; *Utility Consumers Council*, 585 S.W.2d at 56-67; *State ex rel. Missouri Water Co. v. Pub. Serv. Comm'n*, 308 S.W.2d 704, 717-19 (Mo. 1957). The Commission lacks the statutory authority to approve unduly or unreasonably discriminatory rates. *State ex rel. City of Joplin v. Pub. Serv. Comm'n et al.*, 186 S.W.3d 290, 296 (Mo. App. W.D. 2005). Moreover, while absolute adherence to cost-based rates may not be required under Missouri law, any difference in rates must be justified by a difference in the service provided by the utility rather than based on the individual business needs of a particular customer. *State ex rel. The Laundry, Inc. et al. v. Pub. Serv. Comm'n*, 34 S.W.2d 37, 44-45 (Mo. 1931), *citing Civic League of St. Louis et al v. City of St. Louis*, 4 Mo. P.S.C. 412. *See also Western Union Telegraph Co. v. Call Pub. Co.*, 181 U.S. 92, 100 (1901).

4. A complaint fails to state a claim upon which relief can be granted if, accepting the well-pleaded factual allegations as true, the complaint nevertheless fails to establish that the complainant is entitled to the relief sought. *See, e.g. Tari Christ v. Southwestern Bell Tele. Co. et al.*, 2003 Mo. PSC LEXIS 37 (Case No. TC-2003-0066, *Order Regarding Motions to Dismiss*, Jan. 9, 2003), *citing Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. *banc* 1993). A complaint brought under Section 386.390.1 "necessarily must include an allegation of a violation of a law or of a Commission rule, order or decision." *Id.* at *34. A complaint

[5] All statutory references are to the Revised Statutes of Missouri (2000), unless otherwise noted.
[6] The General Assembly can authorize single-issue ratemaking in certain circumstances, as it has done in Section 386.266, RSMo. (Cum. Supp. 2011). It has not done so based on the facts alleged in the Complaint.

constitutes a collateral attack and is barred by Section 386.550 unless it includes proper allegations that if true would show a substantial change in circumstances. *Id.* at *36 - 37, *citing State ex rel. Licata v. Pub. Serv. Comm'n*, 829 S.W.2d 515 (Mo. App. W.D. 1992) and State *ex rel. Ozark Border Elect. Coop. v. Pub. Serv. Comm'n*, 924 S.W.2d 597 (Mo. App. W.D. 1996). The Complaint fails to allege the required substantial change in circumstances.

5. In setting the rates to be charged by a utility (the Complaint seeks a Commission order setting those rates for all customers at levels that are different than those established just over one year ago), the Commission is required to consider all relevant factors. Section 393.270.4; *Utility Consumers Council*, 585 S.W.2d at 49. The Complaint, on its face, seeks to justify the rate shift Noranda seeks on the basis of just one factor: Noranda's claimed need, based upon its own alleged private business circumstances, for a nearly 28% decrease in its rates. Sustaining the Complaint would therefore constitute unlawful single-issue ratemaking.

6. If a complaint can be maintained under Section 386.390, then Section 393.260 instructs that the Commission is required to investigate the cause of the complaint. In this context, such an investigation would necessarily, and at a minimum, have to consist of the completion of class cost of service studies and other studies to test the validity of the bare, conclusory claims reflected in the Complaint. As outlined below, there are indeed a large number of key questions that must be explored and answered before any rate relief could be granted by the Commission, even if it were proper for the Commission to grant such relief. But the threshold question is whether the Complaint has properly been pled under Section 386.390, and whether the Complaint can proceed at all. Here, it has not, and cannot.

Argument

A. Noranda's Complaint is an Unlawful Collateral Attack.

7. Under Missouri law, a complaint cannot be maintained simply by claiming that a utility's current rates are unjust or unreasonable. To the contrary, absent proper allegations of a *substantial* change in circumstances, Section 386.390 requires that the complaint allege a "violation of a law or of a Commission rule, order or decision" in order to challenge a rate else the challenge constitutes an unlawful collateral attack. *Tari Christ*, 2003 Mo. PSC LEXIS at *34. The Complaint contains no such allegations. To the contrary, there is no question but that under Ameren Missouri's lawful, binding and in-effect tariffs – which were approved by a final Commission order that has been upheld on appeal – Ameren Missouri is not in violation of any law, rule, order or decision, including the order approving its tariffs.

8. Noranda et al.'s claim is that those rates are unreasonable, not that they are unlawful or in any way in violation of a Commission or utility rule, or a Commission order. As discussed in *Tari Christ*, under the *Ozark Border* and *Licata* cases cited above, such a claim is barred by Section 386.550 because to entertain such a claim is to unlawfully allow a complainant to collaterally attack the Commission's prior order approving Ameren Missouri's current rate tariffs.

9. Nor has Noranda alleged any substantial change in circumstances that would allow it to maintain the Complaint. In the Company's recently-concluded rate case, Mr. Kip Smith, who also filed direct testimony in the present case, testified to substantially the same circumstances Noranda now claims justify its attack on the Company's current rates.[7] As alleged in the Complaint, he testified, among other things, that electricity is the largest single

[7] File No. ER-2012-0166, Ex. 524, Direct Testimony of Kip Smith.

operational cost of Noranda's smelter;[8] that the smelter's sustainability is inextricably linked to the well-being of approximately 900 Noranda employees as well as businesses in Southeast Missouri;[9] that the price of aluminum on the London Metal Exchange drives the viability of the smelter;[10] that business conditions are "extremely challenging";[11] and that a rate increase would make the smelter unsustainable in the long term.[12]

10. In the Company's last rate case, Missouri Industrial Energy Consumers' ("MIEC") witness Maurice Brubaker, who is one of Noranda's witnesses in this case in support of the Complaint, provided a class cost of service study that, accounting for the rate increase the Commission approved in that case, put the Company's cost to serve Noranda at approximately $36.66 per MWh – fully $6.66 per MWh more than the low, arbitrary rate Noranda et al. ask the Commission to give to Noranda here.[13] Moreover, the Commission approved Noranda's current base rate realization of $37.94 per MWh having been fully apprised by Mr. Smith of Noranda's importance to Southeast Missouri, the challenges the business environment was presenting to it, and the impact of electricity rates on its operations.[14] The Complaint may contain slightly different details about the circumstances that allowed the Commission to determine just 14-15 months ago that a just and reasonable base rate for Noranda was $37.94 per MWh, but any

[8] *Id.* p. 3 (Line numbers are not provided because Mr. Smith's testimony did not contain line numbers, as required by the Commission's rules.).
[9] *Id.* p. 4; p. 6 (As discussed in the Complaint, Mr. Smith pointed out the significant taxes Noranda pays, the impact of its wages and benefits, and similar items).
[10] *Id.*
[11] *Id.*
[12] *Id.* p. 5
[13] Mr. Brubaker was Noranda's witness in that rate case as well given that Noranda was a member of MIEC in that case.
[14] The $37.94 per MWH is for metered energy (i.e., total Noranda revenue, excluding fuel, divided by metered usage only and excluding energy provided for losses). Noranda would undoubtedly argue that the $37.94 base rate is higher (by approximately 3%) than necessary to cover its cost of service. Others might disagree. Regardless, Noranda cannot credibly argue that its $30/MWh proposal comes anywhere near to covering its cost of service, as even under Noranda's view of cost of service in the last rate case Noranda is now asking for a rate that falls short of that cost of service by approximately 22%.

change in circumstances is not substantial; it is not "considerable in quantity" or significantly great."[15] To the contrary, Noranda's contentions here are in sum and substance the same contentions it has been making in recent Company rate cases. In summary, the Complaint fails to plead the required violation of a rule, order, or tariff, nor have Noranda et al, pleaded the required substantial change in circumstances necessary to maintain the Complaint. For that reason alone, the Complaint is an unlawful collateral attack and thus fails to state a claim upon which relief can be granted, requiring its dismissal.

B. Noranda's Complaint Asks the Commission to Engage in Unlawful Single-Issue Ratemaking.

11. As earlier noted, in setting a utility's rates, the Commission must consider all relevant factors that have a bearing on the appropriate revenue requirement and the rates based thereon. The Complaint ignores almost all such factors and instead essentially focuses on only one: Noranda's claimed need for a lower rate to support its claimed business need. Most significantly, Noranda does not provide a cost of service study, which would address the proper revenue requirement for the Company, or a class cost of service study, which would address how that revenue requirement should be allocated among the Company's rate classes. And Noranda's proposal is entirely premised on the validity of Noranda's bare and untested claims about what it needs, how long it needs it, and why it needs it. Without examining and considering these very relevant factors, the Commission is simply not empowered to change Ameren Missouri's rates.

12. It is noteworthy that Noranda provides very little cost support for its proposal, other than suggesting that the proposed rate is above what Noranda claims is Ameren Missouri's current variable cost. While complainants claim that other customers would be better off

[15] Webster's College Dictionary (4th ed. 2000). Noranda's claim that the smelter is now "subject to closure" is certainly no change in circumstances. The smelter was "subject to closure" in the last rate case, and, like all business operations will continue to be "subject to closure" no matter what happens in this case.

subsidizing Noranda's desired $30 per MWh rate as opposed to Noranda leaving the system, they base that claim on a backward-looking snapshot of power prices that completely ignores what those power prices, or other revenue streams the Company may realize in the future if Noranda were to close its smelter, may actually turn out to be over the next ten years and what impact those prices and revenue streams would have on other customers if Noranda left the system.[16] Complainants ignore the fact that even before Noranda claims the smelter would be "subject to closure," there would be a significant period of time when a subsidy of tens of millions of dollars would be flowing from other customers to Noranda.[17] The Complaint and Noranda's testimony ignore the impact of potentially higher aluminum prices (even Noranda projects that the prices will go higher[18]) on Noranda's need for rate relief now, in the near or intermediate terms, or over the long, 10-year term proposed. Put another way, Noranda's proposal would have it pay far below cost of service rates even if aluminum prices increase such that Noranda simply does not need the massive subsidy it now seeks. This puts all of the risk on Ameren Missouri's remaining customers that the subsidy is or will become unwarranted by Noranda's business needs, but provides no opportunity for those customers to be relieved from subsidizing Noranda or to otherwise share in any upside if the aluminum market improves.[19]

13. Noranda claims it has certain capital needs (which appear to go well beyond the capital needs at the *smelter* itself), but makes no binding commitment to actually invest the

[16] For example, Noranda et al. ignore capacity revenues the Company might receive (and pass-through its fuel adjustment clause) if Noranda's demand dropped or went away. Indeed, they ignore what conditions will be during the next 10 years, which is the period over which they seek this extraordinary relief.
[17] We note that Noranda never claims that the smelter would in fact close, either sometime during the year it claims it would become "subject to" closure or at any other time. Indeed, as noted earlier the smelter and every other business are "subject to closure" at any time its owner decides.
[18] Smith Direct Testimony, p. 12, l. 24.
[19] It is noteworthy that while Mr. Smith talks about aluminum prices according to the London Metal Exchange, he fails to mention the substantial "Midwest premium" that Noranda realizes for its aluminum. Noranda is quick to make mention of it when talking to stock analysts, however. Tr., Noranda Earnings Call, February 19, 2014.

capital, to continue to employ any given level of employees, or to continue to operate the smelter even if it obtained the far-below-cost-of-service-rate it seeks. Under its proposal, Noranda could take the subsidy for a period of time and choose to not invest (or invest less), to lay off employees, or close the smelter, with the additional profits the subsidy would provide leaving the state to fund other operations or to pay dividends to its shareholders. This is a particularly worrisome risk because Noranda's proposal contains no restrictions on the ability of its controlling shareholder (New York-based alternative investment firm Apollo Global Management, or "Apollo", which by the very nature of its investment strategy, seeks to maximize relatively short-term investment profits[20]), to increase Noranda's common dividend and to, in effect, take the ratepayer subsidy it seeks and cause it to be paid to Noranda's shareholders.[21] These are but a few of the relevant factors that should be robustly evaluated and considered by the Commission. That this is true is obvious when one considers that the Complaint essentially ignores any factor other than it central allegation that Noranda has to have a $30 per MWh rate, and has to have it very soon.

14. There are other critical questions that would need to be examined by the Commission, and about which evidence would need to be developed by parties through discovery and analysis, before the Commission could intelligently consider whether Noranda's proposed $500 million-plus subsidy from other ratepayers over the next 10 years should be adopted (assuming the Commission ought to be considering such a subsidy at all, which it should not be, for the reasons discussed elsewhere in this Motion). For example, the Commission would

[20] Apollo Global Management has publicly communicated that it typically expects the average holding period of its private equity portfolio investments to be three to five years, but holding periods for individual investments may vary depending on market opportunities and circumstances. Apollo Management International LLP Walker Guidelines Disclosure Document, September 2013.

[21] Neither the Complaint nor any testimony filed by Noranda mentions that its profits in 2013 were $93 million, or that its cash flow position improved in 2013. Tr. Noranda's Earnings Call, Feb. 19, 2014.

need to carefully consider how Noranda has been financially managed, particularly since Apollo completed its leveraged buyout of Noranda in 2007, and whether Noranda has considered, and availed itself of, all available corporate actions to improve its financial condition without having to resort to ratepayer subsidies. Consider the fact, which is easily seen by a review of Noranda's public SEC filings,[22] that Noranda has retained an extremely leveraged balance sheet since Apollo's initial acquisition financing in 2007. This highly leveraged position is reflected in its corporate debt ratings remaining well below investment grade. Typically debt ratings of this nature cause the rated entity to incur relatively high interest rates on its borrowings, which obviously leads to elevated corporate interest expenses on its debt, which publicly available information suggests is true for Noranda as well. While the details are not clear from publicly available data, it appears that despite its significant leverage, Noranda has made sizable dividend distributions to its shareholders, including Apollo, over time, and it appears that these dividends were financed in large part with the debt that created Noranda's highly-leveraged balance sheet. These dividends total more than $450 million since Apollo's leveraged buy-out, including a $216 million special dividend in 2007, and common dividend payments totaling more than an additional $250 million since 2008. These facts raise serious questions, which must be explored further given the limitations of publicly available data, about whether or not Noranda's claimed financial issues today are truly a result of circumstances that are beyond its control and might at least warrant consideration of assistance from the state of Missouri, or are instead the result of it or its controlling shareholder's imprudent management of the enterprise.

15. Another relevant question is whether Noranda should be looking to the state (or to a subset of taxpayers in the state – Ameren Missouri's other customers) to meet its liquidity

[22] Noranda, like all publicly traded companies, must make 10-K and 8-K and other filings reporting on various aspects of its finances with the United States Securities and Exchange Commission ("SEC") each year.

needs or whether it should be looking to those who normally bear the risk of downturns in the business cycle – its shareholders. In this regard, consider that just last week, after Noranda's share price experienced significant price appreciation, Apollo sold 30% (about 10 million shares) of its ownership interest in Noranda for between $40 and $50 million. The 10 million shares Apollo sold represent approximately 15% of Noranda's issued and outstanding shares. While it is true that Noranda itself did not sell any shares and therefore did not receive proceeds from the offering, the share sale strongly suggests that Noranda has available access to the equity markets, and thus could secure additional liquidity to bolster its financial position without seeking a subsidy from other ratepayers.

16. The questions that arise from the things that we do know about Noranda's recent financial history as outlined above are highly relevant to Noranda's proposal because of the need to ensure both that Noranda has taken steps it should take to properly manage its own business without subsidies from others, and to ensure that other Ameren Missouri ratepayers are not in effect bailing out Noranda and its shareholders following years of executing financial policies that have meaningfully enriched Noranda's shareholders. Notably, the foregoing is by no means a complete list of the relevant factors the Commission would need to consider before changing the rates of every non-lighting customer on the Company's system, as adoption of the Complaint's requested relief would require. Aside from the fact that there are many questions that need to be addressed before the state should consider subsidizing Noranda is the fact that there is simply no precedent at the Commission for changing – and not just changing but very substantially changing – the rate for a single customer in the name of economic development or preservation of that one customer's operations and shifting those costs to all of the serving utility's other customers. And there certainly is no such precedent for doing so outside a general

rate proceeding where full revenue requirement and class cost of service studies are completed, vetted, challenged, and examined by the parties and the Commission, and where all relevant factors are properly considered. Indeed, there is no precedent for changing a utility's rate design, and then *actually implementing a change via new rates*, outside of a full–blown general rate case.[23]

17. The bottom line is that the Commission cannot lawfully grant the relief Noranda seeks in this case, because it would necessarily have to order a change in the Company's rates without full consideration of all relevant factors. This is classic single-issue ratemaking, and as earlier noted is unlawful. For this reason as well the Complaint fails to state a claim upon which relief can be granted, requiring its dismissal.

C. *Noranda's Complaint Asks the Commission to Unlawfully Void a Term in Noranda's Contract with Ameren Missouri.*

18. It is beyond debate that the Commission has no power to relieve a contracting party of its contractual obligations. *Utility Consumers Council*, 585 S.W.2d at 47. As the Commission is aware when the Commission granted the Company the certificate of public convenience and necessity ("CCN") that allowed Noranda to obtain service from the Company, Noranda and the Company agreed that Noranda would take electric service from the Company (and the Company would provide that service) through at least May 31, 2020. We say "at least"

[23] It is true that there have been some "rate design cases" where all of the parties, via stipulation (or some of the parties, via a stipulation that was not opposed and was therefore treated as unanimous), have agreed to rate design changes that were implemented without a full-blown rate case, but there are no instances where this has been done absent unanimity or treatment of an unopposed stipulation as unanimous. We would submit that approval of such settlements is legally suspect because the implementation failed to consider all relevant factors. However, we would note that when a stipulation is unanimous or unopposed, and assuming no non-party seeks rehearing or judicial review, such implementation would become immune from collateral attack under Section 386.550, essentially, as a practical matter, "overcoming" the single-issue ratemaking problem such a process presents. To be clear, the Company is not willing to agree to a stipulation or waive its right to object to a stipulation that would implement a subsidy for Noranda except via a full-blown rate general rate proceeding where the kinds of studies mentioned above are completed and examined, along with a proper examination of all other relevant factors.

because under the contract neither the Company nor Noranda could ask that the service arrangement be changed until 10 years of service had passed, and even then if one or the other party desired a change, five years notice is required.[24] What this means is that Noranda contractually waived its right to leave the Company's system until May 31, 2020, and the Company contractually waived its right to ask the Commission to rescind the CCN until that same date. Noranda's contractual agreement was consideration for the Company's agreement to pursue an extension of its service territory so that it could serve Noranda. But for its contract with Noranda, the Company had no legal obligation to pursue that extension or to commit to serve Noranda for at least 15 years.

19. The Complaint, as made clear by Noranda's testimony, asks the Commission to change those contractual obligations, which is a power the Commission simply does not possess. As Noranda witness Brubaker's testimony makes clear, Noranda not only wants a large rate subsidy now, it also wants a 10-year commitment for below-cost rates (which would extend well beyond May 31, 2020). Further, it wants the ability to leave the Ameren Missouri system on just two years' notice.[25] Moreover, Noranda seeks to make the ability to change the service arrangement from a bilateral one– where Noranda can leave the system on May 31, 2020 or thereafter upon proper notice, *and* where the Company can seek to cease serving Noranda as of that date as well – to a unilateral one where *only Noranda* can trigger a change in service.[26]

20. None of these changes can be lawfully ordered by the Commission. Indeed, we would contend that not even a court of competent jurisdiction could order these changes because

[24] Paragraphs 4 and 5 of the Agreement between Noranda Aluminum, Inc. and Union Electric Company dated December 14, 2004, attached as Schedule CDN-1 to the Direct Testimony of Craig D. Nelson in Case No. EA-2005-0180 (Ex. 100).
[25] Brubaker Direct Testimony, Schedule MEB-1, Page 3 of 4, in the "Contract Term" provision thereof.
[26] *Id.*

Noranda could never establish the elements necessary to invoke the drastic contractual remedy of reformation, which is in effect the remedy Noranda seeks. But no matter what Noranda might be able to argue or prove in a court, those claims, and any relief a *court* could grant, are beyond this Commission's jurisdiction. For this additional reason, the Complaint fails to state a claim upon which relief can be granted and must be dismissed.

D. *Noranda's Complaint Asks the Commission to Do Something it Lacks the Power to Do – Sanction Undue Discrimination.*

21. The Commission "lacks statutory authority to approve discriminatory rates." *City of Joplin*, 186 S.W.3d at 296. When one or more classes of ratepayers "pay significantly more than the actual cost of service . . . for the express purpose of subsidizing . . ." other rates it "arguably exceeds . . . [the Commission's] authority." *Id.* The Court of Appeals found this to be so even where some of the subsidized customers were not paying more than their actual cost of service. The facts in the *City of Joplin* case were that the City of Joplin was paying rates higher than its cost of water service, some other districts were paying at cost of service, and other districts were paying below cost of service. While it is true that *City of Joplin* does not stand for the proposition that every customer or class of customers must pay exactly the cost to serve them, the point of the case is that the Commission lacks the statutory authority to approve significant subsidization of one customer class or group by another.[27]

22. It is decidedly easy to recognize that the level of subsidization sought by the Complaint constitutes undue discrimination. As earlier noted, as compared to current rates the

[27] That "precise" cost of service is not required is a function of at least two things. First, no cost study using historical costs (or forecasted costs for that matter) can exactly and infallibly determine what the cost to serve a customer class will be during the period rates will be in effect. Second, it is *undue or unreasonable* preferences or disadvantages (i.e., discrimination) that are prohibited by Missouri law. Section 393.130.3.

Commission would be imposing an approximately – and conservatively estimated – $48 million annual cost shift on other customers, and reducing Noranda's rates by a full 28%.

23. Not only is it manifest that the magnitude of the rate shift constitutes undue discrimination, so is the means to accomplish the shift. It is true that the cost per kilowatt-hour to serve Noranda is significantly less than the cost to serve, for example, a residential customer. This is owing to a number of factors, including the fact that, except for a meter at the smelter, Noranda utilizes none of the Company's distribution system. It is also true that Noranda's current rate comes close to reflecting those lower costs, which is appropriate. But as this Commission long-ago recognized (a recognition cited to and quoted with approval by our Supreme Court), the Public Service Commission Law "'and judicial decision forbids any difference in charge which is not based upon difference of service and even when based upon difference of service [the difference] must have some reasonable relation to the amount of the difference, and cannot be so great as to produce unjust discrimination.'" *The Laundry, Inc.*, 34 S.W.2d at 44-45, *quoting Civic League*, 4 Mo. P.S.C. 412.[28] *See also Western Union Telegraph Co.*, 181 U.S. at 100, *quoted with approval* by our Supreme Court in *The Laundry, Inc.* at 34 S.W.2d at 45 (The principle of equality that calls for all to have equal service and charges does not forbid different charges for different service, but it "does forbid any difference in charge which is not based upon difference in service."). The factors that Noranda claims justify a large subsidy from other customers have nothing to do with differences *in the service Ameren Missouri provides* to Noranda versus the service provided to those other customers. To the

[28] The Supreme Court quoted extensively from the Commission's decision, which the Supreme Court noted was authored by "Commissioner Eugene McQuillin, an eminent Missouri lawyer and distinguished text writer." *The Laundry, Inc.*, 34 S.W.2d at 44.

contrary, those factors relied upon in the Complaint are characteristics of Noranda's private business and simply do not justify the treatment Noranda seeks as a matter of law.

24. This Commission has recognized this, as evidenced by its finding of undue discrimination in the *Civic League* case. In that case, the Commission was confronted with a case where the City of St. Louis (whose rates were subject to Commission jurisdiction at the time) sought to give "manufacturers" a special rate to encourage them to locate in the City. *The Laundry, Inc.*, 34 S.W.2d at 44. In other words, the City was trying to give advantageous rates to promote economic development in the City. This was unlawful, and is precisely what the Complaint asks this Commission to do here. Noranda touts jobs, taxes, economic activity, and related factors as justification for drastically departing from cost of service principles. Those policies may indeed be laudable and the Company does not in any way dispute that Noranda is important to the economy of Southeast Missouri. But this Commission has not been empowered to sanction undue discrimination – indeed, this Commission lacks statutory authority to do so – in order to advance such policies. Could the General Assembly delegate such authority to the Commission? The answer is almost certainly "yes." Has it done so? This Commission long ago recognized in *Civic League* that the answer is "no."

E. The Complaint Should Be Dismissed for Good Cause Shown in that The Relief Sought Should be addressed by the Missouri General Assembly.

25. As noted, Noranda is asking for a substantial subsidy from all of Ameren Missouri's other non-lighting customers. The Complaint raises important questions of public policy typically addressed by state legislatures. For example, should a dry cleaner in St. Charles (and its owner at his or her home) pay higher electric rates so that a dry cleaner near New Madrid can retain business and thus realize greater profits because Noranda is located there and

presumably stays in business?[29] Should a dock builder at the Lake of the Ozarks pay higher rates for that same purpose? Should businesses and residential customers in St. Louis and Jefferson City and Wentzville, many of whom are struggling to make ends meet, pay higher rates to subsidize Noranda? Is it in the interest of the City of St. Louis, St. Louis County or the St. Louis Regional Chamber and Growth Association for Ameren Missouri's rates to be higher in order to subsidize Noranda and benefit Southeast Missouri (and surrounding states) to the detriment of the St. Louis region? Stated more broadly, should this Commission pick winners and losers and, in effect, tax Ameren Missouri's other customers in order to shift those tax revenues to Noranda, Southeast Missouri and surrounding areas?[30]

26. Looked at another way, consider the fact that the City and County of St. Louis might have liked Ford Motor Company or Chrysler to have received a significant break on their electric rates before they closed their plants because that might have helped St. Louis retain those business and jobs. And if that had occurred, Ameren Missouri's customers in Southeast Missouri (and elsewhere) would have had to pay higher rates, principally for the St. Louis region's benefit. Business (large and small – in St. Louis and elsewhere) fail, and others start, all of the time. This is not to say that the Company desires Noranda to fail – it does not – but it is to say that if a shift of wealth from one group of citizens to one company (and indirectly to those in the region where that company is located) is to occur, it is our elected officials in the General Assembly that should be making such a decision.

[29] It is interesting to note that under Noranda's proposal a dry cleaner in the City of New Madrid, which is served by a municipal electric utility, would not be required to subsidize Noranda's rates. The same is true for many customers throughout Southeast Missouri who are served by municipal electric systems or electric cooperatives.
[30] And can the Commission lawfully do so in any event? We discussed earlier limits on the Commission's authority in this regard.

27. There are other important questions posed by the Complaint. Noranda's testimony (and that of the other witnesses who filed testimony on its behalf) focuses on Southeast Missouri and as noted earlier, we do not dispute that Noranda is an important economic force in that region. But undoubtedly Noranda's operations benefit Arkansas, Illinois, Kentucky and Tennessee to some extent. It is very likely that Noranda has some employees – perhaps a significant number – that do not live in Missouri, which means the economic impact of Noranda is not limited to Missouri. In addition, as noted earlier there are questions of whether Noranda, which has paid substantial dividends to its shareholders, including its controlling shareholder Apollo, should receive a subsidy from Missouri ratepayers or Missouri citizens at all.[31]

28. Simply stated, the question of what special treatment, if any, Noranda should get (assuming special treatment is needed to preserve the smelter's operations which, at this point, is nothing more than an allegation) is an issue that is much larger than what its electric rates from Ameren Missouri should be.

29. The Complaint raises other broader policy questions as well: why should the impact of any special economic development deal for Noranda be borne only by *Ameren Missouri ratepayers*? Is it fair to ask only Ameren Missouri ratepayers bear the impact of such a deal, when there are millions of Missourians – including those in Southeast Missouri served by municipal systems and electric cooperatives – that presumably also receive benefits from Noranda's presence in the state? Taking it one step further, if other states like Illinois, Arkansas, Kentucky and Tennessee also benefit from Noranda's operations then why should Missouri residents bear all of the burden of any such special deal?

[31] Particularly when you consider matters such as the fact that Apollo's CEO Leon Black's total compensation in 2013 was $546.3 million. *Wall Street Journal*, March 3, 2014.

30. These are not questions of *public utility regulation*; rather these are questions of *public and legislative policy* and their resolution, or at least the determination of whether the State of Missouri should wade into these matters at all should occur in the General Assembly. Consider the example of West Virginia, which when faced with arguments by an aluminum smelter that special rates were necessary to support the smelter, adopted specific legislation titled the West Virginia "special rates for energy intensive industrial consumers of electric power."[32] While the facts of the case are detailed and complex (discussed in the West Virginia Commission's 63-page order), in summary, Century Aluminum asked the West Virginia Commission to approve special rates using its authority under the new statute. Century's proposal effectively placed the risk that aluminum prices would remain low on the utility's other customers, who would have to bear a rate shift if aluminum prices stayed low. The West Virginia Commission made clear that it would have had serious reservations about giving Century relief at all but for the existence of the specific statutory authority the West Virginia legislature gave it. In the end, the West Virginia Commission did give Century a special rate *pursuant to its newly-granted statutory authority*, but included a number of safeguards. These included a requirement that Century (and its parent) be required to make up a portion of the revenue shortfalls (rate revenues under the special rate to the extent they were below those necessary to cover Century's cost of service) that would occur when aluminum prices were low using offsetting higher electric rates, above cost of service, when aluminum prices were higher. If over the term of the arrangement aluminum rates did not get high enough to trigger electric rates high enough to offset revenue shortfalls caused by the lower special rates during times of lower aluminum prices, the West Virginia Commission required Century and its parent to bear

[32] W. Va. Code § 24-2-1j, adopted March 12, 2012.

that risk, and it was Century and its parent that had to make the utility whole. In addition, the West Virginia legislature provided that another portion of Century's revenue shortfall would be funded from an allocation of proceeds the state derived from coal severance taxes.

31. Other states have also recognized that it is the state legislature that should determine if its state utility commission should have the power to grant special rate relief. *See, e.g.,* Conn. Gen. Stat. § 16-19hh(c), which was an amendment to the Connecticut public utility control law,[33] which authorized the public utility commission to grant an exemption from certain charges for an "existing manufacturing plant located in a distressed municipality." A copper smelter operated by Ansonia Copper & Brass, Inc. sought and received relief under this special statutory authority in *Application of Ansonia Copper & Brass, Inc.,* 2002 Conn. PUC LEXIS 205 (Oct. 23, 2002).

32. In summary, and in addition to the fact that the Complaint fails to state a claim, the Complaint should also be dismissed for good cause shown because it calls for actions by the Commission that should be left for consideration by the Missouri General Assembly. The Commission possesses full discretion to dismiss the Complaint on this basis and it should exercise that discretion in this case. *See* 4 CSR 240-2.116(4) (Specifically authorizing dismissal for good cause shown on 10 days' notice); *Report and Order, In Re: Aquila, Inc.,* Case No. ER-2007-0004 (2007) (*citing Wilson v. Morris*, 369 S.W.2d 402, 407 (Mo. 1963) and *Matter of Seiser*, 604 S.W.2d 644, 646 (Mo. App. E.D. 1980)) (Where the Commission recognized that "good cause" "'lies largely in the discretion of the officer or court to which the decision is committed' and 'depends upon the circumstances of the individual [case].'").

[33] Connecticut's corollary to Missouri's Public Service Commission Law.

Conclusion

33. For the several reasons outlined above, the Complaint fails to state a claim upon which relief can be granted and consequently must be dismissed. Moreover, the Complaint asks this Commission to make policy determinations that only the Missouri General Assembly should be making and for this additional reason the Commission should exercise its discretion to dismiss the Complaint for good cause shown. As Ameren Missouri has clearly communicated to Noranda, Ameren Missouri desires for Noranda to succeed. Indeed, Ameren Missouri has repeatedly suggested to Noranda that it approach the General Assembly to seek policies that would address the needs it claims it has. However, if Noranda needs relief to succeed it should not come at the expense of Ameren Missouri's other customers, and certainly not Ameren Missouri's other customers alone. If a decision is to be made to shift costs from Noranda to others, it should be made by those that the citizens of this State have elected to make those kinds of policy decisions.[34] And before a decision of this magnitude could be made by anyone, the appropriate amount of inquiry and time must be taken to fully vet a number of key areas of inquiry, as discussed above, including the following:

- As a threshold question, even if it were proper for the Commission to engage in economic development in a case like this, what ratepayer protections must be put into place to ensure that any ratepayer-provided subsidy is as limited as possible and in fact is used for the purposes intended? Noranda's proposal contains no such protections.

- What is the true cost to serve Noranda today and over the next 10 years, and thus what is the real subsidy that is being sought over the next 10 years?

[34] At most the Commission's involvement in an issue like this ought to be limited to a legitimate look at the Company's rate design, based upon updated cost of service and class cost of service studies, as part of Ameren Missouri's upcoming general rate proceeding to be filed in July. At least then all relevant factors can be considered, and a far better understanding of any proposed rate shift can be gained.

- What are reasonable estimates of the price of aluminum Noranda could expect to realize over its proposed term, which would also impact the need for a subsidy?

- What does “subject to closure” mean?

- What might Noranda’s staffing levels have been expected to be regardless of any adjustment to its electric rates?

- What does Noranda plan to do with its claimed need for $100 million per year for capital investments – is this money for the smelter, its Jamaica operations, or its operations in other states – and how was the $100 million developed?

- Is the smelter really going to close if relief is not granted?

- How can the state be sure the smelter operation would remain open and the employees would remain employed even with the subsidy Noranda seeks?

- How can the state be sure the the subsidy dollars would not simply flow to shareholders, including Apollo?

- Are electricity costs the real issue, or are there (or were there) steps Noranda could take (or should have taken) to avoid operating such a highly leveraged business, with resulting high interest costs and limited liquidity?

- Is Noranda’s assumption that customers are better off with it on Ameren Missouri’s system versus a closure of the smelter (even if one assumed a closure would occur) reasonable?

- Are the underlying assumptions Noranda used to support its claim that it needs more cash and greater liquidity, and a $30 per MWh rate, reasonable?

- Why is a a ten year deal appropriate? Why is a $30/MWh rate appropriate?

34. It should also be remembered that Noranda approached the General Assembly in 2002-2003 and sought and obtained legislation that in effect gave Noranda "retail choice" – the ability to choose how it receives the electricity it needs. Noranda then chose not to use the statutory authority it was given, which would have allowed it to go to the market at any time it chose, and instead sought and received cost-based regulated electric service from Ameren Missouri, committing to receive that cost-based service for at least 15 years.

35. Indeed, Noranda told this Commission that *cost-based service is what it needed and wanted:* "Noranda can reasonably expect to receive fair treatment in future rate proceedings with rates that *reflect the cost of the service provided to Noranda"* (emphasis added).[35] Noranda went on to tell this Commission that "[t]he regulated service offered by AmerenUE substantially met Noranda's *goal of a cost based supply*" (emphasis added).[36] Noranda has received service that has been overwhelmingly based upon cost since it became Ameren Missouri's customer in 2005. It has essentially received what it asked for, but now asks approximately 1.2 million other customers to in effect bail it out by departing from cost-based service when that cost-based service apparently no longer suits it.

36. The Complaint reflects a complete reversal of Noranda's position, and asks the Commission to discard its longstanding adherence to cost of service as, at a minimum, the

[35] Noranda's Pre-Hearing Brief, Case No. EA-2005-0180, citing to the sworn Direct Testimony of Noranda's Manager of Energy Procurement George W. Swogger.
[36] *Id.*

primary criterion it applies when setting rates. Noranda has executed its reversal of position now that market prices for power, at least in the past few years, have turned out to be below cost-of-service levels much of the time. As discussed earlier, the Commission's longstanding adherence to cost-based rates has its basis in the Public Service Commission Law, which dictates that if there are differences in cost of service they be based on – and roughly proportional to – differences in the *service* that is provided. *Western Union Telegraph,* 181 U.S. at 100.[37]

37. As we noted earlier, the General Assembly has the power to change the law. If such a change is truly needed, it is in that forum that it should be sought and implemented.

[37] We would note that these statements by the United States Supreme Court who was in that case applying the Interstate Commerce Act ("ICA") apply equally to this Commission's regulation under the Missouri Public Service Commission Law. *State ex rel. Western Union Telegraph Co. v. Pub. Serv. Comm'n et al,* 264 S.W.669, 672 (Mo. 1924) ("[I]f authority be needed to support [the Missouri Supreme Court's conclusion in this case] . . ." one need only look to "the rulings of the Interstate Commerce Commission and of the Supreme Court of the United States with respect to provisions of the Interstate Commerce Act which be copied almost literally into the Missouri Public Service Commission Law.").

WHEREFORE, for the reasons outlined herein, the Complaint should be dismissed.

Respectfully submitted,

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ATTORNEYS FOR UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of March, 2014, served the foregoing either by electronic means, or by U. S. Mail, postage prepaid addressed to all parties of record.

James B. Lowery
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