BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Noranda Aluminum, Inc., et al.,	)	
	)	
Complainants,	)	
	)	
vs.	)	**Case No. EC-2014-0224**
	)	
Union Electric Company, doing business As Ameren Missouri,	)	
	)	
Respondent.	)	

AMICUS CURIAE BRIEF OF UNITED FOR MISSOURI

Introduction

On February 12, 2014, Noranda, Inc. filed a rate design complaint ("Complaint") against Union Electric Company, d/b/a Ameren Missouri ("Ameren Missouri") with the Missouri Public Service Commission ("Commission"). In its Complaint, Noranda alleged against Ameren Missouri that without a reduction in its rate its New Madrid smelter would have insufficient liquidity to remain viable and would be subject to closure. Whereas, at its present rate, the New Madrid smelter would be subject to closure, the Complaint alleged that a revised rate of $30/MWh would permit the smelter to remain viable and sustainable for the future. See Complaint, p. 4. Therefore, the Complaint requested the Commission adjust the electric rate charged the New Madrid smelter to $30/MWh and adjust the electric rates of other ratepayers so that the relief requested in the Complaint is revenue neutral to Ameren Missouri.

On June 4, the Staff of the Commission filed on behalf of all the parties a List of Issues, Order of Opening Statements, and Order of Cross-Examination. Among other issues, the Staff identified the following as issue No. 1:

1. Is Noranda experiencing a liquidity crisis such that it is likely to cease operations at its New Madrid smelter if it cannot obtain relief of the sort sought here?

a. If so, would the closure of the New Madrid smelter represent a significant detriment to the economy of Southeast Missouri, to local tax revenues, and to state tax revenues?

b. If so, can the Commission lawfully grant the requested relief?

c. If so, should the Commission grant the requested relief?

United for Missouri ("UFM") will address only issue 1.b. in its Amicus Brief. From UFM's perspective, this is the only significant issue in the case. While UFM is willing to accept for the sake of argument that Noranda is experiencing a liquidity crisis, that factor is irrelevant for purposes of this case. The important issue for this case is whether this Commission has the authority to grant the requested relief, and the answer is clearly no. Without binding itself in any way in future discussions, UFM's position is that this issue should be taken before the legislature or the free market.

Noranda, Inc. certainly has a difficult story to tell. Noranda owns an aluminum smelter in southeast Missouri and sells aluminum in a "globally competitive commodity industry." The price of aluminum is set on the London Metal Exchange and is outside of Noranda's control. See Kip Smith Direct, Ex. 2, p. 8. The price of aluminum is depressed and is likely to be depressed for the foreseeable future. See Complaint, p. 5.

Noranda employs 888 people.[1] See Kip Smith Direct, Ex. 2, p. 3. These people have families and expenses. They engage with those around them. They interact and transact business with the commercial engines of the community. They pay taxes. They contribute to a vibrant society in the southeast of Missouri. The loss of 888 jobs in the community will affect many lives.

[1] It is not exactly clear how many of these 888 people are Missouri residents. The smelter is located in a three state region and some individuals are independent contractors. See Tr. Vol. 7, pp. 636 - 638.

The Commission can certainly desire to help Noranda. Noranda is a good corporate citizen of the state of Missouri. Anyone who hears the story should be searching for appropriate responses to its plight. The question before this Commission is what it can and legally should do to help Noranda.

Noranda operates in a free competitive marketplace. As those words indicate, Noranda is free in that marketplace to compete as it sees fit, to succeed and to fail, as the economy and the circumstances of its business plan and business decisions and the business decisions of others dictate. This is the American economic system that has been in place for over two hundred years. It is an economic system that has been highly successful, but it is not a system without risk. As a business entity enters into the field of a free economy, it has a right to all of the potential rewards of success, but it also is liable to the pain of failure. Each and every entrant has, or should have, an equal opportunity to engage the free marketplace on an equal footing. The power of this Commission should not be used to protect one business entity in one industry at the expense of all of the other Ameren Missouri customers.

The Missouri Legislature and the Courts have accordingly limited the authority of the Commission in two respects. First, the Commission may not act unlawfully beyond the limits of its authority. Second, its decisions and orders must be just and reasonable, not arbitrary and capricious, and based upon competent and substantial evidence. To grant Noranda's Complaint would violate both of these principles.

Legal Standard

The Missouri Constitution recognizes an individual's God given rights in Article 1, Section 2.

> That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and

> **the enjoyment of the gains of their own industry**; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design. [Emphasis added]

The Missouri Constitution echoes the United States Declaration of Independence in recognizing the inalienable rights of life, liberty and the pursuit of happiness for every individual. But it recognizes one more: "the enjoyment of the gains of their own industry." The Missouri Supreme Court observed, in interpreting this language, that, "The state cannot convert to its own use the property or labor of a citizen without compensation under the pretext of preventing the spread of disease." The Court went on to temper its observation that a person's general right to engage in any trade, profession or business is subject to the legitimate power inherent in the state to guard and preserve the public health, morals, comfort, order, and safety. See *Moler v. Whisman et al.*, 147 S.W. 985 (Mo. 1912). However, nowhere in this list of inherent powers of the state is the power to use such gains to guard another from the risks in pursuing the gains of their own industry. In *Fisher v. State Highway Commission*, 948 S.W.2d 607 (Mo. banc 1997), the Supreme Court further observed, "The origin of the 'enjoyment of the gains of their own industry' phrase is in workplace slavery. Equally, the cases of this Court discussing this phrase concern labor, occupations, professions, and the marketplace." There is no governmental authority to use the property of some for the benefit of others.

The regulatory structure, or the regulatory compact as it is widely known, that utilities now operate under is designed to foster this overriding principle. The Public Service Commission exists for the purpose of executing the regulatory compact. The Indiana Supreme Court has captured this bedrock principle of public utility regulation in the following words:

> [The regulatory compact] arises out of a "bargain" struck between the utilities and the state. As a quid pro quo for being granted a monopoly in a geographical area for the provision of a particular good or service, the utility is subject to regulation

> by the state to ensure that it is prudently investing its revenues in order to provide the best and most efficient service possible to the consumer. At the same time, the utility is not permitted to charge rates at the level which its status as a monopolist could command in a free market. Rather, the utility is allowed to earn a "fair rate of return" on its "rate base." Thus, it becomes the Commission's primary task at periodic rate proceedings to establish a level of rates and charges sufficient to permit the utility to meet its operating expenses plus a return on investment which will compensate its investors.

United States Gypsum, Inc. v. Indiana Gas Co. Inc., 735 N.E.2d 790, 797 (Ind. 2000), citing *Indiana Gas Co., Inc. v. Office of Utility Consumer Counselor* ("*Indiana Gas I*"), 575 N.E.2d 1044, 1046 (Ind.Ct.App.1991). A simpler way of describing this compact is that it is mechanism to execute justice. Recognizing the practical implications of the monopolist utility industries, regulation exists to take the place of competition. It constrains the monopoly power, preventing the extraction of monopoly rents. It eliminates favoritism, thus ensuring just and reasonable rates to all customers.

In fulfilling its function within the regulatory compact, the Commission must recognize its limited role. No principle is more foundational to the operation of the Commission than this: "[T]he Public Service Commission is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the Statutes and powers reasonably incidental thereto." *State ex rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1046 (Mo. banc 1943). And its orders must be lawful, and they must be reasonable. "Under section 386.510, the appellate standard of review of a PSC order is two-pronged: first, the reviewing court must determine whether the PSC's order is lawful; and second, the court must determine whether the order is reasonable." *State ex rel. Praxair, Inc. v. Mo. Pub. Serv. Comm'n,* 344 S.W.3d 178, 184 (Mo. banc 2011). Under this legal standard, it would be unlawful and unreasonable for the Commission to grant the Complaint.

Argument

1. Granting Noranda's Complaint Would Be Unlawful

Granting the Complaint would be unlawful because it would violate section 393.130.3.[2] Section 393.130.3 provides that, "No gas corporation, electrical corporation, water corporation or sewer corporation shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, ..." For purposes of this case, the discussion of section 393.130.3 in *State ex rel. Joplin v. Public Service Commission*, 186 S.W.3d 290 (Mo. App. 2005) is helpful. In that case, Missouri American Water Company's Joplin District's water rates resulted in the Joplin District subsidizing Missouri American Water Company's other water districts to the tune of $880,000 in excess of its cost of service. The Commission's Report and Order in the case failed to provide any justification for the disparate treatment. Substantively, the Court found that the Commission requiring one class of customers to pay more than its cost of service to subsidize other classes of customers who were paying for their actual cost of service arguably exceeded the Commission's authority. 186 S.W.3d at 296. Procedurally, the Court directed the Commission to justify the rate design or declare the rates unduly prejudicial and unlawful. 186 S.W.3d 301.

In responding to the Court's direction, in its Report and Order on Second Remand, dated December 4, 2007, in Case No. WR-2000-281 ("Second Remand Order"), the Commission provided its justification. Missouri American had previously charged each customer class a single, average, state-wide rate. Due to some significant cost increases in Missouri American's other districts, Missouri American requested a rate increase and proposed that it was appropriate to move to district-specific rates. In discussing its approach, the Commission analyzed section 393.130.3,

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[2] All statutory references are to RSMo 2013.

which precluded the Commission from granting an unreasonable preference based on locality. It also discussed section 393.140(11), which permitted different rates as long as the rates were consistent among similarly situated customers. "The Commission decided that in order for rates to be just, there should be a relationship between rates and costs, and that moving to district-specific pricing was necessary to achieve that goal." See Second Remand Order, p. 15. However, the Commission tempered that conclusion with the requirement that rates must be reasonable and that going to district-specific rates would result in unreasonable rates in some districts in the form of rate shock. "This Commission does not believe that cost causation and cost recovery should be entirely unrelated in rates, but that they cannot always be directly related, if fair and reasonable rates are to be achieved." See Second Remand Order, p. 16. Joplin District's rates had been just and reasonable in the past as a system average, state-wide rate of the entire Missouri American system. In moving to a district-specific rate, certain pragmatic considerations, such as rate shock, prevented subsidization from being eliminated immediately.

The *Joplin* case stands for the proposition that rate design and cost of service cannot be completely divorced. The regulatory compact requires cost causation be maintained as a component in rate design as a condition of its implementation and the cases support that conclusion. Yet this case has nothing to do with Ameren Missouri's cost of service to Noranda. Noranda has not conducted a cost of service study. See Tr. Vol. 5, pp. 73, 74, 222. This case is simply a matter of what Noranda says it can afford. The Complaint seeks to have the Commission set a rate on this one sole idiosyncratic factor. Such a request is the very epitome of an undue or unreasonable preference or advantage because it depends on a factor beyond the control of the utility company or the Commission itself and only on the characteristics of one individual customer. To grant rate relief on this one factor alone is discriminatory.

Granting the Complaint would also disconnect ratemaking from its regulatory compact underpinnings. The regulatory compact is a covenant between the utility industry and the state designed to foster the execution of justice within the state by protecting the utility customers from arbitrary rates imposed by utility companies in return for a promise of "rates and charges sufficient to permit the utility to meet its operating expenses plus a return on investment which will compensate its investors." While differences in circumstances may justify a tempering of the cost causation principle, the regulatory compact does not authorize this Commission to ensure the viability of an entity that has fallen on hard economic times at the expense of all other utility customers.

2. Granting Noranda's Complaint Would Be Unjust and Unreasonable

Granting the Complaint would be unjust and unreasonable for several reasons. In order for a Commission order to be just and reasonable, it must be based on substantial and competent evidence in the record. It may not be arbitrary and capricious. As the courts have recognized, it is a pragmatic standard, requiring the balancing of the interests of the investors and customers. While the Commission's order must establish a rate necessary to attract equity investors, it must also avoid excessive prices. *State ex rel. Associated Natural Gas Co. v. Public Service Comm'n.*, 706 S.W.2d 870 (Mo. App. 1985). Its orders must be based on reasoned decisions.

It should first be pointed out that the state's tax revenues are not a legitimate factor in this decision. Neither the regulatory compact, nor state statute, nor the court cases indicate that the state has any monetary interest in setting rates. The pragmatic test is a balancing of the customers' and investors' interests. This Commission exists to execute justice in the establishment of just and reasonable rates in the electric utility industry. The state's desire for tax revenues has no place in this analysis despite Noranda's testimony.

The first reason granting the Complaint would be unjust and unreasonable is that the proposed rate is not tied to a cost of service study. While *Associated Natural Gas* makes it clear that there is no one single formula or combination of formulae in determining rates, a cost of service study does give the Commission a legally cognizable standard of review on which to come to a reasoned decision. Without a cost of service study, how does the Commission come to a reasoned decision? What standard does it use? Perhaps the Issues List implicitly suggests a standard, "a liquidity crisis." UFM suggests that this is no standard at all. There is no way for the Commission to administer such a standard. While evidence may indicate that a customer is having a momentary liquidity crisis, there is no long term ability for the Commission to administer all of the multiple industries and markets and gain jurisdiction over all of the potential customers seeking special rates in order to enforce this standard.

Second, granting the Complaint cannot be reasoned decision making because there is no balancing of the interests of the investors and the other customers. The request is to set a rate on the idiosyncratic factor of what Noranda can afford. The rate is set merely by an analysis of what is good for Noranda and does not take into account the impact on the other parties. Only after this one customer gets what it wants is the Commission confronted with what to charge the other customers. This is not the pragmatic analysis the courts require.

Third, the rate itself is arbitrary. The Complaint requests a rate of $30/MWh as what Noranda can afford. It then seeks to justify the rate on the fact that the rate will cover Ameren Missouri's variable cost in its service to Noranda. It tries to use the confluence of its own individual judgment about what it can afford and its own individual judgment on what it thinks Ameren needs to keep Noranda on the Ameren system to set a rate. There is no actual confluence of analyses. Both analyses are aborted before they are brought to a reasoned conclusion. Neither

Noranda's budget analysis nor Ameren Missouri's cost of service are brought to completion. It is interesting that this analysis produced the round number of $30/MWh, not one penny more and not one penny less. This very approach is arbitrary.

Fourth, if the Commission accepts the Complaint, what the Commission will be doing is negotiating on behalf of Ameren Missouri for a new rate for Noranda. Such an action would be a capricious act and an interference with the management of Ameren Missouri.

In actuality, the Complaint puts the Commission on the horns of a dilemma. If the Commission grants the Complaint, need the Commission adjust the rates of the other ratepayers? To ask the question indicates that the request is inappropriate. To answer the question one way, by imposing additional costs on the other ratepayers, makes the rate excessive on those ratepayers since the Commission has previously determined those rates to be just and reasonable. To answer the question the other way, by denying investors a return on their investment, shows that the interests of investors are not being adequately evaluated, since it would deny Ameren Missouri revenues that were previously adjudged appropriate.

Conclusion

The regulatory compact arose as a mechanism to execute justice. It provides a regulatory process to guard against a natural monopoly taking advantage of its monopoly power to extract monopoly profits from its customers or to show favoritism between its customers. The utility industry has been subjected to regulation to moderate its participation in the marketplace so as to prevent the monopolist from manipulating that marketplace.

What the Complaint proposes would turn that guiding principle on its head. It would take the regulatory process that was designed to ensure non-discriminatory treatment in the marketplace

and make it a tool for marketplace favoritism. Such injustice is not within the legal authority of the Commission and it is not just and reasonable.

Noranda is in a difficult situation. It is dealing with a difficult economy. We can all feel for Noranda as it deals with this difficult economy. It is hard to see what is happening to Noranda. But the old adage is apt: hard cases make bad law. Oliver Wendell Holmes, Jr. phrased it thusly in his dissent in *Northern Securities Co. v. United States*: "Great cases like hard cases make bad law. For great cases are called great, not by reason of their importance... but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." See 193 U.S. 197, 400 (1904).

The only thing that would be harsher than living under Noranda's situation would be if the Commission undertook to restructure the Ameren Missouri's rates for the benefit of Noranda at the expense of others based on the Commission's feelings. The Commission should not pick winners and losers or bail any customer out. It has no authority to do so. It should leave those decisions to the Legislature and the Governor and simply administer the regulatory compact. The Complaint should be denied.

Respectfully submitted,

By: /s/ David C. Linton

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Application to Intervene was sent to all parties of record in File No. EC-2014-0224 via electronic transmission this 8th day of July, 2014.

/s/ David C. Linton