BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Noranda Aluminum, Inc., et al.,	)	
	)	
Complainants,	)	
	)	
v.	)	File No. EC-2014-0223
	)	
Union Electric Company, d/b/a Ameren Missouri,	)	
	)	
Respondent.	)	
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 TO THE JOINT PARTIES'[1] AND THE STAFF'S RESPONSES TO ORDER INVITING RESPONSES TO AGENDA DISCUSSION

COMES NOW Union Electric Company, d/b/a Ameren Missouri ("Ameren Missouri" or the "Company") and, pursuant to 4 CSR 240-2.080(13), hereby replies to the above-referenced responses, as follows:

Reply to the Joint Parties' Response

1. The Joint Parties make many assertions in their Response. In most instances those assertions consist of broad statements by counsel that are not supported by any legal authority (or even by past Commission cases or policies). We endeavor below to address these assertions as directly and concisely as possible.

[1] The Joint Parties referred to herein are Noranda and the other complainants, Consumers Council of Missouri ("CCM"), AARP, The Office of the Public Counsel ("OPC"), the Missouri Industrial Energy Consumers ("MIEC") and the Missouri Retailers Association.

File No. EC-2014-0223 - the Earnings Complaint.

2. The Joint Parties suggest that Noranda[2] has a *right* to a quick hearing, claiming that the Commission is "effectively ignoring its statutory duty,"[3] if it does what it has always done when the justness and reasonableness of a major utility's rates is called into question: consider the results of a properly conducted Staff investigation of the utility's cost of service, including consideration of a full cost of service study designed to comply with the Commission's legal obligation to set rates for the future based on an "'honest and intelligent forecast of probable future values, made upon a view of all the relevant circumstances . . ..'" *State ex rel. Missouri Water Co. v. Public Service Commission*, 308 S.W.2d 704, 719 (Mo. 1957) (*quoting State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission et al.*, 262 U.S. 276, 288 (1922)). The Joint Parties ask the Commission to act like they say a circuit court would act–as a tribunal completely indifferent to the validity of the result in the case who acts only as a referee between two or more competing parties–claiming that the Commission "is and always has been a quasi-judicial body."[4] But the Joint Parties' statement in this regard, and their argument, reflects a misapprehension of the role of the Commission. It is well-settled that ratemaking is not a judicial function, but is a *legislative* function. *Lightfoot et al. v. City of Springfield et al.*, 236 S.W.2d. 348, 352 (Mo. 1951); *see also State ex rel. Laundry, Inc., v. Public Service Commission, 3*4 S.W.2d 37, 43 (Mo. 1931); *Hackworth v. Missouri Southern RR Co.*, 227 S.W.1032, 1039 (Mo. 1921). While it is true that the Commission sits as a quasi-adjudicatory body, Commissioners are not judges. *State ex rel. A.G Processing, Inc. et al. v. Pub. Serv. Comm'n et al.*, 344 S.W.3d 178, 190 (Mo. 2011). The point is that there is a very good reason that when one looks at the history of the Commission one will not find the

[2] We sometimes refer herein to complainant Noranda and the individual complainants collectively as "Noranda."
[3] Joint Parties' Response, File No. EC-2014-0223, p. 6.
[4] *Id.*

Commission rushing to change a utility's rates based upon a mere allegation of "over-earnings." Instead, the Commission investigates the continued justness and reasonableness of the utility's rates with a view toward what the utility's revenue requirement should be in the future when any new rates would be in effect. That investigation has necessarily involved the Commission's Staff, for it is only through the Commission's Staff that the Commission can investigate. Section 386.240, RSMo.[5] (calling for the Commission to delegate its authority to its employees–its Staff). In sum, it is simply not true–and the authorities prove it is not true–that complainants have a right to file a complaint and to *insist* that the Commission decide it on the timeline complainants prefer without conducting a proper investigation and without "fully consider[ing] Ameren Missouri's rates going forward."[6]

3. The Joint Parties (without citation to any authority) also assert that "the statute" does not "allow the Commission to anticipate possible future plant additions in determining what rates are just and reasonable today."[7] That statement is patently false and misapprehends (purposefully or not) the Commission's role when it sets rates. As the Commission recognizes–as the courts recognize–rates are set for the *future*. Rate cases are routinely filed and processed based on revenue requirements, prepared by both utilities and the Staff, that include consideration of plant that is not in service as of the date the revenue requirement is filed, but that is reasonably expected to be in service by the time new rates would take effect. What the Joint Parties are really advocating for is a rate reduction very quickly so that they can obtain reparations for what they claim were "over-earnings" in the past. This too reflects a fundamental misapprehension (or mis-statement) of the concept of just and reasonable rates. It is simply not

[5] All statutory references are to the Revised Statutes of Missouri (2000), unless otherwise noted.
[6] *Order Inviting Responses to Agenda Discussion*, p. 2.
[7] Joint Parties' Response, Case No. EC-2014-0223, pp. 6-7.

true that just because a utility earns–on a per book basis or otherwise–more than its last "authorized" return on equity for some time period that it is "over-earning." *Straube v. Bowling Green Gas Co.,* 227 S.W.2d 666, 671 (Mo. 1950) (Utility returns "will necessarily vary from time to time" and no "maximum or minimum return was established when the rate was established"). Indeed, the entire concept of regulatory lag, which the Joint Parties have consistently argued is a critically important and beneficial principle of regulation is to incent utilities to cut costs or take other steps that will improve the utility's earnings that will later be reflected in customer rates prospectively. In that way, utilities temporarily benefit from improved earnings that can be enabled by regulatory lag if they can cut costs between rate cases, and customers benefit from those cost savings either through a lowering of rates if a utility's revenue requirement is going to remain sustainably lower in the future, or through a smaller rate increase than would otherwise occur if there are other increases in the revenue requirement (like the more than $1 billion of rate base investments that the Company will have placed in service since its last rate case by December of this year). It is clear that the Commission understands these concepts; hence its desire to fully consider the Company's rates on a going-forward basis.[8]

4. The Joint Parties also claim that "past over-earnings can be considered" when the Commission sets rates in the future.[9] This too is an out-of-context statement made without citation to any authority. What the cases say is that past costs can be considered in setting rates for the future or that past recoveries can be considered "insofar as [they] . . . are relevant" to determining what rates are just and reasonable in the future -- i.e., figures from an historical

[8] We agree that under Proposition One the Commission could not approve new rates based on plant not in service, but the Commission most certainly can consider plant not in service as part of its development of a new revenue requirement used to set new rates so long as the plant is in service before the rates take effect.
[9] *Id.* p. 5.

period can be used as a proxy to set future rates.[10] But the Commission cannot decrease a utility's rates because of past "over-earnings" any more than it can increase rates to make up for any past "under-earnings." To do so would be to engage in unlawful retroactive ratemaking.[11]

5. Lastly, we will address the Joint Parties' opposition to the Presiding Officer's suggestion that consideration of the complaint be handled as an interim rate proceeding. This opposition reflects their apparent belief that what applies to utilities that ask the Commission to implement a rate change quickly, and before the Commission can consider the results of a full Staff investigation, should not apply to them. As we addressed in our April 10, 2014 Response to the Commission's *Order Inviting Responses to Agenda Discussion*, there is no reason why any lowered rates that might be ordered pursuant to the complaint cannot be lowered on an interim basis subject to refund (assuming that complainants can carry their burden to convince the Commission that rates are unjust and unreasonable and otherwise meet the applicable standards).[12] We outlined a process where that could happen six to seven months earlier than when that rate case would be concluded. Complainants are entitled to nothing more. Indeed, they are not *entitled* to that process, but we agree it is a permissible process that does not present the significant policy concerns that would be presented by trying to resolve an over-earnings complaint case based merely on the wholly inadequate analysis presented by Noranda that

[10] *See, e.g., State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n*, 210 S.W.3d 330, 336 (Mo. App. W.D. 2006); *Utility Consumers Council of Missouri v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49-50 (Mo. *banc* 1979) ("UCCM") (Stating that past "excess recovery" "insofar as this is relevant" to what rates should be in the future can be considered).

[11] *UCCM , supra*. The Joint Parties may say that they are not advocating that the Commission do this, but rather, they will say, are simply using the period ending September 2012 and rate case adjustments based on data dating back to October 2011 as a "proxy" for future rates, notwithstanding the fact that the data is years old. But their arguments in their Response belie any such claim, as does their staunch opposition to the Commission fully investigating the Company's actual cost of service *on a going-forward basis*, as the Commission's Staff always does when over-earnings are alleged.

[12] The approach suggested by the Presiding Officer and supported by the Company would also mean the Commission would have the benefit of its Staff investigation before it when it decides the request.

doesn't even purport to determine what the Company's revenue requirement is likely to be in the future when any new rates would be in effect.

File No. EC-2014-0223 – the Rate Shift Complaint.

6. The Joint Parties' Response filed in this case similarly consists of assertions unsupported by citation to authority, and exaggerated statements that are not actually alleged in the complaint and that are also not contained in the testimony filed in support of the complaint. For example, the Response states that "unless Noranda obtains rate relief by August, its New Madrid Smelter is subject to imminent closure."[13] Neither the complaint nor any of Noranda's testimony in support of it makes such a claim. An allegation that the smelter is "subject to closure" in a future period (certainly nowhere near to August of this year[14]) is not even an allegation of "imminent" closure.[15] Using more hyperbole, the Joint Parties' Response claims the smelter "will be closed" and that the Commission must follow its schedule or else it may be "too late" to "prevent closure" of the smelter.[16] Those allegations are also unsupported by the complaint or any testimony.

7. The Joint Parties claim that their proposed schedule–which would require rebuttal testimony to be filed just 10 days from now, with hearings in only about five weeks from now, is "fair and reasonable to all parties and is in the public interest."[17] It is not. For the many reasons we have already outlined in other filings (and which we will not repeat here), there exists a plethora of unanswered questions that are directly relevant to Noranda's claimed need for a rate subsidy of approximately $500 million or more, and that are relevant to Noranda's claims that

[13] Joint Parties' Response, File No. EC-2014-0223, p. 1.
[14] The date given is highly confidential, so we omit it here.
[15] *Cf.* the definition of "imminent," which means "likely to happen without delay." *Webster's New World College Dictionary*, (4th ed. 2001). Surely it is obvious that the time frame between late this year and the claimed time the smelter would be "subject to closure" reflects a substantial delay between when the Commission would decide this complaint and the later claimed time when the smelter might be "subject to closure."
[16] Joint Parties' Response, Case No. EC-2014-0223, pp. 1, 4.
[17] *Id.*, p. 3.

the smelter is "subject to closure" in the future if it doesn't get that rate subsidy. For the Commission to let Noranda force it to a rush to judgment on those issues without the benefit of evidence that will allow those questions to be accurately answered would reflect terrible policy. Moreover, it is completely unnecessary according to Noranda's own claimed timeline for when it really must have the requested subsidy, even if one assumes Noranda's claims are accurate.

8. Ameren Missouri is not delaying its own investigation into Noranda's allegations. While it is true that Noranda provided responses to the first 37 data requests propounded by the Company[18] we await responses to the remaining 90. A preliminary review of the responses to the first 37 indicates that follow-up questions, and perhaps depositions to explore the responses (and Noranda's testimony), will be necessary. Assuming Noranda timely responds to just the remaining data requests, Noranda's proposed schedule would mean that the Company would only have all of the responses in its hands for a mere two days before rebuttal testimony would be due. The opportunity to conduct meaningful discovery doesn't mean that a party gets what will almost certainly be thousands of pages of material and answers to review on the eve of filing testimony,[19] without any meaningful ability to review and analyze the responses to determine if they are complete, and to follow-up with additional discovery as may be necessary.[20]

And it is simply not true that Ameren Missouri has "vast resources" and that its "numerous" experts can meaningfully "meet the terms of" Noranda's proposed schedule.[21]

[18] The Joint Parties refer to them as the "first wave." One hundred twenty seven data requests, given the complex nature of Noranda's combined businesses, the financial and competitive questions raised by the relief Noranda seeks, is hardly a "wave."

[19] Responses to the first 37 data requests fill six large binders.

[20] Our initial review of some of Noranda's responses suggests that some of the responses are not complete and certainly some of them raise additional questions that must be explored further.

[21] *Id.*, pp. 3-4. These claims are similar to those made when the Company primarily utilizes three attorneys to handle its rate cases, with supplementary assistance from two or three other attorneys on some issues, which some or all of the Joint Parties have in the past suggested puts what they claim are vastly superior resources of the Company against "consumers." We would note that in our last rate case, as an example, there were 18 attorneys who entered

Noranda operates a business that consists of four main business segments. The bare information provided in Noranda's testimony tells us very little about whether Noranda's claimed liquidity issues are driven by the smelter or by other of its business segments, or Noranda's decision to over-leverage its entire operations. For the most part, we cannot tell where all of the capital investment Noranda claims it must make will be made (will it be made in the smelter or other Noranda operations?). As the Company has indicated, it does not intend to simply roll over and let all of its other customers be saddled with hundreds of millions of dollars of subsidies simply because Noranda has made certain untested assertions.[22] The Commission shouldn't do so either. In our April 10 filing, we outlined a schedule that we believe would allow the proper examination of these issues to take place, and that would also give Noranda its day in court well before it claims the smelter is merely "subject to closure." Good policy and, we would respectfully submit, the Company's due process rights,[23] demand that this reasonable time be afforded to complete that investigation so that meaningful testimony can be prepared and filed on these issues.[24]

9. The Joint Parties' continued assumption that *if* the smelter closes Ameren Missouri's customers would be worse off than if the proposed rate shift occurs and the smelter

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appearances for the evidentiary hearings representing parties that generally opposed one or more of the Company's positions. The Company was represented by a total of just five lawyers.

[22] The Joint Parties' assertion that Ameren Missouri is "unaffected" by the relief they seek is false. Any thought by the Joint Parties that Ameren Missouri's phones, website and e-mail will not light up if other parties' rates increase, even if the increase is at the behest of Noranda and not Ameren Missouri, is misplaced. We suspect the same can be said of the Commission. We know that some of our customers have expressly come out in opposition to Noranda's proposed rate shift. When our rates are affected, our customers are affected, and as a consequence we are affected.

[23] And the due process of other parties – not every party to this case has indicated it supports the complaint, and we know of one party that does not support it.

[24] This, along with the need to avoid the single-issue ratemaking problem that would exist if the Commission did attempt to change rates as a result of this case without a consideration of all relevant factors bearing on the Company's rates is another reason this case and the other complaint case should be consolidated with the Company's upcoming rate case and then processed along the timeline we outlined in our April 10 filing. Under that timeline, the Commission will have decided upon relief in the complaints before the rate increase case is even half over, and long before the smelter is even "subject to closure."

remains open[25] also warrants a brief response here. First, their assumption is simply based upon assertions–not proven facts. Second, while we have not completed all of our work on this issue (which is an issue much more within the Company's core expertise), our preliminary studies strongly suggest that this claim is simply not true and that indeed our customers will pay lower rates if Noranda were not an Ameren Missouri customer. This is obviously an issue that would be fleshed-out in testimony at the appropriate time.

10. A couple of other miscellaneous points made by the Joint Parties must also be addressed. First, the Joint Parties make arguments in this Response regarding interim rates and their claimed "right" to the extremely quick relief they seek which are very similar to those made in the Response filed in File No. EC-2014-0224. Our discussion of those points in ¶ 5 above applies equally here. Second, the Commission should not accept at face value yet another assertion made by the Joint Parties without citation to any authority (because there is none)–that it would be "unlawful" for the Commission to consolidate this and Noranda's other complaint with the upcoming rate case or to otherwise open its own case, as discussed during Agenda. The Commission acts lawfully so long as it possesses the statutory authority to take the action it takes. *See, e.g., State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 328 S.W.3d 316, 318 (Mo. App. W.D. 2010). Do the Joint Parties seriously contend that the Commission has only one choice here? That is, the Joint Parties appear to be saying that the Commission must, as a matter of law, process two complaints that they assert call into question the justness and reasonableness of the Company's rates only via a process that is as quick as they desire. They appear to be contending that the Commission is powerless to do anything other than process their complaints separate and apart from a rate case (or from the other complaint case, for that matter), even though such cases also pertain to a review of the justness and reasonableness of the Company's

[25] Joint Parties Response, Case No. EC-2014-0223, pp. 1-2.

rates. Not only is such a suggestion absurd and unsupported by any authority, but it is rebutted by statutory authority expressly given to the Commission. For example, Section 393.270.1 specifically authorizes the Commission to institute an investigation "as to any matter of which a complaint may be made . . ., or to enable it to ascertain the facts requisite to the exercise of any power conferred upon it."[26] It is for the Commission to decide how it will process a complaint case, and with what other cases it will or will not consolidate a complaint case.

Reply to the Staff's Response

11. Staff's Response basically boils down to the following: we don't take a position in this case so we need not do anything in response to the complaints. As we indicated in our April 10 filing, Staff's position reflects poor policy. As we noted above, the Commission exercises delegated legislative authority when it sets rates, whether it is setting rates via a complaint case or via a rate increase case. The Commission is not merely refereeing a dispute between two parties, but instead has a duty to endeavor to get to the "right" answer, within the bounds of the law (e.g., it must balance the needs of the utility and of customers and it must set rates that provide utilities with a fair opportunity to earn a reasonable return). The Commission never, or virtually never, considers how to proceed on a major complaint case without asking its Staff to investigate the facts alleged and file a recommendation or provide testimony, or both. The Commission doesn't simply look at the complainant's evidence as it may be rebutted by the utility with the utility's evidence. Why that should be so in complaints with far less at stake than is at stake here and that implicate far less weighty policy issues, but should not be so here makes no sense at all.

[26] Section 393.260.1 also indicates that the Commission shall investigate any complaint that is filed. Case law indicates that the nature and extent of that investigation is up to the Commission, as the Staff itself has said. *See, e.g., State ex rel. Public Counsel v. Pub. Serv. Comm'n*, 210 S.W.3d 344, 355-56 (Mo. App. W.D. 2006).

12. As noted earlier, it is also not true that complainants can't get their day in court "promptly"[27] if Staff is called upon to do what it always does and what it should do here: determine the Company's cost of service, class cost of service and the facts relating to Noranda's claims. Can complainants get their day in court as quickly as they would like? No, and they shouldn't for the reasons earlier discussed. But they can get it much faster than a utility gets its day in court in a rate increase case, and much faster than would also have been reasonable if the Commission were to simply process the complaints using the same timeline as will apply to the rate increase to be filed in about three months from now or less.

WHEREFORE, for the reasons stated herein, Ameren Missouri renews its prayer that the Commission defer setting a full procedural schedule until after the Commission decides the motions to dismiss pending in File Nos. EC-2014-0223 and EC-2014-0224, or adopt the procedural schedule contained in Ameren Missouri's April 1 filing. If, however, the Commission determines that a faster procedural schedule should be established to address Noranda's complaints, the Company requests and recommends that the Commission order (a) a consolidation of the two complaint cases with File No. ER-2014-0258, (b) its Staff to promptly commence an investigation into Ameren Missouri's cost of service and class cost of service and into Noranda's claims regarding its business needs for the rate shift requested in File No. EC-2014-0224 to be completed by August 31, 2014, (c) the parties to attempt to agree upon a procedural schedule that would provide for the filing of testimony, an evidentiary hearing and briefing to be concluded by November 2014, and (d) such other and further relief as is reasonable and necessary under the unique circumstances of these cases.

[27] Staff's Response, p. 4.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served on counsel for all parties of record in File Nos. EC-2014-0223 and EC-2014-0224 via electronic mail this 15th day of April, 2014

/s/ James B. Lowery