

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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

AMEREN MISSOURI’S RESPONSE TO OPC PLEADING DENOMINATED “NON-UNANIMOUS STIPULATION AND AGREEMENT” AND CONTINGENT OBJECTION PURSUANT TO 4 CSR 240-2.115(2)(B)

COMES NOW Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri” or “Company”), and for its response and contingent objection to the filing entitled a “*Non-Unanimous Stipulation and Agreement*” filed July 24, 2014 by the Office of the Public Counsel (“OPC”), states as follows:

1. OPC’s filing is neither a stipulation nor an agreement; instead, it is in substance an improper, unauthorized third post-hearing brief that articulates for the first time material changes in positions OPC has taken in this case. Indeed, it attempts to create a case that isn’t before the Commission. Complainants¹ did not ask for the relief that OPC now urges the Commission to order. As we explained in our Reply Brief (pages 7-8), the Complaint frames the basis for Noranda’s flawed claim that its current rate is unjust and unreasonable and the Complaint defines the relief that is sought in this case. Neither OPC nor any other party can in effect manufacture a different complaint and a different request, and they certainly can’t do so after the case has been tried, the record has been closed and the issues have been fully briefed. OPC’s filing is not evidence, and it cannot be relied upon by the Commission in any way. It violates rules on the making of an evidentiary record and it violates the

¹ Noranda Aluminum and the 37 individual complainants (collectively, “Noranda”).

Commission's procedural orders in this case, which gave OPC at least five opportunities to adduce evidence or argue the case (rebuttal testimony, surrebuttal testimony, statements of position, initial briefs, and reply briefs). Moreover, it violates Due Process by in effect attempting to supplement its case (or Noranda's case), and materially alter the relief sought, after the record is closed. Giving any consideration whatsoever to an 11th hour filing like this would make a mockery of the Commission's fairly-established and administered process for accepting, processing and deciding contested cases like the complaint case at issue here.

2. Moreover, although OPC's filing is entitled "*Non-Unanimous Stipulation and Agreement*," and while OPC purported to file it under authority of 4 CSR 240-20.115, OPC's filing is obviously neither a stipulation nor an agreement. *Black's Law Dictionary* defines "stipulation" as a [v]oluntary agreement *between opposing counsel* concerning disposition of some relevant point," and defines "agreement" as "[a] meeting of *two or more* minds . . ." (emphasis added) Each of those definitions requires more than one party, yet the only "party" to OPC's "stipulation and agreement" is OPC itself. Because it is truly neither a stipulation nor an agreement, OPC's filing is not authorized under 4 CSR 240-20-115, and it would be inappropriate to accept OPC's filing and accord it the status or weight permitted by that rule.

3. As noted, prior to its most recent filing, OPC had multiple opportunities to state and describe its positions regarding the issues in this case; it should not (and cannot lawfully) be allowed one more opportunity to do so in the false guise of a stipulation and agreement. Under the Commission's April 16, 2014, *Order Establishing Procedural Schedule*, prior to the evidentiary hearings OPC had the opportunity to file rebuttal and surrebuttal/cross-surrebuttal testimony and to also file a detailed statement of position. Indeed, under the Commission's rules, OPC was required to "include *all* testimony which explains why a party rejects, disagrees *or proposes an alternative* to the moving party's direct case" in its rebuttal testimony (emphasis added). 4 CSR 240-2.130(7)(C). OPC did propose an alternative in surrebuttal testimony (it should have been provided in rebuttal testimony), but in any event, OPC certainly can't take yet another bite at the apple now. OPC had its chance to adduce whatever relevant

and otherwise admissible evidence it wanted to, and to advocate and argue for whatever points it wanted to make within the confines of the evidentiary record and the procedural schedule for this case. Why OPC chose not to make its detailed proposal within the record of this case is anyone's guess. But whatever the reasons, OPC cannot now be allowed to express those views or introduce a new proposal for resolving the case after the evidentiary record has closed and the case has been fully briefed; indeed, after the Commissioners have unanimously and publicly expressed their view that the Complaint should not be sustained.

4. While only OPC knows its motivations, any reasonable person would conclude that it was no coincidence that OPC made this filing the day after the Commission's public deliberations about this case on July 23. While the Commission may want to continue to encourage – or at least not completely foreclose – efforts by parties to settle cases after the record closes but prior to a final decision, OPC's filing does not represent such an effort. And Ameren Missouri has no intention of disregarding several legal realities and facts, including the fact that Noranda's proposal if adopted would constitute undue and unlawful discrimination, that the proper place to consider the tax that Noranda's request effectively seeks is at the General Assembly, that Noranda failed to carry its burden to establish that it must have a rate subsidy to maintain adequate liquidity, and that Noranda's own mismanagement (and that of its controlling shareholder, Apollo) put Noranda in the position that it claims it is now in. As we believe the Commission recognizes, other customers should not have to bail Noranda out, and even if the state believes Noranda needs help (deserving or not), the state as a whole should provide it through proper action of the General Assembly.

5. In addition to the significant procedure-related problems with the OPC's filing, it is fraught with substantive problems as well. One example is the "claw back" OPC proposes at pages 8 to 9 of the "stipulation." OPC proposes to require Noranda to pay back its subsidy if Noranda fails to meet the conditions OPC proposes, and proposes some kind of security or "repayment" agreement apparently

in an attempt to ensure that the repayment would be made.² OPC's ideas are half-baked, at best. If, as OPC now claims, Noranda is in such poor financial shape that it must have what would still be a huge rate subsidy (still about \$30 million per year), then how can anyone have any confidence that Noranda could or would ever return any subsidies if Noranda fails to meet its commitments? And if, as OPC's "stipulations with itself" suggest, Noranda is so leveraged now that it can't access the capital markets, how could Noranda grant someone (Ameren Missouri?) a security interest sufficient to secure the obligations OPC has fashioned given that Noranda's assets are probably already subject to prior security interests?³ Indeed, Noranda's testimony in this case was that it could not borrow more because of covenants with its existing lenders. Does OPC seriously contend that those lenders are going to subordinate their security interests to OPC's "repayment" agreement?

6. In addition, OPC's proposal completely ignores the possibility (perhaps even the likelihood) that Noranda could simply take any subsidy that is offered, and dividend it to Apollo and its other shareholders, as it has done so often with any available income generated by Noranda in the past. Without an enforceable prohibition against all future dividends, the subsidy OPC proposes could turn into a gift from Ameren Missouri's customers to Noranda's shareholders.

7. Even if OPC's impractical and half-baked idea could somehow work, OPC asks the Commission to order Ameren Missouri to in effect transfer the subsidy its other customers would have provided, and which Noranda would have repaid, to another set of customers (low-income customers). So what we would have then is an administrative body of limited jurisdiction – the Commission – taking money from one set of customers and transferring it to another set of customers for purely social reasons

² The entire scheme OPC now proposes is also precisely the opposite of the claim it stridently made in both its initial and reply brief that the Commission would have to impose the impact of any subsidy only on Ameren Missouri, based on OPC's novel and obviously incorrect interpretation of the PSC Law and the law governing burden of proof. OPC has apparently now realized that its prior contention was flawed.

³ To be clear, we are not endorsing OPC's views of Noranda's financial situation, but only point out that OPC's ideas are at odds with those views, that is, if OPC actually would expect Noranda to make any such repayments.

– to address poverty. It almost goes without saying: only the General Assembly should be making such decisions.

8. The Commission should, must and indeed has decided this case based upon its duties under the law to fairly process, hear and decide contested cases before it. OPC’s filing asks the Commission to disregard that process, and if it were entertained would make a mockery of it and OPC’s proposal is, in any event, substantively flawed.

WHEREFORE, for all the reasons stated above, the Commission should disregard OPC’s filing on grounds that it is improper, seeks relief that is unlawful and because it is not a “stipulation and agreement” under 4 CSR 240-20.115,⁴ and for the other reasons cited herein.

Respectfully submitted,

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Dated: July 25, 2014

⁴ Out of an abundance of caution, Ameren Missouri hereby lodges this contingent objection to this “non-unanimous stipulation”, as it is entitled to do under 4 CSR 240-2.115(2)(B). As a consequence, it is nothing more than a statement of position by OPC.

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**ATTORNEYS FOR UNION ELECTRIC
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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2014, a copy of the foregoing was served via e-mail on all parties of record in File No. EC-2014-0224.

/s/James B. Lowery
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