BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

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

Staff's Response and Suggestions in Opposition to Ameren Missouri's Motion to Dismiss

COMES NOW the Staff of the Missouri Public Service Commission, by and through the Chief Staff Counsel, and for its *Response and Suggestions in Opposition to Ameren Missouri's Motion to Dismiss,* states as follows:

Introduction

Noranda Aluminum Company and thirty-seven other electric customers ("Complainants") of Ameren Missouri ("Ameren") filed their *Complaint* on February 12, 2014, alleging that Ameren's rate for electric service to Noranda is unreasonable because, unless it is reduced, it will cause Noranda to cease business operations and the rates of the other Complainants to rise correspondingly. The Commission issued its *Notice of Complaint* on February 13, 2014, directing Ameren to file its *Answer* not later than March 17, 2014. On that day, Ameren filed its *Answer* as directed and also filed its *Motion to Dismiss,* asserting that the *Complaint* fails to state a claim upon which relief may be granted because:

- it constitutes an impermissible collateral attack on the Company's

Commission-approved tariffs;

- granting the relief sought by the Complaint would constitute unlawful single-issue ratemaking,
- 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
- sustaining the Complaint would constitute unlawful, undue or unjust discrimination.

Additionally, Ameren asserts:

> 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.[1]

Staff's Position

As shall be explained in detail below, Staff finds that Ameren's *Motion to Dismiss* is not well-taken. The *Complaint* is sufficient under the applicable pleading rules, satisfies applicable statutory requirements and has successfully engaged the Commission's ratemaking power. None of Ameren's several arguments supports its *Motion to Dismiss.* For these reasons, Staff urges the Commission to deny Ameren's *Motion to Dismiss.*

What is the Applicable Standard?

A motion to dismiss for failure to state a claim tests only the legal sufficiency of

[1] *Motion to Dismiss,* ¶ 2.

the complaint.[2] All well-pleaded factual allegations in the complaint must be accepted as true and the facts must be liberally construed to support the complaint.[3] Complainants enjoy the benefit of all reasonable inferences.[4] The complaint should not be dismissed unless it shows no set of facts entitling the complainants to relief.[5]

None of Ameren's arguments actually attack the sufficiency of the *Complaint.* One asserts that the *Complaint* is barred as an impermissible collateral attack; others assert that the requested relief cannot be granted and are thus directed at the Commission's subject matter jurisdiction rather than the sufficiency of the *Complaint.*[6] Ameren's final argument, that this is a matter best left to the legislature, is a prudential argument.

The Sufficiency of the Complaint

The *Complaint* alleges that the Complainants are Noranda, an aluminum smelter, and 37 other current electric service customers of Ameren Missouri; that Ameren Missouri is an electric utility regulated by this Commission; that the *Complaint* is brought under §§ 386.390.1, 393.130.1, 393.260.1, and Commission Rule 4 CSR 240-2.070, (4) and (5); and that the rate for electric service charged by Ameren to Noranda

[2] For this discussion, *see* J.R. Devine, *Missouri Civil Pleading and Practice,* Section 20-3 (1986), and ***Christ et al. v. Southwestern Bell Telephone Co. et al.,*** 12 MoPSC3d 70, 79-86 (Jan. 9, 2003) (***Order Regarding Motions to Dismiss***), ***Christ,*** *supra,* Case No. TC-2003-0066 (***Order Denying Rehearing and Denying Complainants' Alternative Motion for Leave to Amend,*** iss'd Feb. 4, 2003) at pp. 4-7 (not published in MoPSC reports).

[3] ***Nazeri v. Missouri Valley College,*** 860 S.W.2d 303, 306 (Mo. banc 1993).

[4] *Id.*

[5] *Id.*

[6] J.R. Devine, ***Missouri Civil Pleading and Practice,*** § 9-1 (The Harrison Co., Norcross, GA, 1986), explaining that subject matter jurisdiction in Missouri includes whether or not the tribunal can grant the requested relief.

"is now unreasonable."[7] The *Complaint* prays that the Commission will:

> review this Complaint on an expedited basis, conduct whatever investigation or hearings it deems appropriate and required by law, and revise the electric rate charged Noranda for operation of the New Madrid smelter to $30/MWh and adjust the electric rates of other ratepayers accordingly so that the relief requested herein is revenue neutral to Ameren Missouri.

The Commission has discussed the requisites of a complaint under § 386.390.1 in detail.[8] Those include (1) an allegation of a violation of a statute or a Commission rule or order, (2) sufficiently specific to fairly apprise the respondent of the events that constitute the alleged violation; (3) where the complaint is directed at a rate, that at least twenty-five current or prospective customers have joined in the complaint;[9] and (4) where the complaint is directed at a matter previously determined by the Commission in another proceeding, an allegation of a significant change in circumstances.[10]

Turning to the *Complaint* herein at issue, it is apparent that each of these pleading requirements is met. Section 393.130.1 prohibits unjust and unreasonable charges for electric service and the *Complaint* alleges that the rate for electric service charged by Ameren to Noranda "is now unreasonable," thus stating a violation of § 393.130.1.[11] The nature of the alleged violation is definite and certain, it is the rates charged to Noranda. The phrase "is now unreasonable" implies a substantial change of

[7] *Complaint,* ¶ 9.

[8] ***Christ et al. v. Southwestern Bell Telephone Co. et al.,*** 12 MoPSC3d 70, 79-86 (Jan. 9, 2003) (***Order Regarding Motions to Dismiss***), and ***Christ et al. v. Southwestern Bell Telephone Co. et al.,*** Case No. TC-2003-0066 (***Order Denying Rehearing and Denying Complainants' Alternative Motion for Leave to Amend,*** iss'd Feb. 4, 2003).

[9] Unless the complaint is brought by any of a number of specifically authorized officials, such as the Public Counsel. § 393.390.1.

[10] ***Christ,*** *supra,* 12 MoPSC3d at 82-86; ***Christ,*** *supra,* ***Order Denying Rehearing,*** pp. 4-10.

[11] *Complaint,* ¶ 9.

circumstances.[12] The *Complaint* is brought by thirty-eight current customers of Ameren, as required by §§ 393.390.1 and 393.260.1. By the words "that rate is now unreasonable,"[13] the *Complaint* alleges a significant change in circumstances, as discussed in detail below. All of the applicable pleading requirements are met and Ameren's assertion that the *Complaint* fails to state a claim is shown to be without merit.

Collateral Attack

Section 386.550, RSMo., provides, "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive."[14] In ***State ex rel. Licata v. Public Service Commission of the State of Missouri,***[15] the Western District held that § 386.550 barred a complaint brought under § 386.390.1 challenging as unlawful a utility company rule that had been approved by the Commission. Thereafter, In ***State ex rel. Ozark Border Electric Cooperative v. Public Service Commission of Missouri,***[16] the Western District applied the rule of ***Licata*** to a complaint brought under § 394.312.6, which authorizes complaints attacking territorial agreements previously approved by the Commission.[17] The Commission has stated:

> Reading ***Licata*** and ***Ozark Border*** together, it is clear that a complaint seeking to re-examine any matter already determined by the Commission must include an allegation of a substantial change of circumstances; otherwise, Section 386.550 bars the complaint.[18]

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[12] Complainants enjoy the benefit of all reasonable inferences. ***Nazeri,*** *supra,* 860 S.W.2d at 306.

[13] *Complaint,* ¶ 9.

[14] Unless otherwise specified, all statutory references are to the Revised Statutes of Missouri ("RSMo."), revision of 2000, as amended and cumulatively supplemented.

[15] 829 S.W.2d 515 (Mo. App., W.D. 1992).

[16] 924 S.W.2d 597 (Mo. App., W.D. 1996).

[17] 924 S.W.2d at 6001-601.

[18] ***Christ et al. v. Southwestern Bell Telephone Co. et al.,*** 12 MoPSC3d 70, 79-86 (Jan. 9, 2003)

The *Complaint* states, "This Complaint concerns the rate Ameren Missouri currently charges Noranda for the electricity and electrical service that Ameren Missouri sells to Noranda. Under the circumstances set forth below, that rate is now unreasonable."[19] The phrase "***is now unreasonable***" unmistakably signals a change of circumstances. It implies that, "while the rate was reasonable at one time, it is no longer reasonable." While the bar of § 386.550 is absolute, it is not high.

The Commission has stated with respect to § 386.550:

> The ***Ozark Border*** case . . . explains how the requirement of Section 386.550 may be satisfied. The complaint need simply contain an allegation of a substantial change in circumstances. This is not a heavy burden for a pleader to meet. In the case of an earnings investigation, for example, a complaint might be sufficient that did no more than plead the passage of time since the Commission's last rate order and the occurrence of intervening economic fluctuations.[20]

In fact, it's as easy as inserting the word "now" into the sentence, "the rate is unreasonable." An allegation that a rate has become unreasonable is necessarily an allegation that the rate violates § 393.130.1:

> All charges made or demanded by any such . . . electrical corporation . . . for . . . electricity . . . or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for . . . electricity . . . or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited.

The *Complaint* meets the pleading requirements of § 386.390.1. For the reason shown, the *Complaint* is not barred by § 386.550 and therefore should not be

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(***Order Regarding Motions to Dismiss***).

[19] *Complaint,* ¶ 9.

[20] ***Christ et al. v. Southwestern Bell Telephone Co. et al.,*** Case No. TC-2003-0066 (***Order Denying Rehearing and Denying Complainants' Alternative Motion for Leave to Amend,*** iss'd Feb. 4, 2003) pp. 9-10.

dismissed.

Single-Issue Ratemaking

Ameren also asserts that the *Complaint* must be dismissed because the relief sought is barred by the prohibition against single-issue ratemaking:

> 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.[21]

What is single-issue ratemaking? The Western District has explained:

> In reliance upon § 393.270.4, Missouri courts have traditionally held that the Commission's "determination of the proper rate for [utilities] is to be based on all relevant factors rather than on consideration of just a single factor." Thus, when a utility's rate is adjusted on the basis of a single factor, without consideration of all relevant factors, it is known as single-issue ratemaking. Single-issue ratemaking is generally prohibited in Missouri "because it might cause the [Commission] to allow [a] company to raise rates to cover increased costs in one area without realizing that there were counterbalancing savings in another area."[22]

As Ameren is well-aware, ratemaking is a two-step process.[23] The first step is the determination of the revenue required by the utility to operate over the course of an

[21] *Motion to Dismiss,* ¶ 11.

[22] ***State ex rel. Public Counsel v. Public Service Com'n,*** 397 S.W.3d 441, 448 (Mo. App., W.D. 2013) (internal citations omitted), *quoting* ***State ex rel. Midwest Gas Users' Ass'n v. Pub. Serv. Comm'n,*** 976 S.W.2d 470, 479-480 (Mo. App., W.D. 1998); and see extended discussion in ***State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission,*** 585 S.W.2d 41, 51-58 (Mo. banc 1979).

[23] The number of steps distinguished varies from commentator to commentator.

ideal year, with due regard to a reasonable return to the shareholders on the value of their investment:

> The determination of utility rates focuses on four factors. These factors include: (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses. The revenue allowed a utility is the total of approved operating expenses plus a reasonable rate of return on the rate base. The rate of return is calculated by applying a rate of return to the cost of property less depreciation. The utility property upon which a rate of return can be earned must be utilized to provide service to its customers. That is, it must be used and useful. This used and useful concept provides a well-defined standard for determining what properties of a utility can be included in its rate base.[24]

The second step is rate design: "'Rate design' is the method used to determine the rates to be charged to individual classes of customers."[25] The revenue requirement determined in the first step is allocated and assigned to the various customer classes based on the cost of serving each class. As Staff understands the *Complaint,* it seeks to engage only the second step of the two-step ratemaking process, that of rate design. This understanding is supported by the fact that the Complainants simultaneously filed a second complaint with this one, designated Case No. EC-2014-0223, which *Complaint* seeks to engage both phases of the ratemaking process on the allegation that Ameren's rates are now no longer just and reasonable because it is earning more than the return on investment fixed by the Commission.

The prohibition against single-issue ratemaking invoked by Ameren applies only to the first of the two-steps of the ratemaking process, that of the determination of the

[24] ***State ex rel. Union Electric Co. v. Public Service Commission,*** 765 S.W.2d 618, 622 (Mo. App., W.D. 1988).

[25] ***State ex rel. Monsanto Co. v. Public Service Com'n of Missouri,*** 716 S.W.2d 791, 791 (Mo. banc 1986).

revenue-requirement. It is there that all relevant factors must be considered so that increased costs in one area are balanced against savings in another.[26] Certainly, there are legal parameters that guide the rate design process, but the prohibition on single-issue ratemaking is not one of them. This point is apparent in the fact that every reported case on single-issue ratemaking discusses items of cost, some of which have increased and others of which have declined or remained static.

In ***Utility Consumers' Council,*** the lead case, the Court discussed in detail how increases in the fuel costs of electric utilities are, to some significant degree, subject to management control and thus possibly offset by economies elsewhere.[27] Other cases, such as ***Hotel Continental,*** explain that some costs are different by nature and thus not subject to the single-issue ratemaking prohibition.[28] Still other cases, focusing on an accounting device termed an "Accounting Authority Order," explain how the deferral of selected costs from one period to a later one for possible inclusion in the revenue requirement does not violate the prohibition.[29] None of these cases applied the single-issue ratemaking prohibition in a rate-design context.[30]

For the reasons stated above, the relief sought by the *Complaint* is not

[26] ***Public Counsel,*** *supra,* note 10.

[27] ***Utility Consumers' Council,*** *supra.*

[28] ***State ex rel. Hotel Continental v. Burton,*** 334 S.W.2d 75 (Mo. 1960). In ***Hotel Continental,*** the Missouri Supreme Court sustained the Commission's approval of a tariff including a "Tax Adjustment Clause" or "TAC" that provided for the automatic adjustment of rates between rate cases to reflect intervening changes in the rate of the gross receipts tax because it determined that the Commission was authorized to "deal with an item of operating expense in a defferent [*sic*] manner than other such items as part of a pattern or design to accomplish a just and reasonable total charge to the public for its steam service." *Id.,* at 79. ***Utility Consumers' Council*** upheld ***Hotel Continental,*** but concluded that fuel costs do not qualify for the treatment accorded the gross receipts tax.

[29] *E.g.,* ***State ex rel. Office of the Public Counsel v. Public Service Com'n,*** 858 S.W.2d 806, 812-814 (Mo. App., W.D. 1993).

[30] This argument could be greatly amplified if a case-by-case discussion was desired.

impermissible single-issue ratemaking and the *Complaint* should not be dismissed.

Barred by Contract

Ameren next asserts[31] that the remedy sought by Complainants is tantamount to equitable reformation,[32] a remedy beyond the Commission's authority.[33]

Ameren's service to Noranda is governed by a contract contemplated by Ameren's tariff. Ameren's Commission-approved Large Transmission Service Rate tariff provides at Sheet 62.2:

> **4. Contract Term**
>
> A customer taking service under this rate shall agree to an initial Contract Term of 15 years. The Contract Term shall be extended in one-year increments unless or until the contract is terminated at the end of the Contract Term or any annual extension thereof by a written notice of termination given by either party or received not later than five years prior to the date of termination. During the Contract Term, a customer taking service under this rate agrees that Company shall be the exclusive supplier of power and energy to customer's premises, and waives any right or entitlement by virtue of any law, including but not limited to Section 91.026 RSMo as it now exists or as amended from time to time, statute, rule, regulation, or tariff, to purchase, acquire or take delivery of power and energy from any other person or entity.

The contractual relationship between Ameren and Noranda began in 2005, when the Commission approved a *Stipulation and Agreement* resolving the case commenced by Ameren's application for a Certificate of Convenience and Necessity ("CCN") allowing it

[31] *Motion to Dismiss,* ¶¶ 18-20.

[32] ***Thompson v. Koenen,*** 396 S.W.3d 429, 434 (Mo. App., W.D. 2013): "Reformation of a written instrument is an extraordinary equitable remedy and should be granted with great caution and only in clear cases of fraud or mistake. Reformation is a remedy by which a party to a contract may obtain modification of the terms of the contract such that those terms reflect the parties' original intent in forming the contract. Equity will reform an instrument which, through mutual mistake of the parties, does not accurately set forth the terms of the agreement actually made or which does not incorporate the true prior intentions of the parties. * * * The party seeking reformation must show (1) a preexisting agreement between the parties affected by the proposed reformation is consistent with the change sought; (2) a mistake was made in that the deed was prepared other than as agreed; and (3) the mistake was mutual, *i.e.,* it was common to both parties."

[33] ***Utility Consumers' Council,*** *supra,* 585 S.W.2d at 47: "[T]he commission . . . has no authority to declare or enforce principles of law or equity[.]"

to extend its service area to serve Noranda. The Commission described the contract in its order:

> This case concerns a proposed power supply contract between UE and Noranda, an aluminum smelter located at New Madrid, Missouri, that consumes a great deal of electric power in its industrial operation. The filings of record in this matter allege that Noranda's current power supply contract expires on May 31, 2005, and that Noranda is therefore seeking a new power supply source. UE and Noranda propose to enter into a 15-year power supply agreement whereby UE would supply power to Noranda over existing facilities pursuant to a proposed new LTS tariff that is generally similar to UE's existing Large Primary Service ("LPS") tariff. The service area extension sought by UE encompasses Noranda's premises and Noranda is the sole landowner in the area for which certification is sought. Some of the facilities that UE would use to deliver power to Noranda belong to a third party with whom UE already has an Interchange Agreement permitting such use.[34]

Ameren is correct that the Commission cannot abrogate or reform the existing Ameren/Noranda contract.[35] However, the Commission *can* change the rates under which Ameren provides service to Noranda because the rates are a matter of tariff, not of contract.[36] Thus, the principal relief sought by Complainants is available to them in this forum.

In summary, Ameren's contract argument is unavailing. The principal relief sought by Complainants is a matter of rates and the contract of the parties cannot restrain the Commission in setting rates. For this reason, the *Complaint* should not be dismissed.

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[34] ***In the Matter of Union Electric Company,*** Case No. EA-2005-0180 (***Order Approving Stipulation and Agreement,*** iss'd Mar. 10, 2005) p. 3.

[35] ***Kansas City Power & Light Co. v. Midland Realty Co.,*** 338 Mo. 1141, 1149, 93 S.W.2d 954, 959 (1936): "The Commission "is not a court, and has neither the power to construe contracts, nor to enforce them."

[36] *Id.:* "These contracts are of no vitality, in so far as they affect rates. The Public Service Commission, in fixing rates, cannot be clogged or obstructed by contract rates."

Undue Discrimination

Ameren next asserts that the *Complaint* must be dismissed because "[t]he Commission 'lacks statutory authority to approve discriminatory rates.'"[37] The Public Service Commission Law forbids rates that are either unduly preferential or unduly discriminatory.[38] However, the question of whether or not a rate is *unduly* discriminatory or preferential is a question of fact.[39] Facially discriminatory rates may be justified where they are "based upon a reasonable classification corresponding to actual differences in the situation of the consumers or the furnishing of the service."[40]

This argument necessarily is also unavailing to Ameren because, at this point in this proceeding, there are no facts. Complainants have pleaded that Ameren's rate charged to Noranda "is now unreasonable."[41] Perhaps the Complainants will adduce evidence sufficient to support the rate design they seek and perhaps not, but that remains for the Commission's determination after hearing. What is clear is that Ameren's appeal to § 393.130.3 is not sufficient now to support its *Motion to Dismiss* because it cannot be said that the *Complaint* must fail as a matter of law. Rather, it is a matter of fact.

Question for the General Assembly

Finally, Ameren argues that the *Complaint* raises important questions of public

[37] *Motion to Dismiss,* ¶ 21; citing ***State ex rel. City of Joplin v. Public Service Com'n,*** 186 S.W.3d 290, 296 (Mo. App., W.D. 2006). In ¶¶ 21-24, the *Motion to Dismiss* reviews several early cases based on the principle that undue discrimination in rates is impermissible. Each of those cases was based upon its facts.

[38] Section 393.130.3.

[39] ***State ex rel. Mo. Office of Pub. Counsel v. Mo. Pub. Serv. Comm'n,*** 782 S.W.2d 822, 825 (Mo. App., W.D. 1990).

[40] ***State ex rel. Marco Sales, Inc. v. Public Service Com'n,*** 685 S.W.2d 216, 221 (Mo. App., W.D. 1984), quoting ***Smith v. Public Service Com'n,*** 351 S.W.2d 768 (Mo. 1961).

[41] *Complaint,* ¶ 9.

policy that the Commission should leave to the General Assembly to address. Ameren argues, "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."[42] This argument is addressed to the Commission's discretion under Rule 4 CSR 240-2.2116(4), which authorizes dismissal on ten days' notice for good cause shown.

Ameren's argument is not well-taken. Section 393.260.1 states that the Commission, upon complaint by twenty-five or more customers of a utility as to the price of electricity, "***shall*** investigate the cause of such complaint." The statute is mandatory upon proper invocation and the Commission, in fact, does not have discretion to simply dismiss the *Complaint*. Having received such a complaint from thirty-eight customers, the Commission must now investigate.

Conclusion

Staff urges the Commission to deny Ameren's *Motion to Dismiss* because, when considered under the applicable standard, the *Complaint* has met all statutory and other requirements necessary to engage the Commission's investigatory authority under § 393.260.1, RSMo. Each of the several arguments raised by Ameren is without merit and the *Motion to Dismiss* should therefore be denied.

WHEREFORE, Staff prays that the Commission will deny Ameren's *Motion to Dismiss* and enter upon proceedings by which, after consideration of all relevant factors, it will fix just and reasonable rates for electric service by Ameren; and grant such other

[42] *Motion to Dismiss,* ¶ 32.

and further relief as is just in the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **26th day of March, 2014,** on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

/s/ Kevin A. Thompson