

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

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

**APPLICATION FOR REHEARING**

COME NOW Complainants Noranda Aluminum, Inc. (“Noranda”) and the 37 individual customers of Ameren Missouri (collectively, “Complainants”) and pursuant to §386.500.1 RSMo.,<sup>1</sup> and 4 CSR 240-2.160, respectfully apply for rehearing of the Commission’s Report and Order in the above-captioned proceeding which was issued August 20, 2014 (“Report and Order”) and request reconsideration of certain decisions reflected in the Report and Order. In support of its Application, Complainants state as follows:

1. Complainants request that the Commission reconsider its Report and Order in order to consider and adopt the positions embodied in the Nonunanimous Stipulation and Agreement filed on August 1, 2014 by Complainants, the Office of Public Counsel , the Missouri Industrial Energy Consumers, the Missouri Retailers Association and the Consumers Council of Missouri (“Stipulation”).<sup>2</sup>

2. Rule 4 CSR 240-2.115 governs the Commission’s procedure for consideration of stipulations and agreements and provides as follows:

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<sup>1</sup> Statutory references are the Missouri Revised Statutes (2000), unless otherwise noted.

<sup>2</sup> On July 29, 2014, the Office of Public Counsel, Complainants, the Missouri Industrial Energy Consumers and the Missouri Retailers Association filed a nonunanimous stipulation. On August 1, 2014, the current version was filed and the Missouri Retailers Association joined as an additional signatory.

(1) Stipulations and Agreements.

(A) The parties may at any time file a stipulation and agreement as a proposed resolution of all or any part of a contested case. A stipulation and agreement shall be filed as a pleading.

(B) The commission may resolve all or any part of a contested case on the basis of a stipulation and agreement.

(2) Nonunanimous Stipulations and Agreements.

(A) A nonunanimous stipulation and agreement is any stipulation and agreement which is entered into by fewer than all of the parties.

(B) Each party shall have seven (7) days from the filing of a nonunanimous stipulation and agreement to file an objection to the nonunanimous stipulation and agreement. Failure to file a timely objection shall constitute a full waiver of that party's right to a hearing.

(C) If no party objects to a nonunanimous stipulation and agreement, the commission may treat the nonunanimous stipulation and agreement as a unanimous stipulation and agreement.

(D) A nonunanimous stipulation and agreement to which a timely objection has been filed shall be considered to be merely a position of the signatory parties to the stipulated position, except that no party shall be bound by it. All issues shall remain for determination after hearing.

(E) A party may indicate that it does not oppose all or part of a nonunanimous stipulation and agreement.

3. Decisions of the Commission, including decisions to adopt the proposals set forth in a nonunanimous stipulation, must be supported by appropriate findings of fact.<sup>3</sup> The Commission's statutory duty in deciding a contested case is to provide a full hearing, and to provide all parties the right to be heard and to introduce evidence.<sup>4</sup> The Commission cannot merely adopt a stipulation (whether unanimous or nonunanimous)

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<sup>3</sup> Section 386.420 RSMo; *State ex rel. Monsanto Company v. Public Service Commission*, 716 S.W.2d 791 at 795-796 (Mo. 1986) citing *State ex rel. Rice v. Public Service Commission*, 220 S.W.2d 61, 65 (Mo. 1949) and *State ex rel. Fischer v. Public Service Commission*, 645 S.W.2d 39 (Mo. App. 1982) cert. denied 464 U.S. 819, 104 S.Ct. 81, 78 L. Ed.2d 91 (1983).

<sup>4</sup> *Fischer*, 645 S.W.2d at 42.

without meeting these statutory requirements.<sup>5</sup> By the same token, the Commission can incorporate the recommendations of a stipulation into its decision if these statutory requirements are fulfilled.<sup>6</sup>

4. When a stipulation is signed by fewer than all of the parties, it is deemed a nonunanimous stipulation and agreement.<sup>7</sup> When a stipulation is nonunanimous and has been objected to by a party, it is considered to be the joint position of the signatories.<sup>8</sup> Whether unanimous or nonunanimous, a stipulation is a pleading,<sup>9</sup> and may be “filed at any time.”<sup>10</sup> The Commission may not “approve” or “disapprove” of a nonunanimous stipulation to which a party has objected. Rather, the Commission must consider such a nonunanimous stipulation to be merely a position of some parties, and it must be supported by the record after a full hearing of the issues presented for determination. The Commission will view the position articulated in the nonunanimous stipulation as a change of position by the signatories and may consider that position as it decides the issues.<sup>11</sup> The Commission may adopt the position of the nonunanimous stipulation so

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<sup>5</sup> *Id.* at 43.

<sup>6</sup> See *Fischer* at 42 (Section 386.410 RSMo. gives the Commission flexibility in its procedures if other statutory requirements are met).

<sup>7</sup> 4 CSR 240-2.115 (2)(A).

<sup>8</sup> *In the Matter of Empire District Electric Company*, 2001 Mo. PSC LEXIS 201, Case No. ER-2001-299 (May 24, 2001).

<sup>9</sup> 4 CSR 240-2115 (1)(A) and (2)(A).

<sup>10</sup> 4 CSR 240-2-115 (1)(A).

<sup>11</sup> *In the Matter of the Application of The Empire District Electric Company*, 1999 Mo. PSC LEXIS 173, Case No. EA-99-172 (Dec. 7, 1999).

long as the statutory requirements for making such a decision are met.<sup>12</sup> There must be, as always, an adequate factual record to support the Commission's decision.<sup>13</sup>

5. Pursuant to the authority above, Missouri law is clear that the Commission may consider a nonunanimous stipulation as representing the positions of the signatory parties. If the Commission has afforded all parties a full hearing with opportunity to offer evidence on all issues presented in the case for determination, the Commission has the authority and discretion to frame its decision pursuant to the nonunanimous stipulation.<sup>14</sup>

6. In the present case, the parties to the Stipulation represent the vast majority of consumers participating in this case, including all of Ameren Missouri's customer classes: residential, low-income, commercial and industrial customers. Only the Commission Staff and Ameren Missouri have objected to the Stipulation. No consumer party, and thus no affected party, has objected to the Stipulation.<sup>15</sup>

7. The Commission has the legal authority to consider the Stipulation as a position of the consumer parties, and the authority to enter an order consistent with the Stipulation. The Stipulation was filed after a full hearing on all issues presented for determination in this case. The Stipulation presents the position of the consumer parties regarding these issues, which are contained within the evidence and supported by the record as follows:

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<sup>12</sup> See *Empire*, 2001 Mo. PSC LEXIS 201.

<sup>13</sup> See *Empire*, 1999 Mo. PSC LEXIS 173.

<sup>14</sup> See *Fischer* at 42-43.

<sup>15</sup> Wal-Mart Stores East, LP, and Sam's East, Inc. filed testimony in this case expressly stating that they did not object to Noranda's rate request. See *Chriss Rebuttal*, Ex. 460, Page 4, Lines 59-63. The City of O'Fallon and the City of Ballwin, both in the municipal street lighting class, did not object to the Stipulation. The two remaining consumer parties, Continental Cement Company, L.L.C. and River Cement Company, also did not object to the Stipulation.

- a) **Rate.** Based on the testimony of Staff’s witness Sarah Kliethermes, the Commission found that “in order for other customers to be better off with Noranda on Ameren Missouri’s system than they would be if Noranda left the system, Noranda would have to pay some amount greater than \$31.50 for its electric service.”<sup>16</sup> The Stipulation requests that the Commission set an effective base rate for Noranda of \$34.44/MWh. The record before the Commission, as well as the Commission’s findings in this case, confirm that the rate of \$34.44/MWh would *not* constitute an “undue or unreasonable preference” for Noranda, since this rate will allow Ameren to fully recover the incremental cost to serve Noranda and will provide a benefit to other ratepayers by requiring Noranda to contribute to Ameren’s fixed costs.<sup>17</sup>
- b) **Term.** The term is addressed in the parties’ prefiled testimony and was examined during the hearing.<sup>18</sup> The record establishes that the term of five years requested in the Stipulation is consistent with Ameren’s standard EDR tariff.<sup>19</sup>

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<sup>16</sup> Report and Order, Page 17; Transcript, Page 791, Lines 16-20.

<sup>17</sup> Kliethermes Surrebuttal, Ex. 203, Page 2, Line 13.

<sup>18</sup> Scheperle Rebuttal, Ex. 200, Page 4, Lines 1-4; Davis Rebuttal, Ex. 100, Page 7, Line 16 – Page 8, Lines 18; Michels Surrebuttal, Ex. 105, Page 10, Lines 8-19; Smith Surrebuttal, Ex. 3, Page 19, Line 18 – Page 20, Line 11.

<sup>19</sup> Transcript, Page 745, Line 1 – Page 746, Line 17; Scheperle Rebuttal, Ex. 200, Page 4, Lines 1-4; Mantle Surrebuttal, Ex. 300, Page 12, Line 17 – Page 14, Line 21; Page 18, Line 12 – Page 19, Line 2.

- c) **Rate Increase Cap.** The proposed two percent cap on rate increases is addressed in the parties' prefiled testimony and was examined during the hearing.<sup>20</sup>
- d) **Fuel Adjustment Clause.** The issue of the proposed exemption from the fuel adjustment clause was addressed in the parties prefiled testimony, and possible compromise regarding the fuel adjustment clause was examined during the hearing.<sup>21</sup>
- e) **Noranda Commitments and Enforcement.** Noranda's employment and investment commitments and their enforceability were the subject of prefiled testimony and extensive questioning and testimony during the hearings as well.<sup>22</sup>

8. The Commission should consider the Stipulation because it represents the position of the majority of the consumer parties, and it is the consumer parties who are affected by the Commission's decision in this case. Because the Stipulation embodies the position of the majority of the consumer parties who will be affected by the Commission's decision, the Stipulation should be weighed by the Commission in considering the ultimate outcome of this case. The Stipulation is supported by the record, and should be adopted as a reasonable compromise of issues submitted for determination.

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<sup>20</sup> Transcript, Page 745, Line 1 – Page 747, Line 15; Smith Surrebuttal, Ex. 3, Page 19, Line 18 – Page 20, Line 19; Scheperle Rebuttal, Ex. 200, Page 4, Lines 1-4; Mantle Surrebuttal, Ex. 300, Page 13, Line 3; Page 14, Lines 8-21; Page 18, Line 12 – Page 19, Line 2.

<sup>21</sup> Scheperle Rebuttal, Ex. 200, Page 3, Lines 23-24; Smith Surrebuttal, Ex. 3, Page 20, Lines 13-20; Transcript, Page 195, Line 10 – Page 199, Line 24; Mantle Surrebuttal, Ex. 300, Page 12, Lines 5-6; Page 15, Line 1 – Page 16, Lines 22.

<sup>22</sup> Transcript, Page 629, Line 12 – Page 669, Line 8; Mantle Surrebuttal, Ex. 300, Page 2, Lines 14-23; Page 5, Line 13 – Page 6, Line 17; Davis Surrebuttal, Ex. 101, Page 9, Line 17 – Page 10, Line 8; Jarrett Rebuttal, Ex. 103, Page 11-22.

9. The Report and Order reflects the Commission’s decision not to consider the Stipulation, stating on page 27, footnote 87, as follows:

After the record closed, after briefs were filed, and after the Commission publicly began deliberations at an agenda meeting, the Complainants and other parties filed a series of non-unanimous stipulations and agreements, which have been formally opposed by Ameren Missouri and by Staff. Those stipulations and agreement[s] proposed specific compromise terms by which Noranda’s rates would be set at a level above \$30 MWh, subject to various conditions and commitments. Since those stipulations and agreements have been opposed, under Commission Rule 4 CSR 240-2.115 (2) (D), they can only be treated as revised positions of the signatory parties. The Commission finds their proposals intriguing – and encourages the parties to continue to pursue negotiations on a compromise position as it could be considered in Ameren Missouri’s current rate case, File No. ER-2014-0258.

The Report and Order concludes its discussion of the Stipulation by stating that “the Complainants bear the burden of proof regarding the relief they seek in that complaint, not some other relief that the Commission might craft on their behalf.”<sup>23</sup>

10. Complainants respectfully submit that Commission was mistaken in declining to consider the Stipulation. Commission Rule 4 CSR 240.2115 (A) provides that “[t]he parties may **at any time** file a stipulation and agreement as a proposed resolution of all or any part of a contested case.”<sup>24</sup> The Commission’s longstanding policy has been to encourage settlement.<sup>25</sup> Consistent with this policy, and decades of Commission

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<sup>23</sup> Report and Order, Page 27.

<sup>24</sup> 4 CSR 2.115 (1)(A) (emphasis supplied).

<sup>25</sup> *Mountain Iron & Supply Company v. Missouri Gas Energy*, 1997 Mo.PSC Lexis 108 \*4, Case No. GC-96-372 (August 19, 1997). The law favors settlement and compromises based on valid considerations. *Noonan v. Kansas City Power & Light Co.*, 2008 Mo. PSC Lexis 515, Case No. EC-2008-0335 (June 18, 2008), citing *Miners & Farmers’ Bank of Aurora v. American Bonding Co.*, 186 S.W. 1139, 1140 (Mo. App. S. D. 1916). See also *Sanger v. Yellow Cab Co.*, 486 S.W.2d 477, 481 (Mo. banc 1972).

precedent, there is no limitation on the Commission's authority to consider a nonunanimous stipulation at **any** stage of a case.<sup>26</sup>

11. Settlement has always been favored by the Commission, and should not be discouraged at any phase of proceedings. Representatives of consumer parties to the Stipulation have all participated actively in Commission cases for decades, albeit with a very recent change of the Public Counsel, and have a history of working diligently to settle issues whenever possible. In the present case, given the public importance and highly disputed nature of the issues, it is understandable that some of the signatory consumer parties reserved their positions or modified their positions after the evidence was presented. Although the Stipulation was filed at a late stage in this case, this should not be any impediment to the Commission's consideration of the signatory positions. It can be viewed as a point in favor of the Stipulation that it is based on a complete record, including a full hearing and briefing of all disputed issues.

12. The Report and Order is erroneous to the extent it rejects consideration of the Stipulation on the basis that the proposal presented by the Stipulation is different than Complainants' original proposal. The Stipulation represents a compromise of the varying positions supported by the record, and provides less rate relief than originally requested in the complaint, for a shorter period of time, with the addition of both employment and capital commitments by Noranda. The Commission rarely grants the full relief originally sought in any case brought before it—whether a complaint case, rate case or any other

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<sup>26</sup> See *In the Matter of Missouri Public Service, a Division of Utilicorp United, Inc., Proposed Tariffs to Increase Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company*, Case No. ER-93-37 (June 18, 1993) (nonunanimous stipulation considered after the Commission report and order upon rehearing); *In the Matter of the First Prudence Review of Costs Subject to Commission-Approved Fuel Adjustment Clause of Union Electric Company d/b/a Ameren Missouri*, Case No. EO-2010-0255 (May 26, 2011) (nonunanimous stipulation considered and adopted after Commission issued its report and order).



type of contested case. In the Commission's rich history of cases, the Commission usually accepts full or partial compromise of contested cases, or in the absence of compromise, issues a decision quite different than the relief originally requested. This is a natural outcome of the Commission's broad statutory discretion. The Commission may consider positions reflected in the Stipulation as a just and reasonable resolution of the disputed issues in based on the record, even if the Stipulated positions are different from the relief Complainants originally sought. A contrary result would not make sense, since the Commission is clearly authorized by Missouri law to consider both unanimous and nonunanimous stipulations and agreements. If such agreements could only reflect the original positions of parties, those agreements would never even arise in the first instance and contested cases would rarely if ever be settled. Commission Rule 4 CSR 2.115 (2)(D) specifically contemplates nonunanimous stipulations and agreements and provides for the consideration of such agreements. When a stipulation is nonunanimous and has been objected to by a party, the Commission views the stipulation as "merely a change of position." The rule demonstrates that such a change may be considered by Commission in its decision.

13. The Commission should adopt the rate proposed by the parties to the Stipulation because it is "just and reasonable" and consistent with the Commission's findings concerning the cost to serve Noranda in this case. The rate proposed by the Stipulation does not represent an undue preference, but instead exceeds Ameren Missouri's incremental cost to serve Noranda and includes payment of Ameren Missouri's fixed costs, thus providing rate benefits to Ameren Missouri's other customers.

14. As an additional ground for rehearing, the Report and Order is erroneous in that it cites the financial projections Noranda presented to Moody's Investors Service as a basis for concluding that Noranda failed to prove it is facing a liquidity crisis. Specifically, in finding of fact 14, the Commission found that "[f]ar from showing a liquidity crisis, Noranda's presentation to Moody's showed adequate liquidity throughout the five-year-cash-flow forecast used in the financial model."<sup>27</sup> However, the Moody's presentation,<sup>28</sup> as well as all other financial projections provided to investors by Noranda cited in the Commission's decision,<sup>29</sup> were based on the assumption that the \$30/MWh rate requested in this case would be granted.<sup>30</sup> Thus the Moody's presentation cited in finding of fact 14 of the Report and Orders is not competent and substantial evidence to support the Commission's conclusion that Noranda's financial model is flawed. Instead, this presentation shows that with the \$30/MWh rate Noranda would have adequate liquidity to continue its operations, which is consistent with the evidence presented to the Commission by Noranda in this case, and supports Complainants' request for relief.

WHEREFORE, for all the reasons stated above, the Commission should reconsider its Report and Order to consider the Stipulation as the position of the signatory

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<sup>27</sup> Report and Order, Page 8.

<sup>28</sup> Mudge Rebuttal Ex. 102, Schedule RSM-1HC.

<sup>29</sup> Report and Order, Pages 7-8 (quoting statements by Kip Smith and Noranda CFO Dale Boyles concerning Noranda's liquidity position).

<sup>30</sup> Mudge Rebuttal Ex. 102, Schedule RSM-1HC, Page 16, note 1, and Page 28 ("Key Assumptions for Projected Financials . . . Our cost estimates also reflect the impact of CORE productivity savings, including new power rate effective August 1, 2014. See list on page 16."); Smith Surrebuttal, Ex. 4, Exhibit A, Investor Communications:

1. Noranda assumed the requested power rate of \$30.
  - a. "Now, turning to our integrated net cash cost, we expect 2014 to range between \$0.75 to \$0.78 per pound reflecting a new power rate" – February, 2014 transcript.
  - b. "We have talked about power and what we built into our guidance there for the year" – April 23, 2013 transcript.

consumer parties and adopt the positions set forth in the Stipulation based on the record as a just and reasonable resolution of the disputed issues presented for determination in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by electronic mail this 12<sup>th</sup> day of September, 2014, to the parties on the Commission's service list in this case.

/s/ Diana Vuylsteke