

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

Noranda Aluminum, Inc., et al.,)
)
Complainants,)
)
v.)
)
Union Electric Company, d/b/a)
Ameren Missouri,)
)
Respondent.)

File No. EC-2014-0223

Noranda Aluminum, Inc., et al.,)
)
Complainants,)
)
v.)
)
Union Electric Company, d/b/a)
Ameren Missouri,)
)
Respondent.)

File No. EC-2014-0224

**AMEREN MISSOURI'S RESPONSE TO ORDER
DIRECTING THE PARTIES TO FILE A PROPOSED PROCEDURAL SCHEDULE**

COMES NOW Union Electric Company, d/b/a Ameren Missouri (“Ameren Missouri” or the “Company”) and hereby responds to the Presiding Officer’s March 28, 2014, order directing the parties to file proposed procedural schedules. For the reasons stated in this response, because motions to dismiss filed in the above-captioned cases raise significant questions not only about the legal sufficiency of the complaints and the Commission’s legal authority to grant the relief sought in the complaints, but also about whether the Commission should exercise its discretion to dismiss the complaints for good cause shown¹ or order its Staff to investigate, it is neither

¹ 4 CSR 240-2.116(4) . The Chief Staff Counsel's unsupported opinion that this regulation does not allow the Commission to either dismiss a complaint regarding a utility's rates or to alternatively order such investigation as the

necessary nor prudent for the Commission to establish a full procedural schedule in either case at this time. The Commission should therefore defer further action in both cases until it decides the pending motions to dismiss, which as discussed herein can be expeditiously determined by the Commission. If one or both of those motions is denied, the Commission and the parties will be in a much better position to fashion appropriate procedural schedules for these cases, on either a separate or consolidated basis.

Alternatively, if the Commission concludes that procedural schedules should be established at this time, the two pending complaint cases should be combined with the Company's soon-to-be-filed general rate case and a single procedural schedule be should be established for the consolidated docket, as set forth herein.

**THE MOTIONS TO DISMISS PENDING IN EACH OF THE COMPLAINT CASES
RAISE SIGNIFICANT QUESTIONS REGARDING THE LEGAL SUFFICIENCY OF
THE COMPLAINTS AND THE COMMISSION'S AUTHORITY TO GRANT SOME OR
ALL OF THE RELIEF SOUGHT BY THE COMPLAINANTS**

1. The motions to dismiss pending in each of the complaint cases raise significant legal issues regarding both the sufficiency of the complaints themselves and the Commission's authority to grant the relief that the complainants seek. Caution, coupled with a desire to avoid wasting time, effort, and resources in pursuit of relief the Commission is powerless to grant, suggest the Commission should not establish a procedural schedule for either complaint case – except for whatever additional scheduling is necessary to promptly provide for full and complete vetting and consideration of the motions to dismiss – until after the Commission decides those motions. The Presiding Officer has ordered Ameren Missouri to file by April 15, 2014, its reply to the various pleadings in opposition to the motions to dismiss. That reply will include a request

Commission believes appropriate in lieu of dismissal and in lieu of proceeding to establish formal procedural schedules is, we, believe, erroneous. We will address this issue further in our reply to the various pleadings filed in response to our motions to dismiss.

for oral argument of the motions, and will further request that the arguments be scheduled as soon as practicable following the April 15th filing. Assuming the Commission's calendar permits, those motions could be fully submitted and ready for decision before the end of April. Therefore, the delay in establishing procedural schedules that Ameren Missouri recommends need not be lengthy, although it should be long enough to enable the Commission to carefully consider and decide the significant issues raised by the motions. Only after those motions are decided will the Commission and the parties be able to determine how and when any remaining claims should proceed.

2. In its motion to dismiss in File No. EC-2013-0223, Ameren Missouri argues the complainants fail to state a claim upon which relief can be granted because their allegations focus exclusively on the Company's past financial results, and fail to allege that the Company's current rates are unfair, unreasonable, or otherwise unlawful. In addition, the motion argues that complainants' allegations of excessive earnings are not based on the type of comprehensive and rigorous cost of service study that the Commission invariably employs when deciding general rate cases, and further argues that because such a rigorous analysis is required by law the allegations in the complaint do not state a valid claim. The motion describes the type of cost of service study the law requires, one that evaluates and considers "all relevant factors" affecting rates – i.e. revenue, expense, investment in plant-in-service, a fair return on and of a utility's capital, and how the revenue requirement should be collected from ratepayers – and cites *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41 (Mo. Banc 1979) as authority for that requirement. Moreover, the Commission has consistently required that all relevant factors be considered in the context of a current test year and update period, to reflect current costs that the utility is experiencing. Why? Because the very purpose

of using a current test year and update period is to develop a reasonable proxy for what revenues, rate base, and expenses will be during the future when the rates set in the case at issue would be in effect. Using data stretching back more than 40 months – which complainants have done – is patently insufficient for this purpose. Indeed, before proceeding with that complaint, it is critical that the Commission determine, at a minimum, whether the allegations on which the complaint is based satisfy the requirements of the “all relevant factors” affecting rates standard.

3. Ameren Missouri’s motion to dismiss also argues that the complaint in File No. EC-2014-0223 ignores the legal principle the Missouri Supreme Court announced in *Straube v. Bowling Green Gas Co.*, 227 W.W.2d 666 (1950). *Straube* holds that when the Commission sets rates it does not determine either the maximum or minimum return the utility can earn during the period those rates are in effect. The *Straube* court recognized that the return a utility earns “will necessarily vary from time to time.” *Id.* at p. 671. Therefore, before it establishes a procedural schedule to further consider that complaint, the Commission must determine whether complainants’ allegation that Ameren Missouri’s surveillance report earnings have temporarily exceeded the rate of return authorized in its last rate case is a legally sufficient basis for such a complaint. Clearly the simple fact that a surveillance report shows earnings in excess of the utility’s last-authorized return on equity level is insufficient to establish that a utility’s rates are unjust or unreasonable, insofar as during the Company’s last rate case surveillance reports showed just that. Yet the Commission properly determined that the Company’s rates needed to be increased to produce an additional approximately \$260 million of revenue annually.

4. The Company’s motion also argues the complaint is legally deficient for another reason: the complainants failed to allege a substantial change in circumstances since the Commission last fixed Ameren Missouri’s rates. The Missouri Court of Appeals confirmed the

importance of this principle of regulatory law in *State ex rel. Ozark Border Electric Coop v. Public Service Commission*, 924 S.W.2d 597. In *Ozark Border*, the court held that any complaint challenging an existing rate or tariff is an unlawful collateral attack on a Commission order unless the complainants both allege and prove a substantial change in circumstances. *Id.* at p. 600. The complaint in File No. EC-2014-0223 satisfies neither of those criteria, so before proceeding further with that case the Commission should determine whether the complaint presents a valid challenge to Ameren Missouri's rates or is, instead, an unlawful collateral attack.

5. The motion to dismiss in File No. EC-2014-0224 claims that complaint also fails to follow and comply with the legal principles announced in *Utility Consumers Council*. As was the case in their other complaint, the complainants in File No. EC-2014-0224 do not allege that Ameren Missouri's rates are unfair, unreasonable, or otherwise unlawful based on a consideration of "all relevant factors" that have a bearing on the price to be charged for utility service – i.e., on the rates the Company's customers pay. Instead, the complaint focuses on a single customer, Noranda Aluminum, Inc. ("Noranda"), and alleges that because the Company's cost-based rates adversely affect that customer's business results and long-term prospects the Commission should reduce those rates and shift a portion of Noranda's fixed-cost support obligation to Ameren Missouri's other customers. But the law is clear: the Commission cannot, in a "rate design case" (which might be proper characterization of this complaint) raise the rates of all of the Company's non-lighting customers and reduce Noranda's rates simply by relying on Noranda's claimed private business need for lower rates. Even if that were one factor that might have bearing on the Company's rates, it is certainly not the only relevant factor. Moreover, the law is also clear that the Commission "lacks statutory authority to approve discriminatory rates," and the Commission would exceed its statutory authority if it were to order one or more classes

of the Company's ratepayers to "pay significantly more than the actual cost of service . . . for the express purpose of subsidizing" Noranda's rates. *State ex rel. City of Joplin v. Public Service Commission*, 186 S.W.3d 290, 296 (Mo. App. 2005). Even more importantly, the law is clear that if a difference in rates between one type or class of customer is to be allowed, it must be based the difference between the character of the service, not on some private business need or for economic development purposes. *The Laundry, Inc. v. Public Service Commission*, 34 S.W.2d 37, 44-45 (Mo. 1931), citing *Civic League*, 4 Mo. P.S.C. 412. *See also Western Union Telegraph Co.*, 181 U.S. 92, 100 (1901), *quoted with approval* by our Supreme Court in *The Laundry, Inc.* at 34 S.W.2d at 45.

6. Consequently, before establishing a procedural schedule to further consider Noranda's request for special rate treatment, the Commission should first satisfy itself that Missouri law authorizes it to grant the relief Noranda seeks. Moreover, even if the Commission could grant the relief Noranda seeks, the full Commission must carefully consider whether it should engage in the large wealth-shift Noranda seeks through the subsidy it would receive from the Company's other customers, as opposed to leaving those kinds of important policy decisions to the General Assembly, as other states have done.

7. The issues summarized in the preceding paragraphs, and explained in more detail in the motions to dismiss, present substantial questions regarding both of the pending complaints. Some focus on the sufficiency of the complaints themselves. Others focus on the Commission's authority to grant complainants some or all of the relief they seek or on whether the Commission should proceed with the complaints in the manner complainants advocate, even if the Commission could do so. But regardless of their focus, the Commission should address and decide all those questions prior to moving forward to establish procedural schedules for either of

the two complaints. Because most of these legal issues cast doubt on the Commission's ability to proceed with the complaints as pleaded or to grant the relief sought in those complaints, the Commission and all parties would be best served if the Commission addresses those issues at the outset. Moreover, until those critical legal and policy questions are answered, and the parties can determine which claims raised in the complaints will be allowed to go forward, further action on a procedural schedule also would be imprudent. If the Commission grants the Company's motions, in whole or in part, no procedural schedule may be necessary in one or both cases, and whatever schedule is required likely will be very different from any schedule that could be established prior to final disposition of those motions.

8. The potential benefits of this course of action were recently demonstrated in consolidated File Nos. EC-2013-0377 and EC-2013-0378. Like the current complaint cases, those two cases raised significant legal issues regarding the Commission's authority to grant the relief the complainants were seeking. Recognizing that fact, the parties agreed to defer establishing a full procedural schedule until after the Commission decided dispositive motions filed by both the complainants and the respondents. The wisdom of that decision was confirmed when the Commission granted respondents' motions to dismiss, thereby obviating any need for a further procedural schedule and sparing the parties the time, expense, and effort associated with working on claims that never would be adjudicated.

IF A PROCEDURAL SCHEDULE MUST BE ADOPTED AT THIS JUNCTURE, THE COMMISSION SHOULD CONSOLIDATE THE TWO COMPLAINT CASES WITH AMEREN MISSOURI'S UPCOMING GENERAL RATE CASE AND SHOULD PRESCRIBE A SINGLE PROCEDURAL SCHEDULE THAT APPLIES TO ALL THE CONSOLIDATED CASES

9. If the Commission rejects Ameren Missouri's primary recommendation and opts, instead, to establish a procedural schedule prior to deciding the Company's motions to dismiss,

the Commission must first determine whether to combine or consolidate one or both of the complaint cases with Ameren Missouri's soon-to-be-filed general rate case.² The Presiding Officer suggested to the parties that they consider proposing a schedule that would consolidate these three cases during the March 28th procedural conference, and in his order following that conference he specifically directed the parties to address that question as part of their proposed procedural schedules. For the reasons stated *infra*, a combined or consolidated procedural schedule for all three of the aforementioned cases should be adopted. Ameren Missouri commits that it will file its rate case on or before July 15, 2014.

10. There are several reasons why a consolidated procedural schedule is the best option available to the Commission and the parties to the two complaint cases. But the most compelling reason favoring a consolidated docket is that the three cases share common factual issues as well as common legal principles governing how those factual issues must be considered and decided. All three cases involve proposed adjustments to Ameren Missouri's rates, a complicated question which, as noted above requires the development of a cost of service study (based on a current test year and update period) and a class cost of service study in order to satisfy the legal requirement that the Commission consider all relevant factors. Moreover, a consolidated docket will enable the Commission to engage and fully utilize the resources of the Commission Staff ("Staff"). As discussed in greater detail *infra*, requiring the Staff to become actively engaged in issues common to all three cases, and to investigate Noranda's assertions and conduct an independent cost of service study and class cost of service study, is the only way the Commission can ensure that a full and complete record – one that considers "all relevant factors" affecting rates – is developed and available to advise the final orders in each of those cases.

² In accordance with 4 CSR 240-4.020(2), on March 21, 2014, Ameren Missouri filed notice of its intent to file a general rate case. That Commission has assigned that prospective case File No. ER-2014-0258.

Under such circumstances, a consolidated docket with a single procedural schedule is by far the most expeditious way for the parties to vet, and for the Commission to consider and decide all issues the law requires.

11. The “all relevant factors” standard ultimately will control the Commission’s decision in not only the complaint cases – if they are allowed to move forward – but also Ameren Missouri’s upcoming general rate case. Satisfying this standard will require a comprehensive review of all aspects of the Company’s finances and operations. A current test year must be established so that revenue, expense, and investment can be analyzed, evaluated, and matched for a relevant time period so that a reasonable proxy upon which to set future rates can be used. Ameren Missouri’s books and records will have to be audited to determine what levels of revenue, expense, and investment are reasonable for purposes of evaluating current rates and setting rates for the future. Depreciation rates and accounts must also be reviewed to assure they, too, are reasonable. And an analysis must be undertaken to determine what rate of return is appropriate. An update period must also be established so that significant rate base additions that Ameren Missouri has already paid for and which are already in service, which are completely unaccounted for in complainants' stale and grossly deficient "cost of service," can be considered in setting rates. The same is true of significant additions to the Company's system that the Company is currently paying for and which will be in service in a matter of months—including its electrostatic precipitator project at the Labadie Energy Center, its replacement of the reactor head at the Callaway Energy Center and its installation of solar facilities near O’Fallon, Missouri. The rate base additions already made and these major projects which are underway, which are scheduled to be in-service before the end of this year, will provide significant benefits to customers and should be considered in establishing any forward-looking rates.

12. Because the Staff is the only group, other than Ameren Missouri, with the resources necessary to conduct such a comprehensive review, the Commission must order Staff to become actively involved in the three cases. Although a recent pleading suggests that Staff does not necessarily intend to take the initiative to become actively involved in the two complaint cases, that position is untenable from both a practical and legal standpoint. Therefore, the first phase of Ameren Missouri's proposed consolidated procedural schedule would be for the Commission to direct Staff to initiate a thorough investigation of the allegations in both of the complaint cases. Such an investigation should include an investigation of Noranda's assertions regarding its financial condition, conditions in the businesses in which Noranda operates, Noranda's true need for the particular rate that it seeks and the capital investments it claims it needs to make, the impact on other customers and other matters that have a bearing on Noranda's requests for relief. Moreover, Staff should be ordered to initiate a full cost of service study that could be used to set Ameren Missouri's rates. Such a study will address "all relevant factors" affecting the Company's rates, which means it will be essential to the Commission as it evaluates not only Ameren Missouri's upcoming rate case but the two pending complaint cases as well. And because investigation of Noranda's claims and a cost of service study cannot be completed overnight, the consolidated procedural schedule should allow sufficient time to enable Staff to do a thorough and complete job. This should include the time necessary for Staff to incorporate into its cost of service report the data Ameren Missouri will file as part of its general rate case, so that the report reflects all information that is relevant to final disposition of all the consolidated cases.

13. The Commission also should direct Staff to perform a class cost of service study, because the results of such a study are relevant to rate design questions that will be raised by the

upcoming general rate case as well as to similar questions raised by the two complaint cases – indeed, it will provide valuable information of regarding the level of discrimination that is inherent in Noranda's request to cut its current rates by approximately 28%, and even 22% below what Noranda's own witness's cost of service study indicated the cost to serve Noranda to be in the Company's last rate case. Traditionally, such a study is performed simultaneously with Staff's cost of service study, so requiring Staff to prepare such study should not significantly extend the procedural schedule. Such a study is needed because Staff performed its last cost of service study of Ameren Missouri in conjunction with the last general rate case, which was filed in February 2012. Therefore, it is unlikely that the Commission would be willing to – or should – rely on Staff's last class cost of service study to decide rate design issues raised by the two complaint cases – including Noranda's request for a substantial rate reduction – or the upcoming general rate case. Staff's new cost of service study could then be evaluated alongside the study Ameren Missouri is required to perform as part of its general rate case filing. Other parties – including the Office of the Public Counsel and the Missouri Industrial Energy Consumers – also have typically performed class cost of service studies in conjunction with past Company rate cases. A consolidated procedural schedule would allow them to do so again, with the added advantage that the Commission could use the results of those studies for the two complaint cases as well as for Ameren Missouri's upcoming general rate case.

14. The studies described in the two preceding paragraphs are time consuming and cannot be completed overnight, and parties to the complaint cases who are seeking “expedited relief” in those cases may view the time required to complete the studies as an unnecessary obstacle to achieving their objective. But regardless of how much the complainants and others want expedited relief, the Commission should not sanction shortcuts to achieve their objectives

that are inconsistent with the full consideration of “all relevant factors,” having a bearing on the Company's rates, which is the standard mandated by law. As the Commission is aware, it routinely takes eleven months to process a general rate case, and there is no reason to believe that the analysis that will be required to process two complaint cases governed by the same standard can be completed in a shorter timeframe. That would be true even if those cases are not consolidated with the Company’s upcoming general rate case. Moreover, the law requires general rate cases to be prioritized and completed within eleven months,³ but there is no similar time limit – indeed, there is no time limit at all – for complaint cases. Therefore, as soon as Ameren Missouri files its upcoming rate case that case will become a Commission priority as a matter of law, and Staff resources that otherwise would be available to work on the complaint cases will be diverted to work on the rate case. The consolidation the Company proposes avoids that result, because the Staff resources that otherwise would work exclusively on the rate case will, instead, be working on the consolidated docket. This will allow all three cases to be completed as expeditiously as is possible in accordance with applicable law.

15. The Commission also should note that although Noranda has requested expedited relief in File No. EC-2014-0224 the need for such relief is not as great as Noranda’s request might suggest. The prefiled direct testimony of Noranda’s Chief Executive Officer Kip Smith states that closure of the New Madrid Smelter is not imminent even if Noranda does not receive the rate reduction it requests. In fact, Mr. Smith doesn’t even claim that Noranda definitely plans to close the smelter. Instead, he merely warns the smelter will be “subject to closure” at some point in the future, beyond the date that the Commission would decide the consolidated docket in the normal course. An allegation that the smelter will be "subject to closure" provides absolutely

³ Section 393.150.2, RSMo (2000) (Requiring that rate increase proceedings be given preference over all other questions pending before the Commission).

no basis for expediting these cases, any more than a mere allegation by a utility that it "might be imperiled financially" would. Moreover, the Complainants clearly do not meet the standard for establishing interim rates that the Commission has applied to utilities, and there is no reason to apply a different standard here. In Ameren Missouri's 2010 rate case, File No. ER-2010-0036, the Commission denied the Company's request for an interim rate increase. In the *Report and Order* denying Ameren Missouri's request, the Commission stated that absent a showing of "extraordinary circumstances" it "will not act to short circuit the rate case review process" because "[b]y its nature, an interim rate increase will take money from the pocket of ratepayers and give it to the utility's shareholders before the complete review of the company's earnings and expenses that will occur during the full rate case process." *Id.* at pp. 11-12 (January 13, 2010). Not only would expediting Noranda's rate shift complaint take money from some ratepayers and give it to Noranda without a full examination of Noranda's assertions or of cost of service and class cost of service studies, but expediting Noranda's over-earnings complaint case would take money from the Company without affording the Company the benefit of the full review that should take place via a full rate case process. The Commission confirmed its views in this regard in a subsequent case involving The Empire District Electric Company, where it reiterated the importance of fully vetting all issues related to a utility's cost of service, and reaffirmed that as a matter of regulatory policy the Commission will not grant expedited rate relief "unless the utility is facing extraordinary circumstances and there is a compelling reason to implement an interim rate increase." *Report and Order Regarding Interim Rates*, File No. ER-2012-0345 (October 31, 2012), pp. 10-11. In that case, which addressed the impact of the Joplin tornado on Empire's operations, the Commission found no such "extraordinary circumstances" or "compelling reason." The history of applying that standard at the Commission is that the utility

needs to be close to bankruptcy or that it has to be proven (not just alleged) that the utility will suffer significant, irreparable financial harm before a full rate case could be completed. Here, it is not even alleged, much less proven, that this would be the case regarding Noranda,

16. In addition, there are practical problems for handling cases involving Ameren Missouri's rates in separate proceedings. Adjusting rates, either up or down, in the middle of a pending rate case will create a situation where rate tariffs are "pancaked," which some might argue would moot the Commission's suspension of tariffs as part of the rate case. This practical consideration suggests that all dockets in which adjustment of Ameren Missouri's rates are being considered must be consolidated.

17. For all the reasons cited above, Ameren Missouri asks the Commission to combine the three cases and adopt the consolidated procedural set out below, or one very similar to it. The time intervals separating the various elements of the Company's proposed schedule approximate those from past Ameren Missouri rate cases, and should, therefore, reflect the amounts of time parties to those cases have indicated are necessary to adequately complete the prescribed tasks. But, as noted earlier, unlike a normal procedural schedule in a general rate case, the initial step in this proposed schedule involves the Commission directing Staff to investigate the allegations in the complaints and commence its investigation of Noranda's assertions and cost of service and class cost of service studies. In addition, as noted previously, because data collected by Staff during the early phases of those investigations will need to be integrated with data filed as part of the Company's general rate case, the proposed schedule builds in time to allow Staff to perform that integration.

PROPOSED CONSOLIDATED PROCEDURAL SCHEDULE

Commission Orders Staff to Initiate an Investigation of the allegations contained in the complaints and to initiate Cost of Service and Class Cost of Service studies	As soon as possible
Ameren Missouri Tariff and Direct Testimony in Case No. ER-2014-0258	On or before July 15, 2014
Order Consolidating Cases	July 16, 2014
Staff Report/Testimony and OPC's and Intervenors' Direct Testimony – Revenue Requirement	October 31, 2014
Staff Report/Testimony and OPC's and Intervenors' Direct Testimony – Rate Design	November 14, 2014
Preliminary Reconciliation	December 9, 2014
Rebuttal Testimony	December 19, 2014
Local Public Hearings	December 2014/January 2015
End of True-Up Period	December 31, 2014
Surrebuttal/Cross-Surrebuttal Testimony	January 15, 2015
Evidentiary Hearings	Feb. 9-Feb 27, 2015
True-Up Direct Testimony	March 11, 2015
True-Up Rebuttal Testimony	March 18, 2015
True-Up Hearing	March 24-25, 2015
Initial Briefs	March 26, 2015
Reply/True-Up Brief	April 8, 2015
Report and Order	May 6, 2015
Rehearing Deadline	May 15, 2015
Compliance Tariffs	May 11, 2015

Approval of Compliance Tariffs	May 20, 2015
Rehearing Deadline for Compliance Tariffs Order	May 29, 2015
End of Rate Case Suspension Period	On or before June 13, 2015

WHEREFORE, for the reasons stated herein, Ameren Missouri requests the Commission to 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. If, however, the Commission determines that a full procedural schedule should be established prior to the final disposition of those motions, the Company requests the Commission consolidate the two complaint cases with Ameren Missouri's soon-to-be-filed general rate case and adopt a procedural schedule for the consolidated cases as proposed herein or one similar to it.

Respectfully submitted,

UNION ELECTRIC COMPANY
d/b/a Ameren Missouri

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**ATTORNEYS FOR UNION ELECTRIC
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served on all parties of record in File Nos. EC-2014-0223 and EC-2014-0224 via electronic mail this 1st day of April, 2014

/s/ L. Russell Mitten