

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

In The Matter of Noranda Aluminum's Possible)	
Material Default in a Condition Necessary to)	File No. EO-2016-0203
Remain on the IAS Rate Schedule Established in)	
Case No. ER-2014-0258)	

**REPLY TO RESPONSE OF NORANDA ALUMINUM, INC.
OF UNITED FOR MISSOURI, INC.**

COMES NOW United for Missouri, Inc. ("UFM"), and provides its reply to the Response by Noranda Aluminum, Inc. to Petition ("*Response*") of the Staff of the Missouri Public Service Commission.

1. On February 3, 2016, the Staff ("Staff") of the Missouri Public Service Commission filed a petition alleging that Noranda Aluminum, Inc. ("Noranda") failed to comply with a condition for service under the Industrial Aluminum Smelter rate class ("IAS"), namely the employ of 850 people as established in the Missouri Public Service Commission's ("*Commission's*") *Report and Order* in Case No. ER-2014-0258 ("*Report and Order*").

2. On February 9, 2016, Noranda filed its *Response*, affirming that it temporarily reduced its Smelter workforce below the levels provided in the *Report and Order* and arguing that three *force majeure* events occurred, justifying its failure to comply with the requirement without losing the right to take service under the IAS.

3. On February 18, 2016, the Commission issued an *Order Directing Reply*, directing Staff and permitting other parties to reply by February 23, 2016.

4. Noranda claimed three occurrences constituted force majeure events, justifying an excuse for complying with the employment requirement. The three events included (1) an electric supply circuit failure causing extensive damage to two of the three pot lines at the

Smelter, (2) a decline in London Metals Exchange (“LME”) aluminum prices to lower levels than envisioned in Case No. ER-2014-0258, and (3) a molten metal explosion occurring at the cast house of the Smelter facility (events (1) and (3) collectively referred to hereafter as “accidents”). In its argument, Noranda cited to a portion of the *Report and Order* from Case No. ER-2014-0258 granting Noranda the reduced rate:

11. As a condition to access the reduced rate structure available to the IAS class, the IAS customer shall provide the Commission’s Staff and all parties to this rate case the following information regarding employment at the New Madrid smelter:

The IAS customer shall file a monthly certification of compliance and quarterly surveillance reports demonstrating that the customer has fulfilled the requirement that employment at the New Madrid smelter meets or exceeds a daily average of 850 full-time equivalent personnel, either direct employees or contract personnel, and specifically noting instances where the employee count goes below the required average because employees have voluntarily left the customer’s employ and the IAS customer is actively seeking to fill those positions, or due to *force majeure* or other events considered by the Commission to be outside the IAS customer’s control.

Report & Order, pages 135-136 (Emphasis as provide in the *Response*). Based on this language, Noranda believes the three events constitute a *force majeure* and justify Noranda remaining on the IAS rate.

5. UFM disagrees with Noranda’s assessment. In *Clean Uniform Co. v. Magic Touch Cleaning*, 300 S.W.3d 602 (Mo. App., 2009), the Eastern District Court of Appeals discussed the purpose of a *force majeure* or escape clause.

A *force majeure* clause is a "contractual provision allocating the risk if performance becomes impossible or impracticable, esp. as a result of an event or effect that the parties could not have anticipated or controlled." BLACK'S LAW DICTIONARY 718 (9th ed. 2009). Parties typically address the risk of supervening events in a *force majeure* or other escape clause. See LORD, *supra*, § 74.19. The purpose of a general, catch-all phrase, such as "causes beyond [the parties'] control," in a *force majeure* or escape clause is to relieve a party of liability when the parties' expectations are frustrated due to an "unforeseeable occurrence" beyond the parties' control. LORD, *supra*, § 77:31. See also,

14 JAMES P. NEHF, CORBIN ON CONTRACTS § 74.19 (2001). Thus, foreseeable events are not encompassed in the catch-all provisions of such a clause and remain subject to the requirement that they must be expressly set out in a contract to relieve a party of liability.

300 S.W.2d at 610. The three events Noranda describes in its *Response* are not *force majeure* events for several reasons.

6. The *force majeure* clause must be interpreted in its context. The words immediately before it describe events in which employees have left Noranda's employ voluntarily and Noranda is actively seeking to fill those positions. The *force majeure* clause speaks to Noranda's inability to bring the staffing level up to the 850 level despite its efforts to do so, not when it is actively seeking to reduce the employee level. The general provision must be interpreted in light of the more specific provision immediately before it. Only by interpreting the clause in this manner will the *Clean Uniform* discussion make sense. When Noranda's inability to hire suitable employees prevents it from maintaining the 850, its economic expectations would be thwarted by enforcing the requirement. But as UFM describes below, adopting Noranda's interpretation, will further thwart the Commission's economic expectations.

7. Granting Noranda the right to continue under the IAS rate is counter to the very purpose of the IAS rate. As the Commission indicated in its *Report and Order*,

The Commission is not tasked with protecting private interests, and it does not want to reward Apollo's behavior in any way, but it must protect the public interest and set just and reasonable rates. In these circumstances, the public interest encompasses more than the economic concerns of Noranda's employees, the Bootheel, or even the state of Missouri. Specifically, and of greatest import to this Commission's mandate, is the effect of Noranda's closure on Ameren Missouri's other customers. It is important to understand that a customer in St. Louis who has no connection to the Bootheel, will pay higher electric rates if Noranda closes its smelter. Right now, Noranda pays a large portion of Ameren Missouri's fixed costs, costs that will not go away just because Noranda no longer buys electricity. If Noranda closes its smelter, those costs will still be there, but then all Ameren Missouri's other customers will have to pick up the bill for those

fixed costs. Thus, Ameren Missouri's other customers will benefit from retaining Noranda's load for Ameren Missouri.¹

The goal of the special rate was to keep Noranda in business so it could benefit Ameren Missouri's other ratepayers. Clearly, with the significant reduction in load and likely future closure of the Smelter, that goal has already been thwarted. The subordinate justification that Noranda will benefit the local economy is also gone. The reduced rate will not now contribute to the fixed charges other Ameren Missouri customers would otherwise have to bear. What was allegedly a rate for the benefit of Ameren Missouri's ratepayers will now clearly be a rate for Noranda's private benefit. There is now no justification for what is clearly a discriminatory rate.

8. Performance did not become impossible or impractical due to the three events Noranda describes in its response. Neither the accidents nor the decline in aluminum prices are the immediate cause in Noranda's decision to lay off its workers. Noranda could have kept its employees employed. For whatever reason Noranda chose to reduce its workforce, it was not compelled to do so by the three described events.

9. The events described by Noranda were foreseeable. As a general principle, industrial accidents occur and prices fluctuate in commodities markets. As to Noranda in particular, the Commission is well aware of Noranda's operating history and that electric disruptions have happened in the past, producing manufacturing difficulties. Noranda also advised the Commission of the fluctuation of aluminum prices on the LME in the last rate case. Depressed aluminum prices were a core factor in the Commission's determination to give Noranda a reduced rate. The Commission recognized that the projections it received from

¹ *Report and Order*, pp. 131-132.

Noranda were simply that, projections.² The fact that the projections were wrong does not mean the potential decline was unforeseen.

10. The accidents were not out of Noranda's control. The accidents occurred on Noranda's premises in or on Noranda's equipment. *Force majeure* events typically include acts of war or acts of God which no human being can prevent. Noranda, at a minimum, must explain how these events were tantamount to acts of God and how it was unable to humanly anticipate and/or prevent these accidents.

WHEREFORE, United for Missouri, Inc. prays that the Commission deny Noranda access to the IAS rate.

Respectfully submitted,

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² "The additional evidence describes a looming problem for Noranda: it must seek to refinance its existing debt in 2017 and 2019. Noranda presented various scenarios based on the price of aluminum in which it would run out of liquidity (cash and available credit) in the next few years. Those scenarios were criticized a [sic] not the most likely to occur, and indeed, they are not intended to be forecasts of aluminum prices. Rather, they are scenarios of what would happen if aluminum prices, which are volatile, were to drop. They are worst case scenarios, but sometimes the worst happens." *Report and Order*, p. 130.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Initial Brief of United for Missouri, Inc. was sent to all parties of record in File No. EO-2016-0203 via electronic transmission this 23rd day of February, 2016.

/s/ David C. Linton