

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

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

File No. EC-2014-0223

**THE OFFICE OF THE PUBLIC COUNSEL’S MOTION IN LIMINE
AND SUGGESTIONS IN SUPPORT**

COMES NOW the Office of the Public Counsel (Public Counsel) and respectfully moves the Missouri Public Service Commission (Commission) in limine to order the parties, their counsel and their witnesses not to, at any time, inquire into, elicit testimony, volunteer, or inject evidence or statements in the presence of the Commission or its regulatory law judge(s) during the evidentiary hearing and subsequent case procedure, including but not limited to, opening and closing statements and witness examinations which relate directly or indirectly to the pending Ameren Missouri rate case filed under Commission File No. ER-2014-0258.

ER-2014-0258 is merely a pending, unresolved, unverified and unlitigated request, and as such the testimony, documentation, or other information related to ER-2014-0258, if injected into this case, is irrelevant in that it lacks probative value as evidence in the current Complaint case against Ameren Missouri, and is potentially unfairly prejudicial. Public Counsel requests that the Commission take up its Motion in Limine before the July 28, 2014 hearing. In support of its Motion in Limine, Public Counsel respectfully states as follows:

Introduction

This proceeding was commenced by, and is limited by, the Excess Earnings Complaint submitted by Noranda Aluminum, Inc. (Noranda) and 37 individual customers of Ameren Missouri on February 12, 2014. Subsequent to the filing of this Excess Earnings Complaint, many other entities intervened and numerous rounds of testimony were prepared and filed with the Commission culminating in an evidentiary hearing scheduled for July 28, 2014 through August 1, 2014.

On July 3, 2014, not coincidentally less than four weeks before the evidentiary hearing in this Excess Earnings Complaint was set to begin, Ameren Missouri filed tariff sheets under Commission File No. ER-2014-0258 consisting of electric rate schedules designed to increase Ameren Missouri's base gross annual electric revenues by approximately \$264 million.

Testimony, Documentation, or Other Information Relating to ER-2014-0258 is Prejudicial and Irrelevant

As this is an Excess Earnings Complaint, the amount of annual revenues Ameren Missouri collects in rates per its Commission-approved tariff, and the reasonableness of those revenues, is the central issue. In fact, the only question before the Commission is: Can and should the Commission order a reduction in Ameren Missouri's rates as proposed by Complainants, to apply to service rendered after the conclusion in this case?

By suggesting that an increase in Ameren Missouri's annual revenues is necessary, ER-2014-0258 unreasonably prejudices this Excess Earnings Complaint. ER-2014-0258 is based on information filed less than four weeks before the evidentiary hearing in this Excess Earnings Complaint, and any testimony, documentation, or other information relating to ER-2014-0258 is

unresolved, unverified and unlitigated. Since ER-2014-0258 is a case in its infancy, Ameren Missouri could easily dismiss the case once the Excess Earnings Complaint case is completed. Additionally it is irrelevant at this time what Ameren Missouri thinks its future rates should be. Only a fully litigated rate case culminating in Commission-approved tariffs could provide relevant testimony, documentation, or other information for Commission review in this Excess Earnings Complaint.

Testimony, Documentation, or Other Information Relating to ER-2014-0258 Lacks Probative Value

The Commission's decision in this Excess Earnings Complaint must be based on competent and substantial evidence:

The provision for circuit court review of orders of the Public Service Commission is found in section 386.510 (all references are to RSMo 1959 unless otherwise noted) which provides that such review shall be for the "purpose of having the reasonableness or lawfulness" of the administrative action determined. This statutory provision is broadened by the application of the provisions of the V.A.M.S., Missouri Constitution, Article 5, Section 22, setting forth the scope of review of administrative action pursuant to a hearing required by law. This constitutional provision provides for review both as to whether such action is "authorized by law" **and whether the action is "supported by competent and substantial evidence upon the whole record."** Thus, the duty incumbent upon the reviewing circuit court is dual in nature, at least to the extent that a determination of competent and substantial evidence is a determination of a separate question as contrasted with the phrase "authorized by law." *State ex rel. Centropolis Transfer Co. v. Public Service Com.*, 472 S.W.2d 24, 25-26 (Mo. Ct. App. 1971) (Emphasis added; citations omitted).

Any decision of the Commission must have probative value and must not be based on the Commission's own expertise:

The reviewing court is often faced with the question what lack of evidence can be supplied by the expertise of the Commission. No clear line can be drawn from the cases. We go to considerable lengths to give deference to the expertise of the Commission. Furthermore, we acknowledge the restrictive scope of judicial

review, which accords to the Commission's orders every presumption of correctness and places a heavy onus upon its challengers to demonstrate its error. But if judicial review is to have any meaning, it is a minimum requirement that the evidence, along with the explanation thereof by the witnesses and by the Commission itself, make sense to the reviewing court. ***We may not approve an order on faith in the Commission's expertise.*** *State ex rel. Lake Lotawana v. Public Service Com.*, 732 S.W.2d 191, 195 (Mo. Ct. App. 1987) (Emphasis added; citations omitted).

Testimony, documentation, or other information relating to the pending Ameren Missouri rate case filed under Commission File No. ER-2014-0258 should be excluded because it is not competent and substantial evidence. As ER-2014-0258 is a pending case based on information filed less than four weeks before the evidentiary hearing in this Excess Earnings Complaint, any testimony, documentation, or other information relating to ER-2014-0258 is unresolved, unverified and unlitigated. Additionally, the test year and true-up timeframe proposed in ER-2014-0258 differs from that contained in the Excess Earnings Complaint and therefore, has no bearing on the documented over earnings in the Complaint. Further, Due Process dictates that any testimony, documentation, or other information that may be relied on by the Commission in its decision this Excess Earnings Case must be vetted by the parties to that case and properly admitted into the record of that case and cannot be relied upon merely through the expertise of the Commission. Therefore, any testimony, documentation, or other information relating to ER-2014-0258 provides no competent and substantial evidence on which the Commission may legally base its decision in this Excess Earnings Complaint.

WHEREFORE, Public Counsel respectfully requests that the Commission order the parties, their counsel and their witnesses not to, at any time, inquire into, elicit testimony, volunteer, be barred from inquiring into, eliciting testimony, volunteering, or injecting evidence or statements regarding or propound any questions in the presence of the Commission or its regulatory law judge(s) during any hearing, including but not limited to, opening and closing

statements and witness examinations relating directly or indirectly to the pending Ameren Missouri rate case filed under Commission File No. ER-2014-0258. Public Counsel requests that the Commission take up its Motion in Limine before the July 28, 2014, evidentiary hearing.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

/s/ Christina L. Baker

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the parties of record this 25th day of July 2014:

/s/ Christina L. Baker
