BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

COMPLAINANTS' SUGGESTIONS IN OPPOSITION TO AMEREN MISSOURI'S MOTION TO DISMISS COMPLAINT

COME NOW Complainants, and for their Suggestions in Opposition to Ameren Missouri's Motion to Dismiss the subject Complaint, state as follows:

Introduction

This Complaint seeks a reduced electric rate for Complainant Noranda Aluminum, Ameren Missouri's largest consumer of electricity.[1] Without the requested rate, there is a substantial likelihood of imminent closure of the New Madrid smelter.[2] The closure will not only severely impact Noranda and its employees and their families, but will impact the Southeast Missouri economy, the economy of the State of Missouri, but additionally and most importantly to this Commission, the remaining Ameren Missouri ratepayers.[3] The Complaint is revenue neutral for Ameren Missouri, in that it suggests that the revenue shortfall from the reduced Noranda rate be absorbed by other ratepayers.[4] The Complaint alleges that the remaining Ameren Missouri ratepayers' rates will increase more if Noranda were forced to close the New Madrid smelter than their rates would increase if the requested rate reduction is granted.[5] The

[1] *See* Complaint, paras. 9, 13.
[2] *Id.* at paras. 9, 18.
[3] *Id.* at paras. 9, 16, 18.
[4] *Id.* at para. 17.
[5] *Id.* at paras. 16, 17.

Complaint alleges that under the circumstances, Noranda's electric rate is not just and reasonable.[6]

So far, the only consumer groups that are parties to this case who have weighed in on this important issue have supported Complainants' Complaint.[7] The Staff, while having yet to take a position on the Complaint itself, has filed Suggestions in Opposition to Ameren Missouri's Motion to Dismiss ("MTD" or "Motion"). The Office of Public Counsel has joined in the Staff's opposition. Although the Complaint is revenue neutral for Ameren Missouri, Ameren Missouri, apparently unconcerned about any impact caused by the substantial likelihood of the smelter's imminent closure, and the consequent impact on ratepayers and the state's economy, filed the 26 page MTD.

The MTD presents the Commission with two options: (1) in the face of the allegations of the Complaint, whether Complainants should be denied their day in court, resulting in the substantial likelihood of imminent closure of the smelter, economic hardship to the state, and increased electric rates for Ameren Missouri's ratepayers; or (2) whether Complainants be allowed to proceed to hearing, allowing the Commission to make this very important decision based upon facts established under oath, rather than solely on arguments of counsel. The Commission's choice of option (2) does not guarantee that Complainants obtain the relief they seek; it guarantees only that this Commission will make its decision fully informed of the facts after hearing.

The Motion includes a number of legal challenges to the Complaint, but also includes what can best be described as repeated "testimony" of counsel in opposition to the testimony submitted with the complaint or to support its MTD. As this Commission is well aware, the

[6] *Id.* at paras. 19, 21.

[7] *See* Non-Unanimous Stipulation and Agreement and Request for Order Extending Time for Response (filed by the Missouri Retailers Association and the Missouri Industrial Energy Consumers).

standard for a motion to dismiss is whether the allegations of the Complaint, all presumed to be true and capable of proof, nevertheless fail to state a legal claim for relief.[8] Rather, Ameren Missouri would have this Commission deny Complainants their "day in court" on the basis of unsworn assertions of counsel that dispute the facts that the Commission must presume to be true and capable of proof. Indeed, Ameren Missouri's Motion even identifies factual disputes that it believes this Commission should address.[9]

In addition to impermissible "testimony" by Ameren Missouri and impermissible argument of the facts, Ameren Missouri's Motion asserts five grounds for dismissal, four of which are legal in nature. Ameren Missouri alleges these four legal grounds: (1) that the Complaint constitutes an improper collateral attack on the approved tariffs; (2) that granting the requested relief can be accomplished only by improper single-issue ratemaking; (3) that granting the requested relief would improperly reform the contract between Ameren Missouri and Noranda; and (4) that granting the requested relief would improperly discriminate in favor of Noranda against other ratepayers.[10] Additionally, Ameren Missouri asserts that Complainants should seek the requested relief from the General Assembly rather than from this Commission.[11]

Argument

1. The Complaint is Not an Impermissible Collateral Attack on Ameren Missouri's Existing Rates

In its Motion, Ameren Missouri asserts that the Complaint constitutes an impermissible collateral attack on Ameren's Commission-approved tariffs. In support of this assertion, Ameren Missouri states that a complaint brought under Section 386.390.1, RSMo. "necessarily must

[8] *See Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 306 (Mo. 1993); *Tari Christ v. S.W. Bell Tele. Co.*, 2003 Mo. PSC LEXIS 37 (Case No. TC-2003-0066, Order Regarding Motions to Dismiss, Jan. 9, 2003).
[9] *See* Ameren Missouri's Motion to Dismiss Complaint, pp. 4, 6-11, 16-17, 21-23.
[10] *Id.* at paras. 5-16.
[11] *Id.* at paras. 16-25.

include an allegation of a violation of a law or of a Commission rule, order or decision."[12] Ameren Missouri further asserts that "[a] complaint constitutes a collateral attack and is barred by Section 386.550 unless it includes proper allegations that if true would show a substantial change in circumstances."[13]

According to Ameren Missouri, the Complaint contains no allegations of a substantial change in circumstances. Ameren Missouri supports its argument by citing direct testimony from Kip Smith and Maurice Brubaker in Ameren Missouri's last rate case and comparing that testimony to the allegations in the Complaint and the direct testimony submitted in support thereof. By doing so, Ameren Missouri attempts to show that there is no substantial change in circumstances between when the Commission's prior order approved Ameren Missouri's current rate tariffs and now. Based on this comparison, Ameren Missouri concludes that "Noranda's contentions here are in sum and substance the same contentions it has been making in recent Company rate cases." First, as stated above, it is inappropriate to consider factual assertions outside of the Complaint when considering a motion to dismiss that complaint. Second, Ameren Missouri's argument is unfounded in any event.

Ameren Missouri erroneously asserts that, "[u]nder Missouri law, a complaint cannot be maintained simply by claiming that a utility's current rates are unjust or unreasonable."[14] Section 386.390.1 contains two distinct complaint powers.[15] Section 386.390.1 generally authorizes the Commission to determine complaints as to any acts or omissions by a public utility in violation of a law or Commission rule, order or decision. However, Section 386.390.1 also provides special complaint authority to the Commission under which it may hear and

[12] *Id.* at para. 3 (citing *Tari Christ v. S.W. Bell Tele. Co.,* 2003 Mo. PSC LEXIS 37 (Case No. TC-2003-0066, Order Regarding Motions to Dismiss, Jan. 9, 2003).
[13] *Id.* at para. 4.
[14] *Id.* at para. 5.
[15] *See also Tari Christ v. S.W. Bell Tele. Co.*, 2003 Mo. PSC LEXIS 37, *34.

determine complaints addressing only "the reasonableness of any rates or charges of any gas, electrical, water, sewer or telephone corporation[.]" Thus, Ameren Missouri is incorrect in its assertion that Complainants cannot bring a complaint under Section 386.390.1 alleging that Ameren Missouri's current rates are unjust or unreasonable without also alleging a violation of a law or of a Commission rule, order or decision.[16] Moreover, even if a violation of a statute was required, which it is not, the Complaint cites the requirement in Section 393.130.1 that the rates set by the Commission must be "just and reasonable." The Complaint asserts that the subject rate "is now unreasonable," which would show a violation of Section 393.130.1.[17]

Ameren Missouri is further incorrect that a claim that rates are unreasonable is an impermissible collateral attack.[18] Although Section 386.550 prohibits a collateral attack on a prior order of the Commission, no Public Service Commission order or Missouri court decision has held that a claim challenging previously-approved rate tariffs as unreasonable is per se impermissible under Section 386.550.[19] Indeed, Ameren Missouri's position would make the second part of Section 386.390.1 a nullity. Rather, the authorities relied upon by Ameren Missouri provide only that, for purposes of a motion to dismiss, a Complaint need only contain allegations of substantially changed circumstances to avoid running afoul of Section 386.550's bar to collateral attacks.[20] Thus, the only question is whether Complainants have set forth allegations reflecting substantially changed circumstances.

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[16] Although Ameren Missouri does not address this point, the Complaint is also brought pursuant to Section 393.260. Section 393.260 requires the Commission to investigate the cause of any complaint brought by at least 25 consumers or purchasers of electricity concerning the price of electricity sold and delivered. Thus, Section 393.260 is another statutory provision that provides the Commission with special complaint authority separate and apart from Section 386.390.1.

[17] *See* Complaint, para. 9.

[18] *See* Ameren Missouri's Motion to Dismiss Complaint, p. 5.

[19] Section 386.550 provides that "in all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive."

[20] *See, e.g., State ex rel. Ozark Border Elec. Coop. v. Pub. Serv. Comm'n of Mo.*, 924 S.W.2d 597, 600-601 (Mo. Ct. App. 1996) (holding that a complaint brought under Section 394.312.6 may be barred by Section 386.550 unless a

As indicated above, for purposes of a motion to dismiss, "no attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case."[21] In addition, all well-pleaded factual allegations in the complaint must be accepted as true and the facts must be liberally construed to support the complaint.[22] The Complaint contains several allegations regarding the substantially changed circumstances causing Noranda's rate to "now [be] unreasonable," necessitating the Complaint. Those allegations are further supported by direct testimony from several individuals. Specifically, the Complaint alleges that the rising cost of electricity coupled with an extremely depressed price for aluminum products on the London Metals Exchange, and the fact that Noranda will have exhausted all possible cuts to its costs of operations, means that Noranda's New Madrid smelter faces substantial likelihood of imminent closure in the absence of a rate reduction. It asserts that these conditions have caused Noranda's rate to "now [be] unreasonable."[23] The strong implication from those words are that a rate that was a reasonable and just rate at the time it was adopted is, under the current circumstances, now unreasonable and unjust. The Complaint alleges that the current rate, under the circumstances, creates a substantial likelihood of imminent closure of the New Madrid smelter, thus causing increases in Ameren Missouri's ratepayers' rates and economic harm to Southeast Missouri and the State of Missouri.[24] Thus, Ameren Missouri's bald assertion that Complainants have not

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change in circumstance is alleged); *Tari Christ v. S.W. Bell Tele. Co.*, 2003 Mo. PSC LEXIS 37, *35 ("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.").

[21] *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 306 (Mo. 1993).

[22] *Tari Christ v. S.W. Bell Tele. Co.*, 2003 Mo. PSC LEXIS 37, * 25.

[23] *See* Complaint, paras. 9, 14-18.

[24] *Id.* at paras. 18-19.

"alleged any substantial change in circumstances that would allow it to maintain the Complaint" is without merit.

Because Ameren Missouri is unable to point to an absence of allegations, it instead asks the Commission to weigh the facts by impermissibly injecting testimony and factual assertions that are not contained within the Complaint.[25] In deciding a motion to dismiss, however, the Commission is not permitted to consider facts outside of the Complaint.[26] Further, even if the Commission were to consider the extraneous facts and unsworn "testimony" that Ameren Missouri introduces through its Motion, it becomes clear that whether Complainants can establish that the change in circumstances is substantial is a question of fact, not law, and both parties should be entitled to present evidence supporting their positions in the normal course of these proceedings.

2. The Complaint Does Not Seek Impermissible Single-Issue Ratemaking

In its motion to dismiss, Ameren Missouri asserts that Noranda's request for rate relief asks the Commission to engage in single-issue rate making in violation of Section 393.270.4.[27] That section provides:

> In determining the price to be charged for … electricity … the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies.

The courts have noted that it is improper for "one factor to be considered to the exclusion of all others in determining whether or not a rate is to be increased."[28]

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[25] *See* Ameren Missouri's Motion to Dismiss Complaint at para. 9-10.
[26] *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d at 306.
[27] *See* Ameren Missouri's Motion to Dismiss Complaint at para. 4, 7-12.
[28] *State ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 56-57 (Mo. 1979). *See also* Section 393.270.4; *In re UtiliCorp United Inc.'s Tariff*, Case No. GT-2001-484 ("The law is quite clear that when

Ameren Missouri contends that the Complaint, "on its face, seeks to justify the rate shift Noranda seeks on the basis of just one factor: Noranda's claimed need, based upon its own alleged private business circumstances, for a nearly 28% decrease in its rates."[29] Ameren Missouri further asserts that "the Commission cannot lawfully grant the relief Noranda seeks in this case, because it would necessarily have to order a change in the Company's rates without full consideration of all relevant factors."[30] As explained below, Ameren Missouri's claim in this regard must fail.

Unlike the cases cited by Ameren Missouri, this is a rate design case and not also a revenue requirement case. Complainants are not seeking a change in Ameren Missouri's rate of return or revenue requirement. Rather, they ask the Commission to change rates due to dire and exigent circumstances that will, without the relief, cause the substantial likelihood of imminent closure of the New Madrid smelter, thus causing a potentially serious financial impact on Southeast Missouri and the State of Missouri, and result in a rate increase to Ameren Missouri's other ratepayers.

"The Public Service Commission Law of our own state has been uniformly held and recognized by this court to be a remedial statute, which is bottomed on, and is referable to, the police power of the state, and under well–settled legal principles, as well as by reason of the precise language of the Public Service Commission Act itself, is to be 'liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.'"[31] So long as it acts within its statutorily-provided authority, the Commission has

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the Commission determines the appropriateness of a rate or charge that a utility seeks to impose on its customers, it is obligated to review and consider all relevant factors, rather than just a single factor.").

[29] Ameren Missouri's Motion to Dismiss Complaint, p. 4.

[30] *Id.* at para. 12.

[31] *Laundry, Inc. v. Pub. Servs. Comm'n*, 327 Mo. 93, 106 (1931) (internal citations omitted).

broad discretion to set just and reasonable rates.[32] Although single-issue ratemaking is generally prohibited, Missouri courts have recognized that the Commission "can comply with the requirements of Section 393.270.4 without holding a general rate hearing every time there is a change in the amount of charge to be adjusted."[33] The Complaint arises from exigent circumstances that do not affect Ameren's revenue requirement, and do not implicate all the issues of a general rate hearing. Missouri courts have long recognized the considerable discretion the Commission has to address unique and changing circumstances.[34] Further, the Commission is statutorily-authorized pursuant to Section 393.140.11 to prescribe changes in the rate schedule from time to time as may be deemed wise.

The question in this case, and on the subject Motion, is what "factors" are "relevant" to this Complaint. Section 393.270.4 instructs that the Commission is to "consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein[.]" (emphasis added) The very language of the statute Ameren Missouri cites suggests that its Motion is not appropriate; the Commission can hardly "consider" any facts, whether pleaded or not, if the complaint is dismissed and there is no hearing. As will become clear once the parties have the opportunity to present their evidence (which has not occurred at this stage of the proceedings), the Complaint is not designed nor calculated to produce any effect upon the earnings or rate of return of Ameren

[32] *State ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d at 49 ("Once it is determined that an act is within the commission's authority, of course, these considerations and others become part of the broad discretion accorded the commission to set just and reasonable rates.").

[33] *State ex rel. Public Council v. Mo. Pub. Serv. Comm'n*, 397 S.W.3d 441, 448 (Mo. Ct. App. 2013) (citing *State ex rel. Midwest Gas Users' Ass'n v. Pub. Serv. Comm'n*, 976 S.W.2d 470, 479 (Mo. Ct. App. 1998)).

[34] *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 535 S.W.2d 561, 566-67 (Mo. Ct. App. 1976) (discussing broad discretion of Commission with regard to granting emergency relief in context of interim rate increases); *State ex rel. Jackson Cnty. v. Pub. Serv. Comm'n*, 532 S.W.2d 20, 29-30 (1975) ("[T]he very purpose of having the Commission is to have an agency with such expertise as to be sensitive to changing conditions…."); *State ex rel. Chicago, R.I. & P.RR Co. v. Pub. Serv. Comm'n*, 312 S.W.2d 791, 796 (1958) ("Its (Commission's) supervision of the public utilities of this state is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest.").

Missouri.[35] There will be no undue or unreasonable prejudice between Noranda (the only member of its class) and ratepayers in another class of service, as addressed elsewhere in this Motion. Further, by granting the rate relief requested, the other ratepayers will avoid a larger rate increase that would result from the substantially likely imminent closure of the New Madrid smelter, and the economies of Southeast Missouri and the State of Missouri would avoid the harm that would cause.

Three factors are obviously relevant to the Commission's determination in this matter: (1) without the requested rate relief, will there be a substantial likelihood that the New Madrid smelter will be forced to close?; (2) if the New Madrid smelter closes, will Ameren Missouri's existing ratepayers' rates increase by more than they would increase under the proposed relief?; and (3) if the New Madrid Smelter closes, would that have a negative economic impact on the State of Missouri and Southeastern Missouri as it will lose one of its largest employers? Those factors are clearly plead in the Complaint. Under all the circumstances and the authorities discussed above, the requested rate shift is just and reasonable, and in the public interest, and does not constitute single-issue ratemaking.

In conclusion, the requested relief in the Complaint does not require the Commission to engage in single-issue ratemaking as the "relevant factors" have been plead, and the Commission is free to consider any other factors it deems relevant and in the public interest without dismissing the Complaint.[36]

3. The Complaint Does Not Seek to Impermissibly Reform Ameren Missouri's Contract with Noranda

Ameren Missouri argues that the Complaint should be dismissed in its entirety because the requested relief would constitute a modification of the contract between Noranda and

[35] *See* Brubaker Direct Testimony, pp. 4-7.
[36] Section 393.270.4, RSMo.

Ameren Missouri in two respects: (1) by extending the contract beyond 2020; and (2) by altering the notice requirement of the contract from 5 years to 2 years. Ameren Missouri's argument is unfounded in at least three respects: (1) Ameren Missouri again improperly relies on facts outside of the Complaint in its effort to dismiss the Complaint; (2) Ameren Missouri relies on a fundamental misunderstanding of the Complaint; and (3) if some relief is determined to be beyond the Commission's jurisdiction to grant, the key relief requested— the reduced rate, is not beyond the Commission's jurisdiction to grant. As indicated above, on a motion to dismiss, the Commission is to limit its review to the facts and allegations of the Complaint. It is not appropriate to consider Ameren Missouri's factual allegations, as here, extending beyond the Complaint.[37]

The Complaint itself does not seek to change the terms of the contract. Rather, the Complaint merely asks the Commission to set a new rate. Furthermore, when the Commission does look at the facts to consider this issue, it will see that the contract explicitly contemplates that the Commission will set the rates that Noranda pays under the contract. Paragraph 9 of the Complaint specifically states that "[t]his Complaint concerns the rate Ameren Missouri currently charges Noranda for the electricity and electrical service that Ameren Missouri sells to Noranda." Furthermore, even if the contract had a set rate, the Commission has the power to change rate terms in electricity contracts. In *Kansas City Bolt & nut Co. v. Kansas City Light & P. Co.*,[38] the court held that the Commission, under the state's police powers, had the authority to change the rate that a manufacturer was contractually obligated to pay when the Commission's rate increased.

[37] *Nazeri v. Mo. Valley Coll., supra*.
[38] 204 S.W. 1074 (Mo. 1918).

As indicated, the Complaint merely requests a "reasonable rate of $30/MWH for the New Madrid Smelter, under whatever conditions the Commission deems appropriate and in the public interest."[39] The Complaint does incorporate the testimony of witnesses Smith and Brubaker. They both request a rate of $30/MWh, subject to modest increases, for a term of ten years. Brubaker's testimony, in proposed tariffs attached thereto, references new notice requirements.[40] After reviewing the terms of the contract and after conducting a hearing in this case, the Commission may decide that Brubaker's proposed tariff goes too far on this issue, and seeks relief beyond this Commission's authority to grant. But that is certainly no basis for dismissing the entire Complaint and, particularly, the claim for relief that the Commission very clearly does have the authority to grant, namely the setting of a "just and reasonable rate" in the "public interest."

4. The Complaint Does Not Seek Impermissible Discrimination

Ameren Missouri asserts that the Complaint requests the Commission approve a discriminatory rate in Noranda's favor, which exceeds the Commission's authority under the Public Service Commission law and, because of which, should be dismissed.[41] Ameren Missouri's Motion is unfounded in this respect for it fails to properly consider the statute at issue, Section 393.130.3. That section provides:

> No gas corporation, electrical corporation, water corporation or sewer corporation shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (emphasis added)

[39] *See* Complaint, para. 21.
[40] *See* Brubaker Direct Testimony, Schedule MEB-1, Page 3 of 4.
[41] *See* Ameren Missouri's Motion to Dismiss Complaint, pp. 14-16.

This statute forbids "undue or unreasonable" preferences, advantages, prejudice or disadvantage. Under the facts of the Complaint, granting the lower rate to Noranda prevents Ameren Missouri's other ratepayers from realizing larger rate increases that would result from the substantial likelihood of imminent closure of the smelter (without the relief) and harms the economies of Southeastern Missouri and the State of Missouri.[42] Indeed, Brubaker states that the requested rate is above the variable cost to serve Noranda and that "at-risk" loads like Noranda are "typically priced below full embedded cost of service."[43] Certainly, under the facts plead in the Complaint, any difference in the requested rate for Noranda is neither "undue [n]or unreasonable" given that it will not harm Ameren Missouri, and will benefit other Ameren Missouri ratepayers, and the economies of Southeastern Missouri and the State of Missouri.[44] Granting the relief is in the "public interest."

Citing *City of Joplin v. Public Service Comm'n of State of Mo.*,[45] Ameren Missouri argues that the Commission has no power to set rates that have one or more classes of ratepayers subsidizing the lower rates of another customer. The undue discrimination, according to Ameren Missouri, is "easy" to recognize because Noranda is requesting a reduction of its rates by 28% and shifting costs of up to $48 million annually to other customers. Ameren Missouri acknowledges that a utility may charge different rates to different customers, but states that these rates must be based upon differences in service. In support of this argument, Ameren Missouri cites *Laundry, Inc. v. Pub. Servs. Comm'n*[46] and *Western Union Telegraph Co. v. Call Pub. Co.*[47] Ameren Missouri further analogizes Noranda's request to that deemed impermissible in *Civic*

[42] *See* Complaint, para. 17; Brubaker Direct Testimony, pp. 5-7.
[43] Brubaker Direct Testimony, pp. 5-6.
[44] *See* Haslag Direct Testimony.
[45] 186 S.W. 3d 290 (Mo. App. 2005).
[46] 327 Mo. 93 (1931).
[47] 181 U.S. 92, 100 (1900).

League of St. Louis et al v. City of St. Louis.[48] In *Civic League*, the water company had published a rate schedule based upon the amount of water used, however "manufacturers" were excluded from that rate schedule and given a preferable term. As explained in detail below, Ameren Missouri's arguments are unfounded.

Ameren Missouri's arguments regarding alleged discrimination in the rate requested by Noranda are premature and unsupported by the law or the allegations of the Complaint. "Whether there has been any discrimination [regarding utility rates] in a given case depends, of course, upon the facts."[49] It is not a difference in rates that is prohibited by the Public Service Commission law, but "undue or unreasonable prejudice."[50] It is also a question of fact as to "whether discriminatory utility rates are unlawful and unjust."[51] At the motion to dismiss stage, facts are not weighed to determine whether they are credible or persuasive.[52] As such, at this early period in the case the issue of whether the rate requested by Noranda is unlawfully discriminatory is not yet ripe for consideration.

The importance of the fact-based determination and evaluation of evidence required of the Commission is demonstrated in *Joplin*. In that case, while the court noted that the Commission lacked the authority "to approve discriminatory rates," the court specifically stated the differing rates that had been earlier approved "arguably" exceeded the Commission's authority.[53] In particular, the court pointed out that an earlier related lawsuit had been remanded

[48] 4 Mo. P.S.C. 412, 448 (1916).
[49] *Federal Reserve Bank of Kansas City v. Public Servs. Comm'n.*, 239 Mo. App. 531, 540 (1945); *cf. Inter-City Beverage Co., Inc. v. Pub. Serv. Comm'n.*, 972 S.W. 2d 397, 401 (1998) (reasonableness of a Public Service Commission order depends upon, *inter alia*, "whether it was supported by competent and substantial evidence upon the whole record") (emphasis added).
[50] Section 393.130(3), RSMo.
[51] *City of Joplin v. Public Service Comm'n of State of Mo.*, 186 S.W. 3d 290, 300 n. 9 (Mo. App. 2005).
[52] *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 306 (Mo. 1993).
[53] *City of Joplin v. Public Service Comm'n of State of Mo.*, 186 S.W. 3d 290, 296 (Mo. App. 2005).

to give the Commission the opportunity "to justify" the rates they had authorized.[54] Since the Commission had not included factual analysis regarding the reasonableness of the rates, the record was insufficient "to determine that the rates charged . . . were unlawful."[55]

The Complaint alleges that the requested relief will not harm Ameren Missouri[56] and will benefit: (1) other Ameren Missouri ratepayers;[57] and (2) the economies of Southeastern Missouri and the State of Missouri.[58] Those allegations show that any differing rate treatment does not cause undue or unreasonable discrimination or preferences. In this case, the Commission will be called upon to consider all of the evidence put before it to determine if Noranda's proposed rate is unduly or unreasonably discriminatory or unlawful. The proposed schedule in the Complaint calls for rebuttal and surrebuttal testimony, hearing, and subsequent briefing.[59] Only following consideration of that evidence will the Commission have a sufficient basis for its decision. Simply put, Ameren Missouri's argument is premature.

Even if it were proper for the Commission to consider at this time the issue of the alleged unlawful discrimination in the rate proposed by Noranda, that rate is neither unreasonable nor undue. From the earliest cases interpreting the Public Service Commission law, the Commission and the courts have recognized that it is permissible to charge different rates "based upon difference of service."[60] In fact, "[a]ll rates and schedules fixed by the Commission are prima facie lawful."[61] In assessing the reasonableness of utility charges, courts have consistently held

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[54] *Id.* at 296.
[55] *Id.* at 300.
[56] *See* Complaint, Prayer for Relief.
[57] *See* Complaint, para. 19.
[58] *Id.*
[59] *See* Complaint, para. 23.
[60] *See, e.g., Civic League of St. Louis et al v. City of St. Louis*, 4 Mo. P.S.C. 412, 448 (1916); *Laundry, Inc. v. Pub. Servs. Comm'n*, 327 Mo. 93, 111 (1931) ("There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that service shall be exactly all on the same lines.") (quoting Western Union Telegraph Co. v. Call Pub. Co., 181 U.S. 92, 100 (1900)).
[61] *Federal Reserve Bank of Kansas City*, 239 Mo. App. at 546 (citing Mo. Rev. Stat. § 386.270).

that different rates are just when "the quantity [of utility] used, the time of use, the manner of service, or any other factor related to the cost of furnishing the service" is different.[62] In its Complaint, Noranda has properly alleged that its requested rate is just and reasonable, and that the service provided to it by Ameren Missouri is materially different from that provided to other customers. When assessing a motion to dismiss, the factual allegations must be accepted as true and the facts must be liberally construed to support the complaint.[63] Noranda has alleged that it uses "485 MW of power, 24 hours a day, 7 days per week, 52 weeks per year, with a 98 percent load factor," and as a result is "Ameren Missouri's largest customer, and consumes approximately ten percent of the power that Ameren Missouri produces."[64] Ameren Missouri admits that serving Noranda is different than serving other customers, because Ameren Missouri's costs per MWh are less to serve Noranda and because Noranda does not use Ameren Missouri's distribution system.[65] Without any support and in contradiction to its admission that providing service to Noranda is "significantly less" costly to Ameren Missouri than providing service to a residential customer, Ameren Missouri dismisses the factors advanced by Noranda in support of its proposed rate as "characteristics of Noranda's private business."[66]

The Complaint and supporting testimony specifically address the issue of reasonableness.[67] Brubaker testified that because the net revenue loss if the proposed rate is implemented is less than if the smelter ceases to operate, "the requested rate plan also is

[62] *See, e.g., Kliks v. Dalles City*, 216 Or. 160, 186 (1959) (citing cases) (holding that rates for water service charged to apartment homes serviced by one pipe may not be different than those charged to, for example, hotels also serviced by one pipe); *see also Civic League*, 4 Mo. P.S.C. at 453 (rate was not reasonable because evidence demonstrated that "there is no difference at all" in serving the class of entities receiving the special rate).
[63] *Tari Christ v. S.W. Bell Tele. Co.*, Case No. TC-2003-0066, 2003 Mo. PSC LEXIS 37 at *25 (Jan. 9, 2003).
[64] *See* Complaint, para. 13.
[65] *See* Ameren Missouri's Motion to Dismiss Complaint, para. 23.
[66] *Id.* at 23.
[67] *See* Complaint, paras. 16 (impact to other ratepayers smaller under proposed rate than under smelter closure), 20 (incorporating testimony of numerous individuals).

reasonable."[68] Haslag quantified the impact of any smelter closure to the economies of Southeastern Missouri and to the State of Missouri.[69] Ameren Missouri's response to these well-pleaded allegations is merely to state in conclusory fashion that "the level of subsidization sought" is "discrimination," citing a $48 million annual cost shift and 28% reduction in Noranda's rates. Kip Smith testified that the proposed change is necessary because without it, "the New Madrid Smelter would have insufficient liquidity and be subject to [substantial likelihood of imminent] closure."[70] In its contentions regarding discrimination, Ameren Missouri does not contest this allegation.

While it is true that *Civic League* holds that one class of consumers may not be disadvantaged in favor of another class of consumers purely for reasons of promoting economic development,[71] that is not what Complainants have requested in their Complaint. Taking the factual allegations of the Complaint as true, granting the rate change requested by Complainants will result in a net benefit to Ameren Missouri's other customers.[72] Further, Complainants allege that permitting Noranda to pay a lower rate, and thus avoid the substantial likelihood of imminent closure, will benefit the economy of Missouri.[73] In short, the Complaint evidences no request for any undue or unreasonable discrimination.

5. The Complaint Is Properly Lodged With this Commission

Although this section of Ameren Missouri's MTD is the longest, it cites merely this Commission's regulation 4 CSR 240-2.116(4) (the Commission may dismiss a case for "good

[68] Brubaker Direct Testimony, p. 7; *see also* Complaint, paras. 16, 21.
[69] Haslag Direct Testimony.
[70] *See* Smith Direct Testimony, p. 6 (paraphrased to avoid requiring HC treatment of this response); *see also* Complaint, paras. 18, 21.
[71] 4 Mo. P.S.C. at 459.
[72] *See, e.g.*, Complaint, paras. 17, 19 (resulting increase to Ameren Missouri's other ratepayers will be less than the increase that would result if the smelter closes).
[73] *See* Complaint, para. 16.

cause) as the basis for dismissal. That regulation differs from 4 CSR 240-2.070(7) (applying to complaints):

> The commission, on its own motion or on the motion of a party, may after notice dismiss a complaint for failure to state a claim on which relief may be granted or failure to comply with any provision of these rules or an order of the commission, or may strike irrelevant allegations.

Ameren Missouri's asserted "good cause" derives from its rambling policy narratives for why Complainants, and particularly Noranda, should seek relief from the General Assembly. The core argument contains two prongs. First, Ameren Missouri assails the concept of subsidies. Second, according to Ameren Missouri, if there are going to be subsidies, then the legislature, not the Commission, should be the one to impose them.[74]

The Commission has the power to accommodate Complainant's request as evidenced by the statutes cited in the Complaint.[75] The Commission is a legislative agency and its powers are entirely defined by its statutory authority.[76] Reviewing courts uphold the Commission's rulings provided they are lawful and reasonable.[77] An order is lawful if the Commission had statutory authority to issue it and is reasonable if supported by substantial and competent evidence on the whole record.[78] Ameren Missouri bases its public policy arguments on the assumption that the requested relief should be imposed by statute; however, the legislature already has declared Missouri's public policy and has delegated the authority to enact it to this Commission. In fact, that is precisely the job of administrative agencies such as the Commission.

First and foremost, there is statutory authority to make this decision, and the legislature has already ruled against Ameren Missouri's policy-based argument. The legislature allows for

[74] *See* Ameren Missouri's Motion to Dismiss Complaint, pp. 16-24.
[75] *See* Complaint, paras. 4-8.
[76] *Public Serv. Comm'n v. Bonacker*, 906 S.W.2d 896, 899 (Mo. App. S.D. 1995).
[77] *Friendship Vill. of S. County v. Pub. Serv. Comm'n of Missouri*, 907 S.W.2d 339, 344 (Mo. App. 1995).
[78] *Id.*

the Commission to lower utility customers' rates.[79] *Laclede Gas* interpreted Section 393.140(5) of the Revised Missouri Statutes, which reads in relevant part, that the Commission shall:

> Examine all persons and corporations under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. Whenever the commission shall be of the opinion, after a hearing on its own motion or upon complaint, that the rates or charges or the acts or regulations of any such persons or corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts and regulations to be done and observed[.][80]

The "provision, properly interpreted, appears to refer to a proceeding against a utility having for its purpose a reduction of rates."[81] Thus, the legislature plainly envisioned situations in which a utility's rate was "unjust" or "unreasonable," and would allow the Commission to lower the rate on its own motion "or upon complaint[.]"

Moreover, courts have long upheld the public policy of this state, namely that "the PSC be granted considerable discretion" when setting rates.[82] This is because "the fixing of just and reasonable rates involves a balancing of the investor and the consumer interests, and the making of pragmatic adjustments."[83] The adjustment Complainants seek is reasonable, just, and pragmatic for all of the reasons listed in the Complaint. The General Assembly has passed laws that vest the Commission with the statutory authority to decrease Noranda's rate, and doing so is consistent with Missouri's longstanding public policy.

Granting Complainants' request also satisfies the second prong of the test for the Commission's actions because it is reasonable. The Commission's orders are reasonable when

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[79] *State ex re. Laclede Gas Co. v. Pub. Serv. Comm'n*, 535 S.W.2d 561, 569 (Mo. App. 1976).
[80] Emphasis added.
[81] *State ex re. Laclede Gas Co. v. Pub. Serv. Comm'n*, 535 S.W.2d 561, 569 (Mo. App. 1976).
[82] *State ex rel. Office of Pub. Counsel v. Pub. Serv. Comm'n*, 367 S.W.3d 91, 108 (Mo. App. 2012).
[83] *Id.* (internal quotation marks and alteration omitted).

they are "supported by substantial and competent evidence on the whole record."[84] It requires "evidence which, if true, has a probative force on the issues."[85] The Commission will be overturned "only where it is clearly contrary to the overwhelming weight of the evidence."[86] Thus, in this circumstance, the Commission need find only that by substantial and competent evidence it would be unjust or unreasonable not to grant Complainants' request. That is an easy call if the Complaint is proven by substantial and competent evidence, since that would show that other customers and the economies of Southeastern Missouri and the State of Missouri benefit from the requested rate and Ameren Missouri incurs no impact. Here, the Complaint's allegations have already been supported by testimony and expert economic reports detailing why it would be unreasonable not to decrease Noranda's rate. The testimony also includes detailed, highly-confidential information about Noranda's financial state.

Moreover, the Commission should reject Ameren Missouri's argument here because its rambling narrative is improper support for a motion to dismiss. At this phase, the Commission must limit itself to the facts in the pleading.[87] "Furthermore, a "complaint should not be dismissed unless it shows no set of facts entitling it to relief." For the reasons set forth above, Noranda has alleged more than enough for the complaint to be considered "well-pleaded." Moreover, Ameren Missouri's argument here was purely based on public policy. Public policy rationales have no place in motions to dismiss. While Ameren Missouri claims that this Commission can dismiss the Complaint for good cause, that cause should be one of the recognized legal reasons for dismissal. In the face of statutes delegating this precise issue to the Commission, it is utter nonsense to argue that the Commission should dismiss this matter for

[84] *Deaconess Manor Ass'n v. Pub. Serv. Comm'n of State of Mo.*, 994 S.W.2d 602, 611 (Mo. App. 1999).
[85] *Id.*
[86] *Id.*
[87] *Nazeri v. Mo. Valley College*, 860 S.W.2d 303, 317 (Mo. banc. 1993).

"good cause" because the General Assembly should consider it. The law does not work that way. It is the General Assembly that delegates matters to the Commission and not vice versa.

Furthermore, Ameren Missouri's argument contains a philosophical element, so it is appropriate to include a philosophical response. Here, Ameren Missouri's argument comes down to a fundamental misunderstanding of the purpose of government agencies. Ameren Missouri's argument would have been persuasive in 1947, when the Missouri Supreme Court held that the legislature could not delegate its decision-making authority to other agencies due to the nondelegation doctrine.[88] However, "the nondelegation doctrine has been largely abandoned in Missouri."[89] Rather, Missouri courts practice "greater liberality in permitting grants of discretion to administrative officials in order to facilitate the administration of the laws as the complexity of governmental and economic conditions increases."[90]

Next, Ameren Missouri's argument misses a central point of the modern theory of administrative agencies. Starting with President Ronald Reagan and still continuing to this day, administrative agencies have used cost-benefit analyses.[91] The purpose of cost-benefit analyses is to weigh the costs of a given regulatory action against its benefits. Here, the cost of refusing to side with Complainants would be to economically depress the eleventh-poorest congressional district in the country and increase electricity rates for all by more than requested in the Complaint. The benefits of granting the requested relief are significant—the people for whom the Commission is responsible, ratepayers, would see lower increases in rates under Complainants' requested relief and avoid the economic depression mentioned above. The other ratepayers who would provide the so-called "subsidy" under Ameren Missouri's analysis are the

[88] *See Independence-Nat. Educ. Ass'n. v. Independence School Dist.*, 223 S.W.3d 131, 135 (Mo. banc. 2007), (citing *City of Springfield v. Clouse*, 206 S.W.2d 539, 542 (1947)).
[89] *Id.* at 135 (calling Clouse an "anachronism").
[90] *Menorah Med. Ctr. v. Health & Educ. Facilities Auth.*, 584 S.W.2d 73, 84 (Mo. 1979) (citation omitted).
[91] Stephen J. Breyer et al., Administrative Law and Regulatory Policy 27 (7th ed. 2011).

same ones who would reap the benefits of the requested relief because, but for that relief, those ratepayers would see greater rate increases. The parade of horribles that Ameren Missouri proposes is simply not the case.

WHEREFORE, Complainants pray the Commission deny Ameren Missouri's Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been emailed this 27th day of March, 2014, to all counsel of record, and to counsel for putative Intervenors.

/s/ Edward F. Downey

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