BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

POST-HEARING BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

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COMES NOW the Office of the Public Counsel and states for its Post-Hearing Brief as follows:

BACKGROUND

Noranda Aluminum, Inc. ("Noranda"), operator of an aluminum smelter located in New Madrid, MO, and a number of individual electric service customers of Union Electric Company, d/b/a Ameren Missouri ("Ameren" or "Ameren Missouri"), filed a complaint and request for expedited review with this Commission on February 13, 2014 (Doc. No. 1). Within its complaint, Noranda details a series of facts not in serious dispute, but relevant to the Commission's consideration of this matter, including that Noranda consumes 485 MW of power annually with a 98% load factor, that Noranda pays $160 million in base rates and additional charges to Ameren for an effective rate of $41.44/MWh, and that Noranda is one of the largest employers in Southeast Missouri with a current employee headcount of 888 full-time equivalent employees (FTE) (*Id*. at 5-6). Noranda further suggests in its Complaint that due to 1) low prices for aluminum on the London Metals Exchange (LME) – which effectively sets the price for which it can sell aluminum on the global market – and 2) what it believes is a non-competitive energy price, Noranda's future is jeopardized (*Id*.). Accordingly, to address the cost component of its financial picture, Noranda comes before this Commission to seek a rate reduction for the

Large Transmission Service ("LTS") class, of which Noranda is the only customer in the class, to a total rate of $30.00/MWh (*Id*. at 7). Ameren, as Noranda's electric service provider and, therefore, the Respondent to Noranda's Complaint, opposes the request (Doc. No. 51).

The Office of Public Counsel ("Public Counsel" or "OPC") has participated in this matter consistent with its statutory duty to represent and protect the interests of the public in any proceeding before this Commission.[1] Mo. Rev. Stat. § 386.710(2), (3) (2000 & Cum. Supp.). To that end, OPC's engagement has been limited to advocacy on those legal and evidentiary issues that deal with the impact on other ratepayers of Noranda's request should the Commission grant the request in whole or in part (Case No. EC-2014-0224, *passim*). At the evidentiary hearing, OPC articulated its position that the law neither requires nor permits, nor would the evidence of this case support, raising the rates of the remaining ratepayers as a result of Noranda's request (Tr. Vol. 5, 85:19-91:22). Further, OPC entered into evidence the surrebuttal testimony of Lena Mantle to discuss the policy considerations the Commission should examine prior to granting Noranda's request (Doc. No. 158; Tr. Vol. 7, 825:16-22). In support of those positions, OPC offers the following argument.

ARGUMENT

I. A successful customer complaint concerning rates will not be revenue neutral to the utility.[2]

As a preliminary matter, it is important to note that Ameren Missouri's self-serving assertions that any relief Noranda secures in this case must be "revenue neutral" to Ameren are

[1] Various other actors have also participated in this case, including: Staff, the Missouri Retailers Association (Doc. No. 19), the Consumers' Council of Missouri (Doc. No. 25), and the Missouri Industrial Energy Consumers (Doc. No. 18), among others (Doc. No. 52).

[2] Responds to Issues 1b, 1c, 2, 3, 4, 4d, 4f, 4f(i), and 4f(ii) as outlined in the parties' compromise List of Issues (Doc. No. 171).

not supported by Missouri law. In fact, the law indicates the contrary. "We find no statute, rule, or case supporting the utilities [sic] assertion of revenue neutrality, i.e., that they have a property right to a defined level of revenue." *State* ex. rel. *Mo. Gas Energy*, et al. *v. Mo. Pub. Serv. Comm'n*, et al., 210 S.W.3d 330, 334-35 (Mo. App. W.D .2006) ("*Gas Energy*"). Moreover, Missouri courts have "in no way endorsed or found a 'revenue neutrality' requirement." *Id*. Accordingly, "a Commission decision may permissibly affect revenue negatively because there is no requirement to provide a particular return on rates." *Id*.

Now, stepping back for a moment, it is important to dissect the nature of Noranda's complaint and the statutory authorities it invokes in presenting this case. Those authorities bear examination here, as only the statutes – and not misguided and misleading assertions of law and fact – dictate the scope of the Commission's authority in this matter.

Section 386.390.1 sets forth the prerequisites for submitting a complaint to the Commission when it offers, in pertinent part:

> Complaint may be made by…any corporation or person…by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any…public utility, including any…charge heretofore established or fixed by or for any … public utility in violation, or claimed to be in violation, of any provision of law….

Mo. Rev. Stat. § 386.390.1 (2000 & Cum. Supp.). Immediately, then, this statute does at least two things relevant to the instant matter. First, the statute establishes that where, as here, the complaint names only a public utility as a party and concerns only the actions of that public utility and no other actor, it is the public utility and *only* the public utility that acts as the Respondent counter-party to the complaint. *Id*.; s*ee also* 4 CSR 240-2.070(8), (9). Additionally, the statute establishes that the complaint can be brought for any charge in violation, or claimed to be in violation, of the law. *Id*.

As to that second point, Noranda's complaint essentially asserts that the rate applicable for the ratepayer class to which it belongs, the LTS class, is unjust and unreasonable (Doc. No. 1 at 2-4). Noranda makes this assertion by invoking section 393.130.1 in its complaint, which states:

> Every…electrical corporation…shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. **All charges** made or demanded by any such…electrical corporation…for…electricity…or any service rendered or to be **rendered shall be just and reasonable** and not more than allowed by law or by order or decision of the commission. **Every unjust or unreasonable charge** made or demanded for …electricity…or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission **is prohibited**.

Mo. Rev. Stat. § 393.130.1 (2000 & Cum. Supp.) (emphasis added). Further, though not cited in Noranda's complaint, section 393.140(5) also operates to guide the Commission's ability to order relief here:

> …Whenever the commission shall be of the opinion, after a hearing had upon its own motion **or upon complaint**, that the rates or charges…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….

Mo. Rev. Stat. § 393.140(5) (2000 & Cum. Supp.) (emphasis added). Accordingly, these three statutes, operating *in pari materia*, make clear that the Commission is not required to wait until the filing of a traditional rate proceeding to set a new rate for Noranda's class if it determines the evidence supports a substantial change in circumstances such that Noranda currently incurs an unjust or unreasonable rate. *Accord State* ex rel. *Licata v. Pub. Serv. Comm'n*, 829 S.W.2d 515 (Mo. App. W.D. 1992) *with State* ex rel. *Ozark Border Elec. Coop. v. Pub. Serv. Comm'n*, 924 S.W.2d 597 (Mo. App. W.D. 1996) (regarding averments required to support a claim of substantial change in circumstance and avoid an impermissible collateral attack on a prior order).

In determining whether Noranda is entitled to relief, § 386.430 and case law make abundantly clear that the burden of proof and persuasion sits with the complainant, Noranda here, as the party asserting the affirmative. Section 386.430 states in pertinent part:

> In all…proceedings…the burden of proof shall be upon the party adverse to such commission or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful as the case may be.

Mo. Rev. Stat. § 386.430 (2000 & Cum. Supp.); *Michaelson v. Wolf*, 261 W.W.2d 918, 924 (Mo. 1953); *Ag Processing, Inc. v. KCP&L Greater Mo. Ops. Co.*, 385 S.W.3d 511, 515 (Mo. App. W.D. 2012) ("*Ag Processing*"); *State* ex rel. *Tel-Central of Jefferson City, Inc. v. Pub. Serv. Comm'n*, 806 S.W.2d 432, 434 (Mo. App. W.D. 1991).

In this case, Noranda must demonstrate to the Commission that the rate applied to it is unjust or unreasonable. § 393.130.1. Making this showing, which would "upset the rate order" currently in effect is, as Noranda recognizes, a "heavy burden." *Federal Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) ("*Hope*"). Traditionally, Missouri has employed cost-of-service ratemaking principles to determine whether a rate is just and reasonable. *See generally State* ex rel. *Office of Public Counsel v. Pub. Serv. Comm'n*, 367 S.W.3d 91 (Mo. App. S.D. 2012); *State* ex rel. *Laclede Gas Co. v. Pub. Serv. Comm'n*, 328 S.W.3d 316 (Mo. App. W.D. 2010) ("*Laclede Gas*"). Nevertheless, the Commission is required to evaluate what constitutes a just and reasonable rate using "all relevant factors." *State* ex rel. *Util. Consumers' Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 48 (Mo. 1979). Under the just-and-reasonable, all-relevant-factors standard, "it is the result reached not the method employed which is controlling." *Hope*, 320 U.S. at 602. Accordingly, this Commission "has much discretion in determining the theory or method it uses to determine rates." *State* ex rel. *Noranda Alum., Inc.*,

et al. *v. Pub. Serv. Comm'n*, 356 S.W.3d 293, 312 (Mo. App. S.D. 2011) (quoting *State* ex rel. *Pub. Counsel v. Pub. Serv. Comm'n*, 274 S.W.3d 569, 586 (Mo. App. W.D. 2009)) ("*Noranda Alum.*").

That discretion, however, is naturally limited by the state of the record before the Commission in any given matter. In order for this Commission to make a determination as to the rate to be applied, there must be some evidentiary basis to support it. Without such a basis, the Commission abuses its discretion and risks rendering an unsupported, arbitrary and capricious decision. *Laclede Gas*, 328 S.W.3d at 318.

In this case, Public Counsel takes no position as to whether Noranda has or has not met its burden to secure a lower rate. If the Commission determines Noranda has made a compelling case for relief, sufficient legal authority exists to provide the relief requested for the LTS class. *Gas Energy*, 210 S.W.3d at 334-35; §§ 393.130.1 & 393.140(5). It is the impact of Noranda's request, and of Ameren Missouri's response to that request, that Public Counsel focuses on here.

Noranda denominates its complaint a "rate design complaint," within its complaint it discusses the concept of revenue neutrality, and assumes the rates of the individual complainants and other ratepayers will raise less if Noranda's request is granted than if it went out of business (Doc. No. 1 at 1, 4, 6, 7). The fact Noranda inserted the concept of revenue neutrality into its complaint may have caused some confusion among the parties as this matter has progressed. With considerable respect to Noranda and the other parties, though, these statements are inconsistent with the legal authority invoked by Noranda to bring its complaint. As a result, Public Counsel takes them as perhaps well-meaning, conciliatory surplusage, but without any legal import.

Missouri law does not recognize a "rate design complaint." Rather, there is only a complaint. § 386.390.1. The law permits a complainant to contest an unjust or unreasonable rate. *Id* and § 393.130.1. The law does not also permit the complainant to direct how the impact of its request should be borne by others. And so, there is nothing in statute which would permit *automatically* shifting any rate impact Noranda secures for the LTS class to any other class of ratepayer.[3] Further, Public Counsel finds no authority for the proposition that third-party classes of ratepayers are *ever* required to bear the burden of any complainants' request for relief from an unjust or unreasonable rate levied by a utility. In the absence of such authority, we are left examining what the statute actually says and does. The answer is that, in situations like this one, the statute creates a binary process in which a complainant contests a utility's actions, and the utility then responds and bears the entire burden of any relief ultimately granted. *Id*. If the Commission finds a rate is unjust and unreasonable, the utility's revenue is necessarily impacted. *See Gas Energy*, 210 S.W.3d at 334-35. The concept of "revenue neutrality" is entirely irrelevant to Noranda's case; it is a canard fostered by utilities which, unfortunately, has infected this matter from its inception. *Id*.

Public Counsel interprets the gravamen of Noranda's complaint in the following way. First, the complaint process authorized by statute permits Noranda to bring a complaint for any "act or thing done or omitted to be done…in violation, or claimed to be in violation, of any provision of law…." § 386.390.1. Next, the law prohibits the application of an unjust or unreasonable rate to ratepayers. § 393.130.1. Noranda, therefore, utilizes the complaint process

[3] A reading of Ameren Missouri's Motion to Dismiss in this case suggests the utility might tend to agree with this point (Doc. No. 50 at 12). As Ameren correctly notes in its Motion, the only Commission precedent for rate design without completion of the work leading up to rate design occurred when the parties have agreed to such treatment via stipulation or some other agreement (*Id*. at FN 23).

available to it and alleges the rate applied to the LTS class is unjust and unreasonable (Doc. No. 1). The effect of Noranda's request, if granted in whole or in part, would be a reduction in total revenue available to the only party Respondent in this case, Ameren Missouri. § 386.390.1. To support its claims, Noranda offers factual allegations it believes under the required all-relevant-factors analysis will entitle it to relief (Doc. No. 1, *passim*). Finally, the law permits this Commission to order such relief if Noranda meets its burden. § 393.140(5).

This reading is not to say, however, that Ameren Missouri was entirely without recourse in this proceeding. Ameren could have asserted an affirmative defense that it is, in fact, entitled to the revenue Noranda put at issue. *See* 4 CSR 240-2.070(9). Nothing prohibited Ameren from pleading and adducing evidence as to revenue requirement. Under Noranda's theory of the case and a just-and-reasonable all-relevant-factors analysis, it was not Noranda's burden in its case to prove that Ameren Missouri is *not* entitled to the revenue it would lose under Noranda's proposal. In order to avoid bearing the burden of Noranda's request – by facilitating the case's progression to the rate design phase – an affirmative defense was needed from Ameren.

Unlike the instant matter, when a complainant's theory of the case relies on cost-of-service principles to establish an unjust or unreasonable rate charged by the utility, as the party asserting the affirmative of the issue it would be the complainant's burden to put forward evidence proving the utility is not entitled to the revenue in question. § 386.430 (stating the "burden of proof shall be upon the party adverse to…or seeking to set aside any determination…or order of [the] commission"). In such a case, the utility bears no burden whatsoever. This case is entirely different, though. Here, Noranda's case does not rely on traditional cost-of-service ratemaking. And so, if Ameren Missouri desired to protect itself from the loss of revenue that might result from Noranda's success, either as a complete defense to

Noranda's case or to ensure that the case proceeded to rate design, Ameren bore the burden of demonstrating entitlement to the revenue at issue. This is so because Ameren alone would have been asserting the affirmative on that point.[4] *See generally Ag Processing*, 385 S.W.3d 511.

Of course, if it were pled and proven, Ameren Missouri's "entitlement" to revenue would be limited, at most, to that which permits it to recoup prudently-incurred costs and an opportunity for a fair rate of return. *State* ex rel. *Union Elec. Co. v. Pub. Serv. Comm'n*, 765 S.W.2d 618, 622 (Mo. App. W.D. 1988). Correspondingly, any loss of revenue Ameren might bear in this case would have been limited to that sum which can be removed from its Return on Equity (ROE) without impacting the fairness of the rate of return it might secure. In a well-pled case, to take any more from Ameren Missouri without evidence suggesting substantial changes to its rate base or other factors could incite a takings claim. However, because Ameren completely failed to assert an affirmative defense regarding entitlement to revenue, and having failed to include that point in its Motion to Dismiss, its ability to argue a takings claim herein is foreclosed (Doc. Nos. 50 & 51). *See Land Clearance for Redev. Auth. of Kansas City, Mo. v. Kansas Univ. Endowment Ass'n*, 805 S.W.2d 173, 175 (Mo. 1991); *Meadowbrook Country Club v. Davis*, 384 S.W.2d 611, 612 (Mo. 1964).

Even without a pled affirmative defense and despite the fact that Ameren Missouri argued consistently and strenuously throughout the instant case for the continued application of traditional ratemaking principles, it has done nothing to use those principles to try to defend itself from the attack on Ameren's revenue requirement inherent in Noranda's complaint (Tr. *passim*). Instead, and oddly, it used those principles only to argue the rate design question, at which point

[4] The other classes of ratepayers bore absolutely no burden to demonstrate, in this case, why their current rate should remain the same. *Id*; § 386.430.

it has a doubtful interest at most in the outcome.[5] Again, it is not Noranda who must put Ameren Missouri's dis-entitlement to a certain level of revenue at issue in this matter; that need not as a matter of law be a part of Noranda's case, and Noranda has never suggested its theory of the case was predicated upon traditional cost-of-service ratemaking. Accordingly, to protect itself from any loss of revenue stemming from a successful complaint by Noranda, Ameren was required to plead entitlement to the revenue as an affirmative defense, and then prove its entitlement to that level of revenue.[6] Ameren failed in all respects.

To be sure, nothing offered herein by Public Counsel can be construed as advocating single-issue ratemaking for Noranda. The question Noranda has posed is: whether, examining all relevant factors, the rate applied by Ameren Missouri to the LTS class is unjust or unreasonable. In presenting its theory for why that question should be answered by the Commission affirmatively, Noranda has offered a variety of issues impacting the justness and reasonableness of the rate, including but not limited to: competitive electric rates secured nationally by other aluminum smelters (Ex. 7HC, Direct Testimony of Henry Fayne, Sched. HWF-1HC); depressed LME aluminum pricing (Doc. No. 1 at 5-6); Ameren Missouri's off-system sales revenue potential (*Id*. at 4, 6); and Noranda's overall liquidity and financial

[5] In this case, rate design only becomes an issue if 1) the Commission decides to grant the LTS class some rate relief, and 2) the Commission determines the law permits and the evidence supports reallocating any required revenue to the other rate-paying classes. As to the first issue, again, Public Counsel has no position. On the second issue, for the reasons explained in this Brief, the law does not so permit, and even if it did, the evidence does not support such a reallocation.

[6] Ameren Missouri effectively concedes that revenue requirement must be at issue in this matter as a predicate to rate design when, in its Motion to Dismiss, it protests Noranda's putative lack of pleading on that point (Doc. No. 50 at 7).

condition (*Id*. at 6-7).[7] These are among the issues Noranda seeks the Commission to consider when determining the justness and reasonableness of its rate, and Ameren Missouri ably responded to these issues. But Ameren has not done the one thing that might protect it from bearing the burden of any relief the Commission might grant in this case, and that is plead and prove entitlement to its existing level of revenue.[8]

II. Any reduced rate afforded to the LTS class can and should be accompanied with pre-conditions attending the availability of the new rate.[9]

"The legislature, in its wisdom, has given the Commission jurisdiction only over investor-owned utilities…." *Love 1979 Partners v. Pub. Serv. Comm'n*, 715 S.W.2d 482, 489 (Mo. 1986). Within that ambit, however, the Commission enjoys broad authority. §§ 393.130.1 & 393.140(5). And consistent with that authority, the Commission has in several instances approved Economic Development Riders (EDRs) and tariff sheets in the past which impose conditions on the availability of a reduced rate to certain customers.

For instance, in small gas Case No. GR-2009-0434, this Commission approved a rate schedule creating a Large Volume Flexible Rate Transportation Service (LVFRT) tariff permitting The Empire District Gas Co. to reduce charges for transportation service in order to

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[7] Recall the LTS class of ratepayers was created specifically for Noranda, with Ameren's agreement, and Noranda is the only Ameren customer within the class, making company-specific allegations and facts entirely appropriate in order to determine whether the rate applied to the entire class – of one – is unjust and unreasonable. Case No. EA-2005-0180, Order Approving Stipulation and Agreement (March 10, 2005).

[8] Perhaps because Ameren cannot. *See* Case No. EC-2014-0023.

[9] Responds to Issue 4g as outlined in the parties' compromise List of Issues (Doc. No 171). For any issue untreated in this Post-Hearing Brief, Public Counsel adopts and incorporates by reference as if fully set forth herein its position as to that issue as detailed in Public Counsel's Statement of Positions and as submitted in testimony and cross-examination (Doc. No. 180; Ex. 300; Tr. Vol. 7, 824:16-837:12).

retain or add customers who have demonstrated that they have a feasible alternative to natural gas. Empire District Gas Co., P.S.C. Mo. No. 2, 1st Revised Sheet Nos. 39-42 (April 1, 2010). Further, the Commission approved qualifications on the tariff sheet indicating:

> Such reductions will only be permitted if…they are necessary to retain or expand services to an existing customer, to re-establish service to a previous Customer, or to attract new Customers and the Customer executes a written contract for Transportation Service.
>
> The Company may reduce its maximum transportation charge on a case-by-case basis only after the Customer demonstrates to the Company's satisfaction that it meets one or more of the criteria required to receive service under the LVFRT rate.

Id. at 39. In the large gas context, the Commission approved an EDR for Missouri Gas Energy ("MGE") which imposed several rate incentive provisions for ratepayers who qualified as Large Volume customers under the Company's contract rate schedule. Missouri Gas Energy, P.S.C. Mo. No. 1, 1st Revised Sheet Nos. 72-73 (September 2, 1998), Original Sheet No 74 (February 1, 1994). Similar EDRs exist in both the small electric and large electric areas as well. *See* The Empire District Elec. Co., P.S.C. Mo. 5, Sec. 4, Original Sheet Nos. 22-22b (February 28, 2013); Kansas City Power & Light Co., P.S.C. Mo. 7, Original Sheet Nos. 32E-32I (October 19, 2013).

Of particular note, in Case No. WT-2004-0192 this Commission considered and approved a request by Missouri-American Water to enter into a Special Service Contract pursuant to a then newly-approved EDR in order to entice Premium Pork, LLC, to build a 600,000 square feet $130 million pork-processing and headquarters facility in a derelict area of St. Joseph, which ultimately was predicted to create over 1,000 full-time, permanent jobs. Case No. WT-2004-0192, Order Concerning Agreement and Tariffs, Application to Intervene, and Motions to Suspend Tariffs, p. 7 (November 20, 2003). Under the terms of the EDR, the preferred rate it authorized was available only to certain industrial or commercial customers

with: 1) a load factor equal to or exceeding 55%; 2) billing demand for the facility of at least .5% of the total district consumption; and 3) the creation of new permanent jobs of at least .1% of the total population of the district service territory, or at least 50 jobs, whichever is lower. *Id*. at 3. Moreover, the EDR required Commission approval for each Special Service Contract the utility desired to enter into in order to ensure the Commission was satisfied as to the necessity for the reduced rate. *Id*. at 4-6.

Further, Ameren Missouri itself has in effect an EDR permitting it to offer reduced rates to certain customers.[10] Union Electric Co., Mo. P.S.C. Schedule No. 6, Original Sheet Nos. 86-87.5 (June 30, 2013). Notably, the rider includes a claw-back provision wherein any discounts provided to the electric customer who received a reduced rate under the EDR would be required to repay those discounts to the utility if the customer failed to fulfill the entire term of the Special Service Contract it entered into with Ameren. *Id*. at 86.1.

In the instant case, in order for any reduction in the LTS rate for "economic development" or "load retention" purposes to be just and reasonable, that reduction must be accompanied with a Commission requirement that Ameren draft an amended EDR with conditions similar to what has been found in EDRs approved by the Commission in other contexts. To that end, Public Counsel has suggested four broad principles which should guide the conditions to be imposed in order for Noranda to access a reduced rate for energy: 1) continued employment levels at the smelter; 2) guaranteed amounts of additional capital investments in the smelter; 3) strategies that preserve liquidity and the smelter's ability to

[10] The LTS class does not qualify for consideration under Ameren Missouri's EDR as currently in effect, nor would Noranda's request fall within its parameters in any event.

continue to operate; and 4) mechanisms for return of the value of the discount provided (Ex. 300 at 2).

As to the first proposed condition, Noranda's CEO Kip Smith has already agreed, under oath, to guarantee employment of 888 FTE (employees or contractors) at its New Madrid smelter for the duration any preferential rate would be in effect (Tr. Vol 7, pp. 629:25-630:5). This is a powerful and substantial commitment on the part of Noranda's management. The Commission has the authority, and has used that authority in the past, to impose employment conditions in order to access reduced utility rates. *See* Case No. WT-2004-0192. The Commission should take Noranda up on its offer, and as a condition of any relief the Commission may grant herein, require Ameren to develop an EDR for Commission approval consistent with CEO Smith's commitment. However, the Commission should also go further, and require that in order to access a reduced rate, no involuntary layoffs from the current level of FTE directly employed by Noranda may occur. Such a requirement has been imposed successfully on aluminum smelters in other states confronting similar situations (Ex. 7HC, 6-8; Ex. 103, Rebuttal Testimony of Terry Jerrett, p. 16).

Addressing the second proposed condition, CEO Smith stated that Noranda "will commit to spend a total of $350 million in capital expenditure dedicated solely to the New Madrid facility" over the life of the reduced rate (Tr. Vol. 7, 630:9-11). The fact that Noranda's management has begun to engage on this point is important. However, Smith's testimony is that "sustaining capital" requirements – that capital which is needed to keep current operations going – total approximately $35 million annually (Tr. Vol. 5, 206:25-207:4). Accordingly, Smith's commitment is only to that level of capital expenditure that Noranda would have to make in any event just to keep operating. Further, CEO Smith's commitment is actually less than that in real

terms because he admits that the $350 million figure is not adjusted for inflation over the 10-year term of Noranda's proposal (Tr. Vol. 7, 633:5-11). This Commission should require as a condition for Noranda to access a reduced electric rate that Ameren Missouri submit an EDR revision to it for approval which includes a minimum capital expenditure rate negotiated between Staff, Public Counsel, Ameren and Noranda. Imposition of such a condition, an act which Public Counsel recognizes should not be taken lightly, is consistent with the size of Noranda's request, the impact Noranda has on the people of Southeast Missouri, and past practice in other states confronting similar situations with aluminum smelter energy pricing (Ex. 103, p. 16).

As to Public Counsel's third proposed condition – disallowing access to a reduced rate if the Company engages in any program to remit cash to shareholders, CEO Smith recognizes Noranda's history with regard to cash-extracting special dividends paid to ownership (Tr. Vol. 5, 213:3-16). Further, CEO Smith states Noranda already has in place in its debt covenants restrictions on regular and special dividends (Tr. Vol. 5, 213:17-214:1). But then, in somewhat contradictory fashion, CEO Smith suggests this Commission should not impose similar restrictions as a condition on accessing a reduced energy rate because "publicly-traded companies [need] to provide a return to their investor. People aren't going to invest unless you provide a return." (Tr. Vol. 5, 215:19-21). CEO Smith goes so far as to state a restriction on dividends and share buyback programs would be "something that I think would be very, very difficult for us to do" voluntarily (Tr. Vol. 5, 216:24-25). Indeed, in Noranda's later proposal to the Commission on terms and conditions it would voluntarily agree to if the company received the relief requested, CEO Smith does not address the dividend issue at all (Tr. Vol. 7, 634:17-22).

But what Noranda seeks here is a form of corporate finance every bit as liquidity-enhancing to its financials as a capital infusion from a new shareholder or a cash infusion from a lender. It strains credulity, then, to suggest that the interests of the party which bears the burden of Noranda's request, either Ameren Missouri (as Public Counsel suggests) or the ratepayers (as Ameren suggests), should not be protected by this Commission through the imposition of terms and conditions which Noranda itself recognizes are routinely agreed to in the free market as conditions of equity and debt finance. Noranda should not be allowed to access a substantially reduced electric rate secured on the backs of either Ameren or the ratepayers, while at the same time sending "excess" cash to shareholders, particularly given its history in this regard. Accordingly, this Commission should require that Ameren Missouri submit an EDR tariff revision to it for approval which includes terms prohibiting both the enlargement of existing dividend payments to shareholders, as well as the implementation of special dividends or share buyback programs, in order for an LTS class customer to receive a reduced rate for electric service.

Similarly, Public Counsel's fourth proposed condition, concerning enforcement and other mechanisms to return the value Noranda receives back to the financing party, is unaddressed by Noranda's proposal (Tr. 634:23-635:2). As noted above, Ameren Missouri's current EDR contains a claw-back provision for failure to comply with the terms of the Special Service Contract it enters into with a customer receiving a rate under that tariff. Union Electric Co., Schedule No. 6 at 86.1. At a minimum, the Commission should require Ameren to maintain and amend its claw-back provision to apply to any reduced rate Noranda may secure in this case. Further, because the case for providing Noranda rate relief rests squarely on the state of Noranda's financials, the Commission also should require Ameren Missouri to submit an EDR

for approval containing a mechanism that would reset rates incrementally for customers receiving the reduced rate as the customer's reported financial condition improves.[11] This mechanism should contemplate returning Noranda over time to the non-reduced, standard rate for the LTS class and should further provide for, as Noranda's financials might support, a "premium rate" above the standard rate for the LTS class in order to return the dollar value, on an inflation-adjusted basis, previously provided to Noranda via discount rates back to the party that bore the burden of providing it.

CONCLUSION

Noranda's request for rate relief is not predicated on traditional cost-of-service ratemaking principles. If successful in whole or in part, Noranda's request necessarily impacts Ameren Missouri's revenue. When Ameren Missouri failed to plead and prove an affirmative defense that it is legally entitled to its current level of revenue, it failed to take the steps necessary in this case to avoid bearing the burden of that revenue reduction. Accordingly, the only rate which may be changed in this case is the rate applicable to the LTS class. Rate design for the other classes cannot proceed based on the record before the Commission. Ultimately, Ameren Missouri failed to raise any potential takings claim, meritorious or not, in its Answer or within its Motion to Dismiss, and so, it is now foreclosed from doing so.

If the Commission grants Noranda any rate relief, the Commission should require amendments to Ameren Missouri's EDR consistent with provisions requiring: maintenance of

[11] With mixed results, other jurisdictions have attempted to tie the level of rate reduction to the LME aluminum price (Ex. 7HC at 6-8; Ex. 103 at 16). Instead, tying the level of rate reduction to Noranda's financial conditions will improve the likelihood that this arrangement will be successful in that it will permit a broader review of the state of Noranda's financial condition and not limit the factors for continued rate relief to, in effect, just the operating revenue line of Noranda's financial statements.

employee headcount; minimum levels of capital investment in the New Madrid smelter; prohibitions on liquidity-reducing cash distributions to shareholders; and mechanisms facilitating the return of the value Noranda is receiving as its financial condition improves.

Respectfully submitted,

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