BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a Ameren Missouri's Tariff to Increase Its Revenue for Electric Service	))))	Case No. ER-2014-0258

DISSENTING OPINION OF COMMISSIONER STEPHEN M. STOLL

This commissioner dissents from the majority in its order in Case No. ER-2014-0258 because the order establishes a rate structure that is unlawful, confiscatory, arbitrary and capricious.

A foundational cornerstone of regulatory law is provided by the United States Supreme Court in its decision in *Bluefield Water Works v. Public Service Comm'n 262 U.S. 679 (1923).* The order in ER-2014-0258 is remarkably similar to the order overturned by the Supreme Court in *Bluefield* in that it sets rates for a utility service that are less than the cost of providing the utility service.

In *Bluefield*, Justice Butler wrote:

> "The question in this case is whether the rates prescribed by the commission's order are confiscatory, and therefore beyond legislative power. Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment."[1]

The Order lowers the rates of a single customer, Noranda, in a single class, Large Transmission Service, to a level less than the cost of providing service that constitutes 10 percent of the Utility's total load under the pretense that the loss of this single LTS customer would detrimentally affect all other customers of this utility. Therefore, this order would in effect raise the rates of all customers in all classes to subsidize rates of the largest customer to avoid presumably even higher costs should Noranda fail.

It is here that the Order creates a confiscatory dilemma from which it cannot escape: If the losses resulting from the below-service-cost rates approved for Noranda are not spread across other customer classes – residential, commercial and industrial – the Order unlawfully confiscates the value of the service from the Utility; if the Utility is made whole by spreading the subsidized costs of Noranda's below-cost rate to other ratepayers, the money of the customers in all the other classes is being unlawfully confiscated because they are forced to pay costs *higher* than those actually necessary to provide utility service to them.

In the face of this conundrum, the Order arbitrarily departs from the known and measurable costs the Utility has incurred within the test year established in ER-2014-0258. This departure assumes costs that *could* be incurred at some point *outside the test year if* Noranda's management can't make a profit and its board votes to close the New Madrid facility.

Capriciously, this order then builds those assumptions into rates and transmission charges paid by all other customers to subsidize the electric rate for Noranda.

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[1] Bluefield Water Works v. Public Service Comm'n 262 U.S. 679, 262 (1923)

The projections on which these assumptions are based are speculative at best because it is extremely difficult to accurately calculate the benefits or costs of surplus generation that would result from closing the New Madrid plant. The possibilities range from ratepayers bearing the costs of the surplus generation to ratepayers enjoying the profits of the generation if it is sold off-system.

The difficulty of calculating the off-system sales benefits to ratepayers – who would get all profits normally going to the Utility if Noranda fails and that load is sold off-system – becomes impossible in the face of significant, but unknown costs anticipated under new Clean Air Act restrictions.

Absent a crystal ball, we cannot measure the costs or benefits of a rule restricting the CO2 output of coal plants used to generate electricity before the rule is completed. The costs of shutting down heavy CO2 emitting coal plants netted against costs resulting from the closure of an aluminum smelter that consumes 500 megawatts of electricity every hour cannot be calculated until the CO2 limits and costs are finalized.

For more than 100 years this Commission – and the voters of Missouri through adopting prohibitions against electric utilities recovering plant construction costs before the plant is used and useful – have ensured that risks associated with operating utilities are borne, appropriately, by the investors – the owners – of the utilities, and *not* the rate-paying customers of the utility.

The management of business is, fundamentally, the management of risk at a level acceptable to attract and retain investors necessary to finance the operation of the business. In a United States Supreme Court decision in a case emanating this state, *Missouri ex rel Southwestern Bell Telephone Co. v. Public Service Commission of Missouri* 262 US 267 (1923) the Court drew a bright line between regulation and management:

> "It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership."[2]

This Order arbitrarily goes beyond the Supreme Court's prohibition against this Commission managing utilities it regulates to, in effect, managing an aluminum smelter over which it has no authority. It does this by shifting the risk for an aluminum smelting venture from the investors who own it and profit from it to the backs and pocketbooks of utility customers who neither own nor manage it.

No one, especially this commissioner, disputes the importance of Noranda to this state, Noranda employees and all Missouri citizens. We all want to support this company and to see it succeed in producing a product that is important for our state and nation. This support rightly should be borne not just by one utility or its customers, but by all Missourians. And, the steps Missouri takes to help this company should be more sound than a utility rate structure that is unlawful, arbitrary, capricious and confiscatory.

For this reason, and those reasons outlined above, I DISSENT in ER-2014-0258.

Respectfully,

Stephen M. Stoll, Commissioner

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[2] *State of Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n of Missouri,* 262 U.S. 267, 289 (1923)