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 REPLY 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 Reply Brief as follows:

ARGUMENT

In "Staff's Initial Brief," Staff makes several assertions regarding revenue requirement and which party bears the financial burden of Noranda's request that merit treatment here (Doc. No. 301). First, Staff states "In this case, the revenue requirement determined in Ameren Missouri's most recent rate case is taken for granted; the focus is on re-allocating that revenue requirement among the several customer classes." (Doc. No. 301 at 2). But the revenue requirement determined in Ameren Missouri's most recent rate case is not "taken for granted" here, nor can that lawfully be the case. While *Ameren* may have "focused" on re-allocating the revenue requirement among the customer classes, *Noranda* focused on making its case for a rate reduction, a case which necessarily implicates the level of revenue available to Ameren. It is true that Noranda denominates its complaint a "rate design complaint" and then proceeds to suggest, in rather conclusory fashion, that any financial burden that flows from its request must be borne by ratepayers. However, statute, this Commission's rules, and traditional notions of due process suggest Noranda's language is legally-immaterial surplusage.

The *crux* of Noranda's complaint is readily discernable in the pleading: Noranda contests the rate being charged to the LTS class as being unjust and unreasonable and asks the Commission to lower the rate applicable to it. There is absolutely no requirement that Noranda's request be "revenue neutral" to Ameren, nor does the law permit Noranda's request for a rate reduction to be construed in that manner. *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*"); Mo. Rev. Stat. §§ 386.390.1, 393.130.1, 393.140(5) (2000 & Cum. Supp.). The complainant does not get to elect to contravene the clear statutory and regulatory scheme established by the complaint statutes and rules and direct that the burden of its request is to be borne by parties non-respondent to the complaint. *See generally* § 386.390.1; 4 CSR 240-2.070. The only way the other customer classes could permissibly experience a rate increase in this case is after 1) the Commission determines Noranda is entitled to relief from its existing rates, and then 2) the Commission determines Ameren has demonstrated entitlement to its existing level of revenue despite the relief it grants to Noranda.[1] As to the first inquiry, Public Counsel has taken no position and takes none here, and as to the second inquiry it is clear that Ameren has failed to plead and prove that point, and it was entirely Ameren's burden to do so.

Next, Staff states "This case has not addressed the amount of Ameren Missouri's revenue requirement; therefore, the revenue requirement remains that determined in Case No. ER-2012-0166." (*Id*. at 25-26). Noranda has never asserted that the *theory of its case* for rate relief is based upon traditional cost-of-service ratemaking principles, and it does not have to do so in

[1] *See* Post-Hearing Brief of the Office of the Public Counsel (Doc. No. 302 at 6-10).

order to be successful here.[2] *Federal Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944); *State* ex rel. *Util. Consumers' Council of Mo. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 48 (Mo. 1979). But it does not follow that Ameren's level of revenue is not implicated by the *relief* Noranda requests. Noranda alleges that its rate is unjust and unreasonable given various factors completely unrelated to the level of revenue required by Ameren. Noranda then presented evidence in this case consistent with the scope of its allegations. Merely because the theory of Noranda's case does not rely on establishing that Ameren is dis-entitled to its existing level of revenue, does not then mean that the relief Noranda receives cannot or does not implicate Ameren's existing level of revenue. If that were true, Noranda, or any other complainant advancing a load-retention or other non-traditional theory for rate relief, would have no remedy for an unjust or unreasonable rate. And to suggest differently is to ignore the statutes setting up the complaint process by which a customer contests an unjust or unreasonable act of the utility; the complaint statutes do not contemplate any other party being required to bear the burden of the relief requested, and so, any time a complainant seeks relief from a putatively unjust or unreasonable rate, the utility's level of revenue necessarily is at issue. *See* §§ 386.390.1, 393.130.1, 393.140(5).

Finally, Staff asserts "No part of the *pro forma* revenue deficiency [flowing from Noranda's request] may lawfully be charged to [Ameren Missouri's] shareholders." (Doc. No. 301 at 26). Staff then proceeds to discuss the way in which Staff believes such an allocation of financial responsibility for Noranda's request would result in an unconstitutional taking of

[2] As a practical matter, it may be true that using traditional cost-of-service ratemaking principles to present a case for a reduced rate, while hard, might have been an easier road for Noranda to travel than its chosen one, but neither this Commission nor any court has suggested the manner in which Noranda has sought to make its case for rate relief – a load retention theory – is foreclosed to it as a matter of law.

Ameren's property (Doc. No. 301 at 26-27). First, it has long been the law that a constitutional defense must be asserted by a party at its earliest opportunity to do so, typically in an Answer or a Motion to Dismiss; this is true even in an administrative or regulatory action. *Hollis v. Blevins*, 926 S.W.2d 683 (Mo. 1996) (stating "Constitutional issues are waived unless raised at the earliest possible opportunity consistent with orderly procedure."). In this case, Ameren filed both an Answer and a Motion to Dismiss and neither document asserts any argument with respect to a constitutional taking despite the fact that the only reading of Noranda's complaint consistent with the law clearly implicates Ameren's potential revenue.[3]

As to the merits of any putative takings claim, there is absolutely nothing in this record to suggest that the amount of revenue Noranda puts at issue would deprive Ameren of any property right to which it is entitled. "The revenue allowed a utility is the total of approved operating expenses plus a reasonable rate of return on the rate base." *State* ex rel. *Union Elec. Co. v. Pub. Serv. Comm'n*, 765 S.W.2d 618, 622 (Mo. App. W.D. 1988). "We find no statute, rule, or case supporting the utilities [sic] assertion […] that they have a property right to a defined level of revenue." *Gas Energy*, 210 S.W.3d at 334-35. "A Commission decision may permissibly affect revenue negatively because there is no requirement to provide a particular return on rates." *Id.* The Commission may review the revenue requirement calculations in the last rate case order, the parties' submissions in the pending over-earnings case, and the Company's submission in the

[3] Public Counsel assumes, with some reason, Ameren also detects the possibility for financial liability inherent in Noranda's complaint, which has informed Ameren's approach to litigating this matter. *See* Doc. No. 50 (regarding Ameren's argument that Noranda failed to allege revenue with sufficient specificity in its complaint).

Further, there must be some reason Ameren defends and contests this action, which it insists is only about "rate design." In a "rate design" action, under Ameren's theory, it has no liability. If Ameren is right, then any rate case expenses related to the instant matter become highly suspect and undoubtedly will be called into question for prudence when Ameren attempts to recover them.

recently-filed rate case, and in not one instance would the approximately $50 million (at most) Noranda puts at issue in this case 1) eliminate revenue required to compensate for Ameren's rate base costs, 2) eradicate Ameren's reasonable ROR, or 3) even significantly reduce ROR. Case Nos. ER-2012-0166; EC-2014-0223; ER-2014-0258. There is absolutely no plausible claim that any Commission action in this matter could result in a constitutional taking; Ameren has no entitlement to the revenue put at issue by Noranda's request for relief.

Finally, Public Counsel addresses briefly one point made in Noranda's "Initial Post-Hearing Brief of Complainants." (Doc. No. 307). Noranda rightly offers that the Commission has the authority to provide the relief Noranda seeks, or some variation thereof, in this case (*Id* at 3-10). In supporting its argument for why the Commission should exercise that authority, Noranda cites several prior Commission cases in which the Commission has approved economic development tariff sheets authorizing discounted utility rates for certain customers in limited instances (*Id*.). But none of the cases offered by Noranda authorized a utility to charge a discounted rate for one customer or class of customers and in the same proceeding authorized the utility to raise rates on the utilities' remaining customers as an offset. In every instance, the Commission reviewed the cost – i.e., the utilities' lost revenue – of the economic development discount authorized, but did so in the context of the next rate case, when all relevant factors, including revenue, imputed revenue and prudently-incurred costs, could be reviewed holistically. In these cases, rightly, rates were not adjusted on the remaining ratepayers in advance of the next general rate proceeding.

CONCLUSION

As stated in Public Counsel's "Post-Hearing Brief," 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 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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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 16th day of July, 2014:

/s/ *Dustin J. Allison*