

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

Noranda Aluminum, Inc., <i>et al.</i> ,	)	
	)	
Complainants,	)	
	)	
v.	)	EC-2014-0224
	)	
Union Electric Co., d/b/a Ameren Missouri,	)	
	)	
Respondent.	)	

**APPLICATION FOR REHEARING**

COMES NOW the Office of the Public Counsel (“Public Counsel” or “OPC”), and pursuant to Mo. Rev. Stat. § 386.500.1 (2000) and 4 CSR 240-2.160 respectfully requests rehearing of the Commission’s August 20, 2014 Report and Order in the above-referenced matter. In support of its Application for Rehearing, Public Counsel states as follows:

**Argument**

Liquidity

1. Public Counsel requests the Commission rehear the above-referenced matter because it misapplied the law resulting in an unlawful, unreasonable, arbitrary and capricious decision against the weight of the evidence in that the Commission failed to utilize a subjective standard of review to determine whether Noranda meets its burden in proving that an impending liquidity crisis threatens operations at its New Madrid smelter such that its current rate for electricity is unjust and unreasonable, and so, should be reduced.
2. Noranda’s complaint unquestionably puts its liquidity condition at issue in this matter and subjects it to the Commission’s review.<sup>1</sup> However, the standard of review employed by the

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<sup>1</sup> Doc. No. 1.

Commission to assess Noranda's liquidity is essential to a proper evaluation of whether Noranda meets its burden of proof. In applying an improper, objective standard of review to Noranda's liquidity condition, the Commission erred.

3. Complainants in this case presented clear and satisfactory evidence to the Commission that in the opinion of Noranda's management and in the opinion of Noranda's board, Noranda is experiencing a liquidity crisis.<sup>2</sup>

4. Complainants in this case presented clear and satisfactory evidence to the Commission that it is their opinion that the liquidity crisis threatens operations at the New Madrid smelter, and so, they believe they must seek a reduced rate for its electric service to maintain the viability of plant.<sup>3</sup>

5. Indeed, Noranda's own CEO testified at length before the Commission with respect to the Noranda management and board's assessment of Noranda's present liquidity condition and the existence of a substantial likelihood of imminent closure of the New Madrid smelter if rate relief is not secured.<sup>4</sup>

6. Ameren Missouri attempted to dispel the notion that Noranda is experiencing a liquidity condition necessitating relief, and short of that, suggested that if there is any impaired liquidity condition, Noranda itself created it.<sup>5</sup>

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<sup>2</sup> Smith, exs. 1HC, 2, 3HC & 4; Harris, exs. 5HC & 6.

<sup>3</sup> *Id.*

<sup>4</sup> Smith, exs. 1HC, 2, 3HC & 4.

<sup>5</sup> Mudge, exs. 102 & 102HC.

7. Whether or not as a matter of objective fact Noranda is experiencing impaired liquidity is not the inquiry or the standard by which this Commission should evaluate Noranda's liquidity condition. Rather, the only inquiry for the Commission with respect to liquidity is whether or not clear and satisfactory evidence exists to support a finding that Noranda's board and management exercised a reasonable, good faith business judgment in concluding that there is an impaired liquidity condition confronting Noranda. If so proven, then the Commission must evaluate whether or not clear and satisfactory evidence exists to support a finding that Noranda's board and management exercised a reasonable, good faith business judgment in concluding that the solution to their impaired liquidity condition is closure of the New Madrid smelter absent electric rate relief.<sup>6</sup>

8. In short, the Commission should apply a subjective standard akin to the business judgment rule applied in traditional corporate contexts in its evaluation of the evidence surrounding Noranda's liquidity condition, and not the objective standard it applied erroneously in rendering its decision.

9. In Missouri, a corporation operating in this state – domestic or foreign - must be governed by a board, and a for-profit corporate board is answerable to shareholders.<sup>7</sup> The corporate board acts as a fiduciary for those shareholders, and in so doing, has wide latitude to

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<sup>6</sup> Mo. Rev. Stat. § 386.430; *Nixon v. Lichtenstein*, 959 S.W.2d 854 (Mo. App. E.D. 1997) (restating the “business judgment rule” as a standard for reviewing corporate decision-making and as first articulated in *Brown v. Citizens’ State Bank*, 134 S.W.2d 116 (Mo. 1939). See also *Chen v. Howard-Anderson*, 87 A.3d 648 (Del. Ch. 2014) (recapitulating standards of review applied to corporate business decisions).

<sup>7</sup> Mo. Rev. Stat. §§ 351.055.1; 351.310; 351.576.1(6) (2000).

operate the corporation.<sup>8</sup> Where, as here, the corporate actor under inquiry is not regulated by the Commission, the Commission can and must respect and be deferential to traditional corporate legal and policy concepts as it engages in its inquiry here.

10. Accordingly, it is not properly within the authority of the Commission, any other state government agency, or any private actor other than perhaps Noranda's shareholders, to step into the shoes of Noranda's management and board and re-determine the precise point at which Noranda should determine whether it is confronting impaired liquidity.

11. Whether \$100 in cash/cash equivalents is sufficient liquidity but \$99 is not, is a determination this Commission is not in a position to make. The Commission only regulates the utility and not the complainant, and so the manner of its inquiry into issues intrinsic to the complainant - such as the complainant's financial condition - must be deferential to Missouri's long-standing legal and policy approaches to corporate business judgments for state-non-regulated corporate entities.

12. While certainly Noranda brought the complaint in this case, nothing about bringing the complaint divests Noranda itself from the duty and sole responsibility it holds to its shareholders as fiduciaries to make its own determination about its liquidity and then take actions to confront it.<sup>9</sup> As long as Noranda's determination is one entered into in good faith and is predicated on a

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<sup>8</sup> *Lichtenstein*, 959 S.W.2d 854; *Robinson v. Langenbach*, 2014 Mo. App. Lexis 962, slip op. at 10 & 15 (Mo. App. E.D. Sep 2, 2014) (stating "It is a general principle the management and control of a corporation is vested in its board of directors", and "The officers and directors of a corporation occupy a fiduciary relationship to the corporation and to the shareholders"). *See also Stone ex rel. AmSouth Bancorp. v. Ritter*, 911 A.2d 362 (Del. 2006); *Chen*, 87 A.3d 648.

<sup>9</sup> Consistent with the exercise of that responsibility, Noranda has announced publicly it has started a reduction of 150-200 employees at the New Madrid smelter in the wake of the Commission's initial decision in this matter. At the evidentiary hearing this is exactly the action Noranda testified it would take first should its request for relief not be granted, tending to

reasonable, non-pretextual evaluation of its financial condition, the Commission should and must give deference to that determination.

13. While Noranda's former majority shareholder, Apollo Capital Management, may have secured in the form of special dividends the return of all of its equity investment in Noranda, the record is clear that Apollo no longer possesses a controlling interest in Noranda's stock or board seats, and so, cannot dictate Noranda's decisions going forward. To the extent the Commission discredits the current board and management's determination of its own liquidity condition based on these past events, the Commission errs; the ownership structure of Noranda is now substantially different.

14. In failing to undertake its evaluation of Noranda's complaint case from a limited, subjective standpoint, and instead by replacing the judgment of Noranda's board and management with its own as to the genuineness of its liquidity position and as to the need to reduce energy costs or shutter operations at the New Madrid smelter, the Commission employed an incorrect standard to review Noranda's conclusions, acted too broadly, and so, erred.

#### Partial Relief

15. Public Counsel requests the Commission rehear the above-referenced matter because it misapplied and misstated the law resulting in an unlawful, unreasonable, arbitrary and capricious decision against the weight of the evidence in that the Commission failed to consider whether the record before it supported a finding that partial relief for Noranda is just and reasonable.

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support even further - though outside the record as it stands now - that Noranda's belief with respect to its own liquidity crisis is held in good faith (Tr. vol. 6, pp. 405:25-406:9).

16. Noranda's complaint and testimony in this case reflect both 1) its legal argument in support of its request for relief and 2) the amount at which it believes a new electric rate becomes just and reasonable given its financial circumstance.<sup>10</sup>

17. No statute nor any rule of this Commission requires a complaint alleging an unjust or unreasonable rate to state affirmatively the rate at which the complainant's electric rate would become just and reasonable in order for that complaint to be adequate, nor must a specific legal theory entitling the customer to relief be pled.<sup>11</sup> In going further than the pleading requirements set forth for complaints in statute and rule, Noranda did nothing to limit this Commission's authority or its duty to consider whether some other rate for Noranda is just and reasonable based on the record before it.

18. The Commission asserts Noranda failed to meet its burden to prove under a load-retention theory that Noranda is entitled to a rate of \$30.00 per MWh.<sup>12</sup> While a specific legal theory and proposed new rate is undoubtedly helpful to the Commission in assessing the allegations presented, the Commission is required by the statute to engage in a broader analysis than what is offered in its Report and Order.

19. Missouri law mandates that "All charges...rendered shall be just and reasonable...**Every** unjust or unreasonable charge...is prohibited" (emphasis added).<sup>13</sup> Every rate which is unjust or unreasonable is unlawful; only just and reasonable rates are lawful.

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<sup>10</sup> Case No. EC-2014-0224, *passim*.

<sup>11</sup> Mo. Rev. Stat. § 386.390.1.

<sup>12</sup> Doc. No. 336.

<sup>13</sup> Mo. Rev. Stat. § 393.130.1.

20. Further, the statute requires that whenever rates are “unjust, unreasonable...or in any wise in violation of any provision of the law, **the commission shall determine and prescribe the just and reasonable rates...**” (emphasis added).<sup>14</sup>

21. The Commission, then, must examine the record before it, and if in the opinion of the Commission the record before it supports a finding of an unjust or unreasonable rate under any legal theory or at any rate other than the currently-tariffed rate, the Commission must reset rates accordingly. And to be sure, ample evidence exists in the record to support affording Noranda partial relief.<sup>15</sup>

22. By failing to undertake this broader analysis when it issued its Report and Order, and in doing so failing to consider the possibility that Noranda may be entitled to partial rate relief irrespective of its load-retention legal theory, the Commission erred.

#### Non-unanimous Stipulation and Agreement

23. Public Counsel requests the Commission rehear the above-referenced matter because it misapplied and misstated the law resulting in an unlawful, unreasonable, arbitrary and capricious decision against the weight of the evidence in that the Commission ignored the plain language of 4 CSR 240-2.115 when it declined to consider the Non-unanimous Stipulation and Agreement filed by OPC, Noranda, Missouri Industrial Energy Consumers, the Missouri Retailers Association and the Consumers Council of Missouri.

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<sup>14</sup> Mo. Rev. Stat. § 393.140(5).

<sup>15</sup>*Inter alia*, Kliethermes, exs. 201HC, 202, 203HC, 204 and Tr. vol. 7, pp. 745:1-746:6; 747:1-18.

24. The Commission's rules state that a stipulation and agreement may be filed "at any time."<sup>16</sup>

25. Nothing in the Commission's Order Establishing Procedural Schedule or Order Modifying Procedural Schedule served to modify, if such an order could do so, the applicability of 4 CSR 240-2.115 in this case.<sup>17</sup>

26. Where, as here, a stipulation and agreement is signed by fewer than all the parties to a matter and is affirmatively objected to by one or more party, the stipulation and agreement is to be considered the position of the signatory parties.<sup>18</sup>

27. While the Commission must still enter an order based upon the record before it, the Commission may adopt the position of the stipulating parties if the record supports it.<sup>19</sup>

28. Nothing in statute or rule prohibits the Commission from framing its decision in a matter consistent with the terms of the stipulation and agreement when such a stipulation and agreement is filed after an evidentiary hearing, after briefing, or even after the Commission has had a public discussion of the case among its members prior to final disposition.

29. Moreover, nothing in statute or rule permits the Commission to disregard summarily a stipulation and agreement filed by the parties representing their change in position.

30. The positions taken by the signatory parties in the Stipulation and Agreement are supported by substantial and competent evidence presented in the case.<sup>20</sup>

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<sup>16</sup> 4 CSR 240-2.115(1)(A).

<sup>17</sup> Doc. Nos. 89 & 103.

<sup>18</sup> 4 CSR 240-2.115(2)(D).

<sup>19</sup> *In the Matter of the Application of the Empire Dist. Elec. Co.*, 1999 Mo. PSC LEXIS 173, Case No. EA-99-172 (Dec. 7, 1999).



31. Notably, the only objecting party to the final, amended Non-unanimous Stipulation and Agreement is Ameren Missouri, a party which would be financially unaffected by the Stipulation were the Commission to enter an order consistent with its terms.<sup>21</sup>

32. In contravention of the Commission's rules, the Commission's order fails to recognize the change of positions articulated by the parties in their Stipulation and Agreement, and so, the Commission erred.

Ameren Missouri's Exposure

33. Alternatively, Public Counsel requests the Commission rehear the above-referenced matter because it misapplied and misstated the law resulting in an unlawful, unreasonable, arbitrary and capricious decision against the weight of the evidence in that the Commission wrongly determined that the financial burden of any relief it might afford Noranda could only be borne by Ameren Missouri's other electric ratepayers.

34. Noranda bore the burden of demonstrating its entitlement to relief from an unjust and unreasonable rate.<sup>22</sup> Absent some stipulation and agreement from the other customers (as ultimately becomes the case here), when Noranda meets its burden, the complaint statute only contemplates relief coming from the party respondent to the complaint - Ameren Missouri.<sup>23</sup> Noranda's burden of proof and persuasion at that point is complete.<sup>24</sup> Thereafter, if the utility

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<sup>20</sup> See *inter alia*, *Kliethermes*, exs. 201HC, 202, 203HC, 204 and Tr. vol. 7, pp. 745:1-746:6; 747:1-18.

<sup>21</sup> Doc. No. 332.

<sup>22</sup> See Mo. Rev. Stat. § 386.430; *Ag Processing, Inc. v. KCP&L Greater Mo. Ops. Co.*, 385 S.W.3d 511 (Mo. App. W.D. 2012).

<sup>23</sup> Mo. Rev. Stat. § 386.390.1.

<sup>24</sup> Mo. Rev. Stat. § 386.430.

desires to avoid the financial impact to its revenue requirement that stems from Noranda being successful in its case-in-chief, the utility must demonstrate its continued entitlement to the revenue put at issue.<sup>25</sup> Only if the utility does so, can the remaining customers be required to make up the resulting revenue deficiency.

35. It is not Noranda's burden to demonstrate that other customers can or should make up Ameren Missouri's revenue deficiency, or how that deficiency should be apportioned among the classes. Noranda's only burden is to demonstrate that the electric rate currently charged to its class is unjust or unreasonable.<sup>26</sup>

36. In determining that the record and the law require that the financial consequences of any rate relief must be borne only by Ameren Missouri's other customers and not by Ameren Missouri, the Commission erred.

37. Further, in also determining that Noranda's burden in this case extended beyond a mere showing that the rate currently applied to it by Ameren Missouri is unjust or unreasonable, the Commission erred.

### **Conclusion**

WHEREFORE, for the reasons stated above, the Commission should reconsider and rehear its Report and Order in the above-referenced case.

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<sup>25</sup>*Id.*; Mo. Rev. Stat. §§ 386.390.1, 393.130.1, 393.140(5); *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) (stating utilities have no property right to a defined level of revenue and revenue neutrality is not a legal requirement).

<sup>26</sup> Mo. Rev. Stat. §§ 386.390.1, 386.430.

Respectfully submitted,

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**OFFICE OF THE PUBLIC COUNSEL**

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been emailed on this 12<sup>th</sup> day of September, 2014 to all parties on the Commission's service list in this case.

/s/ Dustin Allison