

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

In the Matter of Noranda Aluminum’s Possible)
Material Default in a Condition Necessary to) Case No. EO-2016-0203
Remain on the IAS Rate Schedule Established)
in Case No. ER-2014-0258.)

Public Counsel’s Response to Noranda Aluminum, Inc.
and the Petition of the Staff of the Missouri Public Service Commission

COMES NOW the Office of the Public Counsel, by and through undersigned counsel,
and for its *Response to Noranda Aluminum, Inc. filing of February 9, 2016 and to the Petition of
the Staff of the Missouri Public Service Commission* states as follows:

1. On February 3, 2016, the Staff of the Missouri Public Service Commission (“Staff”), filed its *Petition* with the Commission alleging Noranda Aluminum, Inc. (“Noranda”) failed to materially comply with an expressed condition in ER-2014-0258 requiring Noranda to maintain eight-hundred fifty (850) full-time equivalent employees at its New Madrid smelter in order to qualify for the IAS Class of electric service.

2. On February 9 of 2016, Noranda provided its *Response* to the Staff's *Petition*, invoking an exception to the required condition of maintaining 850 employees due to *force majeure* by alleging three specific circumstances¹. Based on these circumstances, Noranda argues it should be allowed to remain on the IAS Class of electric service.

3. The Commission issued its *Order* of February 18, 2016 directing Staff, and any other party, to reply to the *Response* by no later than February 23, 2016. Public Counsel provides this reply in compliance with that February 18, 2016 *Order*.

¹ The three claimed circumstances cited in Noranda's *Response* rising to the level of a purported *force majeure* are: (1) a January 7, 2016 electrical circuit failure, (2) unforeseen market conditions in the price of aluminum, and (3) an August 4, 2015 explosion at the cast house at the smelter facility.

4. Absent a definition outlined in the agreement or by law, *Black's Law Dictionary* pg. 657 (7th ed. 1999) defines *force majeure* as “(a)n event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars).” At this time, Public Counsel is without the requisite knowledge or facts to determine if the three claimed circumstances presented by Noranda arise to the level of *force majeure*. Public Counsel has submitted data requests to Noranda asking for more information related to the August 4, 2015 explosion and the January 7, 2016 electrical circuit failure.

5. Any determination of *force majeure* is factual in nature and the Commission does not have sufficient information to make a reasonably-supported finding within the circumstances described by Noranda meeting the requirements that the events were unanticipated or outside of Noranda's control. In fact, the U.S. Department of Labor's Occupational Safety and Health Administration launched an investigation into the cause of the August 4, 2015, explosion that may assist in determining if the event was due to negligence of Noranda-such as through deferred maintenance-or truly a matter outside of Noranda's control qualifying as *force majeure*. Such facts are critical for this Commission prior to making any determination that the conditions placed on Noranda in the Commission's ER-2014-0258 Report and Order should be excused.

6. Finally, public statements made by Noranda indicate they intend to shut down the smelter plant and its last functional pot line on March 12, 2016.² Therefore, moving Noranda out of the IAS rate classification and eliminating that classification entirely would not have a significant impact on a business drawing less than three-quarters of the load it once drew when

² Noranda's *Response* references March 2016 as the point when the smelter will curtail all remaining operations at the facility but maintain the flexibility to restart. *Response of Noranda*, page 3 ¶5.

all three pot lines were functional. Regardless of any action the Commission takes, Noranda will not be able to contribute to the Ameren Missouri system as contemplated in the agreement between the parties in establishing the IAS rate classification in ER-2014-0258. As required by the stipulation, the Commission should eliminate the reduced rate structure altogether in the event Noranda materially fails to adhere to any term of that agreement. Neither Noranda or Ameren Missouri has shown the events leading to this reduced load are the product of *force majeure*. They have made statements about the events leading up to the reduced load but they have not proven the causative link causing those events to happen and whether those events were unforeseen and unanticipated.

WHEREFORE, the Office of the Public Counsel submits this *Response* and requests that the Commission remove Noranda from the IAS rate classification because Noranda is not in material compliance with the terms of the ER-2014-0258 Report and Order and has not provided sufficient facts to demonstrate the failure to comply with all conditions was due to a *force majeure* event that was outside Noranda's control.

Respectfully submitted,

/s/ Cydney D. Mayfield

CYDNEY D. MAYFIELD

Deputy Counsel

Missouri Bar Number 57569

Office of the Public Counsel

Post Office Box 2230

Jefferson City, MO 65102

(573) 522-6189 (Voice)

(573) 751-5562 (FAX)

cydney.mayfield@ded.mo.gov

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing has been served, by hand delivery, electronic mail, or First Class United States Mail, postage prepaid, to all parties of record on the Service List maintained for this case by the Data Center of the Missouri Public Service Commission, **on this 23th Day of February, 2016.**

/s/ Cydney D. Mayfield